

**GUARANTEES OF NON-REPETITION AND THE
RIGHT TO HEALTH:
REVIEW OF THE LAW AND EVOLVING
PRACTICE OF JUDICIAL AND SEMI-JUDICIAL
BODIES AT GLOBAL AND REGIONAL LEVELS**

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A thesis submitted for the
Degree of Doctor of Philosophy

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January 2016

ACKNOWLEDGMENTS

Writing this thesis was a dream come true. Finding myself in the intellectually challenging environment of the University of Essex, researching and writing on topics that I love, under the direction of recognized academics, and with the support of my friends and family, has been a privilege for which I cannot feel more than blessed. This does not mean that it was an easy task. I would like to thank, therefore, all of those who helped me and who accompanied me on this long journey, and without whom this thesis would not have been possible.

First, I would like to thank my supervisors Dr. Clara Sandoval and Professor Paul Hunt for their academic and personal support. Clara believed in me and my ability to pursue this challenge, even when I hesitated. She saw the light in moments of crisis (because every thesis has a 'crisis moment') and guided me with her sharp eye and insightful comments. Paul was a constant source of inspiration. He challenged my ideas and pushed me to do the best in every single paragraph. His comments guided me to develop the main arguments of my thesis. Thanks also to the chair of my board, Sabine Michalowsky, her insightful comments and thorough criteria helped me to sharpen my arguments, improve my writing and to raise the quality of my work.

Thanks also to my examiners Theo van Boven and Lorna McGregor. They provided me with insightful comments and a good forum in which to discuss my ideas. Likewise, many grateful thanks to my friend Oscar Parra who read and commented upon my chapter on the Inter-American System. A great lawyer and a good friend, his comments improved my work substantially. Other thanks go to my editor and English proof reader, Julia Firmin. She carefully read and corrected my English

making my thesis look nicer than it originally was. As usual, all of the mistakes are mine.

I would also like to thank the University of Essex for granting me the Essex Scholarship to fund my studies, and to my sponsor in Colombia -Colciencias- for the necessary funds to pay my living expenses whilst in the United Kingdom. They gave me the peace of mind to focus on my research.

Thanks also to the extensive group of friends that I made in Essex for helping me to feel 'at home'. They made my integration into the UK easier, and my time in Essex more fun. Big thanks go to the group of friends with whom I shared the PhD office for all these years. They were there not just to share the complexities of research and academia but, most importantly, to share the experience of life. They were there in the smiles, in the tears, in the calm, in the crisis, in the clarity and in the doubt: Joo-Young Lee, Johana Hoekstra, Tara Van Ho, Anil Yilmas, Chiara Macchi, Sara Houriani, Meo Kongcharoen, Rachel Hatch and Kai Yin. A group of women from very different backgrounds, sharing the same unique experience; you were a constant source of inspiration and strength in these years.

Thanks also to other special friends: Afonso Nuñez, Tatiana Rain, Giorgios Ioannou, Claudia Montero, Juan Carlos Ruiz, Adriana Flores, Nieves Zuniga, your company and friendship brought so much happiness to my experience in Essex.

Special thanks to my family for their incredible support and trust. To my parents Flor Peralta and Ernesto Guarnizo, thanks for being there in every single Skype call. Thanks for believing in my dreams and for encouraging me to always follow them. Your love and example made me the person I am. Thanks to my grandma Maria Ubaldina Peralta for the blessings and good vibes she sent every day from Colombia, even when she hardly understood what my work was about. Other big thanks go to my sister, partner in crime and best friend, Stefany Guarnizo. The

semester she spent in Essex saved me from isolation and helped me to find the strength to carry on in those moments when the weight of the PhD almost looked impossible. Her love and support guided me to the light.

Finally, thanks to Carlos. He was the voice of calm when I freaked out. He was the smile when I was worried. He was always there to provide an answer every time I questioned why I was doing this. My friend, my partner, he makes the journey of life happier and sweeter.

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ABSTRACT

The purpose of this thesis is to analyse the concept of guarantees of non-repetition (GNR) in international law and to consider how to apply GNR in violations of the right to health. GNR are, together with compensation, restitution and satisfaction, forms of reparation. Although international tribunals and UN bodies have increasingly made use of this form of reparation, there is no clarity about both the legal status of the obligation to provide GNR, and the scope and reach of this obligation. Moreover, as economic, social and cultural rights (ESCR) are often targeted with the claim that their redress requires complex and expensive forms of reparation, there is a lack of clarity as to whether GNR are applicable to this type of rights and, if they are, how so. This thesis aims to make a twofold contribution to the literature. On the one hand it aims to unpack the elements of the duty of states to provide GNR in international law, whilst on the other, it aims to show a practical application of this form of remedy in a particular ESCR: the right to health.

It is argued in this thesis that the obligation to provide GNR has been increasingly recognised in public international law and international human rights law. This thesis will also argue that GNR are best granted in cases of large-scale, gross and serious violations of human rights and when there is a risk of repetition.

It will also argue that GNR are equally applicable to all civil, political, economic, social and cultural rights; and that there is nothing in either the nature or the concept of the right to health that prevents the application of GNR to the redress of violations to the this right.

ABBREVIATIONS

ACHR	American Convention on Human Rights
Basic Principles and Guidelines	Basic Principles and Guidelines on the Right to a Remedy and Reparation for victims
CAT	Convention against Torture
CEDAW	Committee on the Elimination of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CPPCG	Convention on the Prevention and Punishment of the Crime of Genocide
ECtHR	European Court of Human Rights
GNR	Guarantees of non-repetition
IACmHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all forms of Racial Discrimination

ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance
IHRL	International Human Rights Law
ILC Draft Articles	Draft Articles on Responsibility of States for Internationally Wrongful Acts
OP3 – CRC	Optional Protocol to the Convention on the Rights of the Child on a communications procedure
OP-CEDAW	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women
OP-CRPD	Optional Protocol to the Convention on the Rights of Persons with Disabilities
OP-ICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
PIL	Public International Law
Protocol of San Salvador	Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights

INTRODUCTION

This thesis critically examines the concept of guarantees of non-repetition (hereinafter GNR) in international law and its application to redress violations of the highest attainable standard of physical and mental health (hereinafter ‘the right to health’ or ‘the right to the highest attainable standard of health’).¹

GNR refer to all the measures states should take, not only legislative, to ensure that violations of international norms do not happen again. They are understood as a form of reparation that is future-oriented and has a preventive dimension, aimed at ensuring that human rights violations will not recur.² By awarding GNR, international tribunals have ordered states: to remove or modify legislation;³ to allocate specific budgets for the creation of certain programs;⁴ to create databases;⁵ to provide

¹ In this thesis the expressions ‘right to health’ and ‘right to the highest attainable standard of health’ are used interchangeably.

² UNGA, *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* (21 March 2006) A/RES/60/147, para 23; and ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (November 2001) Supplement No. 10 (A/56/10), chp.IV.E.1, article, para. 9.

³ *Case of ‘The Last Temptation of Christ’ (Olmedo-Bustos et al.) v. Chile (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 73 (5 February 2001) para 103 Orders (4).

⁴ *Case of Fornerón and Daughter v. Argentina (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C. No. 242 (27 April 2012) para 182.

mechanisms to guarantee adequate redress to victims;⁶ to undertake reforms in state institutions, particularly, in the judicial power⁷ and the police;⁸ to update protocols in accordance with international standards;⁹ and, to provide human rights training to public servants.¹⁰

Despite the relevance of these measures for social change, to date there is no systematic legal study concerning GNR.¹¹ Nevertheless, there is an increasing need

⁵ *Case of González et al. ("Cotton Field") v. Mexico (Preliminary Objection, Merits, Reparation and Costs)* Inter-American Court of Human Rights Series C No.205 (16 November 2009) para 512.

⁶ *Case of Hutten-Czapska v. Poland*, App no. 35014/97 (ECtHR, 19 June 2006) para 239; *Burdov v. Russia (No 2)*, App. no. 33509/04 (ECtHR, 15 January 2009) operative paragraph (6)

⁷ *Egyptian initiative for Personal Rights and Interights v. Arab Republic of Egypt*, African Comm Hum & Peoples' Rights, Comm. 334/06 (2011) para 223 (III); *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (Cohre) v. Sudan*, African Comm Hum & Peoples' Rights, Comm. 279/03, 296/03 (2009) para 229 (2); *Kevin Mgwanga Gunme et al /Cameroon*, African Comm Hum & Peoples' Rights, Comm. 266/03, (2009) para 215 (1.7)

⁸ *Egyptian initiative v. Arab Republic of Egypt* para 223 (IV).

⁹ *Case Fernández Ortega et al v. Mexico (Preliminary Objection, Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C, para 239 (30 August 2010); *Rosendo Cantú et al v. Mexico (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No. 216 (31 August 2010) para 242.

¹⁰ *Case of Radilla-Pacheco v. Mexico (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No. 209 (23 November 2009) para 182.

¹¹ General studies have been carried out regarding the understanding of reparations in international law, however, so far no systematic studies have been carried out about GNR. For general studies on remedies see: Dinah Shelton, *Remedies in International Human*

in international law to understand the meaning, scope and application of this concept, as its use has increased during the last decade. While this is the practice, some states still see orders from courts regarding GNR as breaching the margin of appreciation the states should have in the definition of their own policies.¹²

This thesis aims to both fill the gap in the relevant academic literature and, to provide tribunals and litigants with better legal foundations to request and award GNR. The thesis constitutes a legal contribution to the understanding of the concept of GNR in international law and human rights law. It particularly explores key questions such as, whether there is an obligation to provide GNRs in public international law (hereinafter PIL) and international human rights law; under what circumstances it applies; how GNR should be crafted; and, what is the scope of the measures. As GNR have been traditionally awarded in the protection of civil and political rights, particularly in cases concerning unlawful and arbitrary killings, torture and other gross human rights violations, this thesis also explores the application of GNR in relation to a particular economic, social and cultural right (hereinafter ESCR or socio-economic rights)¹³: the right to health. The reason to select this right for the analysis is twofold: on the one hand, the right to health has been the object of rich litigation during the last decade, in both domestic and international courts, so several cases can be used in the analysis. On the other hand, there has been great conceptual

Rights Law (Oxford University Press, 2nd, 2005); and Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge, 1st edition, 2014). For studies on compensation see: Ewa Baginska (ed) *Damages for Violations of Human Rights: A comparative Study of Domestic Legal Systems* (Springer, 2015).

¹² See the position of the United States in: *LaGrand Case* (Germany v United States of America) (Judgment) [2001] ICJ Rep 466, para 119.

¹³ The expressions 'economic, social and cultural rights' and 'socio-economic rights' are used interchangeably.

development about the foundations of the right to health, so the nature of the obligations that derive from it have been largely clarified.

While we understand better the content, scope and reach of the right to health, this is not the case with the consequences of breaching it. There is little clarity under international law or human rights law as to what forms of reparations can be applied in relation to this right, whether GNR could be used to this end, and, which GNR could be awarded. In fact, many critics of the justiciability of socio-economic rights have emphasized that the redress of this type of rights very often requires the award of complex, usually future oriented, remedies which obstruct the competence of other branches of power, and, are difficult to implement.¹⁴ In this regard, one of the questions that this thesis will explore is whether the treatment of GNR in relation to civil and political rights is similar or different to that applied in relation to violations of the right to health. It will also analyze whether the progressive character of the right to health is also compatible with the adoption of GNR. As a result, while this thesis contributes to understanding GNR in relation to all rights, it sheds particular light in relation to the right to health.

The focus of this thesis will be the conceptual understanding and legal development of GNR, and its particular application to the right to health. Other important aspects related to GNR such as its compliance, will not be developed in this work. The reason for this is practical: before understanding how GNR can be better implemented, we must understand what they precisely mean, what is their scope and in which circumstances can they be awarded. As this gap has not been completely filled in the literature, this thesis aims at making a contribution on this aspect.

¹⁴ Kent Roach, 'The Challenges of Crafting Remedies for Violations of Socio-economic Rights' in, Malcolm Langford (ed) *Social Rights Jurisprudence Emerging Trends in International and Comparative Law* (Cambridge University Press, 2009) p.2.

Methodology

Research questions were answered using qualitative research methods, involving desk-analysis of judicial decisions by different domestic and international tribunals, including the European Court of Human Rights (hereinafter the European Court of the ECtHR), the Inter-American Commission and Court (hereinafter IACmHR), the African Commission and Court, the International Court of Justice (hereinafter ICJ), UN treaty monitoring bodies, as well as domestic courts such as the Colombian Constitutional Court, and, the review of specialized literature on the topic. This was necessary as no detailed analysis of the work of these tribunals and international law exist to show the legal foundations of GNR.

In the analysis of the case law of the ICJ, all decisions where GNR were sought were analyzed. In the case of the African Court, and the African Commission on Human and Peoples' Rights, all decisions on the merits were studied, up until February 2015. Regarding the European Court of Human Rights, all pilot judgments decided by the Court until February 2015 were examined. As explained in Chapter II, a pilot judgment is a special type of procedure applicable to structural or systemic problems that may give rise to similar applications before the European Court. While in the redress of most of its cases the European Court has awarded just compensation and has refused to award any GNR, when recommending general measures in the analysis of pilot judgments, the European Court has awarded more ambitious measures oriented to, for example, modify legislation or to create mechanisms for the adequate redress of victims. This explains the focus of the research in these type of judgments. In the case of the Inter-American Court of Human Rights, the Human Rights Committee, the Committee on the Elimination of Discrimination against Women (hereinafter CEDAW), and the Committee on the Rights of Persons with Disabilities, all relevant decisions until February 2015 were critically studied. While

this thesis looks at the jurisprudence of all these bodies, it focuses its attention on those where the concept of GNR was traceable, or, where the bodies awarded some form of measure to avoid recurrence.

Structure of the thesis

The thesis is divided in two main parts. Whereas part one aims to understand the nature of GNR by analyzing its features in PIL and international human rights law, part two analyses GNR in relation to violations of the right to health.

Part one is composed of three chapters. Chapter I analyzes the concept of GNR in PIL. It examines the law and practice of the ICJ in order to understand whether there is an obligation under international law to provide GNR and, if so, in which circumstances should they be awarded and what is the scope of such measures.

Chapter II explores the concept of general measures awarded in the UN treaty bodies. The chapter examines the origin of the obligation to provide GNR in international human rights law, as well as the awards of general measures by the main UN treaty monitoring bodies. In the analysis of the case law of the UN treaty monitoring bodies, the regularity and scope of the measures was analyzed. The chapter also explores the concept of GNR in the jurisprudence of regional systems of human rights, mainly, the European Court of Human Rights, and the African Commission on Human and Peoples' Rights. In each case, the origin of the obligation to provide general measures, the scope of the measures, and the circumstances that triggered their award, were analyzed.

Chapter III examines the concept of GNR in the jurisprudence of the Inter-American Court of Human Rights. As the Inter-American Court of Human Rights is the tribunal

that has, in a more consistent manner, awarded GNR in the redress of human rights violations, a whole chapter is dedicated to it. This chapter presents a historical overview of the use made by the Court of this legal concept. It also presents the measures awarded by the Inter-American Court as GNR, and critically analyzes the circumstances in which the Court has ordered them.

Part two analyses the award of GNR in right to health and health related cases. It includes two chapters: Chapter IV analyzes the award of GNR in violations of right to health and health related cases in regional courts of human rights, mainly, the African Court on Human and Peoples' Rights, the European Court of Human Rights, and the Inter-American Court of Human Rights. In each jurisdiction, it investigates whether the right to health is directly or indirectly justiciable and critically analyses how the award of GNR has materialized in the protection of right to health and health related cases.

Chapter V provides some insights as to how the Committee on Economic, Social and Cultural Rights (ESCR Committee) should award GNR in the redress of right to health cases. Drawing on the experiences of regional and domestic courts discussed in chapter IV, this chapter explores the scope of the measures that the ESCR Committee could use, the circumstances for their award in right to health cases, and how the Committee could award GNR in the redress of violations of the obligation to respect, the obligation to protect, and the obligation to fulfil the right to health. In the redress of violations of the duty to fulfil the right to health, this chapter explores whether the progressive nature of the right to health has implications in the type of GNR that could be provided.

The thesis argues that the obligation to provide GNR is crystallising in PIL, among other reasons, thanks to its existence under international human rights law. The scope of the measures awarded is quite extensive, ranging from human rights

training, drafting of protocols and manuals, to legislative changes, institutional reforms and even the design of public policies and programs. Regarding the circumstances for their award, this thesis will argue that GNR are better placed in those cases of systemic and large violations of human rights, as well as in cases of repetition.

Regarding the award of these measures in violations of the right to health, the thesis suggests that there is nothing in theory, law, or practice that prevents the application of GNR in cases concerning this right. It also suggests that when GNR are granted in violations to the right to health, they do not differ from those awarded in relation to violations of civil and political rights. However, the lack of full justiciability of the right to health, mainly in the Inter-American and European systems of human rights, has made difficult the award of this type of measures in health-related cases. Based on the experience of regional and domestic tribunals, chapter V will propose some elements that the ESCR Committee could take into account when awarding general redress in the analysis of individual cases related to the violation of the right to health.

PART I: EXPLORING THE LEGAL STATUS OF GNR UNDER INTERNATIONAL LAW

GNR are a form of redress which aims to prevent the repetition of an international law violation by addressing the root causes that trigger the violation. Unlike other forms of reparation such as compensation, restitution and rehabilitation, which focus on the reconstruction of the status quo ante, GNR are future-oriented, aimed at preventing recidivism. It finds its origins in PIL as one of the obligations under international law in cases of wrongdoing, side by side with reparation. It was further developed as a form of redress in international human rights law and has been extensively applied by UN and regional human rights mechanisms.

The first part of this thesis (chapters I to III) considers the origins of the concept in international law while looking at both PIL and international human rights law. While chapter I deals with the meaning of assurances and GNR in PIL, chapters II and III explore the meaning of GNR in international human rights law.

CHAPTER I: GNR IN PIL

The reparations' regime in PIL has influenced international human rights law and its reparations' scheme, providing a general framework for the interpretation and application of reparation measures. The analysis of GNR as one of the consequences of the wrongful act shows that there is potential for the implementation of general and far-reaching reparations in PIL. According to the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC Draft Articles), GNR 'are concerned with the restoration of confidence in a continuing relationship.'¹⁵ Their nature is future looking as long as they focus on preventing new breaches of the law. The first half of this chapter will critically analyse (i) the general principles of responsibility applicable to PIL and the general forms of reparation established by it; and (ii) the role of GNR in the general scheme of reparations for breaches of international law. The second half will emphasise the nature of such obligation, the existence of a duty to provide assurances and GNR; and the specific measures provided.

1. General principles of State responsibility and forms of reparation

¹⁵ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) Doc. A/56/10 in II ILC Yearbook (2001) Part two, commentary article 30, para 9.

PIL has developed a reparations' regime applicable to states in cases of breaches of international obligations. According to this regime there are three traditional forms of reparation: restitution, compensation, and satisfaction. In addition to this, PIL has developed other applicable tools, such as assurances and GNR, in order to wipe out the consequences of a breach of international law if circumstances so require. This section will develop, in depth, the general regime of reparations in PIL.

1.1. The general principle of State responsibility

The principle according to which States have the duty to repair the consequences of the wrong committed, was first established in international law in the case *Factory at Chorzów (Indemnity)*. In this case, Germany requested the Polish Government to pay compensation for its expropriation of two German companies, inside Poland. The Permanent Court of International Justice elaborated a general principle of reparations, according to which:

‘the essential principle contained in the actual notion of an illegal act [...] is that reparations must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.’¹⁶

The obligation to repair has been recognized by the International Law Commission in the ILC Draft Articles. The ILC was created after the Committee on the Progressive Development of International Law and its Codification recommended to the General

¹⁶ *Case Concerning the Factory at Chorzów (German v Poland) (Merits)* [1928] PCIJ Series A No. 17, p. 48.

Assembly of the United Nations the establishment of an international law commission, in order to promote ‘the progressive development of international law and its codification.’¹⁷ While Article 15 of the Statute of the International Law Commission distinguishes between *progressive development*, which refers to ‘the preparation of draft conventions on subjects which have not been yet regulated by international law’, and *codification*, which is ‘the more precise formulation and systematization of rules of international law’;¹⁸ in practice, the ILC gets involved in both functions indistinctively. The ILC is composed of highly qualified lawyers, elected in their individual capacity, and on the basis of equitable geographical distribution. The ILC studies have been cited by the ICJ and other organisations to determine the content of the current law.¹⁹ The ILC Draft Articles have been used as the most authoritative ‘word’ in terms of international responsibility and constitute evidence of *opinio juris*.²⁰ According to Brownlie, the fact that the ILC includes a large variety of political and regional representation, provides a ‘realistic basis for legal obligations’ in its agreed drafts.²¹ Similarly, according to Caron, the ILC’s work has a high level of recognition among experts due to the varied range of experts that it is composed of.²² One of the tasks of the ILC was to produce a compilation of

¹⁷ UNGA, Statute of the International Law Commission (adopted 21 November 1947) UNGA Res 174 (II) article 1, para 1.

¹⁸ Ibid article 15.

¹⁹ The ICJ referred to the ILC Articles in *Gabcikovo-Nagymaros Project* (Hungary/Slovakia) (Judgment) [1997] ICJ Reports 7.

²⁰ James Crawford, *Brownlie’s Principles of Public International Law* (Oxford University Press, 8th edition, 2012) p.44.

²¹ Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 7th edition, 2008) p.29.

²²David Caron, ‘The ILC Articles on State Responsibility: The Paradoxical Relationship between Forms and Authority’ (2002) 96 *American Journal of International Law* 857, p. 867.

Articles on State Responsibility, aiming 'to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts.'²³

Article 31 of the ILC Draft Articles provides the obligation to make full reparation for the injury caused by the internationally wrongful act. According to this article 'the responsible state is under an obligation to make full reparation for the injury caused by the inter-nationally wrongful act.'²⁴

According to the same article, 'injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.'²⁵ While material damage refers to 'damage to property or other interest of the State and its nationals which is assessable in financial terms';²⁶ moral damage covers items such as 'loss of loved ones or personal affront associated with an intrusion on one's home or private life.'²⁷ The formulation of the article seems to exclude the abstract interest of a State which has not been affected by the breach.²⁸

An important clarification is that PIL governs primarily relations between sovereign states. Treaty and customary obligations in international law have a reciprocal or contractual nature.²⁹ A breach in international law committed by one state against the nationals of another state, constitutes mainly an injury to that state, and subsidiary to the individuals that suffer harm. This has an important consequence in terms of

²³ ILC Draft Articles, General Commentary, p. 31 para. 1.

²⁴ *ibid* article 31.

²⁵ *ibid*

²⁶ *ibid*, commentary article 31, paragraph 5.

²⁷ *ibid*

²⁸ *ibid*

²⁹ Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 2nd Edition, 2005) p.97.

reparations that distinguish the responsibility of states for injury to aliens from a human rights violations. While in international human rights law, reparations are originally granted in order to wipe out the victims' harm, in PIL reparations are granted mainly in order to redress the state's harm.³⁰ It does not mean that PIL does not take into account individual's harm, but rather, than its focus is to repair principally the state's injury.³¹

1.2 Forms of reparation in International Law

Article 34 of the ILC Draft Articles refers to the forms of reparation, according to which, 'full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction.'³² These forms of reparation are not mutually exclusive but can be used 'either singly or in combination.'³³ The ILC Draft Articles provide a hierarchical system of preference, according to which restitution should be preferred over compensation³⁴ and satisfaction only in those cases where restitution or compensation is not possible.³⁵ However, the decisions of arbitral and international tribunals show a different practice in the application of these rules. First, cases of restitution are rare in practice.³⁶ In a

³⁰ *ibid* p.103.

³¹ This difference will be further explained in Chapter II, Section 1. p. 57.

³² *ibid* article 34.

³³ *ibid* article 34.

³⁴ *ibid* article 36 (1).

³⁵ *ibid* article 37 (1).

³⁶ Yann Kerbrat, 'Interaction Between the Forms of Reparation', in James Crawford, Alain Pellet, and Simon Olleson, *The Law of International Responsibility*, (Oxford University Press, 2010), p. 584.

large number of cases compensation has been granted, even when restitution could have been possible.³⁷ Second, Kerbrat has stated this 'has not been supported whether by practice or jurisprudence.'³⁸ According to this author, since different forms of reparation are not exclusive, whichever form of reparation awarded generally entails satisfaction.³⁹

What seems to be a more consolidated rule in international law is the principle of proportionality in the application of any form of reparation. In order to avoid excessive requirements, the principle of full reparation must be applied so that every modality of reparation is proportionate to the loss. Therefore, restitution should be excluded if it involves a burden out of all proportion to the benefit deriving from restitution, instead of compensation;⁴⁰ compensation should be provided only for the injury caused by the internationally wrongful act;⁴¹ and satisfaction should not be provided 'out of proportion to the injury.'⁴²

This is also coherent with the idea that reparations must not be intended to be punitive. This means that compensation cannot be used to punish the responsible State, or be imposed with an exemplary character.⁴³ Similarly, satisfaction should not be intended to be punitive in character or humiliating to the responsible State.⁴⁴

³⁷ *ibid* p. 585.

³⁸ *ibid* p. 581.

³⁹ *ibid* p. 581.

⁴⁰ ILC Draft Articles, article 35 (b).

⁴¹ This is implicitly provided in *ibid* article 31 (1).

⁴² *ibid* commentary article 37, para 3.

⁴³ *ibid* commentary article 36, para 4; and *Velásquez Rodríguez Case (Reparations and Costs)*, Inter-American Court of Human Rights, Series C No. 7 (21 July 1989), para 38.

⁴⁴ ILC Draft Articles, commentary article 37, para 8.

1.2.1 Restitution

The first form of reparation for the injury caused by a state is restitution. According to the ILC Draft Articles, the purpose of restitution is 'to re-establish the situation which existed before the wrongful act was committed.'⁴⁵ Under international law, restitution is the primary form of redress. This principle was confirmed in the already referred to *Factory at Chorzów case*,⁴⁶ when saying that the responsible State was under 'the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible.'⁴⁷ Despite this general principle, the practice in the jurisprudence of both arbitral and judicial tribunals, shows that restitution has been rarely awarded.⁴⁸ This can be partially explained by considering the practical difficulties of this remedy. Very often, by the time that the object should be restituted, its value has diminished, or the object has either deteriorated or disappeared. In the *Factory at Chorzów Case*, for example, the German Government changed its original claim for the restitution of the factory, arguing that the present condition of the Chorzów factory did not correspond with the situation of the factory before it was taken over in 1922.⁴⁹ At this point, article 35 (a) of the ILC Draft Articles provides that restitution will be awarded when the re-establishment of the prior

⁴⁵ *ibid* article 35.

⁴⁶ See footnote 2.

⁴⁷ *Chorzów* 48.

⁴⁸ Christine Gray, (et al) 'The Different Forms of Reparation: Restitution' in James Crawford, Alain Pellet, and Simon Olleson, *The Law of International Responsibility* (Oxford University Press, 2010) p. 595.

⁴⁹ *Chorzów* 17.

condition 'is not materially impossible.'⁵⁰ This has been recognized as a widely accepted general principle of international law.⁵¹

Restitution may take different forms. According to the ILC it may imply 'material restoration of return of territory, persons or property, or the reversal of some juridical act, or a combination of them.'⁵² Particularly 'juridical restitution' may involve the modification of certain normativity, either within the domestic law of the responsible State, or in its legal relations with the injured state. This may include, for example, the 'revocation, annulment or amendment of a constitutional or legislative provision'⁵³ that was enacted against a rule of international law. In respect of whether the mere enactment of legislation breaches an international obligation, the ILC has recognized there is no general standard. Whereas in some cases the mere passage of incompatible legislation may be considered a breach, in other cases the enactment of legislation may not be a breach in itself, especially if it is open to the state to give effect to the legislation. In those cases, the ILC has mentioned that the breach will depend on whether the legislation is given effect.⁵⁴

1.2.2 Compensation

Compensation is the second form of reparation established in article 36 of the ILC Draft Articles. The function of this type of remedy is to 'cover any financially

⁵⁰ ILC Draft Articles, article 35 (a).

⁵¹ Gray *The Different Forms of Reparation: Restitution* 596.

⁵² ILC Draft Articles, commentary article 35, para 5.

⁵³ *ibid* commentary article 35, para 5.

⁵⁴ *ibid* commentary article 12, para 12.

assessable damage including loss of profits insofar as it is established.⁵⁵ This normally covers any material injury or pecuniary loss that can be quantified in monetary terms. Pecuniary loss includes both material harm, such as loss of earnings and medical expenses, and non-material harm, such as the pain and suffering for the loss of loved ones.⁵⁶ In domestic systems, non-material harm is also known as 'moral damage'. However, according to the traditional doctrine, non-material injury of the state (or 'moral damage' of the state), which is the injury caused by a violation of rights not associated to the damage of any person or property, should be covered by satisfaction and not by compensation.⁵⁷

Although the application of compensation rules remains a challenge, the practice of different international courts has created a set of principles in the measure of compensation for different injuries. Several principles have been developed, in practice, giving compensation in cases where, among others, State property such as ships, roads, embassies or infrastructure have been damaged;⁵⁸ individuals have suffered personal injury;⁵⁹ individuals, corporate entities or States have been subjected to incidental expenses, when money is owed, and when property rights have been trespassed.⁶⁰

According to the ILC Draft Articles, compensation must be awarded only 'insofar as such damage is not made good by restitution.'⁶¹ Even in those cases when restitution

⁵⁵ *ibid* commentary article 36, para 1.

⁵⁶ *ibid* commentary article 36, para 16.

⁵⁷ *ibid* commentary article 36, para 1.

⁵⁸ *ibid* commentary article 36, paras 8 and 12.

⁵⁹ *ibid* commentary article 36, para 16.

⁶⁰ *ibid* commentary article 36, paras 21-34.

⁶¹ *ibid* commentary article 36, para 1.

is available, compensation should be awarded in order to ensure full reparation.⁶² For example, in the *Factory at Chorzów Case*, the ICJ commented on the role of compensation, stating that:

‘Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.’⁶³

In that case, considering the impossibility of restoring the Chorzów factory, the ICJ ordered the Polish Government to pay compensation to the German Government in order to redress the harm.⁶⁴

1.2.3 Satisfaction

The last form of reparation established in ILC Articles is ‘satisfaction’. Article 37 establishes satisfaction as a secondary form of reparation available only when restitution and compensation are not possible. However, international practice tends to award satisfaction in a complementary way, on the basis that the granting of just restitution, or/and compensation, may not provide full reparation for the injury caused.⁶⁵ For example, in both the *Rainbow Warrior Case*⁶⁶, and the *I’m Alone*

⁶² *ibid* commentary article 36, para 3.

⁶³ *Chorzów* 47.

⁶⁴ *Chorzów* 63.

⁶⁵ Gray *The Different Forms of Reparation: Restitution* 633 [footnote 58].

⁶⁶ *Rainbow Warrior*, (Ruling) Reports of International Arbitral Awards, Vol XIX, (6 July 1986).

Case⁶⁷, requests for satisfaction were made in addition to the request for compensation. In the *Rainbow Warrior Case*, both compensation and apologies were granted in favour of New Zealand, after the French military security service, in an undercover operation, sank the Greenpeace ship, Rainbow Warrior. The ship set sail from Auckland Harbour (New Zealand) with the purpose of disrupting nuclear tests that the French government wanted to conduct on the French Polynesia Islands. In the case, the arbitral ruling established that the Government of France should give to the Government of New Zealand 'a formal and unqualified apology for the attack.'⁶⁸ It also ruled that the French Government should pay US \$7 million 'as compensation for all the damage suffered.'⁶⁹ In the *I'm Alone Case*, the United States was ordered to both formally acknowledge the illegality of the sinking of a Canadian-British vessel, the *I'm Alone*, and to pay US\$ 25,000 in compensation to the Canadian Government.⁷⁰ The vessel was suspected of smuggling liquor into the United States and the sinking took place outside of U.S territorial waters after the ship refused to stop.

Satisfaction may consist of, apologies and statements of regret, punishment of responsible persons, declaration of wrongfulness, or any other appropriate modality.⁷¹ Although it is not clear the nature of the injury for which satisfaction attempts to make reparation, it is generally established that satisfaction is awarded to redress 'non-material injury.'⁷² This means injury usually of a symbolic character,

⁶⁷ S.S. "I'm Alone" (*Canada v. United States*) [1935] 3 Report of International Arbitral Awards 1609.

⁶⁸ *Rainbow Warrior* 213.

⁶⁹ *idem*.

⁷⁰ *I'm Alone* 1618.

⁷¹ ILC Draft Articles, commentary article 37, para 2.

⁷² *ibid* commentary article 37, para 4.

originated in the breach of the obligation, regardless of the material consequences created for the state concerned.⁷³

1.3 Other obligations under International Law in cases of wrongdoing: cessation and GNR

Article 30 of the ILC Draft Articles establishes that the State responsible for the internationally wrongful act is under an obligation '(a) to cease that act, if it is continuing, [and] (b) to offer appropriate assurances and GNR, if circumstances so require.'⁷⁴ Although directly related to the repair of the affected relationship, these are considered as additional obligations for the responsible State, and are not, strictly speaking, forms of reparation.

According to the ILC Draft articles, cessation refers to 'the negative aspect of the future performance, concerned with securing an end to continuing wrongful conduct.'⁷⁵ The function of cessation, as is established in the ILC Draft articles, is 'to put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary rule.'⁷⁶ The obligation of cessation covers all relevant wrongful acts including both acts, and omissions. This means that, whilst sometimes cessation implies that the State should abstain from certain actions, in other circumstances it may require the responsible State to act in a certain way.⁷⁷

⁷³ *ibid* commentary article 37, para 3 and 4.

⁷⁴ *ibid* commentary article 30.

⁷⁵ *ibid* commentary article 30, para 1.

⁷⁶ *ibid* commentary article 30, para 5.

⁷⁷ *ibid* commentary article 30, para 2.

Some cases of cessation can be easily confused with restitution. In these situations, the ILC Articles have emphasised that the continuing character of the breached obligation, or whether it is a peremptory norm of general international law, is key in clarifying the difference. For example, in the case of an unlawful annexation of territory, the withdrawal of the military forces and the annulment of the decree of annexation, can be understood as a case of cessation rather than restitution.⁷⁸

In turn, according to the ILC Draft Articles, GNR 'are concerned with the restoration of confidence in a continuing relationship.'⁷⁹ Their nature is future looking as long as they focus on preventing new breaches of the law.

The relation between cessation and GNR is established in the commentaries to the ILC Draft Articles. According to these, both cessation and GNR are aspects of the restoration and repair of the wrongdoing. However, while cessation represents 'the negative aspect of future performance, concerned with securing an end to continuing wrongful conduct,'⁸⁰ GNR 'serve a preventive function and may be described as a positive reinforcement of future performance.'⁸¹

It must be noted that, according to the ILC Articles, the GNR located in its chapter 1, relate to the 'General Principles' of State responsibility. This could suggest that such guarantees are applicable to any case of wrongdoing. However, as the wording of Article 30 (b) suggests, these are applicable only 'if circumstances so require'. The analysis of the type of circumstances that are relevant to the application of GNR will be developed in section 2.4.⁸²

⁷⁸ *ibid* commentary article 35, para 6.

⁷⁹ *ibid* commentary article 30, para 9.

⁸⁰ *ibid* commentary article 30, para 1.

⁸¹ *ibid* commentary article 30, para 1.

⁸² See pp. 60-70.

2. The role of GNR in PIL

As presented in the previous section, GNR are incorporated in PIL as a consequence of the commission of an internationally wrongful act. Since the nature of such guarantees is not completely clear, this section will analyse (i) the nature of GNR; (ii) the existence of such obligation in PIL; (iii) the type of measures that have been granted under this type of guarantees, and (iv) the circumstances in which this type of measures are awarded.

2.1 The nature of GNR

Traditional forms of reparation in international law, such as restitution, compensation, and satisfaction, are characterized for being primarily restorative or backward looking. As outlined in the previous section, the purpose of restitution 'consists in re-establishing the *status quo ante*, i.e. the situation that existed prior to the occurrence of the wrongful act.'⁸³ Similarly, compensation operates when restitution is not possible.⁸⁴ As for satisfaction, this has an exceptional character, as its purpose is to redress 'those injuries, not financially assessable, which amount to an affront to the State.'⁸⁵ All such forms are oriented to repair the wrong committed in the past. Their aim is to wipe out, as much as is possible, the consequences of the wrongdoing, rather than preventing future harm.

⁸³ *ibid* commentary article 35, para 2.

⁸⁴ *Chorzów* 48.

⁸⁵ ILC Draft Articles, commentary article 37, para (3).

In contrast, GNR are future-oriented rather than past-oriented, even if they are anchored in past events and violations. This characteristic has been emphasised by the ILC commentary in several of its sections. For example, when explaining the difference between cessation and GNR, the ILC commentary states that, while cessation is concerned with ending the continuing wrongful conduct, GNR ‘may be described as a positive reinforcement of future performance.’⁸⁶ According to the ILC, even though states may not always express their claims in terms of assurances or guarantees, ‘they share the characteristics of being future-looking and concerned with other potential breaches.’⁸⁷ This section of the commentary also emphasizes that the purpose of GNR is to restore the confidence between states, especially in those cases when the mere restoration of a pre-existing situation does not constitute an adequate protection for the injured State.⁸⁸ As a result, it is stated that ‘[GNR] focus on prevention rather than reparation.’⁸⁹ Also, when explaining the difference between assurances, or GNR and satisfaction, the ILC Articles emphasize how they are aimed at ‘the reinforcement of a continuing legal relationship and the focus is on the future, not the past.’⁹⁰

2.2 The existence of a duty to provide GNR in PIL

Unlike the forms of reparation provided in Article 34 of the ILC Draft Articles, the duty to provide GNR in PIL, has largely been discussed. During the discussion of the ILC,

⁸⁶ *ibid* commentary article 30, para. 1.

⁸⁷ *ibid* commentary article 30, para. 9.

⁸⁸ *Ibid*.

⁸⁹ *Ibid*.

⁹⁰ *ibid* commentary article 30, para. 11.

Germany, for example, argued that 'to impose an obligation to guarantee non-repetition in all cases would certainly go beyond what State practice deems to be appropriate.'⁹¹

In order to analyse whether there is a duty of states to provide assurances and GNR as a consequence of wrongdoing, this section will analyse such measures in both the work of the International Law Commission in the ILC Articles, and the jurisprudence of the ICJ.⁹²

2.2.1 GNR in the work of the ILC Articles

Assurances and GNR are established in several drafts of the ILC articles. Various special Rapporteurs on State Responsibility consistently proposed the inclusion of GNR in the draft articles on state responsibility.⁹³ The first precedent of the inclusion of GNR in the ILC Articles may be found in the report presented to the General Assembly in 1961, by the Special Rapporteur on State Responsibility, Garcia

⁹¹ ILC, 'State responsibility, Comments and observations received from Governments' (25 March 1998) A/CN.4/488, p.103.

⁹² Article 38 of the Statute of the International Court of Justice establishes as sources of international law '(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decision and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.

⁹³ Five Special Rapporteurs on State Responsibility have been appointed: Francisco V. Garcia Amador (1956-1961); Roberto Ago (1969-1972, 1976-1980); Willem Riphagen (1980-1986); Gaetano Arangio-Ruiz (1988-1989, 1991-1996); James Crawford (1998-2001).

Amador. Proposing, in Article 27, paragraph 2, titled 'Measures to prevent the repetition of the injurious act', he stated that:

'the State of nationality shall have the right, without prejudice to the reparation due in respect of the injury sustained by the alien, to demand that the respondent State take the necessary steps to prevent the repetition of events of the nature of those imputed to that State.'⁹⁴

GNR as such, were then proposed in 1985, under the work of the Special Rapporteur on State Responsibility, Willem Riphagen. Article 6 of the articles proposed that the injured State may require the State which has committed an internationally wrongful act to (a) discontinue the act, (b) apply the remedies provided in internal law, (c) re-establish the situation as it existed before the act, and also:

(d) 'provide appropriate guarantees of non-repetition of the act.'⁹⁵

In this article, GNR appear as a direct consequence of the internationally wrongful act and are not a form of reparation.

The wording 'guarantees of non-repetition' was maintained during the mandates of the following Rapporteurs. In the report presented by the Special Rapporteur on State Responsibility, Arangio-Ruiz, Article 10, titled 'Satisfaction and guarantees of

⁹⁴ ILC, 'Sixth Report on International Responsibility by Mr. F.V. García Amador Special Rapporteur', (1961) Doc. A/CN.4/134 & ADD 1 in II *ILC Yearbook* Addendum, article 27 para (2), p.49.

⁹⁵ ILC, 'Sixth report on the content, forms and degrees of international responsibility (part two of the draft articles); and 'implementation' (mise en oeuvre) of international responsibility and the settlement of disputes (part three of the draft articles), by Willem Riphagen, Special Rapporteur, (1985) A/CN.4/389 and Corr.1 & Corr. 2, II *ILC Yearbook* (1), Article 6 (1) (d).

non-repetition', incorporates GNR as a form of satisfaction. Article 10 paragraph (1) establishes that:

'In the measure in which an internationally wrongful act has caused to the injured State a moral or legal injury not susceptible of remedy by restitution in kind or pecuniary compensation, the State which has committed the wrongful act is under an obligation to provide the injured State with adequate satisfaction in the form of apologies, nominal or punitive damages, punishment of the responsible individuals or assurances or safeguards against repetition, or any combination thereof.'⁹⁶

In this proposal, GNR are understood as a form of reparation, specifically as a form of satisfaction, thus losing its autonomy as an independent consequence of the wrongdoing of a state. Both satisfaction and GNR are conditioned to the impossibility of remedying the wrong by restitution in kind, or pecuniary compensation; therefore, they are conceived as an alternative form of reparation, rather than a complementary one.

In the Report presented by the Special Rapporteur on State Responsibility, James Crawford, GNR are included in Article 36 bis, titled "Cessation". Numeral (2), paragraph (2), of the Article establishes that the State which has committed an internationally wrongful act is under an obligation:

'(a) where it is engaged in a continuing wrongful act, to cease that act forthwith;

⁹⁶ ILC 'Second Report on State Responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur' (1989) A/CN.4/425 & Corr.1 and Add.1 & Corr.1, in II *ILC Yearbook* 1989 (1), p.56, para 191, article 10 (1).

(b) to offer appropriate assurances and guarantees of non-repetition.⁹⁷

Under this article, GNR are conceived as an independent consequence of the wrongdoing, again, different from any form of reparation, and especially different from satisfaction. As such, it operates in addition to the traditional forms of reparation (i.e. compensation, restitution, satisfaction) established in Article 37 bis.

This proposal is very similar to the one finally adopted for the Drafting committee, in the 53rd session of the international Law Commission (2001), establishing in Article 30, titled

‘Cessation and non-repetition’, that:

The State responsible for the internationally wrongful act is under an obligation:

(a) To cease that act, if it is continuing;

(b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

As in the version that immediately preceded this, cessation, as well as assurances and GNR (Article 30), are understood as an independent consequence of the wrongdoing that operates, in addition to reparation (Article 31). Although they are both general consequences of an internationally wrongful act, the fact that they are placed in different articles, may have important consequences. Unlike reparation, cessation and GNR are ‘an aspect of the continuation and repair of the legal relationship affected by the breach.’⁹⁸ Thus, they have a central role in the restoration of the breached legal relationship. In contrast, reparation may not be so

⁹⁷ ILC, ‘Third report on State responsibility, by Mr. James Crawford, Special Rapporteur’ (2000) A/CN.4/507 and Add. 1-4., p. 39, article 36 Bis, numeral (2), paragraph (2).

⁹⁸ ILC Draft Articles, commentary article 30, para 11.

central in a dispute between states.⁹⁹ This may imply a more primary duty in the establishment of cessation and assurances and GNR than in the setting of reparations, in cases of a breach to an international obligation.¹⁰⁰

2.2.2 GNR in the work of the ICJ

GNR have also been included in the work of the ICJ. *LaGrand* (Germany v. United States) Case¹⁰¹ is probably the most important precedent in the granting of this type of remedy. In this case, two brothers who were German nationals residing in the United States, were arrested for participating in an attempted bank robbery in Arizona, where one person was killed. Both men were convicted of first-degree murder and sentenced to the death penalty. Germany alleged that the *LaGrand* brothers were not informed of their right to consular assistance by a third party during the trial. Before the ICJ issued its decision on the case, both brothers were executed.

During the proceedings, Germany requested 'that the United States shall provide Germany an assurance that it will not repeat its unlawful acts and that, in any future cases of detention of or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations.'¹⁰² Even though Germany did not state in detail the specific measures that the United States should take, it

⁹⁹ *ibid* commentary article 30, para 4.

¹⁰⁰ For an application of this argument in the *Bosnia and Herzegovina v. Serbia Case*, see Christian Tomuschat, 'Reparation in Cases of Genocide', [2007] 5 *Journal of International Criminal Justice* 905, pp. 911-912.

¹⁰¹ *LaGrand Case* (Germany v United States of America) (Judgment) [2001] ICJ Rep 466.

¹⁰² *ibid* para 117.

requested that 'In particular in cases involving the death penalty, this requires the United States to provide effective review of and remedies for criminal convictions impaired by a violation of the rights under Article 36.'¹⁰³

The United States answered that, the requirement of assurances of non-repetition sought by Germany, 'has no precedent in the jurisprudence of this Court and would exceed the Court's jurisdiction and authority in this case.'¹⁰⁴ According to the United States, assurances of non-repetition are exceptional and not clearly established in State practice.¹⁰⁵

The United States also informed the ICJ of the 'substantial measures aimed at preventing any recurrence', and the intense work carried out in order 'to improve understanding of and compliance with consular notification and access requirements throughout the United States, so as to guard against future violations of these requirements.'¹⁰⁶ As a result of this effort the United States published a booklet about 'Consular Notification and Access' which was widely distributed. The United States also offered an apology to Germany for the breach of its obligations.

In the decision, the ICJ favoured Germany in its request by stating:

'an apology is not sufficient in this case, as it would not be in other cases where foreign nationals have not been advised without delay of their rights under Article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties.

¹⁰³ *ibid* para 12 (4).

¹⁰⁴ *ibid* para 119.

¹⁰⁵ *ibid*.

¹⁰⁶ *ibid* para 121.

In this respect, the Court has taken note of the fact that the United States repeated in all phases of these proceedings that it is carrying out a vast and detailed programme in order to ensure compliance by its competent authorities at the federal as well as at the state and local levels with its obligation under Article 36 of the Vienna Convention.¹⁰⁷

Even though this is the first case where the ICJ recognized a duty of states under international law to offer GNR, the Court does not provide any explanation about the legal basis for such measures.

The recognition of GNR by the ICJ in this case, has led to opposing opinions by commentators. Upholding the recognition of these measures, Tams has pointed out that:

'No doubt caution is required, but it seems safe to say that this recognition could indeed mark a trend towards a broader approach to the law of state responsibility. By recognizing, for the first time, a state's right to obtain guarantees and assurances of non-repetition, the Court has accepted a remedy that is not only new, but also qualitatively different from the traditionally accepted forms of reparation.'¹⁰⁸

In response to this argument, authors like Sullivan have criticized the recognition of a duty to provide assurances and GNR, by stating that:

'The ICJ's and ILC's surreptitious movement toward AGNRs resulted in an illegitimate and artificial production of an international rule, which is both bad public policy and which stains both the institutions and the

¹⁰⁷ *ibid* para 123.

¹⁰⁸ Christian Tams, 'Recognizing Guarantees and Assurances of Non-Repetition: *LaGrand* and the Law of State Responsibility' (2002) 27 *Yale Journal of International Law* 441, p. 443.

principle. A change in international law to a future-oriented approach empowered to interfere directly with domestic law redefines international court power under the doubtful guise of custom.¹⁰⁹

The fact that GNR includes a new perspective on the nature of reparations, different to the one established in the traditional forms of remedies, may explain the extreme caution of the ICJ in awarding this type of remedy.

In the case law after *LaGrand*, and as Barbier has emphasised,¹¹⁰ the ICJ has consistently recognized that there is a duty of states to offer GNR. After *LaGrand* the ICJ has been requested to order GNR in at least the following nine cases, with different results: In the cases of *Cameroon v Nigeria* (2002)¹¹¹, *Bosnia v Serbia* (2007)¹¹², *Costa Rica v Nicaragua* (2009)¹¹³ and *Argentina v Uruguay* (2010)¹¹⁴, the Court denied the ordering of such measures by considering that they should be granted only under 'specific circumstances', that analysis of the situation showed that there was no reason to think that the acts would happen again, and that 'good faith' must be presumed. In the cases *Mexico v. United States of America (Avena)*

¹⁰⁹ Scott Sullivan, 'Changing the premise of International legal Remedies: the unfounded adoption of assurances and guarantees of non-repetition' (2003) 44 *UCLA Journal of International Law & Foreign Affairs* 265, p. 301.

¹¹⁰ Sandrine Barbier, 'Assurances and Guarantees of Non-repetition', in James Crawford, Alain Pellet, and Simon Olleson, *The Law of International Responsibility* (Oxford University Press, 2010), pp.554-555.

¹¹¹ *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria: Equatorial Guinea intervening) (Judgment) [2002] ICJ, Rep 303.

¹¹² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) (Judgment) [2007] ICJ Rep 43

¹¹³ *Dispute regarding Navigational and Related Rights* (Costa Rica v. Nicaragua) (Judgment) [2009] ICJ Rep 213

¹¹⁴ *Pulp Mills on the River Uruguay* (Argentina v. Uruguay) (Judgment) [2010] ICJ Rep 14

(2004)¹¹⁵ and *DRC v Uganda* (2005)¹¹⁶, the Court held that, the commitment of the respondent state to comply with its obligations must be sufficient in order to satisfy the request of GNR.¹¹⁷ In the advisory opinion *Construction of a wall in the occupied Palestinian territory* (2004)¹¹⁸, and in the cases *Liechtenstein v. Germany* (2005)¹¹⁹ and *Djibouti v. France* (2008)¹²⁰ the Court did not discuss the request made by the complainant states to provide GNR.

Despite the fact that the Court has applied a very restrictive criteria in ordering assurances and GNR in just one case out of nine (i.e. *LaGrand* Case), what is important to highlight here is that, in none of these cases, did the Court question the existence of a duty of the respondent state to offer GNR. In fact, following *LaGrand*, in the *Land and Maritime Boundary between Cameroon and Nigeria Case* (2002), the Court clearly stated that a request for an end of military presence in Cameroonian territory and GNR in the future, are ‘undoubtedly admissible.’¹²¹ Despite the criticism that the criteria held by the Court, in its case law, may engender, the repeated acceptance of the Court of a duty of the responsible state to

¹¹⁵ *Avena and Other Mexican Nationals* (Mexico v. United States of America) (Judgment) [2004] ICJ Rep 12

¹¹⁶ *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda) (Merits) [2005] ICJ Rep 168

¹¹⁷ *Avena* paras 59-60; and *DRC v Congo* para 257.

¹¹⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ, General list 131.

¹¹⁹ *Certain Property* (Liechtenstein v. Germany) (Preliminary Objections) (Judgment) [2005] ICJ Rep 6

¹²⁰ *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France) (Judgment) [2008] ICJ Rep 177.

¹²¹ *Land and Maritime Boundary between Cameroon and Nigeria* para 318.

provide GNR, is a clear and strong argument in favour of the existence of such obligation.

2.2.3 Is there an international obligation of the responsible state to provide GNR?

Scholars have discussed the mandatory character of the duty of responsible states to provide GNR, as incorporated in Article 30 of the ILC Articles. Criticizing the binding character of this obligation, Sullivan has stated that, by the time that the ILC was drafted, there was not enough state practice or evidence of *opinio juris* to consider this remedy as customary international law.¹²²

The ILC recognizes in the commentary of Article 30 that, while assurances and GNR are one of the consequences of the wrongdoing in international law, there was little customary practice to support such obligation. In 1989, the Special Rapporteur, Arangio-Ruiz, presented a list of examples that seems to justify the existence of an international practice to request GNR. The examples refer to cases such as *Dogger Bank* (1904), in which the United Kingdom requested from Russia 'security against the recurrence of such intolerable incidents';¹²³ *Doane Case* (1886), related to an American missionary in the Philippines who was deported to Manila, in which 'the Spanish Government endeavoured in a measure to repair the wrong it had been done by restoring Mr. Doane to the scene of his labours and by repeating its assurances with preference to the protection of the missionaries and their

¹²² Sullivan *Changing the Premise* 283.

¹²³ G.F. de Martens, *Nouveau recueil général de traités*, 2nd series, vol. XXXIII, p. 642. Cited at A/CN.4/425 & Corr.1 and Add.1 & Corr.1, footnote 361.

property;¹²⁴ *Wilson Case* (1894), linked to the murder of an American citizen in Nicaragua, in which the United States demanded that ‘the Government of Nicaragua...adopt such measures as to leave no doubts as to its purpose and ability to protect the lives and interest of citizens of the United States dwelling in the reservation, and to punish crimes committed against them;¹²⁵ and *Vracaritch case* (1961), related to the arrest, in Munich, of a former captain in the Yugoslav resistance forces, in which Germany declared that ‘the arrest ... is a regrettable, isolated case and the competent authorities have taken the necessary measures to ensure that such a case does not occur again.¹²⁶ These are cited as examples of cases where the injured state has demanded safeguards against the repetition of the wrongful act. These cases, however, refer not to situations decided by domestic or international courts, but to diplomatic requests made from one state to another.¹²⁷ In the reports it is not mentioned whether these requests were actually awarded by the states or not. Also, they mainly refer to practices used in the 19th and beginning of the 20th centuries, so they do not clearly show more up-to-date state practice.¹²⁸

The argument of the out-dated nature of the cases was raised during the discussion of Article 10 of the ILC Draft Articles in 1993. Mr Mikulka, chairman of the drafting committee, observed that it was regrettable that the rule governing assurances and

¹²⁴ Moore, *Digest*, vol. II, pp. 903 *et seq.*, at pp. 903 and 907. Cited at A/CN.4/425 & Corr.1 and Add.1 & Corr., footnote 362.

¹²⁵ *idem* pp. 745-746. Cited at A/CN.4/425 & Corr.1 and Add.1 & Corr. footnote 366.

¹²⁶ “Chronique”, RGDIP, vol. 66 (1962), pp. 376-377, cited at A/CN.4/425 & Corr.1 and Add.1 & Corr.1, footnote 367.

¹²⁷ Sullivan *Changing the Premise* 283.

¹²⁸ It is for this reason that, according to Sullivan, the incorporation of assurances and guarantees of non-repetition by both the ICJ and the ILC relies not in the customary character of this obligation but in the legitimacy of the ILC. Sullivan *Changing the Premise* 279.

GNR was based on such old cases and, since it was not possible to find an updated example, the validity of the rule should be called into question.¹²⁹ In this regard the Special Rapporteur Arangio-Ruiz recognized that, at the time the article about GNR was drafted in 1989, he was not able to produce modern examples and, therefore, the Commission was involved in progressively developing international law rather than codifying the existing one.¹³⁰

Despite the lack of up-to-date sources in the ILC Draft Articles, authors such as Barbier have argued that, in the last years, the obligation of states to provide GNR as a consequence of a breach of international law has increasingly been recognised as a norm of customary law.¹³¹ Several arguments have been expressed in this regard:

First, the work of the ILC should not be considered just as mere codification but as relevant *opinio juris*. According to the statute of the ILC its main object is ‘the promotion of the progressive development of international law and its codification.’¹³² In practice, the ILC has found it difficult to distinguish between its function of codification and ‘progressive development.’¹³³ In as much as the ILC drafts may constitute evidence of *opinion juris*, the work of the ILC undoubtedly contributes to the creation of new law.¹³⁴

¹²⁹ ILC, Summary records of the meetings of the 45th Session, 2123rd meeting (19 July 1993) I *ILC Yearbook* 164, para 26.

¹³⁰ *idem* para 29.

¹³¹ In Barbier’s words ‘[e]ven if caution is in order, it can without doubt be considered that guarantees of non-repetition are now part of the legal consequences of an internationally wrongful act’. Barbier *Assurances and Guarantees of Non-repetition* 555

¹³² ILC, Statute of the International Law Commission, article 1 (1)

¹³³ Crawford *Brownlie’s Principles of Public International Law* 44.

¹³⁴ Malcom N. Shaw, *International Law* (Cambridge, 6th edition, 2008) p.121.

In addition to this, and following Article 38(1) of the Statute of the ICJ, the ILC articles can be understood as 'subsidiary means for the determination of rules of law'¹³⁵. As a consequence, and in the opinion of several commentators, the work of the ILC is similar¹³⁶ or even higher in authority to the writings of highly qualified publicists, in as much as the Articles count with very high level experts, have the active participation of states, and work within the framework of the United Nations.¹³⁷

The work of the Commission has been backed up by UN member states. In fact, during the discussion of article 46 on GNR, the few governments that commented on the article were generally supportive. Mongolia found the provisions on satisfaction, assurances and GNR of highly importance.¹³⁸ The Czech Republic was supportive of an enforced regime of GNR, at least in cases of 'crimes'.¹³⁹ Uzbekistan commented that the article should stipulate what form of assurances the injured state is entitled to.¹⁴⁰ Argentina considered that states affected by a wrongful act should be able to request cessation and GNR but not necessarily reparation. Among all these opinions, only Germany and the United States questioned the provision. Whereas Germany debated whether the duty to provide GNR can be imposed in all cases,¹⁴¹ the United States strongly objected to the inclusion of an article on GNR, arguing they are not 'legal obligations, have no place in the draft articles on State

¹³⁵ ILC, Statute of the International Court of Justice, article 38 (1) (d)

¹³⁶ David Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Forms and Authority' (2002) 96 *American Journal of International Law* 4, p.867.

¹³⁷ Clive Perry, *The Sources and Evidences of International Law* (Manchester University Press, 1965) p. 24.

¹³⁸ ILC, 'State Responsibility, Comments and observations received by Governments' (25 March, 30 April, 4 May, 20 July 1998) Document A/CN.4/488 and Add. 1-3, p.150-151.

¹³⁹ *idem* 150.

¹⁴⁰ *idem* 151.

¹⁴¹ *idem* 145.

responsibility and should remain as an aspect of diplomatic practice.¹⁴² This position can be understood as a normal reaction of the American government after *LaGrand*, which was decided in 2001. Apart from these opinions, states have not expressed relevant views in relation to this article. This should be taken into account as an indicator of the tacit support of states to the wording of the article.¹⁴³

Second, following Barbier's argument, the practice of the ICJ shows there is an increasing recognition of a duty to provide GNR as a consequence of an international breach. As discussed in section 2.2.2.,¹⁴⁴ following *LaGrand*, the ICJ has not doubted the existence of a duty to provide GNR, even though it has not always awarded specific and concrete measures. Whereas in some cases it has recognized that the request cannot be upheld, in others it has considered that the request is satisfied by the commitment of the state to uphold its obligations. In other cases, such as *Land and Maritime Boundary between Cameroon and Nigeria Case (2002)*, the Court clearly stated that a request for an end of military presence in Cameroonian territory and GNR in the future are 'undoubtedly admissible.'¹⁴⁵ More importantly, States have continuously requested the ICJ to provide GNR on the basis that they are a consequence of an unlawful act. This was clear in the previously mentioned cases: *Cameron v. Nigeria (2002)*; *Liechtenstein v. Germany (2005)*; *DRC v. Uganda*; *Bosnia v. Serbia & Montenegro (2007)*; *Djibouti v. France (2004)*; *Mexico v. United States (Avena) Case (2009)*; *Costa Rica v. Nicaragua (2009)*; *Argentina v. Uruguay (2010)*, and *Georgia v. Russia (2011)*, as well as in the advisory opinion on the *Construction of a wall in the occupied Palestinian territory*

¹⁴² ILC, 'Comments and observations received from Governments' (1-3, 19 March, 3 April, 1 May and 28 June 2001) U.N. Document A/CN.4/515 and Add, p.58.

¹⁴³ Barbier *Assurances and Guarantees of Non-repetition* 554.

¹⁴⁴ See pp. 40-45.

¹⁴⁵ *Cameroon v. Nigeria* para 318.

(2004). These arguments have allowed some authors to argue that GNR are 'indeed a rule of positive law'¹⁴⁶ or that '[e]ven if caution is in order, it can without doubt be considered that GNR are now part of the legal consequences of an internationally wrongful act.'¹⁴⁷

However, besides the positivism of Barbier, the evidence in favour of the existence of a clear and undoubted customary obligation to provide GNR is still not conclusive. On the one hand, although the ILC articles are the most important codification of international law and can even constitute evidence of *opinio juris*, not all their articles are strictly legally binding for states as they do not necessarily constitute sources of international law. While some of the articles included in the Draft Articles may reflect customary law and be clearly binding for states, some others may simply reflect an emerging practice and a product of the progressive development of international law. On the other hand, even if *LaGrand* constitutes an important precedent in the recognition of such obligation in the practice of the ICJ, it is also true that after that precedent was rendered, the ICJ has not awarded GNR in any other case, although it has not denied the existence of a duty to provide such measures either.

In these circumstances, as will be shown in the following chapters, it is important to note that, whilst keeping the differences in perspective and content, it is possible to state that there is an emerging practice of providing GNR in the work of various international human rights tribunals and quasi-judicial bodies. The Human Rights Committee, for example, has recognised that states have a duty 'to take steps to

¹⁴⁶ Pierre-Marie Dupuy, 'A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility' (2002) 13 EJIL, p. 1065.

¹⁴⁷ Barbier *Assurances and Guarantees of Non-repetition* 555.

prevent similar violations in the future.¹⁴⁸ Similarly, the Committee against Torture (hereinafter CAT) has stated that an ‘effective remedy’ entails ‘GNR’ among other forms of reparations.¹⁴⁹ In turn, the Inter-American Court of Human Rights has consistently required states to provide GNR in many cases.¹⁵⁰ These obligations are based on article 2 of the International Covenant on Civil and Political Rights (hereinafter ICCPR),¹⁵¹ article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter CAT),¹⁵² and article 1 of the Inter-American Convention on Human Rights (hereinafter ACHR),¹⁵³ respectively, which establish a generic duty of states to provide redress, although they do not explicitly incorporate a duty to provide GNR. Specific provisions introducing GNR as a form of reparation can be found in articles 18 and 23 of 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* (hereinafter ‘Basic Principles and

¹⁴⁸ HRC, *M.I. v. Sweden* (2013) Comm. No. 2149/2012; U.N. Doc CCPR/C/108/D/2149/2012, para 9; HRC, *Andrei Olechkevitch v. Belarus* (2013) Comm. No. 1785/2008, U.N. Doc CCPR/c/107/D/1785/2008, para 10; HRC, *Zhanna Kovsh v. Belarus* (2013) Comm. No. 1787/2008, U.N. Doc CCPR/C/107/D/1787/2008, para 9; HRC, *Slimane Mechani v. Algeria* (2013) Comm. No. 1807/2008, U.N. Doc CCPR/C/107/D/1807/2008.

¹⁴⁹ UN, CAT, ‘General comment 3 (2012) ‘Implementation of article 14 by States parties’ (19 November 2012)’ CAT/C/GC/3, paras 2 and 6.

¹⁵⁰ See Chapter III of this thesis.

¹⁵¹ Article 2 (3) (a) of ICCPR establishes the duty of states ‘To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy’.

¹⁵² Article 14 (1) of CAT establishes ‘Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress’.

¹⁵³ Article 1 of the ACHR establishes ‘The States Parties to this Convention undertake to respect the rights and freedoms recognized herein’.

Guidelines' or 'Basic Principles')¹⁵⁴. According to the Preamble, such Basic Principles 'do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law.'¹⁵⁵

Outside of the judicial context, James Crawford has referred to two additional examples of state practice. The first one is the allegation, in 2009, of China to the United States, that the United States had entered its exclusive economic zone. In that case, the Chinese spokesman stated 'we demand the United States respect our legal interests and security concerns, and take effective measures to prevent a recurrence of such events'¹⁵⁶. Similarly, in 2010, Japan alleged that Chinese ships had entered its territorial waters and, as a consequence, demanded that China prevent a recurrence.¹⁵⁷

¹⁵⁴ Article 18 of the 'Basic Principles' establishes '[...] victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition'. While article 23 establishes '*Guarantees of non-repetition* should include, where applicable, any or all of the following measures, which will also contribute to prevention [...]'].

¹⁵⁵ UNGA, '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' (21 March 2006) A/RES/60/147, Preamble.

¹⁵⁶ 'US warships head for South China Sea', *Independent*, 13 March 2009, cited in James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013) p. 474.

¹⁵⁷ 'Japan protests over China ships in disputed waters', *Reuters*, 24 August 2011, cited in *idem* p.474.

In addition to this emerging practice, the duty to provide GNR has also been recently included in treaty law. Article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance (hereinafter ICPPED) establishes GNR as one of the forms of reparation.¹⁵⁸ Adopted on 20 December of 2006, it is the last human rights core convention adopted within the United Nations. The explicit incorporation of GNR as a form of reparation should be indicative of the increasing recognition of such a duty among states. These examples, from international tribunals, as well as diplomatic practice and treaty law, provide support for the idea that: there is certainly an emerging practice among states and international tribunals to offer and provide GNR for the redress of violations. Such practice is particularly strong under international human rights law.

2.3 Specific measures provided

Even though both the ILC and the ICJ have recognized the existence of a duty to offer assurances and GNR, none of these sources are clear about the type of measures that should be granted. In the study elaborated by Arangio-Ruiz, he presents a characterization of GNR. According to his report the injured State may demand:

¹⁵⁸ Article 24 (5) of ACHR establishes 'The right to obtain reparation referred to in paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation such as: (a) Restitution; (b) Rehabilitation; (c) Satisfaction, including restoration of dignity and reputation; (d) Guarantees of non-repetition.'

'(a) safeguards against the repetition of the wrongful act without any specification; or (b) where the wrongful act affects its nationals, that a better protection of the persons and property of the latter be ensured.'¹⁵⁹

In the same report it is also mentioned that, on some occasions, the injured State may also ask the offending State to adopt specific measures in order to avoid repetition. In those cases the injured State may request:

- a. Formal assurances from the offending State that it will in the future respect given rights of the offended State.¹⁶⁰
- b. The adoption of specific measures such as to give specific instructions to state agents.¹⁶¹
- c. The adoption of a certain line of conduct that is considered to be necessary to prevent the creation of conditions that allowed the wrongful act to take place.¹⁶²
- d. The adoption of, or derogation from, specific legislations.¹⁶³

This characterization is generally followed in the ILC Comments which states that, on some occasions the injured State may ask specific measures from the responsible state, such as '[to] seek[] assurances from the responsible State that, in the future, it will respect the rights of the injured State. In other cases, the injured State requires specific instructions to be given, or other specific conduct to be taken.'¹⁶⁴

¹⁵⁹ A/CN.4/425 & Corr.1 and Add.1 & Corr.1, para. 154.

¹⁶⁰ *idem* para 158 (a)

¹⁶¹ *idem* para 158 (b)

¹⁶² *idem* para 158 (c)

¹⁶³ *idem* para 159

¹⁶⁴ ILC Draft Articles, commentary article 30, para 13.

In the few cases where GNR have been considered, the ICJ has opted for a generic formula recognizing that the commitment of the state to comply with its international obligations should be considered sufficient to meet the request for guarantees and assurances of non-repetition. In *LaGrand Case*, the ICJ upheld the request of Germany to provide GNR but without detailing the specific measures that can be considered as such, limiting itself to state that:

‘But no State could give such a guarantee and Germany does not seek it. The Court considers that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), must be regarded as meeting Germany's request for a general assurance of non-repetition.’¹⁶⁵

In *Congo v. Uganda*,¹⁶⁶ the ICJ considered that the measures already taken by Uganda should be understood as a legally binding commitment that Uganda will not repeat the wrongful acts.¹⁶⁷ Similar results were found in *Avena*, where Mexico requested the United States to provide appropriate guarantee and assurances in order to achieve compliance with Article 36.¹⁶⁸ In this case, the ICJ found that the

¹⁶⁵ *LaGrand* para 124.

¹⁶⁶ Congo had requested as part of the guarantees of non-repetition both ‘a solemn declaration that it will in future refrain from pursuing a policy that violates the sovereignty of the Democratic Republic of the Congo and the rights of its population’ and ‘demands that specific instruction to that effect be given by the Ugandan authorities to their agents’, *Congo v Uganda* para 255.

¹⁶⁷ *Congo v. Uganda* para 257.

¹⁶⁸ *Avena* para 144.

commitment expressed by the United States since *LaGrand*, should be considered sufficient.¹⁶⁹

Regarding the inclusion of specific remedies, such as the modification of particular pieces of legislation, they are clearly established in the ILC Articles, but its practice remains rare in inter-state complaints.¹⁷⁰ In the Report elaborated by Arango-Ruiz, the adoption or derogation of specific legislation was included as one of the specific measures that the injured State could request, in order to avoid the repetition of the facts. The Report cites several cases in this regard, such as the *Boxer Case*,¹⁷¹ the *Matheof Case*,¹⁷² the case between France and Belgium in 1854,¹⁷³ the case between Mexico and the United States in 1886,¹⁷⁴ the lynching of Italian nationals in Erwin,¹⁷⁵ and the '*Alabama*' Case.¹⁷⁶ In the case between Mexico and the United States, for example, a case was raised for the prosecution and conviction in Mexico of an American national who published an article in the United States that was

¹⁶⁹ *Avena* para 150.

¹⁷⁰ James Crawford (et al), *The Law of International Responsibility* (Oxford University Press, 2010) p. 559; and Arango-Ruiz, *Second Report on State Responsibility* para 161.

¹⁷¹ Moore, *Digest*, vol. V. pp. 515-516; reproduced in Arango-Ruiz, *Second Report on State Responsibility* para 124, footnote 312.

¹⁷² Jacques Dumas, 'La responsabilité des Etats à raison des crimes et délits commis sur leur territoire au préjudice d'étrangers', *Recueil des cours...*, 1931-11, vol. 36, p. 188, partially reproduced in A/CN.4/425 & Corr.1 and Add.1 & Corr., footnote 383.

¹⁷³ Dumans, *La responsabilité des Etats* 189-190, cited in A/CN.4/425 & Corr.1 and Add.1 & Corr.1, para 159 [footnote 384].

¹⁷⁴ *idem* [footnote 385].

¹⁷⁵ Moore, *Digest*, vol. VI. pp. 848-849; cited in A/CN.4/425 & Corr.1 and Add.1 & Corr.1, para 159 [footnote 386].

¹⁷⁶ Nicolas Socrate Politis, *La justice internationale* (Hachette, 1924) p.41, partially reproduced in A/CN.4/425 & Corr.1 and Add.1 & Corr.1, para 159 [footnote 387].

considered defamatory of a Mexican citizen. Since the prosecution was in conformity with Mexican legislation, the United States requested the modification of the related provision in the Mexican Penal Code. Mexico agreed to the request.¹⁷⁷ Also, in the case of the lynching of Italian nationals in Erwin, Mississippi, Italy requested that the United States modify its law which did not allow federal courts to exercise jurisdiction in certain cases, and thus prevented the punishment of authors of crimes against foreigners.¹⁷⁸ These cases illustrate some scenarios where legislative provisions were requested in order to prevent the commission of future wrongdoing.

However, as discussed in the previous section, these references are not necessarily sufficient to prove consistent state practice. They only refer to diplomatic use in the 19th century so they do not clearly reveal current state practice.

In *LaGrand* Case, changes in the legislation were suggested by Germany and briefly discussed by the Court, but changes were not actually granted. In this case, Germany requested, as part of the fourth submission, that '[v]iolations of Article 36 followed by death sentences and executions cannot be remedied by apologies or the distribution of leaflets. An effective remedy requires certain changes in US law and practice.'¹⁷⁹ When analyzing this request, the ICJ stated that:

'[The Court] has not found that a United States law, whether substantive or procedural in character, is inherently inconsistent with the obligations undertaken by the United States in the Vienna Convention. In the present case the violation of Article 36, paragraph 2, was caused by the

¹⁷⁷ Dumans, *La responsabilité des Etats* op. cit. At A/CN.4/425 & Corr.1 and Add.1 & Corr.1, para 159 [footnote 385].

¹⁷⁸ Moore, *Digest*, vol. VI. pp, 848-849 cited in A/CN.4/425 & Corr.1 and Add.1 & Corr.1, para 159 [footnote 386].

¹⁷⁹ *LaGrand* para 122.

circumstances in which the procedural default rule was applied, and not by the rule as such.¹⁸⁰

As a result the Court found that, in cases where the individuals have been subjected to prolonged detention or convicted and sentenced to severe penalties, the United States has an obligation to allow the review and reconsideration of the conviction and sentence. However it states that:

‘This obligation can be carried out in various ways. The choice of means must be left to the United States.’¹⁸¹

In *Avena*, Mexico requested the United States to take effective remedies, including the modification of domestic law that represented an obstacle to the application of Article 36.¹⁸² However, such a request was not maintained in the final submission, in which Mexico simply asked that the United States provide appropriate guarantees and assurances that it shall take measures sufficient to achieve increased compliance with Article 36’, without concretely specifying what the measures should be.

Other remedies that, for example, contemplate the creation or modification of specific policies or practices in a State seem to be harder to argue. The ILC Articles do not include such possibility within the specific measures that the injured state can request as GNR. In addition to this, there is no case law that supports the inclusion of such remedies in PIL.

¹⁸⁰ *LaGrand* para 125.

¹⁸¹ *LaGrand* para 125.

¹⁸² *Avena* para 279.

This analysis shows a general trend in the ICJ to provide generic remedial measures and to be deferential to the domestic legal order of states.¹⁸³ The Human Rights Committee,¹⁸⁴ the Committee on the Elimination of Discrimination against Women (hereinafter CEDAW Committee),¹⁸⁵ and the Committee on the Rights of the Persons with Disabilities¹⁸⁶ have increasingly, as part of their general recommendations, recommended states the adoption of legislative measures. The European Court of Human Rights has increasingly become more specific in details when awarding general measures that recommend the adoption of legislative reforms, in order to secure the effectiveness of its judgments, especially in cases of large and systemic violations.¹⁸⁷ Similarly, the Inter-American Court of Human Rights, surely the most activist of the regional human rights courts, has not hesitated in ordering extensive legislative and policy measures as part of its reparation measures.¹⁸⁸ In these circumstances, the ICJ will have to find a balance between reparation measures that are detailed enough to provide effective redress, but general enough to respect the

¹⁸³ Stephen Tully, 'By Means of its Own Choosing': Is the Court Refashioning the Remedies of State Responsibility?' (2013) 15 *International Community Law Review* 459, p. 481.

¹⁸⁴ HRC, *Fijalkowska v Poland* (2005) Comm. No. 1061/2002, U.N. Doc. CCPR/C/84/D/1061/2002, para 10.

¹⁸⁵ CEDAW, *Isatou Jallow v. Bulgaria* (28 August 2012) Comm. No. 32/2011, U.N. Doc. CEDAW/C/52/D/32/2011, para 8.8 (2)(b); and CEDAW, *Cecilia Kell v Canada* (26 April 2012) Comm. No. 19/2008, U.N. Doc. CEDAW/C.51/D/19/2008, para 11 (b) (ii).

¹⁸⁶ CRPD, *Zsolt Bujdosó and five others v. Hungary* (20 September 2013) Comm. No. 4/201, U.N. Doc. CRPD/C/10/D/4/2011, para 10(2) (a & b); and CRPD, *Szilvia Nyusti and Péter Takács v. Hungary* (2013) Comm. No. 1/2010, U.N. Doc. CRPD/C/9/D/1/2010, para 10 (2) (a).

¹⁸⁷ See *Greens and M.T. v the United Kingdom*, App. Nos. 6004/08 and 60054/08 (ECtHR, 23 November 2010) operative paragraph (6).

¹⁸⁸ See, Chapter III.

margin of appreciation that states have in the definition of its own policies. It is difficult to establish how this balance should be established as this is something that should be decided by the ICJ case by case.

2.4 Circumstances when assurances and GNR should be awarded

GNR have been recognized to be of an 'exceptional character'¹⁸⁹ and usually granted only when 'circumstances so require.'¹⁹⁰ This characteristic appears in the articles adopted by the Drafting Committee in 1992, according to which:

'The injured State is entitled, where appropriate, to obtain from the State which has committed an internationally wrongful act assurances or guarantees of non-repetition of the wrongful act.'¹⁹¹ [emphasis added]

In the discussions of the drafting Committee, 'guarantees of non-repetition' were not necessarily considered a form of reparation that should be granted to every 'injured state', but rather an exceptional remedy¹⁹² that should proceed depending on the circumstances of the case. According to the Drafting Committee:

'the words 'where appropriate' were intended to give the article the necessary flexibility in that respect and, in effect, left it to the judge (or the third party called upon to apply the rules) to determine whether, in the

¹⁸⁹ ILC, Draft Articles, commentary Article 30, para 13.

¹⁹⁰ *idem* article 30 (b).

¹⁹¹ ILC, 'Draft articles on State responsibility: Titles and texts of articles adopted by the Drafting Committee: Part 2' [1992]. A/CN.4/L.472, in I *ILC Yearbook* 1992, p.215.

¹⁹² ILC, 'Summary Records of the 2288th ILC meeting' (20 July 1992) U.N. Doc. A/CN.4/SER.A/1992, in I *ILC Yearbook*, p.222, para 64.

particular instance, it was justifiable to allow for assurances or guarantees of non-repetition.¹⁹³

This element of 'flexibility' was also incorporated in the Reports on State Responsibility presented by the Special Rapporteur Mr. James Crawford.¹⁹⁴ The formula 'if circumstances so require' was finally adopted by the Drafting Committee and introduced into the ILC Draft Articles 2001.¹⁹⁵ The current formulation of the article on cessation and non-repetition establishes:

'The State responsible for the internationally wrongful act is under an obligation (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require'. [emphasis added]

Besides, the ILC has recognised that there is an element of 'flexibility' in the award of these measures; it would be desirable to have a standard in order to understand in which concrete circumstances parties can request such measures. Some insights can be found in the Drafting Committee's discussion of the ILC articles. During such discussion of the Draft Articles in 1992, the Committee refers to 'a real risk of repetition' and to the suffering of a 'substantial injury', as examples of conditions for its granting such measures. According to the Drafting Committee:

¹⁹³ idem para 65.

¹⁹⁴ According to the Special Rapporteur Mr. James Crawford 'This element of flexibility is reflected in article 46 by the qualifying phrase 'where appropriate', at Doc. A/CN.4/507 and Add. 1-4., para 58; he also stated that 'Under article 30 (b), assurances or guarantees of non-repetition are exceptional remedies which may be called for in certain cases if there is reason to apprehend a further breach of the obligation', in ILC, 'Fourth Report on State responsibility, by Mr. James Crawford, Special Rapporteur' (2001) Doc. A/CN.4/517 and Add. 1, p.9, para 32.

¹⁹⁵ According to the ILC Draft Articles, article 30 (b).

'The conditions for granting such a remedy should, for instance, be that a real risk of repetition existed and that the claimant State had already suffered a substantial injury.'¹⁹⁶

In 2001, before the approval of the ILC Draft Articles, the Drafting Committee again discussed a similar standard:

'The obligation to offer appropriate assurances and guarantees of non-repetition was understood to arise as a function of the risk of non-repetition, the gravity of the wrongful act and the nature of the obligation breached. It was also felt that assurances of non-repetition were required not only where there was a pattern of repetition of the wrongful act, but also where there was a risk of repetition or, alternatively, where the breach was particularly grave, even if the risk of repetition was minimal.

The addition of the words 'if circumstances so require' was said to clarify the dependence of the concept of the particular context.¹⁹⁷ [emphasis added]

In support of this standard the Special Rapporteur Mr. James Crawford suggested that, for the granting of 'guarantees of non-repetition,' precise circumstances should be taken into account including 'the nature of the obligation and of the breach.'¹⁹⁸ Also, during the discussion of these articles, 'the seriousness of the breach and the

¹⁹⁶ ILC, 'Summary Records of the 2288th ILC meeting' op. cit. p.222, para 65.

¹⁹⁷ ILC, 'Report of the International Law Commission on the work of its fifty-second session (2000), Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fifth session prepared by the Secretariat' (15 February 2001) A/CN.4/513, para 57.

¹⁹⁸ A/CN.4/507 and Add. 1-4 para 58.

probability of repetition' were suggested as parameters for the granting of such measures.¹⁹⁹

Despite the standard established by the ILC Draft Articles, the case law of the ICJ has not always been clear or consistent about the circumstances in which to award GNR. As already mentioned, the ICJ denied the ordering of GNR in the cases: *Cameroon v Nigeria* (2002), *Bosnia v Serbia* (2007), *Costa Rica v Nicaragua* (2009) and *Argentina v Uruguay* (2010,) considering that they should be granted only under 'specific circumstances', that there was no reason to think that the acts would happen again, and that 'good faith' must be presumed. Even though in these four cases the Court applied the same criteria to consider the request for GNR, a more detailed analysis shows that the application of this criterion may not be justified in every case.

Taking into account the factors established by the Draft Committee, the decisions of the ICJ in *Cameroon v. Nigeria* (2002) and *Costa Rica v. Nicaragua* (2009) may be defensible. In both cases the debate was related to a border dispute which was unlikely to happen again and, therefore, had a very low risk of repetition.²⁰⁰ The decision in the case *Concerning Pulp Mills on the River Uruguay* (2010) can also be legitimate, since the main claim requested by Argentina (due to the pollution it created, that the Onion mill built on the Uruguay River, be dismantled) was rejected

¹⁹⁹ ILC, 'Report of the International Law Commission on the fifty-second session' (1 May- 9 June and 10 July-18 August 2000) Doc. A/55/10*, para. 91.

²⁰⁰ While in the *Cameroon v. Nigeria* Case the Court discussed a problem related to the course of the maritime boundary between these two countries, in the *Costa Rica v. Nicaragua* case there was a dispute of a section of the San Juan River for navigation purposes by Costa Rica.

by the Court. As a consequence, any request for further redress would be without practical implication.²⁰¹

Probably the most controversial case, as a result of the rejection of GNR, was the ICJ's case of *Bosnia v Serbia* (2007). In this case, the ICJ found that Serbia and Montenegro were not responsible for the genocide committed against the Muslims and Croats in Bosnia, in what was called the Srebrenica massacre. The Court, however, found Serbia and Montenegro responsible for the violation of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter CPPCG) in that they did nothing to prevent the genocide from occurring, and afterward did not punish the perpetrators. Bosnia requested that Serbia and Montenegro provide guarantees that it would not commit the wrongful act again. According to the Court, since this request was related to the finding that Serbia committed Genocide, a finding which eventually was not upheld by the Court, the submission failed. The Court also considered whether the claim for GNR was appropriate, in relation to the duty to prevent and punish genocide. However, once again the Court decided that the declaration, according to which Serbia would immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide, or any other acts proscribed by Article III of the Convention; to transfer individuals accused of genocide for trial by the ICTY; and to co-operate fully with that Tribunal, was an appropriate form of satisfaction, and therefore, GNR would be inappropriate.²⁰²

²⁰¹ The ICJ justified the rejection for GNR reiterating its previous jurisprudence, according to which 'As a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed'. *Pulp Mills* para 278.

²⁰² *Bosnia v. Serbia* paras 465-466.

The rejection of the Court to grant GNR may be open to criticism. On the one hand, as presented by Tomuschat, GNR are part of the consequences for the commission of an internationally wrongful act (Article 30 ICL Articles) and not a form of reparation (Article 34 ICL Articles). As a consequence, GNR are not only dependable on the breach of a primary duty, but should be awarded under a more general basis.²⁰³ In this case, rejecting the request because there was no violation of the duty not to commit genocide, and, similarly, no complicity, conspiracy and incitement, is just a 'misleading twist' of the Court.²⁰⁴ On the other hand, as suggested by the claimants in the case, analysis of the circumstances showed that there were still some movements from Serbia calling for genocide.²⁰⁵ In particular, the fact that Serbia did not show any effective measures to transfer individuals accused of genocide to the International Criminal Tribunal for the former Yugoslavia (ICTY), showed the lack of interest of the state in preventing the repetition of these facts.²⁰⁶ Moreover, the case found Serbia responsible for not preventing genocide; a serious breach of international law. The fact that the case was dealing with very serious violations of international law, with enormous consequences for the stability of the region, should be enough to request the state to display effective measures that ensure the non-repetition of these, or similar, facts in the future.

²⁰³ For a full development of this argument see Tomuschat, *Reparation in Cases of Genocide* 912.

²⁰⁴ *idem* 911.

²⁰⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) (Public sitting held on Tuesday 7 March 2006, at 10 a.m., at the Peace Palace, President Higgins presiding - Oral arguments on behalf of Bosnia and Herzegovina: Mr. Condorelli, Mr. Pellet and Mr. Franck) [2006] CR 2006/11, para 28, available at <http://www.icj-cij.org/docket/files/91/10606.pdf> (accessed on 23 June 2015)

²⁰⁶ See also, Tomuschat *Reparation in Cases of Genocide* 912.

In other cases the Court has held that the commitment of the respondent state to comply with its obligations, must be sufficient in order to satisfy the request of GNR. In the case *DRC v Uganda* Case (2005), the DRC requested 'a solemn declaration that [Uganda] will in future refrain from pursuing a policy that violates the sovereignty of the DRC,'²⁰⁷ in addition it demanded 'that specific instruction to that effect be given by the Ugandan authorities to their agents.'²⁰⁸ Since Uganda had signed a Tripartite Agreement on Regional Security in the Great Lakes, which obliged Uganda to respect the sovereign and territory, the Court considered that this must be understood as a legally binding undertaking that Uganda will not repeat the facts in the future.²⁰⁹ The trust of the Court in the DRC may be understandable, as the signature of the treaty showed the active will of Uganda to not repeat these facts.

In *Avena*, however, the reasoning of the Court does not seem to be justified. In this case, Mexico requested GNR on the basis that the measures taken by the US, to inform people about consular rights, is not effective and that there is a 'regular and continuous' pattern of breaches by the US in this regard. The United States explained that, since *LaGrand*, it had taken steps (i.e. the distribution of booklets informing about consular rights). The Court took note of the commitment undertaken by the United States to ensure implementation of their obligations, and found that this commitment must be regarded as meeting the request by Mexico for GNR.²¹⁰

The excessive trust of the Court in the US, in the *Avena* Case, seems to be naive. The case practically mirrors the judgement in *LaGrand*. In both cases the facts related to the lack of compliance with article 36 of the Vienna Convention on Consular Relations; GNR were requested and later rejected under the argument

²⁰⁷ *Congo v. Uganda* para 255.

²⁰⁸ *idem* para 255.

²⁰⁹ *idem* para 257.

²¹⁰ *Avena* paras 59-60.

that, the commitment of the United States to ensure the implementation of specific measures in order to comply with its obligations under Article 36, was enough to meet the request for GNR.

In this regard, Mexico argued that the deficiencies in the granting of information were not exclusive to these two cases, but were part of a 'regular and continuous' breach, identifying at least one hundred cases where Mexican nationals, during the first half of 2003, were not, in a timely fashion, notified of their consular rights.²¹¹ The Court, however, did not take into account this argument, and without actually providing a reason, held that 'there is no evidence properly before [the Court] that would establish a general pattern.'²¹²

In order to justify its decision the Court relied on information provided by the United States, about the considerable efforts of American authorities to provide consular information, including the distribution of a booklet among authorities of the State Department. The fact that Mexico was bringing a case for the same facts presented in *LaGrand*, proves that the United States did not take seriously the commitment it made in this latter case. In fact, as Tranel has stated, after 11/9, U.S. authorities have detained a large number of foreign nationals without providing timely notification to the respective consulate.²¹³ Additionally, domestic authorities have not always enforced the individual rights stemming from Article 36 of Vienna Convention, and the ones who have done so, do not necessarily refer to *LaGrand*.²¹⁴

²¹¹ *Avena* para 146.

²¹² *Avena* para 149.

²¹³ Adrienne Tranel, 'The Ruling of the International Court of Justice in *Avena and Other Mexican Nationals*: Enforcing the Right to Consular Assistance in U.S. Jurisprudence' (2004-2005) 20 *American University International Law Review* 403, p.449.

²¹⁴ Tranel *The Ruling of the International Court* [...] 450.

The Court should have analysed more carefully the effectiveness of such measures before relying upon the good faith of the United States. In this sense, the Court could have ordered the United States to adopt effective measures to prevent, by means of its own choosing, the repetition of these facts.²¹⁵ This generic statement would have forced the U.S. government to put in place other type of measures that effectively tackle the problem of lack of consular notification. More effective and detailed measures to secure the effective prevention of such violations were at the disposal of the United States, such as the judicial enforcement of the judgement in the domestic law,²¹⁶ and the application of the American Bar Association's adaptation of revised 'Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases' which establishes a duty of defence counsel to inform clients of their right to speak to the relevant consulate.²¹⁷ Although more detailed measures would have been desirable,²¹⁸ at least a general statement calling for the adoption of effective measures would have contributed to the implementation of measures.

In the cases of *Liechtenstein v. Germany (2005)* and *Djibouti v. France (2008)*, the ICJ did not discuss the request made by the complainant states to provide GNR. In

²¹⁵ The ICJ used the formula 'by means of its own choosing' to order the United States to provide a review and reconsideration of the convictions and sentences of Mexican nationals. *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* [2009] ICJ Rep 3, para 9.

²¹⁶ See Tranel *The Ruling of the International Court [...] 453-461*. Similarly, the Inter-American Court of Human Rights has increasingly awarded in its decisions, the duty of judges to perform a 'control of conventionality' when deciding cases that may rise from a violation of human rights.

²¹⁷ Tranel *The Ruling of the International Court [...] 461-463*.

²¹⁸ According to Stephen Tully, the practice of the ICJ will evolve in providing more detailed measures of redress, as has been the practice in the European Court of Human Rights. Tully *By Means of its Own Choosing* 476.

the case *Liechtenstein v. Germany* (2005), the Court did not consider it necessary to study the request for GNR, since the objection proposed by Liechtenstein relating to the lack of jurisdiction *ratione temporis*, was upheld by the Court. In *Djibouti v. France* (2008), the ICJ found that France had failed to comply with its international obligations, and that the ICJ's findings constituted adequate satisfaction. As a consequence, it did not refer to the request for GNR or any other request for reparations. The silence of the Court may be justified in the cases *Liechtenstein v. Germany* and *Djibouti v. France*. While the first case did not study the substance of the case, and therefore it is understandable that it does not provide any reparation measure, the second is related to a specific violation of a non-continuous character, one that does not require the adoption of GNR.

In the Advisory Opinion on the *Construction of a wall in the occupied Palestinian territory* (2004), however, the Court clearly avoided the topic, despite Jordan requesting Israel to bring the illegal situation to an end by ceasing the construction of the wall in the Occupied Palestinian Territories, and asking for appropriate assurances and GNR²¹⁹. The Court did not provide any explanation for this silence, characterized by Barbier as part of the reluctance of the Court to recognize GNR as a consequence of the wrongdoing of a state.²²⁰

The analysis of these cases shows the criteria of the Court in granting GNR. In most of the cases, the Court seems to have a very restrictive view about the type of circumstances that require the granting of GNR, therefore rejecting the request for guarantees, even in cases of, what can be considered, serious breaches (*Bosnia and Herzegovina Case*). In other cases, the Court acknowledged the granting of GNR, by accepting a commitment of the responsible state to abide by obligations, as being enough to avoid the repetition of the facts (*DRC v Uganda, Avena, LaGrand v.*

²¹⁹ *Construction of a wall*, para 144-145.

²²⁰ Barbier *Assurances and Guarantees of Non-repetition* 555.

US). In others, the Court does not even explain the denial of the measures requested (*Liechtenstein v. Germany*). The Court needs to make clear in which circumstances GNR should be granted. The standard proposed during the Sixth Committee of the General Assembly, according to which, the risk of repetition, the seriousness of the breach and the character of the obligation breached, should be taken into account for the awarding of these remedies, may play an important role in the clarification of this standard.²²¹

3. Conclusion

The previous analysis shows that GNR have been clearly recognised by the ILC Commission in the Draft Articles of State Responsibility, and the ICJ in its case law. Although it is still not clear whether there is an international customary law obligation of states to offer GNR, the practice of both international tribunals and states, as well as treaty law, for example as recognised in article 24 of the ICPPED, is moving towards the recognition of such duty under customary law.

Regarding the application of GNR, the ICJ has limited itself to ordering states to uphold its promise to fulfil its obligation, without ordering the states to take concrete and additional measures in order to secure this promise. Legislative reforms, although theoretically possible, have never been ordered in practice. In general, the ICJ has been very deferential to states regarding the means by which they comply with their obligations.

²²¹ According to the Committee 'assurances of non-repetition were required not only where there was a pattern of repetition of the wrongful act, but also where there was a risk of repetition or, alternatively, where the breach was particularly grave, even if the risk of repetition was minimal'; At A/CN.4/513, para 57.

In relation to the circumstances in which to be applied, GNR are not granted in all situations but only when circumstances 'so require'. It has been proposed that GNR should be awarded by taking into account the risk of repetition, the seriousness of the breach and the character of the obligation breached.²²² This constitutes a reasonable standard for the provision of these measures in international law. In the coming chapters, this standard will be examined further, when considering the order of GNR by other bodies.

²²² *idem*.

CHAPTER II: GNR AND GENERAL MEASURES IN INTERNATIONAL HUMAN RIGHTS LAW

As GNR have gained a place under PIL, the same has been the case in international human rights law. International human rights treaties, as well as, the practice of various UN human rights bodies and regional human rights courts, show that the concepts of GNR and general measures are now part of their daily work and of the orders/recommendations they make. This chapter will present the recent developments of these concepts in both, global and regional instruments, aiming at clarifying the nature and scope of this type of remedy.

1. Differences in the redress of violations under PIL and International Human Rights Law, and its impact in the understanding of GNR in IHRL

There are several differences between the redress of violations under PIL and International Human Rights Law (IHRL). PIL deals with violations committed by one state against other; whereas IHRL deals with violations usually committed by a state against an individual. In those cases where a state has committed a wrong against the national of another state, such disputes have been solved under the law of reparations for injuries to aliens under the general principles of reparations of PIL. However, even in those cases, and as Shelton has underlined, there are several differences in the treatment of reparations that distinguish the redress of reparations

for injured to aliens (under PIL) from the redress of reparations for human rights violations (under IHRL).²²³

One of the differences is related to the source of the duty to repair. Even though the source of obligations in international law is a bilateral or multilateral treaty where all states are considered as equal with reciprocal obligations; the source of obligations in IHRL is either a human rights treaty or a human rights obligation imposed by customary law, which represent minimums of dignity and equality obligatory to everyone.

There are also differences in terms of the nature of the obligation. As most of the international law duties are reciprocal or contractual, breaches to these obligations are considered an injury to the state itself. In contrast, human rights obligations impose particular rights on individual persons, and the corresponding duties on states. As a consequence, a breach to a human rights obligation is a breach against the rights of a human being rather than against the rights of a state. In the words of the Inter American Court:

'modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common

²²³ Shelton *Remedies in International Human Rights Law* 97-102.

good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.'²²⁴

Contrary to the reciprocal system of obligations of international law, human rights law establishes an objective regime where many of its obligations are *erga omnes*, meaning that all states have the duty to vindicate them.

Differences in the source and nature of both regimes have consequences in the type of redress awarded. Public international law allows the injured state to take counter-measures based on a decentralized system that allows each state to vindicate their rights in pursue of reestablishing the legal relationship;²²⁵ nevertheless, breaches to the human rights regime would never justify a state to perform the same violation on any national of the breaching state. The public or *erga omnes* nature of the human rights regime requires supervisory bodies to impose remedies that not only protect individuals from human rights violations but, also deter the commission of future violations.²²⁶ As Shelton emphasized, human rights violations performed by the state are different from the ones performed by a private party.²²⁷ As the state is responsible for securing compliance with a human rights regime, the breach of its own duties increases the risk that similar violations are performed by other actors.

It is precisely due to the public dimension of redress in IHRL that measures of satisfaction and GNR acquire a special attention function in IHRL. In her own words:

'Thus, society as well as the individual victim is injured when human rights are violated. [...] If society as a whole is injured by human rights

²²⁴ *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75) Advisory Opinion OC-2/82*, Inter-American Court of Human Rights Series A No. 2 (24 September 1982)

²²⁵ ILA Draft Articles, article 22, p. 75 and Chapter II, Commentary 1, p.128.

²²⁶ Shelton *Remedies in International Human Rights Law* 99.

²²⁷ *Idem*

violations, so also may society as a whole benefit from public remedies.²²⁸

This public dimension of remedies in IHRL will permeate the understanding of GNR in IHRL at both, global and regional levels. Whereas in PIL, GNR are designed to secure the state that similar breaches will not happen in the future; in IHRL, GNR are a guarantee to the society as a whole that similar violations will not be performed by the state again.²²⁹

2. GNR and general measures in global human rights instruments

The term GNR has gained momentum in international human rights law, particularly since its insertion in soft law documents such as the Basic Principles and Guidelines on the Right to a Remedy and Reparation. UN committees do not explicitly refer to this term but have increasingly incorporated the recommendation of general measures in its practice which, *mutatis mutandis*, could be understood as an equivalent term. This section analyses the origin and practice of these concepts in both the core international human rights instruments and UN treaty-monitoring bodies.

²²⁸ *Idem* 99 – 100.

²²⁹ *Case of Trujillo-Oroza v. Bolivia (Reparations and Costs)* Inter-American Court of Human Rights Series C. No. 92 (27 February 2002) para 110.

2.1 Hard and soft law on the duty to provide GNR

The insertion of GNR as a specific form of reparation was first proposed in the work of Theo van Boven in the '*Study concerning the right to restitution, compensation and rehabilitation for victims of gross violation of human rights and fundamental freedoms*'.²³⁰ In this study several forms of satisfaction and GNR were listed in cases of gross violations of human rights.

Subsequently, some reports authored by UN rapporteurs elaborated on the meaning of GNR in the context of impunity. In the Louis Joinet's report on the '*Question of the impunity of perpetrators of human rights violations (civil and political)*',²³¹ he included a section on GNR. An updated and more detailed version of these principles against impunity was elaborated by Diane Orentlicher in the '*Updated set of principles for the protection and promotion of human rights through action to combat impunity*'.²³² Together with the right to know, and the right to justice, 'the right to reparation/guarantees of non-recurrence' was included here as one of the duties of the states to combat impunity. The principles include a section on 'Guarantees of non-recurrence', according to which:

²³⁰ UNCHR, 'Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms' (2 July 1993) U.N. Doc. E/CN.4/ Sub.2/1993/8, para 137 (11).

²³¹ UNCHR, 'Question of the impunity of perpetrators of human rights violations (civil and political), Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119' (2 Oct 1997) E/CN.4/Sub.2/1997/20/Rev.1, para 45.

²³² UNCHR, 'Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher'; Updates Set of Principles for the protection and promotion of human rights through action to combat impunity' (8 February 2005) E/CN.4/2005/102/Add.1, principles 35-38.

'States shall ensure that victims do not again have to endure violations of their rights. To this end, States must undertake institutional reforms and other measures necessary to ensure respect for the rule of law, foster and sustain a culture of respect for human rights, and restore or establish public trust in government institutions.'²³³

As noted in chapter I, GNR were included, in 2006, in 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* which currently constitute the most recognized authority for the establishment of a duty to provide GNR in international human rights law.²³⁴ Article 18 of the Guidelines includes GNR together with, restitution, compensation, rehabilitation, and satisfaction, as one of the forms of reparations that should be granted in cases of gross violations of international human rights law and serious violations of international humanitarian law. The Guidelines establish that this form of reparations should be awarded 'as appropriate and proportional to the gravity of the violation and the circumstances of each case.'²³⁵ Paragraph 23 of the Guidelines also lists some of the measures that could be considered as part of the GNR:

'23. Guarantees of non-repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention:

- (a) Ensuring effective civilian control of military and security forces;
- (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;

²³³ idem principle 35.

²³⁴ UNGA, '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' (21 March 2006) A/RES/60/147.

²³⁵ idem article 18.

- (c) Strengthening the independence of the judiciary;
- (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
- (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
- (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
- (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
- (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.'

The Guidelines have become the most authoritative source²³⁶ on the right to a remedy and reparation under international human rights law.

²³⁶ The Guidelines 'do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law' See, *idem* Preamble. They have also been cited by the International Court of Justice (hereinafter ICC) when defining the concept of victims. See for example, Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation 18 January 2008, ICC-01/04-01/06-119, para 35.

In 2012, the first Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, was appointed by the United Nations. In September 2015, he published a report elaborating upon the main elements of a framework for designing State policies regarding 'guarantees of non-recurrence.'²³⁷ In this report he clarifies the concept of 'guarantees of non-recurrence' in the context of mass violations, and as part of a transitional justice strategy. In this regard, he emphasises the preventive nature of the concept, as well as its increasing use among regional human rights courts and human rights treaty bodies.²³⁸ According to the report 'the "offer" of guarantees of non-recurrence relates to a combination of deliberate, diverse interventions that contribute to a reduction in the likelihood of recurring violations.'²³⁹ This preventive understanding of 'guarantees of non-recurrence' proceeds in the same direction as the one developed by the ILC and other UN rapporteurs.

As the mandate of the rapporteur is mainly oriented to promote the main components of transitional justice, the report also distinguishes between those components and guarantees of non-recurrence. Unlike truth, justice and reparation, which are understood as transitional justice measures, guarantees of non-recurrence are understood as 'a function that can be satisfied by a broad variety of measures.'²⁴⁰ Such measures can be oriented to intervene in the institutional, societal and cultural spheres of a State. This is also in keeping with the broad scope

²³⁷ UN, Human Rights Council, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence', Pablo de Greiff (7 September 2015) A/HRC/30/42.

²³⁸ *idem* paras 18-19.

²³⁹ *idem* para 25.

²⁴⁰ *Idem* para 23.

of measures developed in international human rights law as part of guarantees of non-repetition which will be presented in chapters II and III of this thesis.

The report also provides some clarification about the 'object' of guarantees of non-recurrence. According to the report, 'guarantees of non-recurrence' are not for the prevention of isolated violations, 'but of gross human rights violations and serious violations of international humanitarian law. Such violations presuppose systemic abuses of (State) power that have a specific pattern and rest on a degree of organizational set-up.'²⁴¹ Here again, the report agrees with the concept of, and circumstances developed for, the awarding of guarantees of non-repetition in PIL.

In addition to these soft law documents²⁴², the International Convention for the Protection of All Persons from Enforced Disappearance (ICCPED) is the only human rights treaty to make an explicit reference to GNR as one of the forms of reparation. According to Article 24 (5) of this Convention:

'5. The right to obtain reparation referred to in paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation such as:

- (a) Restitution;
- (b) Rehabilitation;
- (c) Satisfaction, including restoration of dignity and reputation;

²⁴¹ *Idem* para 25.

²⁴² As Abbott and Snidal have stated the term *hard law* 'refers to legally binding obligations that are precise (or can be made precise through adjudication of the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law'. In turn the term *soft law* 'begins once legal arrangements are weakened along one of more of the dimensions of obligation, precision and delegation'. Kenneth W. Abbott & Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 *International Organization* 421 pp. 421-422.

(d) Guarantees of non-repetition´.

The ICCPED was adopted in 2006, entered into force in 2010, and up to September 2015 has been ratified by 50 states' parties. During the discussion of the draft of the treaty, no state made any mention against the inclusion of GNR as a form of reparation, showing an increasing acceptance of a duty to provide GNR in the last years.

That this treaty is the only one to explicitly refer to GNR should not be taken to mean that other human rights treaties do not recognise the concept. Indeed, it has been understood that all human rights treaties establish a right of victims to obtain reparation within the domestic legal system, even if they do not always expressly recognise such a right.²⁴³

²⁴³ See, International Convention on the Elimination of all forms of Racial Discrimination (adopted 21 December 1965, entered into force 21 December 1965), 660 UNTS 195 (ICERD) Article 6; International Covenant on Civil and Political Rights, (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Article 2(3); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1495 UNTS 85 (CAT) Article 14; International Convention for the Protection of all Persons from Enforced Disappearance (adopted 12 January 2007, entered into force 23 December 2010) (ICPPED) Article 24 (4).

2.2 General measures in the practice of the United Nations Treaty - monitoring Bodies

All the UN human rights bodies have increasingly recommended to states the adoption of general remedial measures as a form of redress in the analysis of individual communications. This reinforces the current practice of regional human rights courts which, as will be developed in this and the following chapter, have also applied GNR as a form of reparation.

2.2.1 Human Rights Committee

Since its first cases, the HRC has recognized the existence of a duty of states to provide remedies. In one of its first cases related to the unlawful detention of several member of a family in Uruguay, the Committee considered that the State party is under an obligation to 'provide effective remedies to the victims'.²⁴⁴ The HRC has usually referred to article 2, paragraph 5 of the Covenant, as the basis for the determination of remedial measures. This practice continues nowadays.

The duty to provide remedial measures, however, has been expressed in different ways. Whereas in a few cases the HRC has found a violation without referring to any form of redress; in most of the cases the Committee has stated that the state should procure the redress of the victim, for example, by providing an effective remedy

²⁴⁴ HRC, *Moriana Hernandez Valentini de Bazzano v. Uruguay* (1984) Comm. No. 5/1977, U.N. Doc. CCPR/C/OP/1 at 40, para 10.

including compensation.²⁴⁵ In other cases it has expressed that states should prevent any recurrence of the violation without detailing what particular measures should be taken.²⁴⁶

When providing remedial measures the Committee has recommended both pecuniary and non-pecuniary redress. Within the non-pecuniary measures, the Committee has recommended a large variety of measures such as, restitution, satisfaction and GNR. As for the GNR the HRC has provided this form of redress since its first cases. In the Uruguayan case *Moriana Hernandez Valentini de Bazzano v. Uruguay* the Committee also established that ‘the State party is under an obligation to take immediate steps to ensure strict observance of the provisions of the Covenant.’²⁴⁷ In a similar case, also against Uruguay, the HRC established that the State should take measures to ensure ‘that similar violations do not occur in the future.’²⁴⁸ More recently the Human Rights Committee has recognized the existence of a duty of states to ‘avoid similar violations in the future’,²⁴⁹ or ‘to take steps to prevent similar violations in the future.’²⁵⁰

²⁴⁵ HRC, *Edgardo Dante Santullo Valcada v. Uruguay* (1984) Comm. No. 9/1977, U.N. Doc. CCPR/C/OP/1 at 43 (1984) para 13.

²⁴⁶ HRC, *Aïcha Dehimi and Noura Ayache v. Algeria* (2014) Comm. No. 2018/2011, U.N. Doc. CCPR/C/112/D/2086/2011, para 10.

²⁴⁷ HRC, *Moriana Hernandez Valentini de Bazzano v. Uruguay* (1984) Comm. No. 5/1977, U.N. Doc. CCPR/C/OP/1 at 40, para 10.

²⁴⁸ HRC, *Ann Maria Garcia Lanza de Netto v. Uruguay* (1984) Comm. No. 8/1977, U.N. Doc. CCPR/C/OP/1 at 45, para 17.

²⁴⁹ HRC, *Devian and Narrain et al v. Mauritius* (2012) Comm. No. 1744/2007, U.N. Doc. CCPR/C/105/D/1744/2007, para 17.

²⁵⁰ HRC, *M.I. v. Sweden* (2013) Comm. No. 2149/2012; U.N. Doc. CCPR/C/108/D/2149/2012, para 9; HRC, *Andrei Olechkevitch v. Belarus* (2013) Comm. No. 1785/2008, U.N. Doc. CCPR/c/107/D/1785/2008, para 10; HRC, *Zhanna Kovsh v. Belarus*

Under the form of GNR, the Committee has recommended states to amend, repeal, and align national law with the Covenant, improve prisoners' conditions, as well as, change official practices. As for legal reforms, since 1984 when the Committee recommended Mauritius to amend its immigration law,²⁵¹ the Committee's jurisprudence has had several examples where it has stated that the laws or regulations of a particular state do not line up with the Covenant. When recommending legislative changes, the position of the Committee has not always been consistent. Whereas in some cases it has explicitly made clear what the law or regulations to be changed are,²⁵² in cases related to capital punishment it has stated that the state should 'ensure that similar violations do not occur in the future'; however, it has done so with no details about what laws need to be changed.²⁵³ In some cases, it has not even indicated that the law should be repelled.²⁵⁴ In many cases the Committee follows the general formula of establishing that there is a

(2013) Comm. No. 1787/2008, U.N. Doc. CCPR/C/107/D/1787/2008, para 9; HRC, *Slimane Mechani v. Algeria* (2013) Comm. No. 1807/2008, U.N. Doc. CCPR/C/107/D/1807/2008, para 10.

²⁵¹ HRC, *Shirin AumeeruddyCziffra and 19 other Mauritian women v Mauritius* (1984) Comm. No. 3/1978, CCPR/C/OP/1 para 11.

²⁵² HRC, *Valery Aleksandrov v. Belarus* (2014) Comm. No. 1933/2010, U.N. Doc CCPR/C/111/D/1933/2010, para 9; HRC *Petr Kuznetsov et al. v. Belarus* (2014) Comm. No. 1976/2010, U.N. Doc CCPR/C/111/D/1976/2010, para 11.

²⁵³ HRC, *George Osbourne v. Jamaica* (2000) Comm. No. 759/1997, U.N. Doc. CCPR/C/68/D/759/1997, para 11.

²⁵⁴ HRC, *Boodlal Sooklal v. Trinidad and Tobago* (2000) Comm. No. 28/2000, U.N. Doc CCPR/C/73/D/928/2000, para 6.

violation of the Covenant and recommending that changes in the legislation are necessary, without establishing what particular changes should be applied.²⁵⁵

In very few cases the HRC has recommended the adoption of a new law. For example, in a conscientious objection case, the Committee ordered the Republic of Korea to adopt legislative measures guaranteeing this right.²⁵⁶

In prisons conditions cases, the Committee has been limited to ensure that the conditions of detention should be compatible with the Convention without explaining in detail which measures should be taken.²⁵⁷

In cases where the Committee has recommended official practices, it has, for instance, recommended the state to allow its officials to respond in a different language to the official one, in order to avoid discrimination.²⁵⁸ Recently, in cases again Bosnia and Herzegovina, it recommended that investigation of enforced

²⁵⁵ HRC, *Pedro Pablo Camargo v. Colombia* (1985) Comm. No. 45/1979, U.N. Doc. CCPR/C/OP/1 at 112, para 15; HRC, *Consuelo Salgar de Montejo v. Colombia* (1982) Comm. No. R.15/64, U.N. Doc. Supp. No. 40 (A/37/40) at 168, para 12; HRC, *Ballantyne, Davidson, McIntyre v. Canada* (1993) Comms. Nos. 359/1989 and 385/1989, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1, para 13.

²⁵⁶ HRC, *Min-Kyu Jeong et al. v. The Republic of Korea* (2011) Comm. No. 1642-1741/2007, U.N. Doc. CCPR/C/101/D/1642-1741/2007, para 9.

²⁵⁷ HRC, *Ms. Yekaterina Pavlovna Lantsova v. The Russian Federation* (2002) Comm. No. 763/1997, U.N. Doc. CCPR/C/74/D/763/1997, paras 11 and 12; HRC, *Mr. Carlos Cabal and Mr. Marco Pasini Bertran v. Australia* (2003) Comm. No. 1020/2001, U.N. Doc. CCPR/C/78/D/1020/2001 paras 10 and 11.

²⁵⁸ HRC. *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia* (2000) Comm. No. 760/1997, CCPR/C/69/D/760/1997 (2000) para 12.

disappearances should be available to relatives.²⁵⁹ Furthermore, it has suggested not to apply the domestic legal framework in a way that relatives of victims require a death certification in order to obtain reparations.²⁶⁰ Besides, the HRC has been generally reluctant to recommend the state to provide training to officials in order to guarantee compliance to international standards.²⁶¹ However, it has recommended the training of military personal in order to prevent torture and ill-treatment of prisoners in concluding observations to Colombia,²⁶² Libya²⁶³ and Hungary.²⁶⁴

2.2.2 Committee against Torture

In turn, the Committee against Torture (CAT) has developed the content of GNR, particularly in its General Comment No. 3 on the 'Implementation of article 14 by

²⁵⁹ HRC, *Tija Hero, Ermina Hero, Armin Hero et al v. Bosnia and Herzegovina* (2014) Comm. No. 1966/2010, CCPR/C/112/D/1966/2010, para 11; HRC, *Emina Kozljak and Sinan Kozljak v. Bosnia and Herzegovina* (2014) Comm. No. 1970/2010, CCPR/C/112/D/1970/2010, para 11.

²⁶⁰ HRC, *Tija Hero, Ermina Hero, Armin Hero et al v. Bosnia and Herzegovina* (2014) Comm. No. 1966/2010, CCPR/C/112/D/1966/2010, para 11.

²⁶¹ See for example HRC, *L.M.R. v Argentina* (2011) Comm. No. 1608/2007, CCPR/C/101/D/1608/2007, para 11. In this case the Court refused to recommend training to health workers besides it was clear in the case they did not know how to apply the particular law on access to legal abortion.

²⁶² HRC, *Concluding Observations: Colombia* (3 May 1997) CCPR/C/79/Add.76, para 35.

²⁶³ HRC, *Concluding Observations: Libyan Arab Jamahiriya* (6 November 1998) CCPR/C79/Add.101, para 10.

²⁶⁴ HRC, *Concluding Observations: Hungary* (25 September 2002) CCPR/CO/74/HUN, para 12.

States parties.²⁶⁵ In the General Comment it has stated that the term 'effective remedy' entails GNR among other forms of reparations.²⁶⁶ It has also distinguished between the procedural and substantive obligations of states to provide redress.²⁶⁷ The General Comment lists several preventive measures that are necessary to prevent torture, providing a broad spectrum of measures that could be potentially requested by petitioners in individual communications before the Committee. Particularly regarding GNR it has listed several measures such as.

[...] issuing effective, clear instructions to public officials on the provisions of the Convention, especially the absolute prohibition of torture. Other measures should include any or all of the following: civilian oversight of military and security forces; ensuring that all judicial proceedings abide by international standards of due process, fairness and impartiality; strengthening the independence of the judiciary; protecting human rights defenders and legal, health and other professionals who assist torture victims; establishing systems for regular and independent monitoring of all places of detention; providing, on a priority and continued basis, training for law enforcement officials as well as military and security forces on human rights law that includes the specific needs of marginalized and vulnerable populations and specific training on the Istanbul Protocol for health and legal professionals and law enforcement officials; promoting the observance of international standards and codes of conduct by public servants, including law

²⁶⁵ Particularly in the General Comment No. 3 on the 'Implementation of article 14 by States parties' the Committee has elaborated on the content of guarantees of non-repetition.

²⁶⁶ UN, CAT, General Comment No. 3 'Implementation of article 14 by States parties' (2012), UN. Doc. CAT/C/GC/3, paras 2 and 6.

²⁶⁷ *idem* para 5.

enforcement, correctional, medical, psychological, social service and military personnel; reviewing and reforming laws contributing to or allowing torture and ill-treatment; ensuring compliance with article 3 of the Convention prohibiting refoulement; ensuring the availability of temporary services for individuals or groups of individuals, such as shelters for victims of gender-related or other torture or ill-treatment.¹²⁶⁸

More importantly, the General Comment 3 reinforces the link between GNR and the underlying causes of an specific violation, by stating that GNR 'offer a clear potential for the transformation of the social relations that may be the underlying causes of violence and may include, but are not limited to, amending relevant laws, fighting impunity, and taking effective preventive and deterrent measures.'¹²⁶⁹

However, it has not been the practice of CAT, in the analysis of individual communications, to recommend specific measures of general scope. Most of the time, the Committee against Torture restricts itself to remind the states of their duty to provide 'an effective remedy' but on very few occasions has it stated their obligation 'to prevent similar violations in the future.'¹²⁷⁰

2.2.3 CEDAW Committee

The CEDAW Committee, and the Committee on the Rights of Persons with Disabilities are the most prolific committees in terms of the frequency and scope of the GNR. Under the title 'general measures', the CEDAW Committee has

²⁶⁸ idem para 18.

²⁶⁹ idem para 18.

²⁷⁰ CAT, *Oskartz Gallastegi Soduve v. Spain* (2012) Comm. No. 453/2011, U.N. Doc. CAT/C/48/D/453/2011, para 9.

recommended states to take legislative measures;²⁷¹ to provide training to judges, law enforcement personnel, health providers and others;²⁷² to take measures to guarantee effective access to certain services;²⁷³ and to investigate promptly allegations of human rights violations.²⁷⁴ In specific cases the Committee has even recommended states to take measures of structural order, such as to ‘formulate policies and comprehensive programmes that ensure the needs of women prisoners are met,²⁷⁵ to implement specific programs and establish committees to secure the protection of rights;²⁷⁶ and to monitor the provision of certain services.²⁷⁷

²⁷¹ CEDAW, *Isatou Jallow v. Bulgaria* (2012) Comm. No. 32/2011, U.N. Doc. CEDAW/C/52/D/32/2011, para 8.8 (2)(b); CEDAW, *Cecilia Kell v Canada* (2012) Comm. No. 19/2008, U.N. Doc. CEDAW/C.51/D/19/2008, para 11 (b) (ii); CEDAW, *T.P.F. v. Peru* (2011) Comm. No. 22/2009, U.N. Doc. CEDAW/C/50/D/22/2009, para 9.2 (a) and (c); CEDAW, *V.K. v. Bulgaria* (2011) Comm. No. 20/2008, U.N. Doc. CEDAW/C/49/D/20/2008, para 9.16 (b) (i).

²⁷² *Isatou Jallow v. Bulgaria* para 8.8 (2) (c); *T.P.F. v. Peru* para 9.2 (b); *V.K. v. Bulgaria* para 9.16 (b) (iv); CEDAW, *Inga Abramova v. Belarus* (2011) Comm. No. 23/2009, U.N. Doc. CEDAW/C/49/D/23/2009, para 7.9 (2) (e); CEDAW, *Karen Tayag Vertido v. Philippines* (2010) Comm. No. 18/2008, U.N. Doc. CEDAW/C/46/D/18/2008, para 8.9 (iii) and (iv); CEDAW, *Maria de Lourdes da Silva Pimentel v. Brazil* (2011) Comm. No. 17/2008, U.N. Doc. CEDAW/C/49/D/17/2008, para 8 (II); CEDAW, *Ms. Zhen Zhen Zheng v. The Netherlands* (2008) Comm. No. 15/2007, U.N. Doc. CEDAW/C/42/D/15/2007, para 9.1 (II) (a); CEDAW, *Fatima Yildirim v. Austria* (2007) Comm. No. 6/2005 U.N. Doc. CEDAW/C/39/D/6/2005, para 12.3 (d).

²⁷³ *Isatou Jallow v. Bulgaria* para 8.8 (2) (a).

²⁷⁴ *Fatima Yildirim v. Austria* para 12.3 (b).

²⁷⁵ *Inga Abramova v. Belarus* para 7.9 (2) (f).

²⁷⁶ The Committee has recommended to ‘reduce preventable maternal deaths through the implementation of the National Pact for the Reduction of maternal Mortality at state and municipal levels, including by establishing maternal mortality committees where they still do not exist’. *Maria de Lourdes da Silva Pimentel v. Brazil* para (8) (2) (f).

2.2.4 Other committees

The Committee on the Rights of Persons with Disabilities has recommended states to take legislative measures,²⁷⁸ ensuring that certain procedures are accessible to people²⁷⁹ and to provide regular training to judges and other judicial officials.²⁸⁰ Similarly, the Committee on Economic, Social and Cultural Rights, in its first case decided against a state, has recommended a list of ‘General Recommendations.’²⁸¹

However, other Committees like the Committee on Racial Discrimination has not developed the concept in individual communications, beyond requesting the state party to ‘give wide publicity to the Committee’s Opinion, including among prosecutors and judicial bodies.’²⁸²

2.2.5 Conclusions

Most of UN committees have included in its case law the concept of GNR or general measures. However, some Committees have been more proactive than others in the

²⁷⁷ *Fatima Yildirim v. Austria* para 12.3 (a).

²⁷⁸ CRPD, *Zsolt Bujdosó and five others v. Hungary* (2013) Comm. No. 4/201, U.N. Doc. CRPD/C/10/D/4/2011, para 10(2) (a and b); CRPD, *Szilvia Nyusti and Péter Takács v. Hungary* (2013) Comm. No. 1/2010, U.N. Doc. CRPD/C/9/D/1/2010, para 10 (2) (a); CRPD, *H.M. v. Sweden* (2012) Comm. No. 3/2011, U.N. Doc. CRPD/C/7/D/3/2011, para 9 (2).

²⁷⁹ *Zsolt Bujdosó and five others v. Hungary* para 10(2) (c).

²⁸⁰ *Szilvia Nyusti and Péter Takács v. Hungary* para 10 (b).

²⁸¹ CESCR, *IDG v. Spain* (2014) Comm. No. 2/2014, U.N. Doc. E/C.12/55/D/2/2014, para 17.

²⁸² CERD, *TBB-Turkish Union in Berlin/Brandenburg v. Germany* (2013) Comm. No. 48/2010, U.N. Doc. CERD/C/82/D/48/2010; CERD, *Mahali Dawas and Yousef Shava v. Denmark* (2012) Comm. No. 46/2009, U.N. Doc. CERD/C/80/D/46/2009.

recommendation of general measures. Whereas the CEDAW Committee, and the Committee on the Rights of the Persons with Disabilities have consistently incorporated a section on general measures in the analysis of individual communications, detailing with precision the type of measures to be taken, the Human Rights Committee (HRC) has recommended states to adopt general measures and to prevent future recurrence in most of its cases, but does not necessarily explain in detail what measures the state should take in this regard.²⁸³

Furthermore, it is difficult to establish a general rule on how far should a UN Committee go in detailing the type of GNR that a state should implement in order to prevent the recurrence of a violation. Subsequently, a fair balance should be done in each case between, providing measures that are detailed enough to trigger a significant change in the domestic legislation and the margin of appreciation that each state has in defining its policies, as well as, in the perceived legitimacy of the Committee that recommends those changes. As it has been specified, such a balance has been solved in different ways by each Committee. Moreover, each case would require a particular analysis. In cases where clear inconsistency between a specific piece of legislation and the international framework is shown, it seems fair to say that specific measures recommending the state to amend such particular laws would have a greater impact than measures that generally invite the state to display measures in order to prevent the future commission of the acts. The fact that other committees are also engaging in recommending changes of legislation - without necessarily specifying in which way changes are to be applied- and states are actively complying with these recommendations, seems to suggest that the

²⁸³ Viviana Krsticevic and Brian Griffey, 'Remedial Recommendations' in Malcom Langford & others (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (Pretoria University Law Press, 2004) Chapter 10, p.11.

perceived legitimacy of these Committees to engage in such recommendations has increased.

None of the Committees, however, have developed a clear criteria related to the circumstances in which such recommendations with a general scope should be granted. Although many individual cases analysed by the Committees may show a widespread situation of human rights violations, this element is not necessarily required by the Committees in order to award these types of measures.

For widespread situations, some UN Committees have established an 'inquiry procedure' whenever the Committee receives reliable information that 'gross or systemic violations of human rights' are taking place. Under this procedure, established under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter CAT),²⁸⁴ the Third Optional Protocol to the Convention on the Rights of the Child (hereinafter OP3-CRC),²⁸⁵ Optional Protocol to the Convention on the Rights of Persons with Disabilities (hereinafter OP- CRPD),²⁸⁶ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter OP-CEDAW),²⁸⁷ International Convention for the Protection of All Persons from Enforced

²⁸⁴ Convention against Torture and other Cruel, Inhuman and or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) (CAT), article 20.

²⁸⁵ Third Optional Protocol to the Convention on the rights of the Child on a communications Procedure (adopted 19 December 2011, entered into force 14 April 2014) A/RES/66/138 (OP3-CRC) article 13.

²⁸⁶ Optional Protocol to the Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) A/RES/61/106 (OP-CRPD) article 6.

²⁸⁷ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (adopted 6 October 1999, entered into force 22 December 2000) 2131 UNTS 83, (OP-CEDAW) article 8.

Disappearance (hereinafter CED),²⁸⁸ and most recently the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (hereinafter OP-CESCR),²⁸⁹ the Committee is allowed to carry out visits to the country and to formulate general recommendations in a final report. This procedure does not require a specific victim or victims to be identified thus allowing the general analysis of a situation in a given country. Through this procedure, both CAT and CEDAW have analysed inquiries, recommending states to adopt 'general recommendations' in terms of, strengthening the coordination among authorities in order to carry out investigations, establishment of early warning mechanisms, organization of campaigns and setting up of programs, among other recommendations.²⁹⁰ There is not clarity, however, until what extent the general recommendations achieved as a result of an individual petition would be better achieved, more legitimate and with a wider factual base by the inquiry procedure.

3. GNR and general measures in regional instruments

GNR and general measures have also been used by regional bodies (commissions and courts). Whereas the Inter-American Court of Human Rights is by far the most

²⁸⁸ International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entry into force 23 December 2010) A/RES/61/177 (ICPPED) article 33.

²⁸⁹ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) A/RES/63/117, article 11.

²⁹⁰ See for example, UN, CEDAW, 'Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico' (27 January 2005) CEDAW/C/2005/OP.8/Mexico, paras 263-294.

prolific in terms of the cases where it has decided to award GNR, the European, and African, courts have demonstrated an increasing interest in ordering general measures, or measures of general character, in the redress of individual cases. This section will present how general measures have been granted in both the European, and African, Courts of Human Rights. Chapter III will develop the concept of GNR in the Inter-American Court of Human Rights, given that it has crafted the most elaborate and far reaching jurisprudence on the subject.

3.1 General measures in the European Court of Human Rights

3.1.1 The award of remedies and the interpretation of ‘just satisfaction’ by the European Court of Human Rights

The European Court of Human Rights has jurisdiction in all cases concerning the interpretation and application of the European Convention.²⁹¹ If the Court finds that there is a violation of the ECHR, the judgment will impose a legal obligation on the respondent state to put an end to the breach and to repair the harm. Traditionally, Article 41(1) has been referred as the Conventional base for the award of some type of reparations. According to Article 41 (1) of the European Convention on Human Rights:

‘If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party

²⁹¹ European Convention on Human Rights as amended by Protocols 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953), article 32 (1).

concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party' [emphasis added].

The decision of 'just satisfaction' included in Article 41 (1) has been generally interpreted in a minimalistic way by the Court as essentially 'declaratory'. The idea of 'declaratory judgments' is a reflection of the principle of subsidiarity under international law, according to which the primary responsibility to ensure the rights established in the Convention, relies on the national authorities.²⁹² This idea is central for the European Court of Human Rights which is empowered to take a decision only in those cases where states fail in fulfilling their responsibilities. Under Article 41(1) of the European Convention, the Court may also include compensation for both pecuniary and non-pecuniary loss, as well as legal costs and expenses. In these cases, the applicant must prove that there is a causal link between the damage claimed and the violation alleged.²⁹³

As the decisions are, in principle, 'declaratory,' the Court will not normally order any other measure that may interfere with the ability of states to choose the means to comply with the Convention. As Leach presents, the Court:

'will not, however, quash decisions of domestic authorities or courts (including convictions), strike down domestic legislation, require a state to alter its legislation or otherwise require a respondent government to take particular measures within the national legal system (such as

²⁹² Parliamentary Assembly, 'Execution of Judgments of the European Court of Human Rights' (12 July 2000) Doc.8808, para 2, available at <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=9013&lang=en> (consulted 27 August 2015)

²⁹³ Philip Leach, *Taking a case to the European Court of Human Rights* (Oxford University Press, 3rd, 2011) p. 466.

ordering the transfer of prisoners to the jurisdiction of another Convention state or order repayment of fines).²⁹⁴

Given this understanding, the Court has traditionally limited itself to establish the occurrence of violations and denied any power to award remedial measures adducing that: (i) Article 41(1) establish that its judgments are essentially declaratory; (ii) that is up to the respondent state to decide the means by which to redress the victim (Article 46 (1));²⁹⁵ and to the Committee of Ministers to supervise the execution of the judgments (Article 46(2)).²⁹⁶

Despite this approach to reparations, the European Court's remedial powers have been transformed in recent years, allowing the Court to grant measures beyond 'just satisfaction'. Several authors have described how the Court has expanded its *repertoire* of remedies in particular cases, moving from a very restrictive model of reparations focused on the provision of 'just satisfaction', to the inclusion of a more diverse and bold set of measures through the interpretation of the concept *restitution in integrum*.²⁹⁷

²⁹⁴ *idem* 84.

²⁹⁵ *Marckx v Belgium* App. No. 6833/74 (ECtHR, 13 June 1979) para 58.

²⁹⁶ *Assanidze v Georgia* App no 7153/01 (ECtHR, 8 April 2004) para 202.

²⁹⁷ 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' (2010) 23 *Harvard Human Rights Journal* 51; Valerio Colandrea, 'On the Power of the European Court of Human Rights to Order Specific Non-Monetary Measures: Some Remarks in Light of the *Assanidze*, *Broniowski* and *Sejdovic* Cases' (2007) 7(2) *Human Rights Law Review* 396; Leach *Taking a case to the ECHR* 83-95.

According to this new trend, and as Philip Leach has explained,²⁹⁸ the European Court has extended its remedial powers beyond ‘just satisfaction’ by ordering measures of *restitution in integrum*, usually in cases related to the right to property. In *Papamichalopoulos and others*²⁹⁹ v. Greece; *Brumarescu v. Romania*,³⁰⁰ and *Dacia S.R.L. v. Moldova*³⁰¹, all relating to the expropriation of private property, the Court ordered the return of the properties as the best way to restore the applicants to the situation held prior to the violation occurring.³⁰² Also in *Saghinadze and Others v. Georgia*³⁰³ the Court proposed that, in cases where *restitution in integrum* was not possible, an alternative property should be granted.

In other cases the Court has also ordered the states to provide the release of persons under unlawful arrest. In *Assanidze v. Georgia*, the Court found that the continued detention of the applicant in spite of a presidential pardon violated Article 5 of the ECHR. The Court ordered Georgia to ‘secure the applicant’s release at the earliest possible date’³⁰⁴. Similarly, in *Ilascu and Others v. Moldova and Russia*, the

²⁹⁸ Leach *Taking a case to the ECHR* 91; Philip Leach, ‘No longer offering fine mantras to a parched child? The European Court’s developing approach to remedies’, in Andreas Føllesdal, Birgit Peters and Geir Ulfstein, (eds) *Constituting Europe: the European Court of Human Rights in a national, European and global context* (Cambridge University Press, 2013) pp. 149-161.

²⁹⁹ *Papamichalopoulos and others v. Greece*, App. no. 14556/89 (ECtHR, 31 October 1995)

³⁰⁰ *Brumarescu v. Romania*, App. no. 28342/95 (ECtHR, 23 January 2001)

³⁰¹ *Dacia SRL v. Moldova*, App. no. 3052/04 (ECtHR, 24 February 2009)

³⁰² For an analysis of *restitution in integrum* in the European Court of Human Rights see Antoine Buyse, ‘Lost and Regained. Restitution as a Remedy for Human Rights violations in the Context of International Law’ (2008) 68 *Heidelberg Journal of International Law (Zeitschrift für ausländisches öffentliches Recht und Völkerrecht)* 129.

³⁰³ *Saghinadze and Others v. Georgia*, App. no. 18768/05 (ECtHR, 27 May 2010).

³⁰⁴ *Assanidze v. Georgia*, App. no. 71503/01 (ECtHR, 08 April 2004).

Court found that the detention of political prisoners by a non-competent Court cannot count as a lawful detention. As a consequence, the Court ordered the states 'to take all the necessary steps to put an end to the arbitrary detention of the applicants still imprisoned and secure their immediate release.'³⁰⁵ Similar measures have also been awarded in other cases.³⁰⁶

The Court has also awarded measures beyond 'just satisfaction', in some exceptional cases ordering the reopening of criminal proceedings. Although the Court has constantly emphasised that it has no jurisdiction to order the reopening of such proceedings,³⁰⁷ the Committee of Ministers has recognized that, under certain circumstances, the re-examination of cases by domestic authorities is the most efficient means to achieve *restitution in integrum*.³⁰⁸ Following this new trend, and since 2003, the European Court has urged states to reopen criminal proceedings carried out in opposition to the European Convention.³⁰⁹ In some exceptional cases,

³⁰⁵ *Ilascu and others v. Moldova and Russia*, App. no. 48787/99 (ECtHR, 8 July 2004).

³⁰⁶ See, *Tehrani and others v Turkey*, App. nos. 32940/08, 41626/08, 43616/08 (ECtHR, 13 April 10); *Yakışan v Turkey*, App. no. 11339/03 (ECtHR, 6 March 2007); *Fatullayev v Azerbaijan*, App. no. 40984/07 (ECtHR, 22 April 10) and *Aleksanyan v Russia*, App. no. 46468/06 (ECtHR, 22 December 08). For a discussion of these cases, see Leach *Taking a case to the ECHR* 91-95; Leach *No longer offering fine mantras to a parched child?* 157-161.

³⁰⁷ *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (No. 2)*, App. no. 32772/02, (ECtHR, 30 June 09); commented in Leach *Taking a case to the ECHR* 94, note 100.

³⁰⁸ Council of Europe, Recommendation of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights R(2000)2 (adopted on 19 January 2000 at the 694th meeting of the Ministers' Deputies).

³⁰⁹ Several Turkish cases have emphasised this point, *Akkas v Turkey*, App. no. 52665/99 (ECtHR, 23 October 2003); *Cakar v Turkey*, App. no. 42741/98 (ECtHR, 23 October 2003), commented in Leach *Taking a case to the ECHR* note 104, p.94.

such as in *Scoppola (No. 2) v Italy*³¹⁰ and *Maksimov v Azerbaijan*,³¹¹ the Court has stated such measures in the operative paragraphs of the decision, opening a new trend in the award of remedies.

The expansion of the remedial powers of the European Court in cases related to, the right to property, the release of detained people and, to a lesser extent, in the reopening of legal proceedings, shows a broader interpretation of the concept of *restitution of integrum* that goes beyond mere compensation. This is an important, but still timid, step of the Court which has still not fully updated its interpretation of reparation measures with international standards, maintaining a very conservative view.

The European Court of Human Rights has not, in general, actively engaged with other type of reparations measures, such as rehabilitation and GNR. In the case of rehabilitation, and apart from some specific cases where the Court has ordered compensation for past medical expenses,³¹² the European Court has not yet recognised it as a specific form of reparation.³¹³

Regarding GNR, they have not yet been recognized by the European Court as a form of redress. However, the Court has engaged in remedial measures of general

³¹⁰ *Scoppola v Italy (No. 2)*, App. no. 10249/03 (ECtHR, 17 September 2009) Operative paragraphs 6 (a).

³¹¹ *Maksimov v Azerbaijan*, App. no. 38228/05 (ECtHR, 8 October 2009) Operative paragraph (3)

³¹² *Aksoy v. Turkey*, App. no. 21987/93 (ECtHR, 18 December 1996); *Mikheyev v. Russia*, Merits, App. no. 77617/01 (ECtHR, 26 January 2006) paras 9-27.

³¹³ Clara Sandoval, *Rehabilitation as a form of reparation under international law*, December 2009, p. 45, available at

<http://www.redress.org/downloads/publications/The%20right%20to%20rehabilitation.pdf>

(Consulted 30 July 2015)

character, especially through the use of pilot and semi-pilot judgments. As will be explained, these measures resemble, in function, the concept of GNR in PIL and international human rights law.

3.1.2 General measures in the Pilot Judgments of the European Court of Human Rights

Among all of the regional systems, the European System of Human Rights is the only one that has established a specific procedure in order to deal with systemic violations and cases of repetitive litigation. Pilot judgements were created as an answer to the increasing number of complaints coming from structural or systemic violations of human rights, and the large backlog of pending cases resulting from this.³¹⁴ In this regard the need for a procedure ‘that focused less on giving individual justice [...] and more on the systemic and structural problems which were at the root of repetitive cases’, was understood.³¹⁵

According to Article 61(1) of the Rules of the Court, the European Court may ‘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.’³¹⁶ According to this rule, pilot cases should have priority treatment. The Court should

³¹⁴ Philip Leach, Helen Hardman, Svetlana Stephenson and Brad K. Blitz (eds.) *Responding to Systemic Human Rights Violations – An Analysis of Pilot Judgments of the European Court of Human Rights and their Impact at National Level* (Intersentia, 2010) p. 9.

³¹⁵ Interview with Michael O’Boyle, Deputy Registrar at the European Court of Human Rights, Strasbourg, 25 March 2003, cited in *idem* 10.

³¹⁶ ECHR, Rules of Court (1 July 2014) Rule 61 (1)

consult the parties as to whether the case results from a structural or systemic problem; identify the nature of the structural or systemic problem and the type of remedial measures; and impose a time framework in which the measures should be adopted.³¹⁷ The Court may also adjourn the examination of similar petitions, in which case the Court will retain its jurisdiction to examine the case, in the interest of the administration of justice.³¹⁸

The Court has applied this procedure by invoking Article 46 of the Convention, according to which:

- ‘1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.’

As a general principle, Article 46 does not allow the Court to determine the appropriate remedial measures needed to comply with the Convention, but it is up to the states to choose the means by which to comply with their duty. However, the Court has interpreted this Article flexibly, allowing the identification of precise general measures in cases of structural or systemic violations. This was clarified by the Court in the *Bronioswski* Case, its first pilot judgement, stating that:

‘It is in principle not for the Court to determine what remedial measures may be appropriate to satisfy the respondent State’s obligations under Article 46 of the Convention, in view of the systemic situation which it has identified, the Court would observe that general measures at national

³¹⁷ idem Rule 61 (3) and (4).

³¹⁸ idem Rule 61 (6).

level are undoubtedly called for in execution of the present judgment, measures which must take into account the many people affected.³¹⁹

This article has opened the debate on whether the remedial measures adopted by the European Court are binding or not. In 2011 a new rule to the Rules of the Court was introduced, establishing that the Court has a binding power to grant general measures. The Rules of the Court establishes a regulatory framework for the application of the pilot procedure that clearly states its binding power. According to Rule 61 (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.'³²⁰

Moreover, according to this rule, the Court can even identify a specific time within which the state should take the general measures (Rule 61(4)). This rule codifies the previous practice of the Court which traditionally indicated the general measures to be taken by the state, in the operative paragraphs of the decision.

Against Rule 61(3), some have argued that the competence of the Court to prescribe remedies should be determined in Convention provisions and not in a regulatory provision created by the own Court (Rules of the Court). In favour of the binding power of the pilot judgments, Haider has argued that the basis to empower the Court to determine remedial obligations can be found in Article 32 of the ECHR. Article 32 concedes the Court jurisdiction to interpret the Convention in regard to both, the rights established in it and the procedural provisions established in section 2 of the

³¹⁹ *Broniowski v. Poland*, App no. 31443/96 (ECtHR, 22June 2004) para 193.

³²⁰ Rules of the Court, Rule 61 (3).

Convention.³²¹ Article 32 read in conjunction with article 46 allows the Court to take the measures that strengthen the implementation of the Convention objects and purposes.³²² According to Haider, by underlying a systemic problem of the Convention's implementation, the Court enhances the contracting States' compliance.³²³ Without impacting the root cause of the problem, the Court will have to repeatedly deal with individual cases related to a particular situation. That is why in this type of systemic problems, the Court has no choice in order to emphasize the violation and to provide some general form of redress. All in order to actually implement the rights established in the Convention. If the European Convention provides the Court the capability to interpret and decide about the rights established on it, it is according to its object and purpose to provide effective remedies.³²⁴

In addition to this, and as it will be explained, the practice of the European Court in awarding general measures in more than 23 pilot judgements, shows that there is a growing practice in the Court to order these types of measures. This practice has also been followed via the acceptance of the states which have traditionally complied with the Court's pilot decisions. Despite the Court originally denied any power to determine remedial obligations, the practice of the Court and the states, as well as, the opinion of commentators, increasingly recognises the binding power of the Court's remedial decisions, particularly in pilot judgments.

³²¹ Dominik Haider, *The Pilot-Judgment procedure of the European Court of Human Rights* (Martinus Nijhoff Publishers, 2013) p. 172.

³²² *Idem* p. 178.

³²³ *Idem* pp.179-180.

³²⁴ For a similar interpretation about the binding role of decisions of the Human Rights Committee see, UN. HRC, General Comment No. 33 'The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights' (2008) U.N.Doc. CCPR/C/GC/33.

3.1.3 Scope of the general measures granted in Pilot Judgments by the European Court of Human Rights

By February 2015, the European Court has applied the pilot judgement in 23 cases³²⁵ relating to: protection of property rights (*Broniowski v. Poland*;³²⁶ *Hutten-Czapska v. Poland*;³²⁷ *Suljagic v. Bosnia and Herzegovina*;³²⁸ *Maria Atanasiu and Others v. Romania*;³²⁹ *Manushage Puto and Others v. Albania*;³³⁰ *M.C. and Others v. Italy*;³³¹ and, *Ališić and Others v. Bosnia and Herzegovina, Croatia, “the former Yugoslav Republic of Macedonia”, Serbia and Slovenia*;³³²) prolonged non-enforcement of court decisions and lack of domestic remedies (*Burdov v. Russia*;³³³ *Olaru and others v. Moldova*;³³⁴ *Yuriy Nikolayevich Ivanov v. Ukraine*;³³⁵ and,

³²⁵ European Court of Human Rights, Pilot Judgments, Factsheet – Pilot judgments, June 2015, available at: http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf (consulted 10 July 2015).

³²⁶ *Broniowski v. Poland*.

³²⁷ *Hutten-Czapska v. Poland*, App. no. 35014/97 (ECtHR, 19 June 2006).

³²⁸ *Suljagic v. Bosnia and Herzegovina*, App. no. 27912/02 (ECtHR, 3 November 2010)

³²⁹ *Maria Atanasiu and Others v. Romania*, App. nos. 30767/05 and 33800/06 (ECtHR, 12 October 2011)

³³⁰ *Manushage Puto and Others v. Albania*, App. nos. 604/07, 43628/07, 46684/07 and 34770/09, Judgment, Final (ECtHR, 31 July 2012).

³³¹ *Affaire M.C. et Autres c. Italie*, Requete no. 5376/11 (ECtHR, 3 September 2013).

³³² *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and ‘The former Yugoslav Republic of Macedonia’*, App. no. 60642/08 (ECtHR, 6 November 2012).

³³³ *Burdov v. Russia (No. 2)*, App. no. 33509/04 (ECtHR, 15 January 2009).

³³⁴ *Olaru and others v. Moldova*, App. no. 476/07, 22539/05, 17911/08 and 13136/07 (ECtHR, 28 July 2009).

*Gerasimov and Others v. Russia*³³⁶); excessive length of proceeding and lack of domestic remedy (*Rumpf v. Germany*,³³⁷ *Athanasidou and others v. Greece*,³³⁸ *Dimitrov and Hamanov v. Bulgaria*,³³⁹ and *Finger v. Bulgaria*,³⁴⁰ *Ümmühan Kaplan v. Turkey*,³⁴¹ *Michelioudakis v. Greece*,³⁴² *Glykantzi v. Greece*),³⁴³ the loss of status as permanent residents of a country (*Kurić and others v. Slovenia*);³⁴⁴ the right to vote and participate in elections (*Greens and M.T. v. the United Kingdom*);³⁴⁵ and, the overcrowded conditions in prisons (*Anayev and Others v. Russia*³⁴⁶; *Torreggiani and Others v. Italy*³⁴⁷; *Neshkov and Others v. Bulgaria*).³⁴⁸

³³⁵ *Yuriy Nikolayevich Ivanov v. Ukraine*, App. no. 40450/04 (ECtHR, 15 October 2010).

³³⁶ *Case of Gerasimov and others v. Russia*, App. nos. 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11 (ECtHR, 1 July 2014).

³³⁷ *Rumpf v. Germany*, App. no. 46344/06 (ECtHR, 02 September 2010).

³³⁸ *Affaire Vassilios Athanasiou Et Autres c. Grece*, Requête No. 50973/08 (ECtHR, 21 décembre 2010) (French).

³³⁹ *Dimitriv and Hamanov. v. Bulgaria*, App. nos. 48059/06 and 2708/09 (ECtHR, 10 May 2011).

³⁴⁰ *Finger v. Bulgaria*, App. no. 37346/05 (ECtHR, 10 May 2011).

³⁴¹ *Affaire Ümmühan Kaplan C. Turquie*, Requête no 24240/07 (ECtHR, 20 Mars 2012) (French).

³⁴² *Affaire Michelioudakis C. Grèce*, Requête no 54447/10 (ECtHR, 03 avril 2012) (French).

³⁴³ *Affaire Glykantzi C. Grèce*, Requête no 40150/09 (ECtHR, 30 Octobre 2012) (French).

³⁴⁴ *Kurić and others v. Slovenia*, App. No. 26828/06 (ECtHR, 26 June 2012).

³⁴⁵ *Case of Greens and M.T. v. The United Kingdom*, App. no. 60041/08 and 60054/08 (ECtHR, 23 November 2010).

³⁴⁶ *Ananyev and others v. Russia*, App. nos. 42525/07 and 60800/08 (ECtHR, 10 January 2012).

³⁴⁷ *Affaire Torreggiani Et Autres C. Italie*, Requêtes nos 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 et 37818/10 (ECtHR, 8 janvier 2013).

The general measures adopted in the application of 'pilot judgements' have increased both in number and reach. In its first cases, the Court usually awarded measures oriented to provide a mechanism that secured adequate redress to the victims. This was the situation in the analysis of its initial cases relating to the protection of property rights, and the non-enforcement of decisions. In *Broniowski v. Poland*, the first case where this procedure was applied, the Court considered the case of a Polish national who complained that he did not receive the compensatory property to which he was entitled. In this case, Poland had undertaken to compensate all Polish citizens who had been repatriated and who had to abandon property in the territories located in the south of the Bug River, after the redrawing of Poland's east border at the end of the Second World War. The ECHR found that the case demonstrated the existence of a systemic problem in the payment of compensation which affected an identifiable class of citizens: the Bug River claimants. According to the Court, the lack of a mechanism for settling these claims had affected nearly 80,000 people and there were already 167 applications pending before the Court.³⁴⁹ As a result, the Court ordered the State 'through appropriate legal measures and administrative practices, secure the implementation of the property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress in lieu.'³⁵⁰

In other pilot judgments relating to the protection of property rights, the ECHR has also ordered the creation of mechanisms that provide adequate redress to the victims. In *Hutten-Czapska v. Poland* (2006), the Court found serious deficiencies in the rent-control provision of Polish housing legislation. The law established a ceiling

³⁴⁸ *Neshkov and others v. Bulgaria*, App. nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13 (ECtHR, 27 January 2015).

³⁴⁹ *Broniowski v. Poland* para 193.

³⁵⁰ *idem* operative paragraph (4).

on rent levels that did not allow landlords to recoup the maintenance cost of the property and, therefore, violated their rights. The Court ordered the Polish government to secure in the domestic legal order, a mechanism for the setting of rent prices, 'maintaining a fair balance between the interests of landlords and the general interest of the community.'³⁵¹ Also, in *Manushaqe Puto and others v. Albania*, the Court ordered the state to take measures 'in order to secure in an effective manner the right to compensation, while striking a fair balance between the different interest at stake'.³⁵² As the Court was aware of the considerable burden on the State budget such financial compensation represented, it urged the state 'to start making use of other alternative forms of compensation'³⁵³ instead of mainly relying on financial compensation. In this case, the Court found that there was a general lack of enforcement of administrative decisions, granting compensation for property confiscated under the communist regime in Albania. Finally, in *Maria Atanasiu and Others v. Romania*, the Court ordered the state to put in place general measures, to secure effective and rapid protection of the right to restitution. These can be achieved, for instance, 'by amending the current restitution mechanism, in which the Court has identified certain weaknesses, and establishing simplified and effective procedures'.³⁵⁴ The Court found that there were serious delays by the Romanian authorities, in giving a decision of the application for restitution or compensation, in several cases where property had been nationalised or confiscated by the state. In other cases relating to the right to property, such as in *Suljagic v. Bosnia and Herzegovina*, and, more recently, in *M.C. and Others v. Italy*, the Court requested the state to ensure adequate payments due to claimants in the case, whether in the form

³⁵¹ *Hutten-Czapska v. Poland* para 239.

³⁵² *Manushaqe Puto and Others v. Albania* para 110.

³⁵³ *idem* para 113.

³⁵⁴ *Maria Atanasiu and others v. Rumania* para 232.

of bonds³⁵⁵ or by securing 'the effective and expeditious realisation of the entitlements in question.'³⁵⁶

In other cases, relating to the lack of enforcement of domestic judgements, the Court focused on ordering the state to set up an effective remedy for the non-enforcement, or delayed enforcement, of decisions. In *Burdov v. Russia*, the Court analysed a recurrent practice of the Russian state of non-execution of judgements debts. In the specific case, the Court studied the case of a person who complained about the failure of Russian authorities in executing some domestic judgment that awarded him social benefits. The Court ordered the state to set up 'an effective domestic remedy or combination of such remedies which secures adequate and sufficient redress for non-enforcement or delayed enforcement of domestic judgments.'³⁵⁷ The Court also ordered similar measures in the cases of *Olaru and others v. Moldova*, relating to the lack of execution of final judgments awarding social housing benefits; *Yurily Nikolayevich v. Ukraine*, relating to the failure of authorities in the execution of judgment debts; and, more recently, in *Gerasimov and Others v. Russia*, relating to the lack of enforcement of courts' decisions awarding housing and other type of benefits. In all these cases, the Court ordered the states to establish effective domestic remedies for the non-enforcement or delayed enforcement of domestic judgments.

In some other pilot judgments relating to the excessive length of judicial procedures, and the lack of adequate remedial mechanism for the redress of people whose cases have not been heard within a reasonable time, the Court has ordered the state to set up effective domestic remedies, capable of affording redress for the excessive

³⁵⁵ *Suljagic v. Bosnia and Herzegovina* operative paragraph (4).

³⁵⁶ *Affaire M.C. et Autres c. Italie*, Requete no. 5376/11 (ECtHR, 3 September 2013) operative paragraph (11).

³⁵⁷ *Burdov v. Russia (No 2)* Operative paragraph (6).

delay in court proceedings. In the *Rumps v. Germany* case, the first of its type analysed by the Court, the Court observed the recurring failure of Germany to ensure that the cases before its administrative Courts were handled within a reasonable time. The Court ordered the state to establish 'an effective domestic remedy or combination of such remedies capable of securing adequate and sufficient redress for excessively long proceedings.'³⁵⁸ Similar orders were also granted in: *Vassilios Athanasious and others v. Greece*;³⁵⁹ *Michalioudakis v. Greece*;³⁶⁰ *Ummuhan Kaplan v. Turkey*;³⁶¹ *Dimitrow and Hamanov v. Bulgaria*, and *Finger v. Bulgaria*;³⁶² and *Glykantzi v. Greece*.³⁶³

In all of these pilot judgments, the Court has been very respectful of the margin of appreciation by which the state may decide to redress the violations the Court has found. In very few decisions has the Court gone further and ordered states to modify their legislation. In *Green and M.T. v. UK*, the Court ordered the UK to introduce some legislative proposal in order to modify its electoral law. In this case, UK legislation had imposed a blanket ban on convicted prisoners, held in detention, from being able to vote. In a previous judgment in 2005, *Hirst v. the UK (No.2)*, the Court had established that a blanket ban on convicted prisoners voting, violated the right to free elections, (Article 3 Protocol 1 to the European Convention). Five years later, the UK had still not amended its legislation and the number of similar applications was more than 2,500. The Court ordered the UK to 'bring forward, within six months [...],

³⁵⁸ *Rumpf v. Germany* Operative paragraph (5).

³⁵⁹ *Vassilios Athanasiou et Autres c. Grece* para 35.

³⁶⁰ *Michelioudakis v. Greece* Operative paragraph (5).

³⁶¹ *Ummuhan Kaplan c. Turquie* Operative paragraph (5).

³⁶² *Dimitrov and Hamanov c. Bulgaria*, App. no. 48059/06 and 2708/09 (ECtHR, 10 May 2011), Operative paragraph (5).

³⁶³ *Glykantzi v. Greece* Operative paragraph (5).

legislative proposals intended to amend the 1983 Act and, if appropriate, the 2002 Act in a manner which is Convention-compliant' and 'enact the required legislation within any such period as may be determined by the Committee of Ministers.'³⁶⁴

Similarly, in *Ališić and Others v. Bosnia and Herzegovina, Croatia, "the former Yugoslav Republic of Macedonia", Serbia and Slovenia*, the Court ordered Serbia and Slovenia to 'make all necessary arrangements, including legislative amendments, within one year, in order to allow [the applicants and others in similar position], to recover their 'old' foreign-currency savings under the same conditions as Serbian and Slovenian citizens who had such savings in domestic branches'³⁶⁵ within Serbian and Slovenian banks.

In more recent cases, the Court has taken even more audacious steps in the granting of remedial measures. In *Ananyev and others v. Russia*, the Court analysed the structural problem of overcrowding and inadequate conditions of detention in the Russian prison system. The Court found that the facts of the case violated Article 3 (right to not to be subjected to inhuman or degrading treatment) and 13 (right to an effective remedy). This situation was not exclusive to a specific detention centre, but was generalized in the country. As a consequence, the Court ordered the state to 'produce, in co-operation with the Committee of Ministers, within six months [...], a binding time frame in which to make available a combination of effective remedies having preventive and compensatory effects [...].'³⁶⁶ Similarly in *Torreggiani and others v. Italy*, the Court analysed the overcrowding conditions of detention in a number of Italian prison, forming a violation of Article 3 of the Convention. In this case, the Court also ordered the state to establish, within a year, 'an action or a set of domestic remedies able to provide adequate and sufficient redress in cases of

³⁶⁴ *Greens and M.T. v the United Kingdom* Operative paragraph (6).

³⁶⁵ *Ališić and Others v. Bosnia and Herzegovina* Operative paragraphs (10 and 11).

³⁶⁶ *Ananyev and others v Russia* Operative paragraph (7).

overcrowding.³⁶⁷ Similar measures were also ordered in *Neshkov and Others v. Bulgaria*. In this case the Court found a systemic problem of overcrowding in the Bulgarian prison system and also problems in the remedies provided by the state to pay compensation for violations that took place. The European Court ordered the state to make a combination of effective domestic remedies, in respect of conditions of detention, with both preventive and compensatory effects.³⁶⁸ Interestingly, the Court also ordered the state to provide compensation within three months.³⁶⁹

As has been shown, the Court has taken progressive steps to award general measures in pilot judgments. In the application of these measures, the Court has developed a set of measures that range from, ordering states to set up effective remedies guaranteeing access to justice and redress, to a more pro-active approach, ordering legislative measures, and, even to take measures in order to prevent and compensate the effects of overcrowded prison conditions.

3.1.4 Circumstances where general measures are ordered in Pilot Judgments

The application of general measures in pilot and semi-pilot judgments by the European Court is restricted to the existence of a 'structural or systemic problem'.³⁷⁰ The European Court has defined a 'structural or systemic problem' as a situation where 'the facts of the case disclose the existence, within the... [domestic] legal order, of a shortcoming as a consequence of which a whole class of individuals have

³⁶⁷ *Torreggiani et Autres c. Italie* Operative paragraph (4).

³⁶⁸ *Neshkov and others v. Bulgaria*, App no. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13 (ECtHR, 27 January 2015) para 310 (8).

³⁶⁹ *idem* para 310 (7).

³⁷⁰ ECHR Rules of the Court (Article 61 (1)).

been or are still denied... [their Convention right or freedom]' and where 'the deficiencies in national law and practice identified in the applicant's individual case may give rise to numerous subsequent well-founded applications.'³⁷¹

According to Haider, 'systemic problems (or practices incompatible with the Convention) may be described as occurrences of repeated similar violations of the Convention, which are rooted in deficiencies in the implementation of the Convention or, respectively, in the execution of judgments finding a violation.'³⁷² According to this author, and in the context of pilot judgments, this definition is used by the European Court of Human Rights to identify problems that can potentially affect a large number of people and, therefore, can lead to a large number of similar applications in the future.³⁷³

The application of the procedure is, also, highly selective. Pilot and semi-pilot procedures are not applied to all structural or systemic problems identified by the Court. This has been criticized by several authors, who consider this to be a lack of transparency.³⁷⁴ According to Leach, there are several practical, political and legal factors that play a role in the selection of the cases.³⁷⁵ In general, the Court has applied the pilot procedure, after a process of informal consultation with the

³⁷¹ *Broniowski v. Poland* para 231.

³⁷² Haider *The Pilot-Judgment Procedure* [...] 40.

³⁷³ *idem*.

³⁷⁴ 'The Court's innovative pilot judgment and similar procedures represent a very welcome development and should, if at all possible, now be made more transparent and systematic [...]' Council of Europe, Contribution of the Secretary General of the Council of Europe to the Preparation of the Interlaken Ministerial Conference, SG/Inf (2009) 20 (18 December 2009) para 20, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1571667&Site=CM> (consulted 27 August 2015)

³⁷⁵ Leach (et al) *Responding to Systemic Human Rights Violations* 34.

respondent state, if it considers it is likely that the decision will be complied with by the state.³⁷⁶ This practice, applied by the Court in the first cases, was incorporated in the Rules of the Court in 2011, establishing that ‘the Court shall first seek the views of the parties on whether the application under examination results from the existence of such a problem or dysfunction in the Contracting Party.’³⁷⁷ There is no requirement that the Court needs the acceptance of the respondent state, but rather, that the Court needs to engage with the state in order to decide whether or not to apply the procedure. For some authors, by consulting with the states, the Court secures the effectiveness of the procedure, and its own credibility, in the application³⁷⁸.

However, the high exceptionality of these measures, in the European System, can be quite restrictive in comparison with the application of GNR in, for example, the Inter-American System. As will be developed in the following chapter, GNR are usually provided by the Inter-American Court of Human Rights including in cases concerning gross violations of human rights. The European Court has applied the pilot procedure only to cases of systemic violations, and after a process of previous consultation with states, but it has not made this procedure applicable in cases of gross violations of human rights. In general, the European Court has applied the pilot procedure to cases such as *Broniowski*, where there is a clear, dysfunctional problem in the domestic system, and a large number of identifiable applicants. Pilot judgments usually involve violations to the rights to property, and access to a remedy.

Although there is nothing in theory that prevents the European Court of Human Rights from analysing cases of gross violations of human rights, in practice it has

³⁷⁶ idem 35.

³⁷⁷ ECHR Rules of the Court Article 61 (1).

³⁷⁸ Leach *Responding to Systemic Human Rights Violations* 35.

abstained from applying individual petition mechanisms, in general, and the mechanism of pilot judgments, in particular, to the investigation of gross violations of human rights in the region. Authors, such Kamminga, have argued that the European Convention on Human Rights, including the European Court of Human Rights, is not sufficiently equipped to deal with gross violations of human rights³⁷⁹. According to Reidy, Hampson and Boyle, in order to properly deal with gross human rights violations, the European Court would need to reform its protocols in order to acquire *proprio motu* competence to investigate allegations, when victims cannot denounce human rights violations, and to create a fact-finding section within the Court in order to carry out the investigation of facts, and monitor the compliance with the Convention.³⁸⁰ This approach contrasts with the one taken by the Inter-American Court of Human Rights which has addressed gross violations of human rights through its individual petition system, and provided large reaching redress through the award of GNR³⁸¹, even without a strong mechanism for the collection of evidence and the enforcement of judgments. Although the measures awarded by the Inter-American Court of Human Rights have not always been effective in dealing with gross violations, the boldness of the Inter-American Court contrast with the conservative view of the European Court.

³⁷⁹ See, Menno Kamminga, 'Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systemic Violations?' (1994) 12 *Netherlands Quarterly of Human Rights* 153.

³⁸⁰ Aisling Reidy, Françoise Hampson and Kevin Boyle, 'Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey' (1997) 15 *Netherlands Quarterly of Human Rights* 161, p. 173.

³⁸¹ See for example, *Case of the Plan de Sánchez Massacre v. Guatemala (Reparations)* Inter-American Court of Human Rights Series C No. 116 (19 November 2004).

One factor that may explain the limitation of pilot judgments to systemic violations, is the fact that the procedure originated as a process to deal with the workload of the Court, rather than from a genuine intention of the European Court to expand its remedial powers, or to deal with gross and serious violations. Pilot judgments are understood as a way to deal with relatively 'easy' but repetitive cases, rather than a mechanism to provide over reaching remedies to serious violations. However, taking into account that the pilot judgment procedure is already in place, allowing the Court to study large numbers of cases and to provide extensive recommendations, the Court could explore the possibility of applying the pilot procedure to cases of gross violations of human rights. Such possibility would be analysed in the following section.

3.1.5 General measures in Pilot judgments and the concept of GNR

The general measures awarded by the European Court of Human Rights in pilot judgments share functional similarities with the concept of GNR: First, general measures in pilot judgments have a preventive nature, similar to the one established in GNR. This has been established by the Court in several judgements. In *Bronowski*, for example, the European Court recognized that the measures adopted in order to remedy the systemic violation, must be 'so as not to overburden the Convention system with large numbers of applications deriving from the same cause.'³⁸² Similarly, the Committee of Ministers have emphasised it shall examine

³⁸² *Bronowski v. Poland* para 193.

whether states have adopted general measures, in order to either prevent new violations or put an end to continuing violations.³⁸³

The preventive nature of general measures has been understood to be a key component in securing the credibility and efficiency of the system. As the Committee of Ministers have emphasised:

‘The credibility and efficiency of the Convention system depends to a large extent on its capacity to ensure that States *prevent* new violations similar to those established by the European Court of Human Rights – that they take so called ‘general measures.’³⁸⁴

Prevention is also considered as a way to reduce the work load of the Court which has increased considerably during the last years.³⁸⁵ There is no reason for granting only individual redress in the analysis of repetitive cases related to the same systemic situation. If the root cause of the violation is not tackled in the decision, the number of cases will keep increasing in the future.

Second, general measures, as well as GNR, are aimed at redressing the structural situation that is the origin of a case, or number of cases. The idea of these measures is to underline the existence of a systemic problem that needs to be redressed. This is clearer in pilot judgements where the Court should ‘as far as possible, [...] identify,

³⁸³ Rules adopted by the Committee of Ministers for the supervision of the execution of judgments and of the terms of the friendly settlements (Adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers) Rule 6.2.

³⁸⁴ Council of Europe, ‘General measures adopted to prevent new violations of the European Convention on Human Rights, Stock-taking of measures reported to the Committee of Ministers in its control of execution of the judgments and decisions under the Convention’, H/Conf (2000)7, para 8.

³⁸⁵ Leach (et al) *Responding to Systemic Human Rights Violations* 9.

in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications.³⁸⁶

Third, general measures, like GNR, have a general rather than individual character. They are oriented to impact upon a larger number of people, beyond those who are represented in the case. These can be either a specific class of individuals or a generic group. For example, in the *Broniowski v Poland* case, the Court awarded general measures 'in respect of the remaining Bug River claimants'³⁸⁷ which, according to the Polish Government, could be nearly 80,000 people, and whom did not necessarily bring a petition before the European Court.³⁸⁸ In the remaining pilot judgements, general measures were granted to a generic or indeterminate group of people. For example, in the cases relating to the non-enforcement of decisions, the Court usually ordered the state to set up a remedy, or combination of remedies, that secured adequate redress for the non-enforcement of decisions.³⁸⁹ This remedy was not restricted to those persons currently with a non-enforced judicial sentence (regardless of whether they had filed a petition before the European Court), but also included those persons that, in the future, may need redress for a similar situation. In this sense, general measures, as GNR, are designed to impact larger groups of people, beyond the original petitioners of a case.

Despite the similarities in the nature of these two concepts, there are important differences in the application of general measures awarded in pilot judgments, and the award of GNR in other jurisdictions, that cannot be ignored.

³⁸⁶ Committee of Ministers, 'Resolution on judgments revealing an underlying systemic problem, adopted by the Committee of Ministers' (12 May 2004) RES (2004) 3.

³⁸⁷ *Broniowski v. Poland* para 194.

³⁸⁸ *idem* para 162 and 193.

³⁸⁹ *Burdov v. Russia (No 2)* operative paragraph (6).

First, as previously stated, the scope of general measures in pilot judgments is still very limited and usually related to the implementation of effective domestic remedies, and the payment of entitlements already recognized in the domestic law. Only in two pilot judgments has the Court directly ordered states to modify their legislation,³⁹⁰ and only in one pilot judgment has it suggested the state take preventive measures beyond compensation.³⁹¹ With very few exceptions, the Court has generally rejected any request for other types of reparation measures beyond compensation, such as rehabilitation or GNR.³⁹² In turn, and depending on the jurisdiction, GNR may offer a wider scope of measures that include the modification of legislation, the dissemination of judgments, the modification of manuals and protocols, the establishment of institutional and operative mechanisms of follow up, etc.³⁹³ In general, under international human rights law, GNR can take various forms, as they are required to tackle the root causes of violations. Although the general measures established in pilot judgments are more detailed than in the majority of cases before the European Court of Human Rights, where the choosing of appropriate means to comply with the decision is left to the state, they are still too restrictive in comparison

³⁹⁰ *Greens and M.T. v. The United Kingdom*; and *Ališić and Others v. Bosnia and Herzegovina*.

³⁹¹ *Ananyev and others v. Russia*.

³⁹² Just very recently in the case *Aslakhanova and others v. Russia*, the Court went a bit further in the awarding of just compensation by referring to the creation of a body in charge of investigating the disappearances, the need to allocate specific resources in order to carry out both forensic work and the set-up of genetic databanks, as recurrent proposals to deal with the gross violation of human rights. The Court, however, did not include such measures in the dispositive part of the judgement making the measures not strictly binding for the state. *Aslakhanova and others v. Russia*, App. Nos. 2944/06 and 8300/07, 50184/07, 332/08, 42509/10 (ECtHR, 18 December 2012) paras 225-226.

³⁹³ See chapter III section 2.

to the measures awarded under the concept of GNR established in other jurisdictions (i.e. Inter-American system of human rights).³⁹⁴

Second, as explained in section 3.1.2,³⁹⁵ the award of general measures in pilot judgments is exceptional as it is restricted to systemic problems. This limits the application of the pilot judgment to the redress of gross violations of human rights.³⁹⁶ In this aspect, and as will be presented in the following chapter, the Inter-American Court of Human Rights has developed far reaching GNR in cases of gross violations of human rights, including legislative measures, educational measures, setting up of data basis, and institutional changes.

Following the general trend in reparations, the European Court has been timid in the award of remedies in cases of gross violations of human rights.³⁹⁷ Instead of applying pilot judgments or more proactive forms of redress, the European System has opted for a more political approach when dealing with gross violations of human rights. In most of the decisions, the European Court has only provided satisfaction, and occasionally compensation, leaving it up to the state to choose the means to comply with the decision, and to the Committee of Ministers to supervise the compliance in accordance to Article 46 of the European Convention on Human Rights.³⁹⁸ The Committee of Ministers has, in some cases, recommended the

³⁹⁴ The use of GNR in the Inter-American System will be fully developed in chapter III.

³⁹⁵ See, p. 100-103.

³⁹⁶ As it was developed in previous sections GNR are usually provided in cases of systemic violations, gross violations of human rights and risk of repetition.

³⁹⁷ Gabriella Citroni, 'Measures of reparation for victims of gross human rights violations: developments and challenges in the jurisprudence of two regional human rights courts' (2012) 5 *Inter-American and European Human Rights Journal* 49 pp. 59-60.

³⁹⁸ In application of Rule 6.2 of the Committee of Ministers' Rules of Procedure, and in order to abide with the final judgment, the Committee shall examine whether states have

adoption of specific general measures.³⁹⁹ Besides, these recommendations represent a unified interpretation by the member states and, in practice, have been generally followed by the Court and the states;⁴⁰⁰ they are not strictly binding.⁴⁰¹

The emphasis in the use of political mechanism as a way to deal with gross violations of human rights has several problems in terms of the protection of human rights. As Citroni has explained, in cases of gross violations, states have not shown any real interest in spontaneously applying any individual or general measures beyond mere compensation.⁴⁰²

When used in a complementary way, with the political means exercised by the Committee of Ministers, the awarding by the European Court of more extensive reparation measures, in the form of general measures or GNR, could facilitate the effective redress of gross violations.. Also, the fact that they are awarded by the

implemented both individual and general measures. Committee of Ministers, 'Rules of the Committee of Minister for the Supervision of the execution of judgments and of the terms of the friendly settlements' (10 May 2006) Rule 6.2.

³⁹⁹ See, for example, the resolutions of the Committee in cases related to Chechenia and Turkey. The Committee has also elaborated general principles to deal with gross violations, see Committee of Ministers, 'Guidelines of the Committee of Ministers on eradicating impunity for serious human rights violations' (2011) H/Inf (2011) 7.

⁴⁰⁰ European Centre for Law and Justice, 'Status of the recommendations of the Committee of Ministers in the legal field of the Council of Europe' (2012) available at <http://eclj.org/PDF/status-of-the-recommendations-of-the-committee-of-ministers-in-the-legal-field-of-the-council-of-europe%E2%80%93synthesis-english.pdf>.

⁴⁰¹ See, Committee of Ministers, Recommendation 2 (2002) (adopted by the Committee of Ministers on 19 January 2000 at the 694th meeting of the Ministers' Deputies) available at <https://wcd.coe.int/ViewDoc.jsp?id=334147&Sector=secCM&Language=lanEnglish&Ver=original> (consulted 27 August 2015).

⁴⁰² Citroni *Measures of reparation* [...] 64.

Court could reinforce their obligatory character, making states accountable in case of non-compliance. Finally, it would open a window of opportunity for the victims to suggest to the Court concrete general measures, therefore, allowing their participation in the drafting of measures⁴⁰³. Participation of the victims in the definition of general measures is important in itself not just as a measure to create more meaningful measures to those recipients of the measures but also as a way to ensure their adequate implementation.

Similarities in nature and function between general measures and GNR, make general measures an important vehicle for the potential implementation of more structural redress in the European system. Besides the European Court does not explicitly use the term guarantees of non-repetition in their case law, the application of general measures in pilot judgments shows that the Court is, in practice, applying more general forms of redress besides 'just compensation'. However, their current limited scope, together with the highly exceptional circumstances in which general measures are granted, still make them a very restrictive way of introducing general redress into the European System. Despite the recent efforts of the European Court to move towards more progressive forms of redress beyond compensation,⁴⁰⁴ there is still a long way to go before the jurisprudence of the European Court can update the international standards established by the UN Committees, as well as the Inter-

⁴⁰³ Although the participation of victims in the definition of remedies may create delays in the process of reparation and make more difficult the definition of reparation measures, it is actually the only way to create reparation measures that are truly meaningful to the victims. See Cristián Correa, Julie Guillerot and Lisa Magarrell, 'Reparations and Victim Participation: A Look at the Truth Commission Experience', in Carla Ferstman, Mariana Goetz and Alan Stephens (eds) *Reparations for victims of Genocide, War Crimes and Crimes against Humanity* (Nijhoff Publishers, 2009)

⁴⁰⁴ See section 2.1.1 in this chapter.

American Court of Human Rights, and the African Commission on Human and Peoples' Rights. However, the continuous use of the pilot procedure and the increasing expansion of the remedial powers of the European Court in its jurisprudence demonstrates that, the European Court is taking steps in the right direction and new windows of opportunity may open.⁴⁰⁵

3.1.6 General measures in quasi-pilot judgments

In addition to pilot judgments, the European Court of Human Rights has introduced general measures through 'quasi-pilot judgements'. According to Leach, these are cases that the European Court does not describe as pilot, but where the Court has invoked Article 46 of the Convention to highlight a systemic or structural problem that is incompatible with the Convention.⁴⁰⁶ Unlike the pilot judgments, they do not allow the adjourning of similar cases, and, in principle, they do not include general measures in the operative paragraphs of the judgment.⁴⁰⁷

In those cases where the Court has stated the existence of incompatibilities in the domestic legislation of a country, general measures have usually taken the form of legislative reforms. For example, in *Manole and others v. Moldova*, the Court found that the legislative framework did not provide sufficient safeguards against the virtual monopoly of a state-owned telecommunications company. The Court considered that

⁴⁰⁵ See David Kosar and Lucas Lixinski, 'Domestic Judicial Design by International Human Rights Courts' (2015) 109 *The American Journal of International Law* 4.

⁴⁰⁶ Leach (et al) *Responding to Systemic Human Rights Violations* 24-25.

⁴⁰⁷ Just in very exceptional circumstances the Court has introduced 'general measures' in the operative paragraphs of semi-pilot judgements, but none of them were actually described as 'pilot judgements' by the Court.

'[i]n the light of the deficiencies found by the Court, these general measures should include legislative reform [...].'⁴⁰⁸ Legislative reforms have also been indicated by the Court in cases relating to the compulsory letting of the land, on the basis of certain rental terms in Slovakia,⁴⁰⁹ the ban of the publication of statements of a terrorist organization in Turkey,⁴¹⁰ and the inadequate protection for parents' beliefs being recognised in the Turkish education system⁴¹¹.

In other cases, the ECHR has also indicated general measures, among others, to be taken by a state in a semi-pilot judgement to 'set up an *ad hoc* domestic compensation scheme;⁴¹² and to take all possible steps to gain an assurance from a certain government, that condemned persons will not be subjected to the death penalty.⁴¹³ These measures have been used as a standard to verify the compliance of the state to the judgment.

3.1.7 Conclusion

The analysis of the jurisprudence of the European Court shows that the tribunal has, increasingly, expanded its remedial powers from 'just satisfaction', to the inclusion of

⁴⁰⁸ *Manole and others v. Moldova*, App. no. 13936/02 (ECtHR, 17 September 2009) para 117.

⁴⁰⁹ *Urbarska obec Trencianske Biskupice v. Slovakia*, App. no. 74258/01 (ECtHR, 27 November 2007) para 150.

⁴¹⁰ *Gözel and Özer c. Turquie*, Req. nos 43453/04 et 31098/05 (ECtHR, 06 juillet 2010) para 76.

⁴¹¹ *Hasan and Eylem Zengin v. Turkey* App. no. 1448/04 (ECtHR, 9 October 2007) para 84.

⁴¹² *Kuric and Others v. Slovenia*, App. no. 26828/06 (ECtHR, 26 June 2012) para 415.

⁴¹³ *Al-Saadoon and Mufdhi v The United Kingdom*, App. no. 61498/08 (ECtHR, 2 March 2010) para 171.

other types of reparation's measures such as restitution. Despite its reluctance to provide remedial measures, since 2004 the European Court has applied the pilot judgment procedure for the redress of 'repetitive cases'. Through this procedure, the European Court has ordered states to adopt general measures, usually ordering the adoption of effective domestic remedies, the payment of certain entitlements, and, exceptionally, some legislative changes. These measures are, nevertheless, very similar to GNR in terms of its functional preventive nature, focus on structural problems, and general scope. In the last years, general remedial measures provided in pilot judgments have been recognised by both, the Court and commentators, as having a binding effect on the contracting states.⁴¹⁴

Besides this conceptual similarity, the European Court has been timid in respect of, both the scope of the measures awarded, and the type of cases in which they have been applied. On the one hand, general measures in pilot judgments have usually been restricted to ordering the setting up of adequate mechanisms of redress and the payment of entitlements. On the other hand, the fact that pilot judgments are restricted to systemic violations, and to prior negotiation with the state, limits the application of these measures to the redress of gross violations of human rights. These two characteristics contrast with the large scope of measures, and the application of GNR, in the redress of gross violations by the Inter-American Court of Human Rights. The European Court could make more extensive use of the mechanism of pilot judgments and the award of general measures by expanding the scope of the measures and applying the mechanism of pilot judgment to cases of gross violations of human rights. This will certainly update the jurisprudence of the European Court to international standards in reparation measures. It will also provide the European System with an additional tool (beyond the recommendations of the Committee of Ministers) with which to tackle gross violations of human rights. The

⁴¹⁴ Haider *The Pilot-Judgment Procedure* [...] 213-214

European Court has started to expand the scope of their remedial recommendations which is a positive step in this regard. A more decisive intention of the European Court would be needed if they wish to fully engage with the potential of general measures in pilot judgments.

3.2 GNR in the African Human Rights System

3.2.1 GNR in the case law of the African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights⁴¹⁵ has jurisdiction over all cases submitted to it concerning the interpretation and application of the African Charter on Human and Peoples' Rights (the Charter), the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol), and any other relevant human rights instrument ratified by the States concerned.⁴¹⁶ After analysing the merits of the case, the Court is entitled to provide appropriate remedies. According to Article 27 of the Protocol:

'If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violations, including the payment of fair compensation or reparation.'⁴¹⁷

Even though this Article allows the African Court to provide remedies in the form of compensation or any other form, the reparation model has not quite been developed by the African Court in its case law. Up to February 2015, the African Court had received 32 applications and finalized 22 cases. From the finalized cases, the Court found it had no jurisdiction in 20 cases, and only analysed the merits of two applications filed against Tanzania. The two petitions were joined and analysed in

⁴¹⁵ The African Court was established by Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted on 10 June 1998 and entered into force on 25 January 2004).

⁴¹⁶ *idem* article 3.

⁴¹⁷ *idem* article 3. Also Rule 63 of the Rules of Court establishes that 'the Court shall rule on the request for the reparation' in either the same decision or a separate one. Rules of Court of the African Court on Human and Peoples' Rights (as amended in April 2010) Rule 63.

one decision, namely *Tanganyika Law Society and LHRC, and Reverend Christopher R. Mtikila v. Tanzania*. In this case, the African Court found that the law that prohibits any candidate from participating in presidential elections without being part of a political party, violates the rights of freedom of association, to participate freely in the government of its country, and not to be discriminated under the law. As a consequence, the African Court ordered Tanzania 'to take constitutional, legislative and all other necessary measures within a reasonable time to remedy the violations found by the Court.'⁴¹⁸ The Court also allowed the applicants to file submissions requesting individual reparations within 30 days after the decisions.

Although the Court does not refer to these as GNR, the reparation measures granted in this case may have important consequences in terms of structural reform. In spite of the High Court having previously ruled that the Amendment violated existing provisions of the Constitution, the Parliament passed the constitutional reform without taking the ruling of the High Court into consideration. The African Court, aware of the different opinions between the Parliament and the High Court, ordered the removal of the constitutional provisions. This order may open the door for other requests for legislative reforms, in situations where a law violates some of the provisions established in the African Charter.

The decision does not explain the grounds for the adoption of these measures but refers to them only in the conclusion of the decision. The scarce development of the jurisprudence of the African Court, together with the lack of analysis of the understanding of reparations, makes the reparation measures granted by the African Court a field still open to development. In this regard, the developments achieved by the Inter-American Court of Human Rights, and the European Court of Human

⁴¹⁸ *Tanganyika Law Society and LHRC & Reverend Christopher R. Mtikila v. Tanzania*, African Court on Human & Peoples' Rights, App. no. 009/2011 and 011/2011 (2013) para 126 (3).

Rights, may bring some insights for the future development of structural remedies by the African Court. As the work of the African Court is still developing, it would be necessary to analyse the decisions of the African Commission on Human and Peoples' Rights which has elaborated more detailed recommendations in the examination of individual and group communications. This analysis will be carried out in the following section.

3.2.2 Other 'general recommendations' granted by the African Commission on Human and Peoples' Rights

The African Commission has the mandate to promote and ensure the protection of the human and peoples' rights established in the African Charter, as well as to interpret the provisions of the Charter and to carry out any other task entrusted to it by the Assembly of Heads of State and Government.⁴¹⁹ The Commission can also consider communications submitted to it by one state claiming that another state has violated the Charter,⁴²⁰ or by individuals or organizations claiming that one state has violated some of the rights established in the Charter.⁴²¹ After considering the arguments presented by the author and the state's party observations, the Commission will decide upon the admissibility of the decision, and whether or not the facts presented constitute a violation to the African Charter. If the Commission finds there is a violation, it will state a final decision, also called recommendation. This will contain specific measures, addressed to the state, in order to remedy the violation.

⁴¹⁹ OAU, African Charter on Human and Peoples' Rights (adopted on 27 June 1981, entered into force 21 October 1986) CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982) Art 45.

⁴²⁰ *idem* article 47.

⁴²¹ *idem* article 55.

These recommendations are, however, of a semi-judicial nature so they are not legally binding for the states. As a consequence, the compliance of these recommendations by states parties has been relatively low in the last years.⁴²²

In contrast to the African Court, and despite the low levels of enforceability, the African Commission has developed an extensive range of recommendations in the last years, ones that refer to the entire range of reparation measures. By February 2015 the Commission had published a decision on 35 communications. In these, the Commission recommended states to take measures in order to recognise ownership rights to specific communities,⁴²³ to release prisoners wrongly detained,⁴²⁴ to adequately compensate the victims,⁴²⁵ provide measures of rehabilitation,⁴²⁶ and, in many cases, also to engage in general measures.

⁴²² Magnus Killander, 'The African Commission on Human and Peoples' Rights' in, Manisuli Ssenyonjo (Ed), *The African Regional Human Rights System. 30 years after the African Charter on Human and Peoples' Rights* (Martinus Nijhoff Publishers, 2012) p. 237.

⁴²³ *Centre for Minority Rights Development (Kenya) and Minority Rights Group (On behalf of Endorois Welfare Council) v. Kenia*, African Comm Hum & Peoples' Rights, Comm 276/03 (2009) Recommendation (a) and (b).

⁴²⁴ *Liesbeth Zegveld and Mussie Ephrem v. Eritrea*, African Comm Hum & Peoples' Rights, Comm. 250/02 (2003); *Constitutional Rights Project v. Nigeria*, African Comm Hum & Peoples' Rights, Comm. 102/93 (1998).

⁴²⁵ This is probably the most common recommendation issued by the African Commission. The majority of the Communications decided on merits, will end up with a recommendation ordering the payment of adequate compensation. Although the Commission does not mention which laws have to be considered in order to carry out such payment, it is expected they should take into account standards contained in international human rights law. *Egyptian initiative for Personal Rights and Interights v. Arab Republic of Egypt*, African Comm Hum & Peoples' Rights, Comm. 334/06 (2011); *Kenneth Good v. Republic of Botswana*, African Comm Hum & Peoples' Rights, Comm. 313/05

In terms of general measures, the African Commission has recommended states to engage in a large variety of measures, such as to harmonize their domestic legislation in accordance with the African Charter.⁴²⁷ It has also recommended states to carry out assessments,⁴²⁸ establish specific institutions such a National Reconciliation Forum to address the long-term sources of conflict,⁴²⁹ or an expert body to review the cases of all persons detained under certain law.⁴³⁰ It has also recommended states to undertake reforms in state institutions, particularly in the

(2010).

⁴²⁶ *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (Cohre) v. Sudan*, African Comm Hum & Peoples' Rights, Comm. 279/03, 296/03 (2009) para 229 (5); *Purohit and Moore v. Gambia*, African Comm Hum & Peoples' Rights, Comm. 241/01 (2003) recommendation (3).

⁴²⁷ *Egyptian initiative v. Arab Republic of Egypt; Marcel Wetsh' Okonda Koso and others v. Congo*, African Comm Hum & Peoples' Rights, Comm. 281/03 (2009); *Scanlen & Holderness v. Zimbabwe*, African Comm Hum & Peoples' Rights, Comm. 297/05 (2009); *Antonie Bissangou v. Congo*, African Comm Hum & Peoples' Rights, Comm. 253/02 (2006); *Curtis Francis Doebller v. Suddan*, African Comm Hum & Peoples' Rights, Comm. 236/00 (2003); *Legal Resources Foundation v. Zambia*, African Comm Hum & Peoples' Rights, Comm. 211/98 (2001); *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, African Comm Hum & Peoples' Rights, Comm. 218/98 (2001); *Avocats Sans Frontiers (on behalf of Gaëtan Bwampamye) v. Burundi*, African Comm Hum & Peoples' Rights, Comm. 231/99 (2000).

⁴²⁸ *Malawi Africa Association, Amnesty International, Ms Sarr Diop and others v. Mauritina*, African Comm Hum & Peoples' Rights, Comm. 54/91, 61/91, 96/93, 98/93, 164/97, 196/97, 210/98 (2000) recommendation (5).

⁴²⁹ *Cohre v. Sudan* para 229 (6).

⁴³⁰ *Purohit and Moore v. Gambia* Operative Paragraphs (2).

judicial power⁴³¹ and the police.⁴³² It has even recommended the state to engage in political negotiations, such as the consolidation and finalization of peace agreements.⁴³³

These general recommendations have been developed in cases claiming the violation of the rights of individuals,⁴³⁴ communities,⁴³⁵ and even in cases of generalized and massive patterns of human rights violations.⁴³⁶ Unlike other regional systems of human rights, the African Charter (Article 56.1) allows complainants to file a case with no need to show they are victims themselves, or that they have been authorized by the victims.⁴³⁷ Particularly, the African Commission allows the presentation of *action popularis* which are actions filed usually for human rights organizations or any other individual or institution, for the public interest. This characteristic allows the African system to receive communications for the violations of human rights of multiple actors, including individuals, communities and large populations.

⁴³¹ *Egyptian initiative v. Arab Republic of Egypt* para 223 (III); *Cohre v. Sudan*, para 229 (2); *Kevin Mgwanga Gunme et al /Cameroon*, African Comm Hum & Peoples' Rights, Comm. 266/03, (2009) para 215 (1.7).

⁴³² *Egyptian initiative v. Arab Republic of Egypt* para 223 (IV).

⁴³³ *Cohre v. Sudan* para 229 (1).

⁴³⁴ *Scanlen & Holderness v. Zimbabwe*, African Comm Hum & Peoples' Rights, Comm. 297/05 (2009).

⁴³⁵ *Purohit and Moore v. Gambia*.

⁴³⁶ *Cohre v. Sudan*.

⁴³⁷ Manisuli SSenyonjo, 'Economic Social and Cultural Rights in the African Charter', in Manisuli SSenyonjo (ed) *The African Regional Human Rights System 30 Years after the African Charter on Human and Peoples' Rights* (Martinus Nijhoff Publishers, 2012) p.61.

Regardless of the type of complainant, one element that is common to all the cases is that as the violation could potentially affect or is currently affecting a large number of people, the measures recommended by the African Commission aim to address the root causes of the violations and lead to its transformation. In the *Malawi African Association (et al) v. Mauritanian Communication*, the commission ordered the carrying out an assessment of the status of degrading practices in the country 'with a view to identify[ing] with precision the deep-rooted causes for their persistence [*sic*] and to put in place a strategy aimed at their total and definitive eradication.'⁴³⁸

In the cases where the Commission found that there was a political issue that needed to be addressed, the Commission has recommended the state to engage in dialogue with other political forces rather than ordering the state directly to take a concrete measure. For example, in the Communication *Kevin Mgwanga Gunme et al v. Cameroon*, the Commission recommended the state to enter into constructive dialogue with the Complainants and other political movements, in order to eliminate the discriminatory practices against people of Northwest and Southwest Cameroon.

As the role of the Commission is semi-judicial, it has more freedom to issue recommendations in different ways, even those that touch the political sphere. However, its semi-judicial character also undermines the possibility of compliance by states, making these recommendations very difficult to enforce.

3.2.3 Conclusion

The analysis of the case law of the African Court, and particularly the African Commission, shows that the African System has consistently included general

⁴³⁸ *Malawi Africa Association and others v. Mauritania*, operative paragraphs (5).

recommendations in the analysis of communications. Such recommendations resemble GNR in terms of the scope of the measures and their nature. General recommendations can range from legislative reforms, to institutional reforms, to political negotiations. They all share a common interest in tackling the root causes of the violation in order to prevent its repetition. However, the fact that the Commission fulfils a semi-judicial role diminishes the possibility of enforcement of such decisions. In the future, the African Court could make use of the experience collected by the African Commission in the recommendation of general measures, by following the scope of general measures established by the African Commission. The large scope of measures referred by the Commission could inspire the work of other regional systems, as well as UN Committees, in the drafting of more suitable general recommendations.

CHAPTER III: GNR IN THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

As has already been indicated, the jurisprudence of the Inter-American Court of Human Rights deserves special attention given the far reaching forms of reparation it has awarded over the years, including GNR. Indeed, as is widely accepted, the most ground-breaking treatment of reparations, both in compensatory and non-compensatory forms under international human rights law, comes from this regional body.⁴³⁹

According to the American Convention on Human Rights (ACHR) states have the general obligation to both respect and ensure the rights established in the Convention (Article 1.1) In turn, the obligation to ensure, implies the duties to respect the rights and freedoms established in the Convention; guarantee or ensure the free and full exercise of human rights; prevent the violation of rights; investigate the facts effectively and, if appropriate, punish those responsible for the violation; provide redress to the victims when their rights have been infringed; and not to discriminate in the exercise of these obligations.⁴⁴⁰

The duty to provide redress to victims is also incorporated in Article 63(1) of the Convention, according to which:

⁴³⁹ Dinah Shelton, *Remedies in International Human Rights Law* (Oxford, 2nd edition, 2005) p. 299.

⁴⁴⁰ *Case of Velásquez Rodríguez v. Honduras (Merits)* Inter-American Court of Human Rights, Series C No 4 (29 July 1988) para 174.

‘If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.’

Apart from the provision established in this Article, none of the human rights treaties of the Organization of the American States establishes a general framework for the granting of remedies. Although there are some specific references to the duty to provide compensation in some of the treaties,⁴⁴¹ none of them establishes a clear reparations framework, as this is presented in *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*. According to the Guidelines there are five basic forms of reparation: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁴⁴² Although the Court has not always labelled its reparations measures in this way,⁴⁴³ in the jurisprudence, it is currently consistent practice to follow this approach.

⁴⁴¹ See for example, the Inter-American Convention to Prevent and Punish Torture (adopted 9 December 1985, entered into force 28 February 1985) OAS Treaty Series No 67 (1992), Article 9.

⁴⁴² UN General Assembly, ‘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’ (21 March 2006) A/RES/60/147, paras 18 to 23.

⁴⁴³ Douglas Cassel, ‘Expanding scope and impact of reparations awarded by the Inter-American Court of Human rights’, De Feyter et al (eds.), *OUT OF THE ASHES Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia, 2006) p.193.

The Court has developed interesting and detailed measures regarding each form of reparation. Throughout its jurisprudence the Court has developed significant standards in regards to compensation, restitution, rehabilitation and satisfaction. However, GNR have not been given the same attention, although they have gained prominence in the jurisprudence of the Court in recent years.

Similarly, the Inter-American Commission has also requested important forms of reparation in the cases it has referred to the Court, or in friendly settlements. In these cases, the Commission has either requested or recommended measures of compensation, restitution, rehabilitation, satisfaction and GNR.

This chapter provides a critical analysis of the GNR as they have been included in friendly settlements before the Inter-American Commission, or ordered by the Inter-American Court of Human Rights.

1. GNR in the Inter-American System: the work of the Inter-American Commission on Human Rights

The Inter-American Commission has played an important role in the inclusion of these measures in the Inter-American System. The Commission has dealt with GNR, not just in the process of individual cases, but also in friendly settlements. The friendly settlements procedure may be initiated at the request of any of the parties or the Commission's own initiative, and its purpose is to solve the petition in a friendly manner.⁴⁴⁴ Such settlements have had a positive impact, not only on the immediate

⁴⁴⁴ Rules of procedure of the Inter-American Commission on Human Rights (adopted in 28 October 2009, as amended in 2013), Article 40.

victims of human rights violations, but also on 'society as a whole', providing measures that foster change and address the root causes of the violation.⁴⁴⁵

In these agreements both the states and victims have traditionally agreed that various measures of reparation would be given by the state, including compensation, restitution, rehabilitation, and satisfaction, as a condition to stop processing the petition. In recent years, states and petitioners have also agreed in the provision of several GNR.

Under friendly settlements, states have given a commitment to: provide instruction and training to officials and public servants;⁴⁴⁶ take legislative measures;⁴⁴⁷ establish

⁴⁴⁵ IACmHR, 'Impact of the Friendly Settlement Procedure' (2013) OEA/Ser.L/V/II. Doc. 45/13, para 158.

⁴⁴⁶ *Inocencia Luca de Pegoraro et al v. Argentina (Friendly Settlement)* Inter-American Commission on Human Rights Report 160/2010 (1 November 2010) para 25 (2.3).

⁴⁴⁷ *Gerónimo Gómez López v. Mexico (Friendly Settlement)* Inter-American Commission on Human Rights Report 68/12 (17 July 2012); *Juan Carlos de la Torre v. Argentina (Friendly Settlement)* Inter-American Commission on Human Rights Report 85/11 (21 July 2011); *Inmates of the Penitentiary of Mendoza v. Argentina (Friendly Settlement)* Inter-American Commission on Human Rights Report 84/11 (21 July 2011); *Inocencio Rodriguez v. Argentina (Friendly Settlement)* Report 19/11; *María Soledad Cisternas Reyes v. Chile (Friendly Settlements)* Inter-American Commission on Human Rights Report 86/11 (21 July 2011); *Rodolfo Correa Belisle v. Argentina (Friendly Settlement)* Inter-American Commission on Human Rights Report 15/10 (16 March 2010); *Valerio Oscar Castillo Báez v. Argentina (Friendly Settlement)* Inter-American Commission on Human Rights Report 161/10 (1 November 2010); *Gilda Rosario Pizarro et al v. Chile (Friendly Settlement)* Inter-American Commission on Human Rights Report 162/10 (1 November 2010).

procedures;⁴⁴⁸ establish specific positions for the protection of human rights;⁴⁴⁹ design plans of action;⁴⁵⁰ elaborate public policies;⁴⁵¹ and, even to provide health services.⁴⁵²

Interestingly, the measures adopted in these friendly settlements are broader than the ones granted by the Inter-American Court, as they are the result of negotiations with the state and are consented to. Through this mechanism, states have agreed not just to provide training and adopt legislative measures (which are measures commonly granted by the Court under the individual petition system), but also to provide a large set of measures that the Court would not be able to easily order, given their far reaching nature. The agreement of measures to design public policies seems to be a good example of this. While the Inter-American Court, through the analysis of individual cases, has hesitated to order the implementation of public policies, through friendly settlements states have committed to undertake steps aimed at the establishment of public policies. For example, in the paradigmatic friendly settlement regarding the *Inmates of the Penitentiaries of Mendoza*, the government of the Province of Mendoza, Argentina, undertook:

‘to draw up, in conjunction with the National State and the petitioners,
within a maximum period of 90 days, a Plan of Action on Penitentiary

⁴⁴⁸ *Amílcar Menéndez and Juan Manuel Caride v. Argentina (Friendly Settlement)* Inter-American Commission on Human Rights Report 168/11 (3 November 2011); *Inocencia Luca de Pegoraro et al v. Argentina* para 25 (2.4).

⁴⁴⁹ *Raquel Natalia Lagunas & Sergio Sorbellini v. Argentina (Friendly Settlement)* Inter-American Commission on Human Rights Report 17/10 (16 March 2010).

⁴⁵⁰ *Inocencia Luca de Pegoraro et al v. Argentina* para 25 (2.2.c).

⁴⁵¹ *Penitentiary of Mendoza (Friendly Settlement)*.

⁴⁵² *Gilda Rosario Pizarro et al v. Chile (Friendly Settlement)* Inter-American Commission on Human Rights Report 162/10 (1 November 2010).

Policy to aid in setting short, medium and long-term public policies with an appropriate budget to make implementation possible. Said plan shall include, at a minimum, the following points:

- a) Indicate measures that shall be implemented for the assistance and custody of young adults deprived of their liberty [...] Additionally, every member of that population must be ensured education, recreation and access to cultural and athletic activities, adequate medical/psychological assistance and other measures geared towards adequate social integration and job placement;
- b) [...] request administrative and judicial authorities to review the disciplinary files [...]
- c) Improve the health-care service of the Provincial Penitentiary [...]
- d) Ensure access to a job for all inmates in the Prisons of Mendoza who should so request one [...];
- e) Ensure access and adequate service at the Courts of Criminal Sentence Execution, for all persons who have a legitimate interest [...]
- f) Endeavor to provide adequate training and professional instruction to Penitentiary Staff'.

This agreement is unique not only because the state and petitioners sat together to draw up a plan of action or public policy, but also because it established, in detail, some of the objectives that such a plan should include in terms of the protection of the human rights' of persons deprived of liberty. The agreement is flexible enough, providing the parties with the opportunity to discuss the elements of the policy, without excessively intervening in the design of said policy. This idea is secured by establishing that the draft should be elaborated 'in conjunction with the National

State and the petitioners⁴⁵³ and by establishing a time framework of 90 days to carry out such discussion.

At the same time, the agreement is strict enough in terms of the protection of human rights. The agreement establishes specific elements that should be incorporated in order to guarantee that prisoners enjoy, education, recreation, adequate medical and psychological assistance, as well as access to health care, job opportunities and justice.

The acceptance by the states of these measures, agreed after a long process of debate and under the supervision of the Commission, may show a progressively more open attitude of states to the implementation of broader reparations measures.

In these friendly settlements, states have also committed to take legislative measures and to provide regulatory reforms in several topics,⁴⁵⁴ such as: women's rights,⁴⁵⁵ indigenous peoples,⁴⁵⁶ migrants,⁴⁵⁷ freedom of expression,⁴⁵⁸ torture,⁴⁵⁹

⁴⁵³ *Penitentiary of Mendoza (Friendly Settlement)* para 31 (c) (1).

⁴⁵⁴ For a full presentation of the case law of the Inter-American Commission on Friendly Settlements, see IACmHR *Impact of the Friendly Settlement Procedure*.

⁴⁵⁵ *María Merciadri de Morini v. Argentina (Friendly Settlement)* Inter-American Commission on Human Rights Report 103/01 (11 October 2001).

⁴⁵⁶ *Mercedes Julia Huentao Beroiza et al v. Chile (Friendly Settlement)* Inter-American Commission on Human Rights Report 30/04 Petition 4617-02 (11 March 2004).

⁴⁵⁷ *Juan Carlos de la Torre v. Argentina (Friendly Settlement)* Inter-American Commission on Human Rights Report No. 85/11 (21 July 2011).

⁴⁵⁸ *Carlos Dogliani v. Uruguay (Friendly Settlement)* Inter-American Commission on Human Rights Report 18/10 (16 March 2010).

⁴⁵⁹ *Alejandro Ortiz Ramírez v. Mexico (Friendly Settlement)* Inter-American Commission on Human Rights Report 101/05 (27 October 2005).

forced disappearance,⁴⁶⁰ military justice,⁴⁶¹ rights of persons with disabilities,⁴⁶² access to justice and social security.⁴⁶³

States have also agreed to offer training to state officials and civil servants in a variety of topics, such as, sexual and reproductive rights,⁴⁶⁴ gender-based violence,⁴⁶⁵ labour rights,⁴⁶⁶ respect for human rights by police officers,⁴⁶⁷ and, training of judges in topics related to forced disappearance.⁴⁶⁸

GNR, in friendly settlements, may also have an important impact on the protection of socio-economic rights. On the one hand, they may give victims the opportunity to get involved in the discussion of public policies, as relevant actors in the political discussion, and also, in the drafting of such policies, to guarantee the establishment of a minimum contents of rights. For example, in the case *Inmates of the Penitentiaries of Mendoza*, where the state compromised to include, in the Plan of Action on Penitentiary Policy, measures to ensure that every member of the penitentiary would receive medical and psychological assistance, and also improvements of the health service in the penitentiary, were agreed.

⁴⁶⁰ *Inocencia Luca de Pegoraro v. Argentina*.

⁴⁶¹ *Roison Mora Rubiano v. Colombia (Friendly Settlement)* Inter-American Commission on Human Rights Report 45/99 (9 March 1999.)

⁴⁶² *María Soledad Cisternas Reyes v. Chile*.

⁴⁶³ *Amilcar Menéndez, Juan Manuel Caride et al. v. Argentina*.

⁴⁶⁴ *María Mamérita Mestanza Chávez v. Peru (Friendly Settlement)* Inter-American Commission on Human Rights Report No. 71/03 (10 October 2003).

⁴⁶⁵ *Marcela Andrea Valdés Díaz v. Chile (Friendly Settlement)* Inter-American Commission on Human Rights Report 80/09 (6 August 2009).

⁴⁶⁶ *Jose Pereira v. Brazil (Friendly Settlement)* Inter-American Commission on Human Rights Report 95/03 (24 October 2003).

⁴⁶⁷ *Alejandro Ortiz Ramírez v. Mexico*.

⁴⁶⁸ *Inocencia Luca de Pegoraro v. Argentina*.

Another case that may have a very important impact in the protection of the right to health, is *María Mamérita Mestanza*. This represents one case among many, of women affected by a massive and systemic government policy of sterilization, among poor, Indian women in rural Peru. María Mamerita, a rural woman of approximately 33 years old, and a mother of seven children, was pressured by the local Health Centre into accepting sterilization. After having tubal ligation surgery, her condition worsened and she died at home. In the friendly settlement, the Peruvian State promised to investigate the facts, carry out administrative and criminal investigations against those responsible for pressuring the consent, and the health personnel that ignored the need for urgent care. It also reached a compromise to pay monetary compensation, and to agree indemnification from those criminally responsible for the acts. For the victim's beneficiaries, it also ordered the state to make a one-time payment to the beneficiaries for psychological rehabilitation, as well as to provide the victim's children with free primary and secondary education in public schools, and tuition-free university education for a single degree at state schools. In terms of GNR the state made a compromise agreement to carry out changes in laws and public policies in terms of:

'a. Penalties for human rights violators and reparation for victims

1) Conduct a judicial review of all criminal cases on violations of human rights committed in the execution of the National Program of Reproductive Health and Family Planning, to break out and duly punish the perpetrators, requiring them to pay the appropriate civil damages, including the State if it is determined to have some responsibility for the acts that gave rise to the criminal cases.

2) Review the administrative proceedings initiated by the victims and/or their family members, linked to the cases in the previous paragraph,

which are pending or have concluded concerning denunciations of human rights violations.

b. Methods for monitoring and guaranteeing respect for human rights of health service clients

1) Adopt drastic measures against those responsible for the deficient pre-surgery evaluation of women who undergo sterilization, including health professionals in some of the country's health centers. Although the rules of the Family Planning Program require this evaluation, it is not being done.

2) Continuously conduct training courses for health personnel in reproductive rights, violence against women, domestic violence, human rights, and gender equity, in coordination with civil society organizations that specialize in these topics.

3) Adopt the necessary administrative measures so that the rules established for ensuring respect for the right of informed consent are scrupulously followed by health personnel.

4) Guarantee that the centres that offer sterilization surgery have proper conditions required by standards of the Family Planning Program.

5) Take strict measures to ensure that the compulsory reflection period of 72 hours is faithfully and universally honoured.

6) Take drastic action against those responsible for forced sterilization without consent.

7) Implement a mechanism or channels for efficient and expeditious receipt and processing of denunciations of violation of human rights in the health establishments, in order to prevent or redress injury caused.⁴⁶⁹

This case represents an important step forward in the protection of sexual and reproductive rights of women in the region. It opened up the opportunity for the request and implementation of far reaching GNR, aimed at modifying public policies, the carrying out of human rights training, and, the adoption of administrative and other positive measures in order to protect the rights of women. This model of friendly settlements can be used for the protection of the right to health in other types of cases.

2. GNR in the case law of the Inter-American Court of Human Rights: the progressive expansion of the remedial powers of the Court

2.1 The jurisprudence on reparations in the Inter-American Court of Human Rights

This section will explain some of the main features of the jurisprudence on remedies of the IACtHR, highlighting the progressive expansion of remedial powers of the Court in recent years. It will refer to the time framework introduced by Thomas

⁴⁶⁹ *María Mamérita Mestanza Chávez v. Peru* para 14.

Antkowiak, related to the distinctive eras of IACtHR's jurisprudence on reparations.⁴⁷⁰ According to the classification suggested by Antkowiak, it is possible to distinguish three periods of the jurisprudence on reparations in the IACtHR: early reparations jurisprudence (from 1987 to 1998), a following period following 1998 (from 1998 to 2001), and a contemporary era (starting in 2001). In this chapter it will also be argued that, in addition to the eras mentioned, there is a new era of consolidation of the reparations jurisprudence in the Inter-American system, starting in 2008.

2.1.1 Early reparations jurisprudence (1987-1998)

In its *early reparations jurisprudence (1987-1998)*, the Court focused on monetary remedies as the main form of reparations, placing special emphasis on restitution and, when appropriate, compensation. During this period, the Court did not expressly refer to the concept of GNR in its case law. In *Velásquez Rodríguez v Honduras*,⁴⁷¹ *Godínez Cruz v Honduras*,⁴⁷² *Gangaram Panday v Suriname*,⁴⁷³ and *Genie Lacayo v*

⁴⁷⁰ Thomas M. Antkowiak, 'Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond' (2008) 46 *Columbia Journal of Transnational Law* 351.

⁴⁷¹ *Case of Velásquez Rodríguez v. Honduras (Reparations and Costs)* Inter-American Court of Human Rights Series C No. 7 (21 July 1989).

⁴⁷² *Case of Godínez-Cruz v. Honduras (Reparations and Costs)* Inter-American Court of Human Rights Series C No. 8 (21 July 1989).

⁴⁷³ *Case of Gangaram-Panday v. Suriname (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 16 (21 January 1994).

Nicaragua,⁴⁷⁴ the Court granted just compensation, in order to repair the material and moral damage caused by the disappearance and killing of victims, by military and state authorities. In addition to monetary compensation, in some cases, the Court ordered the locating and identification of the remains of the victims and the delivery of them to their next of kin;⁴⁷⁵ whilst in some others, it ordered the state 'to continue investigations into the events referred to in the instant case, and to punish those responsible.'⁴⁷⁶

In this period the focus of reparation was on monetary orders, with an aim to compensate the material and moral harm. The only exception to this principle was probably in the case *Aloeboetoe et al*, related to the ill treatment and subsequent execution, by military forces in Surinam, of seven young men (Maroons) from the Saramaka tribe. In this case, the Court granted extensive amounts of compensation, taking into account the particular family structure of the polygamy-based community.⁴⁷⁷ It also ordered non-monetary reparations, such as the reopening of a school and the establishment of a medical clinic, so that the children of the victims could receive adequate education and basic medical attention,⁴⁷⁸ as well as the creation of a trust fund so that the relatives of the victims could get the most benefit

⁴⁷⁴ *Case of Genie-Lacayo v. Nicaragua (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 30 (29 January 1997).

⁴⁷⁵ *Case of El Amparo v. Venezuela (Reparations and Costs)* Inter-American Court of Human Rights Series C No. 28 (14 September 1996); *Case of Caballero-Delgado and Santana v. Colombia (Reparations and Costs)* Inter-American Court of Human Rights Series C No. 31(29 January 1997).

⁴⁷⁶ *idem* para 64 (4).

⁴⁷⁷ *Case of Aloeboetoe et al v. Suriname (Reparations and Costs)* Inter-American Court of Human Rights Series C No.15 (10 September 1993) paras 63-66.

⁴⁷⁸ *idem* para 96.

from the monetary compensation.⁴⁷⁹ The measures taken in this case seem to be exceptional for this period, as, in other cases, the Court had been reluctant to order other types of reparation, beyond compensation.⁴⁸⁰ The general approach granted in this decision has been criticized for going beyond the harm proved.⁴⁸¹ The Court ordered measures that benefited the whole community, but refused to recognize them as 'collective reparations', or to acknowledge the existence of a moral damage to the community.⁴⁸² The decision was also criticized for endorsing and legitimizing polygamy which is arguably a practice against women's rights.⁴⁸³

2.1.2 From 1998 to 2001

A second moment in the IACHR's jurisprudence went from 1998 to 2001. In this period the Court started to grant legislative and other measures which reflected a more expansive approach in the award of remedies. They were not, however, explicitly granted under the concept of GNR. Instead, the Court preferred to analyse

⁴⁷⁹ *idem* paras 100-101.

⁴⁸⁰ Theo Van Boven, 'Reparations; A requirement of Justice', in *Memoria del Seminario: El Sistema interamericano de proteccion de los derechos humanos en el umbral del siglo* (Costa Rica, CIDH, 1999) p.665-666; Michael Reisman, 'Compensation for Human Rights Violations: The Practice of the Past Decade in the Americas', in Albrecht Randelzhofer and Christian Tomuschat (eds) *State Responsibility and the Individual; Reparation in Instances of Grave Violations of Human Rights*, (Martinus Nijhoff Publishers, 1999) p. 107; Antkowiak *Remedial Approaches to Human Rights Violations* 366 and 385.

⁴⁸¹ Antkowiak *Remedial Approaches to Human Rights Violations* 367.

⁴⁸² *Aloeboetoe et al v. Suriname (Reparations)* para 83.

⁴⁸³ Patricia Palacios Zuloaga, 'The Path to Gender Justice in the Inter-American Court of Human Rights' (2007-2008) 17 *Texas Journal of Women and the Law* 227, p. 233.

the topic as part of the general duties of States, established in Articles 1 and 2 of the CADH, to both respect the rights recognized in the Convention and to adopt legislative or other measures necessary to give effect to those rights or freedoms. Very often, the Court referred to Article 2 of the American Convention in order to justify the granting of legislative measures.⁴⁸⁴

In the case *Loayza Tamayo v Peru*, the Court took the first steps in establishing legislative measures. In this case, a female university teacher was arrested, tortured and tried in military and civil courts, for the crime of terrorism, and sentenced to twenty years in prison via the application of anti-terrorist laws that allowed such procedure.⁴⁸⁵ Although, by the time the Court decided on reparations, major reforms had been introduced to these laws, including elimination of the practice of trial before 'faceless' judges,⁴⁸⁶ there were still some problems in defining the crimes of 'treason' and 'terrorism'. According to the Court, the lack of adequate definition of such crimes could imply a risk against the judicial guarantee that prohibits double jeopardy.⁴⁸⁷ In consequence, the Court stated Peru 'shall adopt the international legal measures necessary to adapt [its legislation] to conform to the American Convention.'⁴⁸⁸ The Inter-American Court was still timid in the drafting of the order, not specifying which aspects of the law should be amended.

⁴⁸⁴ *Case of Loayza-Tamayo v. Peru (Reparation and Costs)* Inter-American Court of Human Rights Series C No.42 (27 November 1998).

⁴⁸⁵ *Case of Loayza-Tamayo v. Peru (Merits)* Inter-American Court of Human Rights Series C No. 33 (17 September 1997) para 46, (f) and (h).

⁴⁸⁶ *Loayza-Tamayo v. Peru (Reparation)* para 161.

⁴⁸⁷ *Loayza-Tamayo v. Peru (Merits)* paras 66- 68.

⁴⁸⁸ *Loayza-Tamayo v. Peru (Reparation)* para 192 (5).

Following this case, the Court enacted a similar order in the case *Castillo Petruzzi v. Peru*, which also related to the application of the Anti-terrorist legislation in Peru. In this case, four people were judged and convicted under a military tribunal, to life imprisonment for the crime of treason established in this legislation. The Court ordered the State to ‘adopt the appropriate measures to amend those laws that [the] judgment has declared to be in violation of the American Convention on Human Rights.’⁴⁸⁹

However, legislative measures were not always awarded in this period. For example, in the case *Garrido v. Argentina*, relating to the detention and forced disappearance of two Argentinian men, the victims’ representatives had requested the Court, as part of ‘other forms of reparations’, to order the state that, forced disappearance be typified under criminal law. The Court recognized that, in addition to monetary compensation, ‘the reparation may also be in the form of measures intended to prevent a recurrence of the offending acts.’⁴⁹⁰ However, the Court did not order to change the legislation, considering that the State had already taken serious steps in this regard⁴⁹¹ through the introduction of a bill in the Congress to criminalize forced disappearances.

Also in the case *Suárez Rosero v. Ecuador* the Court found that Article 114 of the Ecuadorian Criminal Court established an exception to the right to be released which, in the opinion of the Court, violated Article 2 of the American Convention. Despite this finding and the request of the Commission to ‘adopt effective measures

⁴⁸⁹ *Case of Castillo-Petruzzi et al v. Peru (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 52 (30 May 1999) para 226 (14).

⁴⁹⁰ *Case of Garrido and Bagorria v. Argentina (Reparations and Costs)* Inter-American Court of Human Rights Series C No. 39 (27 August 1998) para 41.

⁴⁹¹ Antkowiak *Remedial Approaches to Human Rights Violations* 367.

to ensure that this type of violation does not recur in future,⁴⁹² the Court did not grant such measure, considering that the Article had already been declared unconstitutional by the Constitutional Court of Ecuador.

During this period there were already developments to the idea of GNR. For example, in the case *Loayza Tamayo v. Peru*, when referring to the duty of states to investigate the facts, identify and punish those responsible, the Court stated that ‘impunity fosters chronic recidivism of human rights violations.’⁴⁹³ In the case *Bámaca Velásquez v Guatemala*, when referring to the right of the victims to know the truth, the Court expressly recognized that, according to the general obligation established in Article 1 (1) of the Convention, the State has an obligation ‘to ensure that these grave violations do not occur again. Therefore, the State must take all steps necessary to attain this goal. Preventive measures and those against recidivism begin by revealing and recognizing the atrocities of the past.’⁴⁹⁴

2.1.3 The revisited ‘contemporary’ era (2001-2008)

According to Antkowiak, the third moment in the jurisprudence of the Inter-American system on reparations starts in 2001, with a fast increase in the number of judgments

⁴⁹² *Case of Suárez-Rosero v. Ecuador (Reparation and Costs)* Inter-American Court of Human Rights Series C No. 44 (20 January 1999) para 104 (b).

⁴⁹³ *Loayza-Tamayo v. Peru (Reparation)* para 170.

⁴⁹⁴ *Case of Bámaca-Velásquez v. Guatemala (Reparations and Costs)* Inter-American Court of Human Rights Series C No. 91 (22 February 2002) para 77.

of reparations decided by the Court.⁴⁹⁵ In this period, the jurisprudence included remedies directed, not just to repair individual harm, such as restitution, cessation and rehabilitation measures, recognition of responsibility, apologies and memorials, but it also ordered measures addressed to specific communities, in the form of development projects, and even measures oriented to benefit the society as a whole.⁴⁹⁶

Regarding the measures directed to discrete communities, the Court established important measures. For example, the Court ordered the implementation of development funds and programs in particular communities, with the purpose of developing social services that may contribute to the wellbeing of affected communities. In the case *Plan de Sánchez v. Guatemala*, the Court ordered the implementation of a development fund for health, education, production and infrastructure. It stated that the program should include a sewage system and potable water supply, as well as the maintenance and improvement of the road system within the affected communities, the supply of teaching staff trained in intercultural and bilingual teaching, and the establishment of a health centre in the village. It also ruled that these programs should be carried out independently of the existing public works financed by the national budget in these communities.⁴⁹⁷

In other cases of violations of indigenous communities' rights, the Court granted similar measures. In the case *Yakye Axa v. Paraguay*, the Court ordered the State to set up a development fund and program for the implementation of education,

⁴⁹⁵ According to Antkowiak, the number of reparations judgements nearly doubled in this year. Antkowiak *Remedial Approaches to Human Rights Violations* 371; and Cassel *Expanding scope and impact of reparations* 191.

⁴⁹⁶ Antkowiak *Remedial Approaches to Human Rights Violations* 372.

⁴⁹⁷ *Case of the Plan de Sánchez Massacre v. Guatemala (Reparations)* Inter-American Court of Human Rights Series C No. 116 (19 November 2004) para. 110.

housing, agricultural and health programs, with a value of US \$905,000.⁴⁹⁸ Similarly, in the case *Moiwana v. Suriname*, the Court ordered the composition of a development fund consisting of US \$1,200,000 which would be directed to health, housing and educational programs.⁴⁹⁹ In the Paraguayan cases, *Sawhoyamaxa*, *Saramaka* and *Xakmok Kasek*, the Court also ordered the establishment of community development funds with a value of US\$1,000,000,⁵⁰⁰ US\$ 600,000⁵⁰¹ and US\$700,000,⁵⁰² respectively, in order to finance educational, housing, agricultural, nutritional and health, projects, as well as to provide electricity and drinking water and to build sanitation infrastructure.⁵⁰³ These measures also reflect an interest of the Court in expanding its remedial powers in order to address the harm, not just of the individuals directly affected by the violations, but to the whole community.

In addition to this, the Court also ordered a series of measures directed to a larger section of the society, especially by ordering legislative reforms and training in human rights to public servants.⁵⁰⁴ Although previous developments were presented in other decision, it is in this period that the Court starts applying these measures

⁴⁹⁸ *Case of the Yakye Axa Indigenous Community v. Paraguay (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 125 (17 June 2005) para. 205.

⁴⁹⁹ *Case of the Moiwana Community v. Suriname (Preliminary objections, Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 124 (15 June 2005) para. 214.

⁵⁰⁰ *Case of the Sawhoyamaxa Indigenous Community v. Paraguay (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 146 (29 March 2006) para. 224.

⁵⁰¹ *idem* para 201.

⁵⁰² *idem* para 323.

⁵⁰³ *Case of the Xákmok Kásek Community v. Paraguay (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 214 (24 August 2010) para. 201.

⁵⁰⁴ Antkowiak *Remedial Approaches to Human Rights Violations* 382-384.

more consistently.⁵⁰⁵ Through these measures the Court explicitly developed a more structural approach to remedies, by ordering measures oriented to redress, not just the violation of a specific individual, but also oriented to prevent future harm.

In 2002, in *Caracazo v Venezuela*, for the first time, the Court referred explicitly to ‘guarantees of non-recidivism.’⁵⁰⁶ In this case, relating to the disproportionate use of force of the Venezuelan military forces in controlling protesters, the Court considered ‘[i]t is necessary to avoid by all means any repetition of the circumstances described.’⁵⁰⁷ As a consequence, the Court ordered the State ‘to take all necessary steps to avoid recurrence of the circumstances and facts of the instant case’⁵⁰⁸ by ordering it to take all necessary steps to educate and train all members of its armed forces in human rights and the standards to use weapons; adjust its operational plans regarding public disturbances to the requirements of respect for human rights; and to ensure that members of the armed forces and security agencies will use only those measures that are strictly required to control the situation. It is important to highlight here that the Court not only explicitly referred, in these measures, to take ‘necessary steps to avoid recurrence’⁵⁰⁹ but it also develops in detail, the type of measures that should be taken, ordering for example, among others, training courses, and the adjustment of operation plans.

Interestingly during this period, the Court refers to the concept of ‘society as a whole’, as a way to denote all the measures which have a broader aspect, beyond the individual. In the Case *Caballero Delgado y Santana v. Colombia*, the Inter-

⁵⁰⁵ The specific analysis of this will be undertaken in more depth in sections 2.2.1 and 2.2.4

⁵⁰⁶ *Case of the Caracazo v. Venezuela (Reparations and Costs)* Inter-American Court of Human Rights Series C No. 95 (29 August 2002) para 126.

⁵⁰⁷ *idem* para 127.

⁵⁰⁸ *idem* para 143 (4).

⁵⁰⁹ *idem*

American Commission requested the Court to publicly acknowledge its responsibility to the relatives of the victims and 'to Colombian Society as a whole.'⁵¹⁰ This interpretation was recognised by the Inter-American Court in the *Trujillo-Oroza v. Bolivia* case, by stating that 'the State has the obligation to take all necessary steps to ensure that these grave violations are not repeated, an obligation whose fulfilment benefits society as a whole.'⁵¹¹ According to Schonsteiner, this term has been used extensively by the Court in connection with the right to the truth, in the context of impunity, and in connection with the obligation to investigate, try and punish the perpetrators.⁵¹² The explicit use of this term by the court is also a signal of the increasing interest of the Court in a broader understanding of reparations, one which focuses not just on the individual relief, but also spreads its effects to wider society. According to Schonsteiner, 'after reviewing the contexts in which the Court has used the term 'society as a whole', it can be inferred that the Court intends for these awards to repair more than the harm to an individual victim.'⁵¹³

During this era the Court started to make explicit reference to the concept of 'guarantees of non-recidivism' or GNR, in both the analytical part and the operative paragraphs of the decisions.⁵¹⁴ For example, in the case *Caracazo v. Venezuela*,

⁵¹⁰ *Case of Caballero Delgado and Santana v. Colombia (Reparations and Costs)* Inter-American Court of Human Rights Series C No. 31 (29 January 1997) para 21.

⁵¹¹ *Case of Trujillo-Oroza v. Bolivia (Reparations and Costs)* Inter-American Court of Human Rights Series C. No. 92 (27 February 2002) para 110.

⁵¹² Judith Schonsteiner, 'Dissuasive Measures and the 'Society as a Whole': A working theory of reparations in the Inter-American Court of Human Rights' (2011) 23 *American University International Law Review* 127, pp. 141-143.

⁵¹³ *idem* 144.

⁵¹⁴ *Case of Bulacio v. Argentina (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 26 (18 September 2003) operative paragraph, para 162 (5).

the Court stated that the finding, exhumation, identification and delivery of the mortal remains to the next of kin will 'give impetus to the criminal proceedings in connection with the facts [and] provide guarantees of non-recidivism of the latter.'⁵¹⁵ It also mentioned that the training of all members of armed forces was necessary to avoid 'any repetition of the circumstances described.'⁵¹⁶ In harmony with this, in the operative paragraphs of the decision, the Court declared that 'the State must take all necessary steps to avoid recurrence of the circumstances and facts of the instant case,'⁵¹⁷ by ordering the training of all members of armed forces, the adjustment of operational plans regarding public disturbances to human rights standards, and to ensure that members of the armed forces will use only those physical means strictly required to control situations.

The Court's understanding of this concept is, however, not very clear. During this era, there were several decisions in which measures, currently understood by the Court as measures of rehabilitation⁵¹⁸ or satisfaction,⁵¹⁹ were labelled as GNR. For example, the provision of medical psychological treatment, actually a form of rehabilitation, and the order to carry out a public act of acknowledgment, which

⁵¹⁵ *Caracazo v. Venezuela* para 126.

⁵¹⁶ *idem* para 127.

⁵¹⁷ *idem* para 143 (4).

⁵¹⁸ During this period, the provision of medical psychological treatment is frequently discussed under the general title "other forms of reparation measures of satisfaction and GNR", see *Case of De la Cruz-Flores v. Peru (Reparations and Costs)* Inter-American Court of Human Rights Series C No.115 (18 November 2004) para 168.

⁵¹⁹ The publishing of the decision and the carrying out of a public act of acknowledgment is also usually discussed under the general title 'other forms of reparation measures of satisfaction and GNR', see *Case of Carpio-Nicolle et al v. Guatemala (Reparations and Costs)* Inter-American Court of Human Rights Series C No. 117 (22 November 2004) paras. 136-138.

should be considered a form of satisfaction, are usually discussed under the general title of 'other forms of reparation measures of satisfaction and GNR'. In fact, during this period, the Court analysed all of the non-monetary remedies under the general title 'other forms of reparations' and, later on, under the title 'other forms of reparation, measures of satisfaction and guarantees of non-repetition', without necessarily distinguishing among the different forms of reparations.

In other cases, the Court seems to exceed their powers by ordering extensive GNR, without adequately explaining their reasoning for this. For example, in the case *López Álvarez v. Honduras*, relating to the illegal privation of liberty of one person, and several irregularities in the judgment of this case, the Court ordered extensive reparation measures that covered the whole prison system. In concrete, the Court ordered the state to 'adopt, within a reasonable time, measures tending to create conditions that ensure the inmates an adequate diet, medical attention, and physical and sanitary conditions pursuant with the international standards on this subject.'⁵²⁰ Although the Court received some evidence that the victim was held in a Criminal Centre under unhealthy and overcrowded conditions,⁵²¹ there was no discussion of whether this was a systemic situation in the country's prison system, or if it was a particular policy of the centre where the victim was held.

2.1.4 The era of consolidation of remedial measures (2008- onwards)

After 2008 the Court decided more than one hundred cases, representing almost half of its case law. Although in most of the judgments the Court took a restrictive

⁵²⁰ *Case of López-Alvarez v. Honduras (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 141 (1 February 2006) para 209.

⁵²¹ *idem* para 108.

approach in the award of GNR, it is in this era that the Court consolidated its understanding of reparations. In contrast with the jurisprudential trend, the Court also decided some specific cases, with very ambitious orders, in cases related to women's rights and people with disabilities.

The first judgment where the Court developed ambitious guarantees was in the case *Cotton Field v. Mexico*. The case related to the disappearance, mistreatment and death of three women, two of them minors, who were subsequently found in a cotton field in Chihuahua, (Mexico). The cases were not isolated, but part of a systemic pattern of disappearances and murders of girls and women in the city.⁵²² In addition to measures of compensation, rehabilitation and satisfaction, the Court ordered extensive GNR.

In this decision, the Court starts to make clearer use of the concept of GNR, especially by distinguishing these measures as separate from rehabilitation and compensation, by introducing subtitles in the decision for each of them.⁵²³

The Court also became more precise in the drafting of measures. Instead of just providing a general measure ordering the state to 'amend its domestic law',⁵²⁴ as in previous cases where specific provisions of the domestic law contravened the Convention, the Court was very detailed in determining the specific norms that must be modified, and the normative standards that should be taken into account in the reform. In situations where the legislation was in line with international standards,

⁵²² *Case of González et al. ("Cotton Field") v. Mexico (Preliminary Objection, Merits, Reparation and Costs)* Inter-American Court of Human Rights Series C No.205 (16 November 2009) para 125 and 127.

⁵²³ *idem* paras 464, 544 and 550.

⁵²⁴ *Case of 'The Last Temptation of Christ' (Olmedo-Bustos et al.) v. Chile (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 73 (5 February 2001) para 103 (4)

GNR were oriented to guarantee full access to justice by forcing concrete reforms in the manner that operators of justice carry out their duties. This was translated into orders to: adopt protocols, manuals, prosecutorial investigation criteria, expert services, and services, to provide justice in the investigation of disappearances and sexual abuse, that should be modified in accordance with the Istanbul Protocol.⁵²⁵

Regarding training programs, the Court increased the spectrum of human rights courses by addressing them, not just to public officials, but also to the population in general. In particular, in this case the Court ordered the State to conduct educational programs on human rights and gender, for both the public officials and the general population of the State of Chihuahua, as a way to overcome the stereotyping of women.⁵²⁶

In this case the Court also ordered new measures and GNR. Specifically, among other measures, the Court ordered the creation of a web page concerning the women and girls who had disappeared, and a database containing the available, personal information on the missing women, their DNA and genetic information.⁵²⁷

Interestingly, in this case the Court also engaged in the development of the concept of 'transformative reparations'. This concept refers to the idea that reparations must be designed to change structural patterns of violations, when they happen in situations that are, per se, discriminatory, and not just in the re-establishment of the situation of the status quo ante, as it was before the violation. According to the Court:

[...] bearing in mind the context of structural discrimination in which the facts of this case occurred, which was acknowledged by the State, the reparations must be designed to change this situation, so that

⁵²⁵ *Cotton Field Orders*, numeral (18).

⁵²⁶ *idem* paras 530- 543.

⁵²⁷ *idem* Orders (20) and (21).

their effect is not only of restitution, but also of rectification. In this regard, re-establishment of the same structural context of violence and discrimination is not acceptable.⁵²⁸

Other international 'bodies', such as the Committee against Torture,⁵²⁹ and the Rapporteur on violence against women, Rashida Manjoo, have also made reference to this concept.⁵³⁰ Despite the theoretical achievements, there are certainly difficulties in the application of this concept in practice. Apart from the order to provide general human rights and general training to the population of Chihuahua, the Inter-American Court did not award any transformative measure in the Cotton Field case, but also did not make any new references to the concept of *transformative reparations* in its jurisprudence.⁵³¹ In general, the Court has rejected any request to order states to adopt public policies, programs, institutional reforms, and any other measure with a transformative component, in cases where such measures were clearly requested.

⁵²⁸ *idem* para. 450.

⁵²⁹ '[...] guarantees of non-repetition offer an important potential for the transformation of social relations that may be the underlying causes of violence [...] See UN. CAT, General Comment No. 3, (2012) *Implementation of article 14 by States parties* (2012) U.N. Doc. CAT/C/GC/3, para 18.

⁵³⁰ '[...] adequate reparations for women cannot simply be about returning them to where they were before the individual instance of violence, but instead should strive to have a transformative potential'. UN, HRC, 'Report of the Special Rapporteur on violence against women, its causes and consequences', Rashida Manjoo (19 April 2010) A/HRC/14/22, para 31.

⁵³¹ Ruth Rubio-Marin and Clara Sandoval, 'Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgment' (2011) 33 *Human Rights Quarterly* 1062, p. 1090.

For example, in the case *Atala Riffo v. Chile*⁵³² the Court considered that, since the violations did not result from a problem with the laws, per se, it was not appropriate, in the circumstances of the present case, to order the adoption, modification or adjustment of specific domestic laws.⁵³³

The combination of very progressive statements in theory, with more modest results in practice, shows a clear dichotomy in the jurisprudence of the Inter-American system. While the introduction of the concept of ‘transformative reparations’ was an important step forward in the development of the jurisprudence of the Court, it seems there is not a real will from the Inter-American Court to engage in truly transformative reparations. As a result, some commentators have expressed that this jurisprudence on ‘transformative reparations’ may be an obstacle rather than progress in the protection of human rights, in as much as the concept is not well developed in international law and the Court did not award any actual measures.⁵³⁴ In order to see further development of this concept, it will be up to the petitioners and the Inter-American Commission to adequately argue the request of these measures, to academics to clarify the links between GNR and ‘transformative reparations’, and to the Court to develop a consistent theory for the awarding of such measures.

The boldness of the Court in the Cotton Field decision is maintained in other specific cases during this period. For example, in the cases *Radilla Pacheco, Fernández-Ortega and Rosendo Cantú v. Mexico*, the Inter-American Court ordered very specific measures in terms of legislative reform, ordering the state to adopt ‘the relevant

⁵³² *Case of Atala Riffo and daughters v. Chile (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 239 (24 February 2012).

⁵³³ *idem* para 280.

⁵³⁴ Clara Sandoval, ‘The Inter-American System and Approach’, in Scott Sheeran and Nigel Rodley (eds) *Routledge Handbook of International Human Rights Law* (Routledge, 2013) p. 439.

legislative reforms to conform Article 57 of the Military Code of Justice to international standards.⁵³⁵

In the case *Fornerón and daughter v. Argentina*, the Court was not shy to grant orders that compromised the budget capacity, or the internal organization of an institution, in some way. It ordered the government ‘to implement, [...] with the respective budgetary provision, a compulsory program or course for judicial agents [...] who intervene in the administration of juvenile justice’⁵³⁶ in an Argentinean province. This measure was necessary, taking into account the difficulty of securing the resources to fund the program in a federal system, as the Argentinian system required that local authorities (not just the general government) approve the budget.

The Court also granted measures that required the establishment of new institutional mechanisms of control, with corresponding budget and organizational implications. In the case *Furlán and Family v. Argentina*, the Court ordered the state to establish an interdisciplinary group in order to assist the victim in his educational, vocational, and labour insertion.⁵³⁷ When carrying out this duty, the State has a duty to enforce the obligation of ‘active transparency’ in relation to health and social security benefits. This duty implies the obligation ‘to provide the public with the maximum amount of

⁵³⁵ *Case of Radilla-Pacheco v. Mexico (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No. 209 (23 November 2009) para 342; *Case of Fernández Ortega et al v. Mexico (Preliminary Objection, Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C, para 239 (30 August 2010); *Case of Rosendo Cantú et al v. Mexico (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No. 216 (31 August 2010) para 222.

⁵³⁶ *Case of Fornerón and Daughter v. Argentina (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C. No. 242 (27 April 2012) para 182.

⁵³⁷ *Case of Furlán and Family V. Argentina (Preliminary Objections, Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C. No. 246 (31 August 2012) para 288.

information, in a proactive manner, regarding the information needed to obtain said benefits. This information should be comprehensive, easily understood, available in simple language and up to date.⁵³⁸

The boldness of the Court expressed in these high-profile cases is, however, not present in the rest of the jurisprudence of the Court during this period, where the Court was more reluctant to the award of GNR. This shows the lack of consistency of the Court in the criterion to award GNR, one that is not fair for those victims of less high profile cases.

2.2 The scope of the measures: different forms of GNR

The jurisprudence of the Inter-American Court of Human Rights is characterized by the variety of GNR the tribunal has awarded. Such measures vary in the way they interfere with state sovereignty, ranging from human rights courses and campaigns, to the standardization of protocols of actions and manuals, legislative reforms, strengthening and reform of state institutions, and even, in some cases, the consideration of the adoption of public policies and programs. The next section will discuss in detail the characteristics and circumstances in which these measures have been awarded.

2.2.1 Human rights courses and campaigns

As already noted, the Court ordered GNR for first time in 2002, in the *Caracazo v. Venezuela Case*. After 2002 the Court granted these measures with some regularity, but it was after 2008 that the measure became more common in the jurisprudence of

⁵³⁸ idem para 294.

the Court. Since 2012, the Court has been much more detailed in the wording of these measures, specifying the type of topics that should be covered in the curricula. For example, while in the *Caracazo v. Venezuela Case* the Court ordered the state to ‘take all necessary steps to avoid recurrence of the circumstances and facts of the instant case including training of members of armed forces [...]’, in *Radilla Pacheco v. Mexico* the Court ordered the implementation of permanent courses in the ‘analysis of the jurisprudence of the Inter-American system in reference to military criminal jurisdiction’, and the ‘due investigation and prosecution of facts that constitute forced disappearance of persons’. In the last case, the Court also mentioned that public servants should be trained in the use of circumstantial evidence, indicia, presumptions and the assessment of systematic patterns, among other aspects.⁵³⁹ Also, in the case *Nadege Dorzema v. Dominican Republic*, the Court ordered the state to carry out training sessions to ‘members of the armed and police forces, agents responsible for border control, and agents responsible for the administration of justice.’⁵⁴⁰

Such courses have been directed at various public servants. Although in the beginning the Court primarily addressed this measure to the armed forces and security agencies, it has also directed these courses to, among others: police officials,⁵⁴¹ agents responsible for responding to requests for access to state-held information,⁵⁴² judicial agents,⁵⁴³ military criminal court staff,⁵⁴⁴ border control agents

⁵³⁹ *Radilla-Pacheco v. Mexico* para 347.

⁵⁴⁰ *Case of Nadege Dorzema et al v. Dominican Republic (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 25 (24 October 2012) para 267.

⁵⁴¹ *Case of Goiburú et al v. Paraguay (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 153 (22 September 2006).

⁵⁴² *Case of Claude-Reyes et al v. Chile (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 151 (19 September 2006).

and agents in charge of migratory procedures.⁵⁴⁵ The Court has gone even further, by ordering educational programs for the general public of a state, in order to overcome the general situation of discrimination against women.⁵⁴⁶ In the Cotton Field case the Court also ordered an annual report elaborated by the state, indicating the actions taken.

The Court has also ordered courses on a large variety of human rights topics, such as: the prevention of torture,⁵⁴⁷ limits of military criminal jurisdiction and investigation and prosecution of forced disappearance,⁵⁴⁸ diligent investigation in cases of sexual violence,⁵⁴⁹ and, the human rights of indigenous peoples.⁵⁵⁰

Regarding ESC rights the Court has ordered training programs directed to health care professionals and judicial officials, in relation to patient's rights,⁵⁵¹ reproductive

⁵⁴³ *Case of Kichwa Indigenous People of Sarayaku v. Ecuador (Merits and Reparations)* Inter-American Court of Human Rights Series C No.245 (27 June 2012); *Case of Artavia Murillo et al. (in vitro fertilization) v. Costa Rica (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No.257 (28 November 2012); *Case of Fornerón and daughter v. Argentina (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No.242 (27 April 2012) para 182.

⁵⁴⁴ *Case of Gutiérrez Soler v. Colombia (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 132 (12 September 2005).

⁵⁴⁵ *Nadege Dorzema et al v. Dominican Republic* paras 269-270.

⁵⁴⁶ *Cotton Field Orders*, para 543.

⁵⁴⁷ *Case of Bayarri v. Argentina (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No.187 (30 October 2008) para 182.

⁵⁴⁸ *Radilla-Pacheco v. Mexico* para 347.

⁵⁴⁹ *Rosendo-Cantú and other v.* para 246; *Fernández Ortega et al v. Mexico* para 260.

⁵⁵⁰ *Sarayaku v. Ecuador* para 302.

⁵⁵¹ *Case of Albán-Cornejo et al v. Ecuador (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 171 (22 November 2007) para 164.

rights, and non-discrimination.⁵⁵² The Court has also ordered national campaigns in order to inform and sensitize people about the importance of the work of environmental defenders;⁵⁵³ in detection and attention to problems of violence against women;⁵⁵⁴ and, more widely, the dissemination of patient's rights.⁵⁵⁵ When ordering the latter, the Court has also ordered the state to act with 'active transparency', which implies the obligation to provide information in a proactive, comprehensive and simple manner.⁵⁵⁶

2.2.2 Standardization of protocols of action and manuals

Legislative reforms do not necessarily guarantee that real changes take place in practice. In fact, without appropriate operationalization, it is almost illusory to expect adherence to the duties of states to respect, protect and ensure human rights. For public servants that carry out their work every day, the establishment of clear protocols of action and manuals is indispensable to clarify their human rights obligations.

Taking into account this idea, since 2008, the Court has ordered states to carry out the standardization of protocols of action and manuals used in the attention and

⁵⁵² *Case of Artavia Murillo et al. (in vitro fertilization) v. Costa Rica (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No.257 (28 November 2012) para 341.

⁵⁵³ *Case of Kawas-Fernández v. Honduras (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No.196 (3 April 2009) para 124.

⁵⁵⁴ *Fernández Ortega et al v. México* para 278.

⁵⁵⁵ *Albán-Cornejo et al v. Ecuador* para 162-163.

⁵⁵⁶ *Furlán and Family v. Argentina* para 294.

investigation of human rights violations in accordance with international standards. These measures have been applied by the court particularly in cases of sexual violence against women. In the case *Gonzalez et al (Cotton Field) v. Mexico* the Court ordered the state to 'continue standardizing all its protocols, manuals, prosecutorial investigation criteria, expert services and services to provide justice that are used to investigate disappearance and sexual abuse in accordance with the Istanbul Protocol and other international norms.'⁵⁵⁷ Similarly, in the cases *Fernández-Ortega v. Mexico* and *Rosendo Cantú v. Mexico*, both about the rape of indigenous women, by soldiers, when the women were carrying out daily life activities, the Court found serious faults, such as: the lack of female doctors, and chemical reagents, to perform the medical examination;⁵⁵⁸ indifference of the officials in charge of receiving the complaint,⁵⁵⁹ and, a lack of translators to receive the complaint.⁵⁶⁰ In both cases the Mexican state was found responsible for the lack of due diligence in the investigation and punishment of the rape of the women.⁵⁶¹ As a consequence, the Court ordered the Mexican government to standardize the action protocol used in the attention and investigation of rape, taking into account the Istanbul Protocol and the Guidelines of the World Health Organization.⁵⁶²

⁵⁵⁷ *Cotton Field Orders* para 602(18).

⁵⁵⁸ *Fernández-Ortega et al. v. Mexico* paras 184 and 197.

⁵⁵⁹ *Fernández-Ortega et al. v. Mexico* para 195 (i) ,196 and 197; *Rosendo-Cantú and other v. Mexico* para 179 (iii).

⁵⁶⁰ *Fernández-Ortega et al. v. Mexico* para 195. (ii); *Rosendo-Cantú and other v. Mexico* para 179 (iv).

⁵⁶¹ *Fernández-Ortega et al. v. Mexico* para 198; *Rosendo-Cantú and other v. Mexico* para 182.

⁵⁶² *Fernández-Ortega et al. v. Mexico* para 256; *Rosendo-Cantú and other v. Mexico* para 242.

As in the granting of legislative measures, the Court has been very detailed in stating not only the type of measures that should be the object of standardization, but also the type of standards that should be taken into account in order to carry out such updating. While these standards are soft law, they do establish the most clear and updated criteria for the regulation of specific topics. Without the use of such standards, the regulation and updating of protocols and manuals would be even more difficult, lacking an adequate model of reference.

As will be discussed in Chapters IV and V, these measures may have an important impact in the realisation of ESC rights, where, often, the lack of operational methods for the provisions contained in the legislation, make the rights illusory.

2.2.3 Capacity building and institutional reform

The Inter-American Court has also ordered measures that have a specific impact in the creation, strengthening, and reform of state institutions. Particularly in cases related to disappearances, the Inter-American Court has shown an active involvement with the strengthening of state institutions, in order to prevent the commission of these facts. Among other measures, the Court has ordered states to create search web pages for missing people,⁵⁶³ to establish databases with personal and genetic information,⁵⁶⁴ to implement a system of genetic information in order to

⁵⁶³ *Cotton Field* para 508; *Case of the "Las Dos Erres" Massacre v. Guatemala (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No.211 (24 November 2009) paras 271-274; *Case of Serrano-Cruz Sisters v. El Salvador (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 120 (1 March 2005) paras 189-191.

⁵⁶⁴ *Cotton Field* para 512.

determine the blood relationship of victims,⁵⁶⁵ to set up or improve national registries of detainees, in order to reduce the risk of torture and disappearance.⁵⁶⁶ It has also awarded measures to establish the truth of the facts, by welcoming the establishment of a Truth National Commission to clarify facts of disappearances,⁵⁶⁷ and by recommending the state to allow the participation of civil society in the establishment of a national commission to trace young people who have disappeared.⁵⁶⁸ In other cases related to disappearances, the Inter-American Court has also ordered states to strengthen certain institutions, in order to advance the investigation and prosecution of this crime; ordering states to provide an Inter-Institutional Council for the clarification of Forced Disappearance,⁵⁶⁹ and to equip the

⁵⁶⁵ *Case of Anzualdo-Castro v. Peru (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No.202 (22 September 2009) para 189.

⁵⁶⁶ *Case of the 'White Van' (Paniagua-Morales et al) v. Guatemala (Reparations and Costs)* Inter-American Court of Human Rights Series C No. 76 (25 May 2001) para 203; *Case of Juan Humberto Sanchez v. Honduras (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No. 99 (7 June 2003) para 189; *Case of Cabrera-Garcia and Montiel-Flores v. Mexico (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No.220 (26 November 2010) para 243.

⁵⁶⁷ *Case of Gomes-Lund et al ("Guerrilha do Araguaia") v. Brazil (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No.219 (24 November 2010) para 297.

⁵⁶⁸ *Serrano-Cruz Sisters v. El Salvador* paras 183- 188.

⁵⁶⁹ *Case of Ticona-Estrada et al v. Bolivia (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No.191 (27 November 2008) para 173.

Prosecutor's office,⁵⁷⁰ with the necessary human and material resources to effectively carry out their functions.

In other cases relating to the inadequate conditions of detention, the Inter-American Court has ordered the general improvement of prisons and detention centres⁵⁷¹ and, in some cases, it has also ordered the creation of facilities to accommodate persons detained for suspected immigration violations.⁵⁷²

In cases related to the prevention of sexual violence against women, the Inter-American Court has ordered the state to improve and strengthen specific services and institutions. In the cases *Rosendo-Cantú v. Mexico*, and *Fernández Ortega v. Mexico*, the Court ordered Mexico to strengthen services for treating female victims of sexual violence in health centres⁵⁷³ and to follow the recommendations of other institutions that recommended the decentralization of services which are mainly located in the cities, in order to prevent violence against women, and to improve the access of indigenous women to telephones.⁵⁷⁴

These measures require a higher level of effort from states as they have to carry out the design, budget appropriation, and both legal and administrative procedures, in order to implement them. As a consequence, the challenge of the Inter-American

⁵⁷⁰ *Case of Heliodoro-Portugal v. Panama (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No.186 (12 August 2008) para 263.

⁵⁷¹ *Case of Yvon Neptune v. Haiti (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No.180 (6 May 2008) para 183; *Case of Lori Berenson-Mejia v. Peru (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No.119 (25 November 2004) para 241.

⁵⁷² *Case of Vélez Loo v. Panama (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No. 218 (23 November 2010) para 272.

⁵⁷³ *Rosendo-Cantú and other v. Mexico* para 260.

⁵⁷⁴ *idem* para 264; *Fernández-Ortega et al. v. Mexico* para 278.

Court is to duly justify these measures in order not to reduce the margin of appreciation, which states have in the design of their own institutions.

2.2.4 Legislative reforms

Although legislative measures were first granted in 1997, in the cases *Loayza Tamayo v. Peru*, and then again in 1999 in *Castillo-Petruzzi v. Peru*,⁵⁷⁵ they have been more consistently granted since 2001, with the *Olmedo Bustos et al v. Chile Case*. In this case the Chilean State had banned the exhibition of the film ‘The last temptation of Christ’, relying on article 19(12) of the Chilean Constitution which establishes a ‘system of censorship for the exhibition and publicity of cinematographic productions.’⁵⁷⁶ The Inter-American Court found that previous censorship, as was established in the Chilean Constitution, represented a violation of the freedom of expression, set up in Article 13 of the Convention. As a consequence, the Court ordered the State to ‘amend its domestic law, within a reasonable period, in order to eliminate prior censorship to allow exhibition of the film.’⁵⁷⁷ The case is relevant since it ordered the modification of a constitutional provision in order to make it compatible with the American Convention.

From 2001 onwards, legislative measures have been applied in a wide range of topics related to:

⁵⁷⁵ *Case of Castillo-Petruzzi et al. v Perú* para 226 (14).

⁵⁷⁶ *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 73 (5 February 2001) para 60.

⁵⁷⁷ *idem* para 103 (4).

'children's rights, conditions of detention, corporal punishment, death penalty, extrajudicial executions, forced disappearances, freedom of expression, judicial independence, juvenile detention, indigenous land and property titles, kidnapping or abduction, military jurisdiction, obligation to investigate, prosecute and punish, political rights, principle of legality, procedures for acquiring nationality, registers of detainees, regulation of the recourse of habeas corpus, right of judicial appeal, states of exception and suspension of guarantees, terrorism, use of force by State agents and use of information.'⁵⁷⁸

Regarding the level of specificity, they have varied over the course of time. In early decisions the Court was prone to order general reforms, ordering the states to 'adopt the legislative, administrative and any other measures that are necessary in order to adapt [a state's] legislation.'⁵⁷⁹ In other cases, such as in the case *Olmedo Bustos v. Chile*, the Court ordered specific measures oriented to eliminate, include, or modify, specific pieces of legislation. For example, the Court has ordered the elimination of prior censorship from the Chilean Constitution,⁵⁸⁰ the Corporal Punishment Act from the domestic legislation in Trinidad and Tobago,⁵⁸¹ and, most recently, it has ordered the annulment of the prohibition to practice In vitro Fertilization (IVF) in Costa Rica.⁵⁸² In other cases, the Court has also ordered the inclusion of specific

⁵⁷⁸ Sofía Galván, 'Legislative measures as guarantees of non-repetition: a reality in the Inter-American Court, and a possible solution for the European Court' (2009) 49 *Revista IIDH* 69, pp.80-82.

⁵⁷⁹ *Case of 'Street Children' (Villagrán-Morales et al) v. Guatemala (Reparations and Costs)* Inter-American Court of Human Rights Series C No.77 (26 May 2001) para 132 (5).

⁵⁸⁰ *Olmedo-Bustos et al* para 103 Orders (4).

⁵⁸¹ *Case of Caesar v. Trinidad and Tobago (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No.123 (11 March 2005) para "Decides" (3).

⁵⁸² *in vitro fertilization* paras 336 and Orders (2).

provisions, usually in criminal legislation, for example, the order to define both the forced disappearance of persons,⁵⁸³ and the sale of children,⁵⁸⁴ as an offence in criminal codes, and to approve an Ethics Code.⁵⁸⁵

The Court has also ordered the modification of specific pieces of legislation that were found to be incompatible with the Convention. It has largely 'ordered to conform to international standards' specific provisions of domestic legislation, in cases regarding the definition of the crimes of kidnapping and abduction,⁵⁸⁶ forced disappearance,⁵⁸⁷ and, military jurisdiction,⁵⁸⁸ among others.

Only in one decision, *Raxcaco-Reyes v. Guatemala*, was the Court detailed in its identification of the concrete elements different forms of the crime of kidnapping or abduction should take into account, in order to be compatible with the Convention.⁵⁸⁹ In this case a person was sentenced to death via the application of a law that

⁵⁸³ *Trujillo-Oroza v. Bolivia (Reparations)* paras 98 and Orders (2)

⁵⁸⁴ *Fornerón and daughter v. Argentina* Orders (4)

⁵⁸⁵ *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No.182 (5 August 2008) para 253 and Orders para 19; *Case of Chocrón v. Venezuela (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No. 227 (1 July 2011) para 163.

⁵⁸⁶ *Case of Raxcaco-Reyes v. Guatemala (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No.133 (15 September 2005) para "Orders" (5).

⁵⁸⁷ *Case of Goiburú et al v. Paraguay (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 153 (22 September 2006) paras 179 and Orders (12).

⁵⁸⁸ *Radilla-Pacheco v. Mexico* para 342; *Fernández-Ortega et al v. Mexico* para 239; and *Rosendo-Cantú and other v. Mexico* para 222.

⁵⁸⁹ *Raxcaco-Reyes v. Guatemala* para 132 (i).

punished, with the death penalty, the perpetrators of the crime of kidnapping or abduction. The Court found that such legislation which 'punishes any form of kidnapping or abduction with the mandatory death penalty and expands the number of crimes punishable with this sanction',⁵⁹⁰ violated the rights to life (Article 4), and that the state must adopt legislative or other measures necessary to give effects to the rights in the Convention (Article 2). The Court ordered the modification of this article in the Criminal Code, in very precise terms:

'It orders that the State should adopt the legislative, administrative and any other measures necessary to adapt its domestic legislation to the American Convention; in particular: (i) Modification, within a reasonable period, of Article 201 of the Penal Code in force, in order to define various specific crime categories that distinguish the different forms of kidnapping or abduction, based on their characteristics, the gravity of the facts, and the circumstances of the crime, with the corresponding provision of different punishments, proportionate to each category, and the empowerment of the courts to individualize punishment in keeping with the specifics of the crime and the perpetrator, within the maximum and minimum limits that each crime category should include, This modification should, under no circumstances, expand the list of crimes punishable with the death penalty established prior to ratification of the American Convention.'⁵⁹¹

The specificity of this order seems to be justified due to the gravity of the rights involved. In fact, the provision deals with the application of the death penalty which is

⁵⁹⁰ idem para 88.

⁵⁹¹ idem para 132 (i).

considered a clear violation of the right to life under the American Convention. As a consequence, even though the order establishes a clear directive to the legislative power in the modification of these norms, this seems to be justified for the relevance of the rights involved.

The granting of these measures imposes several challenges for the Court. As Antkowiak has pointed out, three elements are crucial for the development of legislative measures: 'they must be clear enough to be understood and followed by frequently unenthusiastic bureaucrats, [...] concrete enough to be verifiable by the Court in the supervisory process, [and] they should be sufficiently flexible to allow the sovereign state some discretion.'⁵⁹² In the granting of legislative measures, the Court seems to have taken a proactive role by establishing, not only those cases where domestic provisions were against international standards, but also by establishing the elements that should be taken into account by congresses and parliamentary institutions, in order to adapt its legislations.

2.2.5 Adoption of public policies and plans of action

While the Court has not hesitated in granting measures ordering the training of public officials, the updating of manuals, legislative measures, and, in some circumstances, the strengthening and reform of state institutions, it has been very cautious in granting measures that order the state to adopt public policies, programs and plans. So far, the Court has not accepted any of the requests made by the Commission to order the adoption of public policies oriented to guarantee specific rights.

⁵⁹² Antkowiak *Remedial Approaches to Human Rights Violations* 384.

The reasons for these rejections have always been linked to procedural issues. In the case *Gonzales et al (Cotton Field) v. Mexico* case, the Commission requested the Court to design a coordinated public policy in order to prevent facts of sexual violence, and to investigate, prosecute and punish those responsible.⁵⁹³ Similarly, in the case *Rosendo-Cantu v. Mexico*, the Commission requested, as part of the GNR, the design of a participatory program to contribute to the reinsertion, into the community, of indigenous women who had been the victims of rape.⁵⁹⁴ In both cases, the Inter-American Court rejected the request, arguing that the Commission did not adequately demonstrate that the current policies in place did not appropriately protect the rights violated.⁵⁹⁵ The argument of the Court is interesting as it did not question the legitimacy of this type of measures in the repertoire of reparation measures established by the Court. This is an important step forward, as it implicitly recognizes the possibility of requesting the creation, or modification, of public policies and programs when it is proved they are part of the root causes of a violation.

However, the fact that the Court did not grant these measures raises several concerns regarding the burden and standard of proof required by the Inter-American Court. In respect of the burden of proof to demonstrate the non-existence or non-effectiveness of policies to prevent the repetition of the facts, the jurisprudence is not

⁵⁹³ *Cotton Field* paras 474-475.

⁵⁹⁴ *Rosendo-Cantú and other v. Mexico* para 236.

⁵⁹⁵ In the *Rosendo Cantú Case* the Court argued that, since the state provided information about some public policies in place and that the Commission did not object to the validity of the measures, the Court found that there was not enough evidence or argumentation to grant the measures (*Rosendo-Cantú and other v. Mexico* paras 237-238). In the *Cotton Field Case* the Court argued that, without information about any structural defects and problems of implementation and impact, it was unable to order such measures. *Cotton Field* para 495.

clear. On the one hand, it is generally established that the party making the allegation has the burden to prove the facts on which the claim is based.⁵⁹⁶ As changes in the definition of public policies may be considered an illegitimate interference in the definition of state's own policies, it makes sense that the Inter-American Court requires from petitioners extensive evidence, in order to justify the award of such measures. On the other hand, at least in cases of systemic violations of human rights, it seems disproportionate to expect the victim to prove that the policies and programs settled by the state do not actually protect the right violated, especially when information about the content and effectiveness of some policies, relies on the state. In this sense, Sandoval and Rubio have argued that, in these circumstances, the Court should reverse the burden of proof⁵⁹⁷ as has been its consistent practice in those cases where evidence cannot be produced without the State's cooperation, such as in cases of enforced disappearances.⁵⁹⁸

In relation to the problems of evidence that the victims may encounter, it should be noted that the Inter-American Commission could take an active step to assume part of the burden to prove the lack of policies, or the ineffectiveness of the existent ones. In particular, the Inter-American Commission could make use of the extensive information collected in its country and thematic reports, as well as the documentation of other cases, in order to prove the lack of effective policies to prevent the facts, and, how this is intrinsically linked with the eventual repetition of the violation. The Inter-American Commission could also refer to the reports of other

⁵⁹⁶ *Velásquez Rodríguez Case (Merits)* para 121.

⁵⁹⁷ Rubio-Marín and Sandoval *Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights* 1088.

⁵⁹⁸ *Bámaca Velásquez v. Guatemala* paras 152-153; Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge, 2nd edition, 2013) p. 171.

domestic and international bodies, received in the preparation of the case. After all, one of the main pillars of the work of the Commission is to monitor the human rights situation of the Member States.⁵⁹⁹ In doing so, it has a privileged view of the general situation of remedies and policies in the states, which facilitate the Commission's role in the proving and requesting of programs and policies of prevention.

Regarding the type of proof required, the Court would have to clarify the type of standard applied to these situations. In the case *Gonzales et al (Cotton Field) v. Mexico* the Court mentioned that it was unable to rule on the existence of an integral policy, without information on: 'any structural defects that crosscut these policies, any problems in their implementation, and their impact on the effective enjoyment of their rights by the victims of this violence.'⁶⁰⁰ Impact and effectiveness evaluations, in the analysis of legal cases, impose new challenges for both the petitioners and the Court who are not used to the assessment of such variables. Taking into account the difficulty of carrying out these studies and the cost associated with them, the Court could be flexible in the type of standard accepted to prove this. In this aspect, the Court has also specified that result indicators can also be used as a tool to measure such variables.⁶⁰¹ However, there is not yet clarity as to how result indicators can be adequately used in measuring the impact and effectiveness of public policies. Further research is it necessary in this regard.

In other cases the Court has rejected the request for GNR, arguing that the request was not presented in a timely manner. In the case *Fernández Ortega v. Mexico*, the

⁵⁹⁹ Statute of the Inter-American Commission on Human Rights (adopted October 1979) Res 447, Article 18 (a), (b) and (c).

⁶⁰⁰ *Cotton Field* para 495.

⁶⁰¹ The Court also mentioned that it "does not have result indicators in relation to how the policies implemented by the State could constitute reparations with a gender perspective" (*Cotton Field* para 495).

Commission requested similar measures to those requested in the cases *Gonzales et al (Cotton Field) v. Mexico* and *Rosendo Cantú v. Mexico*. The Court, however, considered that the request 'was not presented at the opportune procedural moment' which should be in the respective application and brief of pleadings and motions.⁶⁰²

In other cases, the Court has rejected the request for new programs and public policies, arguing that the laws in which these programs are based did not violate the Convention. For example, in the case *Atala v. Chile*, the Commission requested the Court to adopt 'legislation, public policies, programs and initiatives to prohibit and eradicate discrimination based on sexual orientation in all areas of the exercise of public power, including the administration of justice.'⁶⁰³ At the same time, the victim's representative requested the Court to send a 'message of utmost urgency' regarding a draft law, that was intended to establish anti-discriminatory measures, in order to ensure that said draft expressly prohibited discrimination based on sexual orientation, and that it provided a legal remedy by which to claim for a violation. Most of the argumentation of the Court was related to the request of 'message of utmost urgency' laws, but the argumentation did not address the broader request of both the Commission and the victims' representative, to provide positive measures in the form of programs, policies and legal remedies to protect people against discrimination. In this case, the Court concluded that the petitioners did not provide sufficient facts to suggest that the violations resulted from a problem with the law, *per se*, but that the application of the law.⁶⁰⁴ By doing this, the Court focused on the legal dimension of the measure, particularly in the 'message of utmost urgency', but did not address the request oriented to provide, for example, legal remedies to claim protection. At the end of the case, instead of granting the 'message of utmost urgency', the Court took

⁶⁰² *Fernández Ortega et al v. Mexico* para 280.

⁶⁰³ *Atala Riffo and daughters v. Chile* para 273.

⁶⁰⁴ *Atala Riffo and daughters v. Chile* paras 279-284.

a halfway position by, *motu proprio*, ordering Chilean judges to carry out a 'convention control', *ex officio*, between domestic law and the American Convention, in the analysis of discrimination cases.

2.2.6 Conclusion

This section has shown the variety of measures that the Court has awarded as GNR. In all cases, a higher or lower level of intrusion in the sovereignty of the state takes place. As is to be expected, the higher the level of intrusiveness of the measure, the higher the standard of proof. Whereas human rights courses, standardization of protocols of action and manuals, and some form of institutional strengthening imply low levels of intrusion in the sovereignty of states, they are more or less common forms of GNR. However, as legislative measures and public policies require a stronger intrusion in the sovereignty of states, they require a higher level of argumentation and of evidence to be ordered by the Court. For example, in respect of legislative measures, the Inter-American Court has indicated that it is necessary to prove there is a violation of Article 2 of the American Convention. This raises the standard for the application of this type of measures. Also, in the request of public policies and programs, the Court has been extra cautious in raising the standard of proof for the award of such measures, by indicating that the parties should prove the lack of, either existence or effectiveness, of the policies in place. Despite the attempts of the Court to create a narrower criterion for the award of remedies, still GNR are commonly requested in almost every case, and some form of GNR is generally awarded by the Court in most of its judgments. This necessarily raises concerns about the respect to the sovereignty of states, and the difficulties for the

compliance of these measures.⁶⁰⁵ Even though the Court has made efforts in order to narrow down the criteria to award GNR, it has not necessarily agreed on a coherent criterion. The next section will discuss some of the circumstances in which GNR have been granted, and some of the criteria that the Court could use in order to provide such measures.

2.3 Under which circumstances does the Inter-American Court of Human Rights grant GNR?

As a general rule, every violation of the American Convention entitles the victims to request reparations from the Commission or the Court, for the harm suffered. As already stated, reparations may take the form of restitution, compensation, rehabilitation, satisfaction and GNR. These are not exclusive options but may be requested alternatively, or all together, depending on the circumstances of the case.

The Court, however, has not established precisely under which circumstances GNR can be granted. As a consequence, it has become a general practice for petitioners to request some form of GNR in almost every case. Even though the Court has tried to narrow down the criteria for the granting of GNR, by requiring the demonstration of a 'generalized pattern' of violations, such criteria is still not consistent. The next sections will present both the procedural and substantive standards that the Court has used in order to award these measures.

2.3.1 Procedural standards in the awarding of GNR

⁶⁰⁵ Shelton *Remedies in International Human Rights Law* 290.

In recent years, the Court has narrowed down the criteria it applies in ordering reparation measures, by setting several procedural standards. First, GNR should be generally requested by either the Inter-American Commission or the petitioners. The Inter-American Court could also award measures in application of the *iura novit curia* principle,⁶⁰⁶ even when they have not been requested. This has happened only in exceptional circumstances, such as in the case *Gonzales et al (Cotton Field) v. Mexico*, where the Court ordered the state to offer a program of education for the general public of the State of Chihuahua, one that was not requested by any of the parties.⁶⁰⁷

The Inter-American Court has also established that measures should be requested at the right procedural opportunity: either when the Inter-American Commission brings a case to the Court and/or when the petitioners (the victims or their representatives) bring the brief containing pleadings, motions and evidence.⁶⁰⁸ The Court has rejected the request for GNR in several cases, arguing that the request was made out of time.⁶⁰⁹

The Inter-American Court has also established the need to demonstrate a causal link between the facts of the case, the alleged violation and the damage alleged. The Court has stated that:

⁶⁰⁶ *iura novit curia* is a Latin, legal maxim expressing the principle that 'the Court knows the law' and therefore it is not necessary to prove particular pieces of law in the litigation of a case.

⁶⁰⁷ *Cotton Field* para 543.

⁶⁰⁸ Rules of procedure of the Inter-American Court of Human Rights, articles 35 and 40.

⁶⁰⁹ *Case of Tiu Tojin v. Guatemala (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 190 (26 November 2008) para 121; *Vélez Loor v. Panama* para 298.

'[...] reparations must have a causal link to the facts of the case, the violations declared and the damage attributed to those violations, as well as to the measures requested in reparation of the corresponding damages. Therefore, the Court must examine that concurrence in order to duly rule in keeping with the law.'⁶¹⁰

In respect of the link between the facts and the measures, the Court has rejected measures that go beyond the facts discussed in the case. For example, in the case *Escué-Zapata v Colombia*, the Court rejected the request of the representatives to order the state to adopt measures to grant the indigenous community rights over their ancestral territory, and to create a plan that facilitated the restructuring of the community's plan of life.⁶¹¹ The case related to the extra-judicial killing of Mr Zapata, who worked in the defence of the indigenous community's land. Since the GNR requested were related to the indigenous community and not to the facts discussed in the case (i.e. the killing of the victim) the Court decided that the petitions should not proceed.⁶¹²

In respect of the link between the violation occurred and the measures requested, the Court rejected the petition to modify specific legislation, arguing that a violation of Article 2 of the Convention was not demonstrated. In the cases *Garibaldi v. Brasil*, relating to the failure of the state to investigate and punish the murder of a person

⁶¹⁰ *Case of Abrill Alosilla et al v. Peru (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 223 (4 March 2011) para 87; *Ticona Estrada et al v. Bolivia* para 110; *Case of Gomes Lund et al (Guerrilha do Araguaia)* para 246 and; *Case of Cabrera Garcia and Montiel Flores (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No. 220 (26 November 2010) para 209.

⁶¹¹ *Case of Escué-Zapata v. Colombia (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No.165 (4 July 2007) paras 181 and 182.

⁶¹² *idem* para 185.

during an extrajudicial operation to evict families of landless workers, and, *Escher et al v. Brasil*, relating to the unlawful telephone interception by the military police, of conversations of members of several organization; the representatives requested the state to derogate laws that granted the title of ‘honorary citizen’ to one of the judges in charge of the investigation. In both cases, the Court denied the request, arguing that the representatives did not prove how such laws were contrary to Article 2 of the Convention.⁶¹³ In other cases, such as in *Mejía-Idrovo v. Ecuador*, the Court rejected the request to apply administrative, and other, measures to remove all legal and factual obstacles and mechanisms that prevented the investigation, identification and prosecution of those responsible, arguing that obstacles in the investigation and prosecution of the ones responsible, were not demonstrated.⁶¹⁴

The Court also established that there should be a link between those persons recognised as victims by the Court, and the reparations granted. For example, in the case of *Manuel Cepeda v. Colombia*, the Court recognized that the murder of the congressman Manuel Cepeda happened in a context of violence against the opposition party, ‘Union Patriótica’ (UP in Spanish); here, members, representative and sympathizers of this party were harassed, attacked and murdered, in an attempt to eliminate the opposition.⁶¹⁵ As a consequence, the Commission requested the state to adopt a policy to eradicate violence based on political ideology. The Court

⁶¹³ *Case of Garibaldi v. Brasil (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No.203 (23 September 2009) para 173; *Case of Escher et al. V. Brazil Mexico (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No.200 (6 July 2009) paras 252-254.

⁶¹⁴ *Case of Mejía-Idrovo v. Ecuador (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No.228 (5 July 2011) paras 145-146.

Case of Manuel Cepeda-Vargas v. Colombia (Preliminary Objections, Merits, Reparations, and Costs) Inter-American Court of Human Rights Series C No. 213 (26 May 2010) paras 81 and 87.⁶¹⁶ idem para 238.

rejected the measures arguing that, 'since the members of the UP were not declared to be victims in this judgment, the Court will abstain from ordering reparation on this aspect.'⁶¹⁶ The argument in this case is, however, quite problematic. GNR have, by nature, a clear collective component, requiring the state to grant measures oriented to impact wider audiences. When the Court has ordered human rights training, legislative measures, and institutional changes, the recipients of such measures are the public servants, the population in general, and the institutions which are not necessarily recognized as victims of the case. Expecting that the beneficiaries of the GNR should coincide with the identified victims of the case nullifies the transformative potential of GNR. If the Court disagreed with the awarding of public policies as a form of guarantee of non-repetition, or if it decided not to grant these measures in order to see the outcome of a second petition about the UP, pending a resolution in the Inter-American system,⁶¹⁷ it could have explicitly mentioned this, instead of arguing the lack of compatibility between the measures and the victims of the case.

The Court has also established that the request for GNR should be sufficiently argued by the parties to the case. As discussed in section 2.2.5⁶¹⁸ of this chapter, in the cases *Gonzales et al (Cotton Field) v. Mexico*, *Fernández Ortega v. Mexico*, and *Rosendo Cantú v. Mexico*, the Commission and the representatives requested the implementation of public policies oriented to prevent the facts of violence against women. In each case, the request was denied by the Court, arguing that the parties

⁶¹⁶ *idem* para 238.

⁶¹⁷ See, *José Bernardo Díaz and other v. Colombia 'Union Patriótica' (Admissibility)* Inter American Commission on Human Rights, Case 11.227, Report 5/97(12 March 1997).

⁶¹⁸ See, pp. 174-179.

did not adequately argue why current policies were insufficient in order to prevent the facts.⁶¹⁹

In addition to this criterion, the Court has also taken into account other procedural elements in order not to grant certain GNR. The Inter-American Court has rejected the request to award additional GNR arguing that the state has already put in place other measures which have the same purpose. In the case *Chitay Nech et al v. Guatemala* the representatives requested certain legislation, related to the procedures of absence and death, be modified in order to adapt them to international standards. The Court stated that it had ordered the modification of such legislation in a previous decision and was still in the process of monitoring of compliance.⁶²⁰ Similarly in the case *Tristán Donoso v. Panama*, the Inter-American Commission requested the Court to adapt the criminal legislation that established ‘crimes against honour’, in order to conform to the American Convention. Since the State had introduced some amendments precluding the possibility of criminal punishment for offences against certain public officials, the Court did not accept the request for the measures.⁶²¹

In other cases, however, the Court has not provided an in-depth argument for the denial of the measures but has simply argued that other measures awarded in the case were sufficient to redress the violation and that, therefore, in the context of the case, the request for GNR was not necessary. For example, in the case of *Valle Jaramillo et al v. Colombia*, the Commission and the representatives requested

⁶¹⁹ *Cotton Field* para 495-496; *Fernández Ortega et al v. Mexico* para 274; *Rosendo Cantú et al v. Mexico* para 232.

⁶²⁰ *Case of Chitay Nech et al v. Guatemala (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No. 2012 (25 Mar 2010) para 260.

⁶²¹ *Case of Tristán Donoso v. Panama (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No. 193 (27 January 2009) para 209.

additional measures with the purpose of raising awareness of the risks faced by human rights defenders, in order to prevent the repetition of the facts. Without providing further argumentation, the Court found that the measures granted were enough to achieve such purpose and, as a consequence, it was not necessary to order additional measures.⁶²² Similar arguments can be seen in the case *Heliodoro Portugal v. Panama*,⁶²³ and *Tristán Donoso v. Panama*.⁶²⁴

Although the Inter-American Court has not always being consistent with the application of these standards, they show a growing interest of the Court to narrow down the procedural criteria to award GNR. The next section will explore some of the substantive criteria that the Inter-American Court is developing in the awarding of these measures.

2.3.2 Substantive standards: GNR in cases of ‘general patterns’ of violations

In its first cases the Court did not take into account the systemic character of a violation, or the pattern of recurrence in which the violation took place, in order to award or reject any request of GNR. As a consequence, the Court did not grant any strong GNR in cases that had a clear structural component. For example, in the Cases *Castillo Paez v Peru*, and *Blake v. Guatemala*, both cases relating to a proven pattern of disappearance of political opponents, the Court ordered the states, in very

⁶²² *Case of Valle Jaramillo et al. v. Colombia (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No. 192 (27 November 2008) para 239; *Manuel Cepeda-Vargas v. Colombia* para 238.

⁶²³ *Case of Heliodoro Portugal v. Panama (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No. 186 (12 August 2008) para 262.

⁶²⁴ *Tristán Donoso v. Panama* para 211.

general terms, to 'adopt the necessary domestic legal measures to ensure that this obligation is fulfilled.'⁶²⁵ Although this measure has some structural dimension, the Court did not grant any specific measures aimed at addressing the pattern of violence in which the violations took place.⁶²⁶

In contrast, the Court has ordered important GNR in cases of individual violations that were not necessarily part of a pattern of violations by the state. For example, in the case *Gutiérrez Soler v. Colombia*, the Court analyzed the case of Mr. Wilson Gutiérrez who was detained and tortured by members of the National Police. The case was not presented before the Court as part of a systemic violation, or as part of a context of torture against a particular population. The Court, however, ordered the state to grant wider GNR in the form of human rights training for officials,⁶²⁷ measures of dissemination and implementation of the Istanbul Protocol,⁶²⁸ and measures to strengthen existing control mechanisms in state detention centers.⁶²⁹

The lack of connection between the granting of GNR and the demonstration of a 'pattern of violations' may be problematic. As more of the cases presented before the Inter-American System are related to individual violations of human rights, this standard may raise the expectation of the victim's representatives who, as a result of

⁶²⁵ *Case of Castillo-Páez v. Peru (Reparation and Costs)* Inter-American Court of Human Rights Series C No.43 (27 November 1998) para 118 (2).

⁶²⁶ According to Antkowiak, other measures would have included 'orders to build transparency/accountability within government institutions, to increase civilian control over the military, and to implement military/police training programs on human rights'. Antkowiak, *Remedial Approaches to Human Rights Violations* 371 [footnote 99.]

⁶²⁷ *Case of Gutiérrez-Soler v. Colombia (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 132 (12 September 2005) paras 106-107.

⁶²⁸ *idem* para 110.

⁶²⁹ *idem* para 112.

the litigation, may request the granting of GNR in cases that affect exclusively the individual victim in the case, and do not necessarily reflect a generalized problem, or have a public impact. Unless the case clearly shows a risk of repetition or it is related to a gross or serious violation, the demonstration of a pattern of violations should be a relevant criterion in the award of GNR.

In more recent cases, the Court has applied a more restrictive criterion, stating that it is necessary to prove that there is a 'generalized problem' or 'general pattern', in order to grant certain GNR. For example, in *Salvador Chiriboga v. Ecuador*, the Court found that the expropriation of certain property for environmental reasons, but without the respect of the legal procedure to restrict rights, violated the Convention. As a consequence, the Commission requested, as a GNR, the training of administrative and judicial officials involved in expropriation processes on human rights. The Court, however, considered that 'it was not proven that the violations and circumstances proven in the case sub judice constitute a generalized problem in the substantiation of these type of trials in Ecuador' [emphasis added].⁶³⁰

Similarly, in the case *Mejía Idrovo v. Ecuador*, the Court found a lack of compliance of a judicial decision that ordered the payment of compensation for the suspension of Mejía Idrovo's job as a Colonel of the Army. The representative requested, as GNR, the state to be ordered to carry out specific training courses on human rights for the military high command, and to take all necessary measures to adapt its legislation to accord with the Convention. The Court found that 'since no violation of Article 2 of the Convention was declared, nor the existence of general patterns of

⁶³⁰ *Case of Salvador-Chiriboga v. Ecuador (Reparations and Costs)* Inter-American Court of Human Rights Series C No. 222 (3 March 2011) para 131.

noncompliance with the rulings, [emphasis added]⁶³¹ these measures were not appropriate.

Recognizing the need to prove a pattern of violations as one of the conditions for the granting of GNR implies accepting that they cannot be granted in all cases but only 'if circumstances so require'⁶³² as stated in the ILC Articles, or 'where applicable' as stated in the Basic Principles and Guidelines on the Right to a Remedy.⁶³³

The request for a 'generalized pattern' or 'generalized problem' has been implicitly applied by the Inter-American Court in order to grant GNR in cases with a clear public dimension. For example, in the case *Gonzales et al (Cotton Field) v Mexico* it was proved by the Commission and the petitioners, and accepted by the State, that there was a context of systematic discrimination against women, in Ciudad Juarez (Mexico).⁶³⁴ This pattern was not directly caused by the state. However, the existence of a climate of impunity reveals such a pattern was tolerated and, in some cases, even promoted by Mexican authorities.⁶³⁵ The Court ordered various GNR in order to prevent the repetition of the facts, including, among others: the standardization of protocols to combat the disappearances and murders of women, implementation of a program to look for and find disappeared women, creating legal mechanisms against impunity, and, human rights training for officials and the general public.⁶³⁶

Also, in the case *Nadege Dorzema v. Dominican Republic*, both the Inter-American Commission and the victims proved that the case happened in a context of structural

⁶³¹ *Mejía-Idrovo v. Ecuador* para 144.

⁶³² ILC Articles, Article 30.

⁶³³ UNGA *Basic Principles and Guidelines* para 23.

⁶³⁴ *Cotton Field* paras 133 and 144.

⁶³⁵ *idem* para 388.

⁶³⁶ *idem* paras 474-543.

discrimination towards Haitians in the Dominican Republic.⁶³⁷ The Court, however, was very careful in not expressing its opinion regarding the structural situation of discrimination against such persons, only making reference to the specific situation of discrimination faced by the victims in the case.⁶³⁸ However, when granting the measures, the Court clearly linked the patterns of discrimination within the case, with the remedies ordered. According to the Court:

'since it has been proved that the State was responsible for a pattern of discrimination against migrants in Dominican Republic, the Court finds it relevant that the State organize a media campaign on the rights of regular and irregular migrants on Dominican territory in the terms of this judgment.'⁶³⁹

Later on, in the case *Expelled Dominicans and Haitians v. Dominican Republic*, the Court studied the context of poverty and discrimination suffered by Haitians and people born in Dominican territory with Haitian ascendancy. The case dealt with the arbitrary arrest and summary expulsion of 26 Haitian individuals and Dominicans of Haitian descent, along with the implementation of discriminatory policies that did not allow the right to a nationality for individuals born in the Dominican Republic but whose parents were not citizens. The Court documented extensively the existence of a systematic pattern of collective expulsions of Haitians and people of Haitian origin which happened to have a discriminatory effect against this population.⁶⁴⁰ Although the Court did not link the pattern of collective expulsion with the granting of GNR, the

⁶³⁷ *Nadege Dorzema et al v. Dominican Republic* paras 219-22.

⁶³⁸ *idem* para 40.

⁶³⁹ *idem* para 272.

⁶⁴⁰ *Case of Expelled Dominicans and Haitians v. Dominican Republic (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No. 282 (28 August 2014) para 171.

Inter-American Court awarded extensive reparation measures. The Court ordered human rights training for state operators, in particular, for members of the Armed Forces, border agents and agents in charge of migratory and judicial procedures;⁶⁴¹ the adoption of measures of domestic law and, particularly, the adoption of the necessary measures to ensure that the judicial decision that approved discriminatory measures, had legal effects.⁶⁴² The Court also ordered the authorities to exercise a 'conventionality control' of the decisions that the authorities were in charge of implementing.⁶⁴³

Adding the criterion of 'generalized pattern' or 'generalized problem' may be an interesting way to narrow down the criteria for the granting of GNR. This standard could help the Court to gain legitimacy in order not to award GNR, in individual cases without a 'public relevance', but, at the same time, allows them the freedom to award truly comprehensive GNR, in cases that do clearly reveal a systemic problem. For example, in the *Karen Atala v. Chile*, and *Nadege Dorzema et al v. Dominican Republic*, Cases, arguably there were patterns of discrimination against women and Haitian migrants, based on sexual orientation and origin, respectively. Although these patterns were not explicitly proven in the mentioned cases, a different standard for the application of GNR, one that takes into account the generalized patterns of violations, would have helped the Court to develop comprehensive measures directly linked to redressing the structural situation of discrimination. For example, policies directed at public officials in the judicial branch, in order to eradicate discrimination based on gender, or directed to public officials in the registry offices, in order to eradicate discrimination based on ethnic origin in Dominican Republic.

⁶⁴¹ idem para 465.

⁶⁴² idem para 469.

⁶⁴³ idem para 471.

There is, however, much discussion regarding the standard required to recognise the existence of a context or pattern of violations. For example, in the case *Barrios Family v. Venezuela* (2011) the Court received extensive evidence from the Ombudsman's Office regarding the existence of a 'modus operandi' in Venezuela, of extrajudicial executions, and threats and harassment against people; the Court considered that the evidence provided was insufficient to recognize the existence of a context of extrajudicial executions in this country.⁶⁴⁴ However, based on similar evidence, the Court recognized the existence of such a pattern later in the cases *Uzcategui et al v. Venezuela* (2012), and *Brothers Landaeta Mejias and others v. Venezuela* (2014).⁶⁴⁵ This opens a new debate regarding the standard of evidence required by the Court in order to prove the existence of a pattern. In this regard, the Court should clarify the standard required so that it may provide better guidance to petitioners. In general, the Court should be able to receive any means of evidence in order to prove the existence of such patterns, and to recognise the existence of such patterns in a larger number of cases.

Since the establishment of patterns and contexts in a case requires a higher standard of proof, other criterion should be also taken into account in order to award GNR. In this sense, the standard provided in PIL according to which GNR can be adopted when there is i) a pattern of repetition of the wrongful act; ii) a risk of

⁶⁴⁴ *Case of the Barrios Family v. Venezuela (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 237 (24 November 2011) paras 43 and 44.

⁶⁴⁵ In *Uzcategui et al v. Venezuela* and *Brothers Landaeta Mejias and other v. Venezuela*, in addition to the Ombudsman's reports cited in *Barrios Family*, the Inter-American Court also took into account the report prepared by the Venezuelan National Commission for Police Reform (CONAREPOL) as well as the reports of UN Rapporteurs. These reports, however, were previous to 2011 and were available to the public so the Court could have access to them.

repetition, and iii) the breach was particularly grave, could provide an interesting and wider standard for the Inter-American Court to take into account when awarding such measures.⁶⁴⁶

2.3.3 Conclusion

The lack of consistency in the application of the criteria to award GNR by the Court is the result of various tensions. On the one hand, both the Commission and the victims have demanded from the Court the expansion of its remedial powers and orders. In recent years, requests for GNR have increased, not only in number but also in detail and scope, in almost every case. On the other hand, the granting of such measures may face resistance from states who see the expansion of the remedial powers of the Court as 'ultra vires'.⁶⁴⁷ It also implies additional effort required by the Court's to follow-up the compliance of these decisions, and to secure their enforcement.⁶⁴⁸

Beyond the political implications that this debate may have, part of the problem is that the Inter-American Court has not established a clear conceptual framework

⁶⁴⁶ According to the Committee 'assurances of non-repetition were required not only where there was a pattern of repetition of the wrongful act, but also where there was a risk of repetition or, alternatively, where the breach was particularly grave, even if the risk of repetition was minimal'; UNGA, Sixth Committee (53th Session) 'Report of the International Law Commission on the work of its fifty-second session' (15 February 2001) UN Doc A/CN.4/513, para 57.

⁶⁴⁷ Tara Melish, 'The Inter-American Court of Human Rights Beyond Progressivity', in Malcom Langford, *Social Rights Jurisprudence Emerging Trends in International and Comparative Law* (Cambridge, 2009) p. 404.

⁶⁴⁸ Shelton *Remedies in International Human Rights Law* 290.

regarding the conditions that should be taken into account to grant such remedies. There are no clear standards regarding the circumstances in which GNR should be granted and which form of GNR should be ordered. This situation is not an exclusive problem of the Inter-American system. In fact, both PIL and international human rights law lack a comprehensive conceptual framework to explain the nature and adequate application of GNR.

In order to establish some of the elements that an appropriate understanding of GNR should have, it would be relevant to take into account some of the standards discussed in PIL according to which GNR are granted. The recent jurisprudence of the Court, linking the granting of GNR with a 'generalized pattern', may open the door for the establishment of a clearer standard in the granting of GNR in the Inter-American system. However, more consistency from the Court would be needed in order to apply this criterion in all cases where a 'generalized pattern' is proved. Additionally, it would be important for the Inter-American Court to reflect on the possibility of awarding GNR, in those cases where a risk of repetition is proved, or in cases of serious violations of human rights. A strict application of these criteria could help the Court to narrow down the awarding of these measures without depriving the measures of all content.

3. Conclusion

GNR have been extensively developed in the Inter-American System. Although the American Convention does not explicitly refer to GNR they have been clearly recognized as a legitimate form of reparation in the Court's jurisprudence, in application of Articles 1(1) and 63 of the ACHR. As presented in this chapter, such a process has been developed progressively, appearing for the first time in 2002 and showing a moment of consolidation from 2008 onwards. Besides the boldness of

some of the measures adopted in some cases, after 2008 the Court has taken a more conservative view in the award of GNR, showing a very deferential attitude towards the margin of appreciation that states have in the definition of their own policies and laws. This can be a reaction to the continuous criticisms that the Court has faced in the award of these measures. This is reflected in the low level of compliance of these measures by states. According to David Baluarte, among different forms of reparation in the Inter-American system, GNR are the ones with the lowest levels of compliance.⁶⁴⁹

In this context, clearer criteria for the award of GNR could help to justify the award of GNR in the specific situations where it is necessary. This chapter proposed the limiting of the award of these measures to those situations when i) there is a pattern of repetition of the wrongful act; ii) there was a risk of repetition and, iii) the breach was particularly grave, even if the risk of repetition is minimal. Such criterion is compatible with the practice of the Court in most of its jurisprudence and would help to clarify the situations in which such measures should be awarded. Still more needs to be done by the states. Rather than simply insisting on the legitimacy of the measures, states need to show the same level of compliance with these measures as they do with other forms of obligatory remedies.

⁶⁴⁹ David Baluarte, 'The Evolution of a Compliance Phase of Inter-American Court litigation and the Strategic imperative for victims Representatives' (2011-2012) 27 *American University International Law Review* 263, p. 303.

PART II: THE AWARDING OF GNR IN RIGHT TO HEALTH CASES

The previous chapters provided a general understanding of the concept of GNR in international law. Whereas chapter I focused on the development of this concept in PIL, chapters II and III focused upon the development of this concept in international human rights law by referring to the individual communications of several UN Committees and also to the case law of regional courts of human rights. In the analysis of this concept the scope of the measures, as well as the difficulties in finding a clear criterion for the awarding of the measures, were presented.

The second section of this thesis will analyse how GNR have been, and should be, applied in the redress of a particular economic, social and cultural right: the right to health. The main question that this section analyses is whether the awarding of GNR in right to health cases is similar or different to the awarding of the same measures in civil and political rights. This is a very important question taking into account that, as presented in section one, GNR have been mainly awarded in cases of civil and political rights. As a consequence, there is no clarity on how these measures could be applicable in the redress of violations to the right to health.

The reasons to choose the right to health are twofold: on the one hand, it is a right that has been increasingly litigated in regional courts in the last years⁶⁵⁰. On the

⁶⁵⁰ Leonardo Cubillos, Maria-Luisa Escobar, Sebastian Pavlovic, Roberto Lunes, 'Universal health coverage and litigation in Latin America' (2012) 26 *Journal of the Health Organization*

other hand, there is a large amount of literature about the understanding and conceptualization of the right which allows for a more detailed analysis of, and engagement with, the application of GNR in the protection of specific elements of the right to health.

In order to develop these ideas, chapter IV provides a brief outline of the international right to health. It also refers to the difficulties that regional human rights tribunals have experienced in the awarding of remedies, in particular GNR, when redressing violations to the right to health. The chapter will analyse in particular how the lack of justiciability of right to health cases makes the awarding of such remedies difficult.

Finally, based on the insights gained in chapters I to IV, chapter V offers some analysis of how an adequate model for the awarding of GNR in violations of the right to health should work. In this chapter, specific analysis will be given to the nature, scope, characteristics, and the circumstances for, the awarding of GNR in right to health cases. Special attention will be paid to the specific nature of the right to health as a right subject to the clause of progressive realisation, and whether such a characteristic will require special circumstances in the awarding of GNR.

The chapter will end with the provision of some recommendations to the CESCR concerning the award of general measures for the redress of violations to the right to health. With the entry into force of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, the Committee will have the opportunity to receive individual and group communications related to alleged violations of the right to health, opening a window of opportunity for the awarding of general measures in the protection of right to health cases.

and Management 390; Siri Gloppen, 'Litigation as a strategy to hold governments accountable for implementing the right to health' (2008) 10 *Health and Human Rights* 21.

CHAPTER IV: GNR FOR THE PROTECTION OF RIGHT TO HEALTH AND HEALTH RELATED ISSUES IN INTERNATIONAL HUMAN RIGHTS LAW

1. The international right to health: a brief outline

The right to health cannot be understood as a right to be healthy. Instead, it should be understood as a right to the enjoyment of the facilities, goods and other conditions, that the state is responsible for providing and that are necessary for the attainment and maintenance of the 'highest attainable standard of health.'⁶⁵¹ Several international instruments have tried to give meaning to the right to health. The Constitution of the World Health Organization (1946) has recognized that:

⁶⁵¹ UN, CESCR, General Comment No. 14 'The right to the highest attainable standard of health' (2000) U.N. Doc E/C.12/2000/4, para 9.

'the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic, or social conditions.'⁶⁵²

Later, the Universal Declaration of Human Rights (1948) provided a legal foundation for the international framework of the right to health but did not establish a 'right to health' as such. According to the instrument:

'Everyone has the right to a standard of living adequate for the health and wellbeing of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.'⁶⁵³

In 1966, the International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR)⁶⁵⁴ provided the cornerstone provision, in international law, to the establishment of a right to health. According to it:

'1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

⁶⁵² WHO, Constitution of the World Health Organization, *Basic Documents*, Forty-fifth edition, Supplement (October 2006).

⁶⁵³ The Universal Declaration of Human Rights (1948) article 25 (1).

⁶⁵⁴ International Covenant on Economic, Social and Cultural Rights (adopted on 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

- (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
- (b) The improvement of all aspects of environmental and industrial hygiene;
- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.'

The right to health, as defined by the Committee on Economic, Social and Cultural Rights (hereinafter CESCR or 'the Committee'), takes into account a holistic approach to health, influenced by public health principles, according to which 'health' includes not just a right to health care, but also a right to healthy conditions. In this respect, the General Comment on the right to health has recognised several determinants that influence the enjoyment of the right to health. According to the CESCR, 'the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health.'⁶⁵⁵ As a consequence, the right to health must be seen as:

'an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health related education and information, including on sexual and reproductive health. A further important aspect is

⁶⁵⁵ CESCR GC 14 para 9.

the participation of the population in all health related decision making at the community, national and international levels.⁶⁵⁶

The CESCR has also emphasised that the right to health includes several essential and interrelated elements: availability, accessibility, acceptability, and quality. Availability refers to the fact that, within the State party, public health and health-care facilities, goods, services and programs, have to be available in sufficient quantity⁶⁵⁷. Accessibility means that health facilities, goods and services have to be accessible to everyone. This aspect includes four dimensions: non-discrimination, meaning that health services must be available to all, including the most vulnerable, and without discrimination on any ground; physical accessibility, meaning that health facilities should be within safe, physical reach for all sections of the population; economic accessibility (affordability), meaning that health facilities must be affordable for all, including socially disadvantaged groups; and, information accessibility, meaning that people should have the right to seek, receive and impart information and ideas concerning health issues.⁶⁵⁸ Acceptability refers to the fact that health facilities, goods and services, must be respectful of medical ethics and be culturally appropriate.⁶⁵⁹ Quality means goods and services must be scientifically and medically appropriate, and of good quality.⁶⁶⁰

⁶⁵⁶ idem para 11.

⁶⁵⁷ idem para 12 (a).

⁶⁵⁸ idem para 12 (b).

⁶⁵⁹ idem para 12 (c).

⁶⁶⁰ idem para 12 (d).

1.1 General legal obligations of states on the right to health

Article 2.1 of the ICESCR obliges states to take steps, up to the maximum of their available resources, in order to achieve progressively the full realization of the rights established in the Covenant. When resource constraints make the fulfilment of this obligation impossible, states should be able to demonstrate that every effort has been made to use all available resources in order to fulfil the obligations established under the Covenant.⁶⁶¹ According to the CESCR, this clause simply acknowledges that the complete realization of all economic, social and cultural rights needs effort, and cannot be achieved immediately.⁶⁶² In order not to deprive the Covenant's obligations of all content, the CESCR has recognized that Article 2.1 imposes an obligation to advance towards the full realization of this right 'as expeditiously and effectively as possible.'⁶⁶³ The clause also provides a strong presumption that retrogressive measures are not permissible.⁶⁶⁴ Any retrogressive measure should be carefully justified by taking into account all the rights included in the Covenant and by making use of the maximum available resources.⁶⁶⁵

In addition to the obligation to progressively realise the right to health, states also have immediate obligations to fulfil certain core obligations, such as to guarantee

⁶⁶¹ *idem* para 47.

⁶⁶² UN, CESCR, General Comment No. 3 'The Nature of States Parties Obligations' (1990) U.N. Doc. E/1991/23, para 9.

⁶⁶³ CESCR GC 14 para 31.

⁶⁶⁴ *idem* para 32.

⁶⁶⁵ *idem* para 32.

that rights will be exercised without discrimination of any kind, and to take deliberate, concrete and targeted steps⁶⁶⁶ towards the full realization of the right to health.⁶⁶⁷

1.2 Legal obligations of states on the right to health: the respect, protect and fulfil framework

As is the case with all human rights, the right to health imposes three types or levels of obligations on states: the obligations to respect, protect, and fulfil.

In relation to the right to health, the duty to respect 'requires states to refrain from interfering directly, or indirectly, with the enjoyment of the right to health.'⁶⁶⁸ Examples of this obligation are, the obligations of states, *inter alia*, to refrain from: limiting equal access to health services to everyone, imposing discriminatory practices, prohibiting forms of traditional preventive care, marketing unsafe drugs, prohibiting specific medical treatments, limiting access to women to contraceptives or any other way to maintain sexual and reproductive health, and to prevent people from participating in health related matters.⁶⁶⁹

The duty to protect the right to health requires the state to prevent third parties from interfering in the enjoyment of the right to health.⁶⁷⁰ Examples of this duty include:

⁶⁶⁶ *idem* para 30.

⁶⁶⁷ A presentation on the minimum core obligation of states regarding the right to health occurs in section 1.3.

⁶⁶⁸ CESCR GC 14 para 33.

⁶⁶⁹ *idem* para 34.

⁶⁷⁰ *idem* para 33.

ensuring that, when some sectors of the health service are privatized, these are not a threat to the adequate provision of services, establishing appropriate regulations for the marketing of medical equipment and medicines by third parties, making sure that health practitioners, and health professionals in general, are adequately trained, taking measures in order to prevent traditional practices within the family or the community from interfering with the access to pre and post-natal care, as well to family planning, preventing third parties from obliging women to undertake traditional practices, and to make sure that third parties do not interfere in the adequate access to health information and services.⁶⁷¹

Lastly, the obligation to fulfil requires states to 'adopt appropriate legislative, administrative, budgetary, judicial, promotional, and other measures, towards the full realization of the right to health.'⁶⁷² The CESCR has distinguished between three levels of this obligation: to facilitate, provide and promote.⁶⁷³ 'Facilitate' involves positive measures that assists individuals in enjoying the right to health.⁶⁷⁴ 'Provide' requires the state to deliver a specific right when individuals or a group are unable to realise that right themselves.⁶⁷⁵ Finally, 'promote' requires the state to take measures in order to 'create, maintain and restore the health of the population.'⁶⁷⁶ For example, it requires states to promote factors that support positive health results, such as research and provision of information ensure that health services take into account the cultural differences of the population and that health care staff are adequately

⁶⁷¹ idem para 35.

⁶⁷² idem para 33.

⁶⁷³ idem para 33.

⁶⁷⁴ idem para 37.

⁶⁷⁵ idem para 37.

⁶⁷⁶ idem para 37.

trained in this respect, provide appropriate information in order to promote healthy lifestyles and help people in the provision of information so they can make informed choices about their health.⁶⁷⁷

1.3 Minimum core obligations v. 'reasonableness'

The CESCR has also recognized that states have a *minimum core obligation* to ensure minimum essential levels of each of the rights established within the Covenant.⁶⁷⁸ Although some scholars have been sceptical about the idea of minimum core obligations,⁶⁷⁹ the CESCR has understood this as a logical interpretation, in order not to deprive the Covenant of its *raison d'être*.⁶⁸⁰ The CESCR has confirmed its interpretation of the minimum core in its general comments about rights to food,⁶⁸¹ education,⁶⁸² health,⁶⁸³ water,⁶⁸⁴ work,⁶⁸⁵ social security,⁶⁸⁶ and the right to take part in cultural life.⁶⁸⁷

⁶⁷⁷ *idem* para 37.

⁶⁷⁸ *idem* para 10.

⁶⁷⁹ According to John Tobin, states did not envision the idea of minimum core when drafting the ICESCR. He also argues that this concept is not realistic as 'it simply does not offer a principled, practical, or coherent rationale which is sufficiently sensitive to the context in which the right to health must be operationalized'. John Tobin, *The Right to Health in International Law* (Oxford University Press, 1st edition, 2012) pp. 239-240.

⁶⁸⁰ CESCR GC 3 para 10.

⁶⁸¹ UN, CESCR, General Comment No. 12 'The right to adequate food (Art.11)' (1999) U.N. Doc. E/C.12/1999/5, paras 14 and 17.

⁶⁸² UN, CESCR, General Comment No. 13 'The Right to Education' (1999) U.N. Doc. E/C.12/1999/10, para 57.

⁶⁸³ CESCR GC 14 para 43.

In relation to the right to health, the CESCR has confirmed that states have a duty to provide minimum essential levels of this right. In General Comment No. 3, the CESCR established that states have a minimum core obligation to ensure the satisfaction of, at very least, minimum essential levels of each of the rights, for example, through the provision of essential primary health care. This General Comment also establishes that, if the state fails to meet at least its minimum core obligations, it must demonstrate that 'every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.'⁶⁸⁸ In terms of the right to health, such core obligations include, at a minimum the following:

(a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;

(b) To ensure access to the minimum essential food which is nutritionally adequate and safe, [and] to ensure freedom from hunger to everyone;

⁶⁸⁴ UN, CESCR, General Comment No. 15 'The right to water' (Art.'s 11 and 12) (2003) U.N. Doc. E/C.12/2002/11, para 37.

⁶⁸⁵ UN, CESCR, General Comment No. 18 'The right to work' (2006) U.N.Doc. E/C.12/GC/18, para 31.

⁶⁸⁶ UN, CESCR, General Comment No. 19 'The right to social security' (2008) U.N. Doc. E/C.12/GC/19, para 59.

⁶⁸⁷ UN, CESCR, General Comment No. 21 'Right of everyone to take part in cultural life' (2009) U.N. Doc. E/C.12/GC/21 para 55.

⁶⁸⁸ CESCR GC 3 para 10.

- (c) To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
- (d) To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
- (e) To ensure equitable distribution of all health facilities, goods and services;
- (f) To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population.⁶⁸⁹

However, the idea of minimum core obligations should be placed in the context of the obligation established in Article 8(4) of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, which establishes that:

'When examining communications under the present Protocol, the Committee shall consider the *reasonableness* of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant'. (italics added)

This was one of the most discussed provisions during the negotiation of the Optional Protocol.⁶⁹⁰ The United Kingdom, Canada and Norway proposed that both a

⁶⁸⁹ CESCR GC 14 para 43.

'reasonableness' test and a 'margin of appreciation' would be necessary in order to prevent the unnecessary intervention of the CESCR in domestic policymaking.⁶⁹¹ The final version of Article 8(4) of the Optional Protocol excludes any reference to 'margin of appreciation', but sets out that states 'may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.'⁶⁹²

Notwithstanding its incorporation in the Optional Protocol, it is not yet clear what the 'reasonableness' test means. Although it was certainly informed by South African jurisprudence, particularly in *Government of the Republic of South Africa & Ors v Grootboom & Ors*,⁶⁹³ the CESCR has adopted its own standards of review. Based on its experience in the periodic reporting process, the CESCR established some standards outlining the obligation of states to take steps in respect of use of maximum of available resources. The CESCR stated that 'in assessing whether they are 'adequate' or 'reasonable', the CESCR may take into account, inter alia, the following considerations:

⁶⁹⁰ Brian Griffey, 'The Reasonableness Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural rights' (2011) *11 Human Rights Law Review* 275, p. 276-277.

⁶⁹¹ UNCHR 'Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its third session' (14 March 2006) E/CN.4/2006/47 at para 92.

⁶⁹² UNGA, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted on 10 December 2008, entered into force 5 May 2013) A/RES/63/117, article 8(4).

⁶⁹³ Constitutional Court of South Africa, *Government of the Republic of South Africa & Ors v Grootboom & Ors* 2000 (11) BCLR 1169 (CC).

- '(a) the extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights;
- (b) whether the State party exercised its discretion in a non-discriminatory and non-arbitrary manner;
- (c) whether the State party's decision (not) to allocate available resources is in accordance with international human rights standards;
- (d) where several policy options are available, whether the State party adopts the option that least restricts Covenant rights;
- (e) the time frame in which the steps were taken;
- (f) whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk.⁶⁹⁴

The CESCR also established that, in those cases where the state has taken no steps, or any retrogressive measures have been taken, the burden of proof passes to the state to prove that such measures were taken after careful consideration, can be justified by reference to the totality of rights provided in the Covenant, and that the state made full use of available resources.⁶⁹⁵ In those cases where the state seems to justify its action on the grounds of 'resource constraints', the CESCR should consider the information, taking into account:

⁶⁹⁴ UN, CESCR, 'An Evaluation of the Obligation to take steps to the "Maximum of available resources" under an optional protocol to the Covenant' (21 September 2007) E/C.12/2007/1, para 8.

⁶⁹⁵ E/C.12/2007/1 para 9.

- (a) 'The country's level of development;
- (b) The severity of the alleged breach, in particular whether the situation concerned the enjoyment of the minimum core content of the Covenant;
- (c) The country's current economic situation, in particular whether the country was undergoing a period of economic recession;
- (d) The existence of other serious claims on the State party's limited resources; for example, resulting from a recent natural disaster or from recent internal or international armed conflict;
- (e) Whether the State party had sought to identify low-cost options; and
- (f) Whether the State party had sought cooperation and assistance or rejected offers of resources from the international community for the purposes of implementing the provision for the Covenant without sufficient reason.⁶⁹⁶

The CESCR will have to clarify, on a case-by-case basis, exactly how this understanding of reasonableness is compatible with the idea of minimum core obligations. This aspect will be considered more in depth in chapter V Section 4.3.1.⁶⁹⁷

1.4 The challenge of remedies

Once a violation of the right to health has been identified, domestic and international bodies have the challenge of granting appropriate redress. Whereas the determination of remedies in international law has been extensively developed in

⁶⁹⁶ E/C.12/2007/1 para 10.

⁶⁹⁷ See, pp. 320-327.

cases of violations of civil and political rights, there are no clear standards about the redress for violations of ESCR. According to Courtis, the imbalance in the development of remedies is not related to the distinction between civil and political and ESCR, but rather to the 'degree of leeway' that is granted to the political branches of the State.⁶⁹⁸ When the violation is related to defined acts or omissions, it can be redressed by simple orders provided by the judiciary (i.e., to provide a benefit, or to prohibit the carrying out of a specific action) However, there are situations where the order of the Court is clear (i.e., to reach a certain goal or standard) but the means of reaching that standard are numerous. In those cases, the redress of the violation may require the cooperation of the judiciary alongside other branches of power.⁶⁹⁹

The communications procedure established in the Optional Protocol brings new challenges in the awarding of remedies for violations of ESCR. The CESCR has consistently emphasized, in its general comments, that all victims of ESCR' violations are entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction, or guarantees of non-repetition. This has been inserted into general comments relating to the rights to food,⁷⁰⁰ health,⁷⁰¹ water,⁷⁰² work⁷⁰³,

⁶⁹⁸ Christian Courtis, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights – Comparative experiences of justiciability*, (International Commission of Jurist, 2008) pp. 84-85.

⁶⁹⁹ *idem*.

⁷⁰⁰ CESCR GC 12 para 37.

⁷⁰¹ CESCR GC 14 para 59.

⁷⁰² CESCR GC 15 para 55.

⁷⁰³ CESCR GC 18 para 48.

and social security,⁷⁰⁴ and is similar to a provision established in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997)⁷⁰⁵.

Following the example of the CEDAW Committee, and the Committee on the Rights of the Persons with Disabilities (CRPD), it is likely that, when defining the content of remedies, the CESCR will order both 'individual' and 'general measures.'⁷⁰⁶ In a previous statement, the CESCR seems to confirm this two-track approach to remedies by indicating that recommendations should include remedial measures oriented to the victim(s), such as compensation, and more general measures aimed at redressing the 'circumstances leading to a violation.'⁷⁰⁷ This corresponds to a general trend in international human rights law of providing both individual relief, intended to redress the particular victims of a violation (usually in the form of compensation, restitution or rehabilitation), and general relief in the form of GNR aimed at preventing future violations, and with a wide-reaching character.⁷⁰⁸ This

⁷⁰⁴ CESCR GC 19 para 77.

⁷⁰⁵ International Commission of Jurists, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (adopted on 26 Jan 1997), para 23.

⁷⁰⁶ This has been also suggested by Viviana Krsticevic and Brian Griffey, 'Remedial Recommendations' in Malcolm Langford (ed), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (Pretoria University Law Press, 2004) Chapter 10.

⁷⁰⁷ E/C.12/2007/1 para 13.

⁷⁰⁸ The ILC distinguish between the duty of states to offer appropriate assurances and guarantees of non-repetition (article 30), and to make full reparation for the injury caused by the wrongful act (31) which can take the form of restitution, compensation and satisfaction (article 34). See ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (November 2001) Supplement No. 10 (A/56/10), chp.IV.E.1. Also, whilst the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross

suggests that reparation measures for violations of ESCR are not inherently different from those awarded in cases of violations to civil and political rights.

As the Optional Protocol remains silent about the scope and content of remedies, it is not yet clear what the interpretation of the CDESCR will be when drafting individual and general measures. In particular, with respect to its recommendations in the analysis of individual cases, the CDESCR will face a central challenge in trying to draft adequate and effective measures that actually contribute to the non-repetition of future violations. Although the CDESCR already has experience in providing recommendations in its concluding observations to states, the awarding of general measures through individual communications represents an additional challenge. While the reporting cycle allows the CDESCR to receive general information relating to the implementation of the Covenant,⁷⁰⁹ and on that basis carry out a general analysis and provide recommendations, individual communications are based on an individual's or group's complaint and are likely to be highly specific. Nonetheless, following the practice of other Committees which have traditionally engaged in both individual and general redress, the CDESCR should be able to make both individual and general recommendations in order to provide adequate redress to the victims in the relevant case.

Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, establish that full and effective reparation can take the form of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition; it is clear that while restitution, compensation and rehabilitation are oriented to provide individual relief to the victim, guarantees of non-repetition have a general scope.

⁷⁰⁹ UN, CDESCR, 'Guidelines on treaty-specific documents to be submitted by states parties under articles 16 and 17 of the international Covenant on Economic, Social and Cultural Rights' (24 March 2009) E/C.12/2008/2, para 2.

In order to provide a clear understanding of how general measures have been awarded for the redress of violations concerning health related issues, the next section will analyse the jurisprudence of regional bodies of human rights. In particular, it will analyse general measures on the right to health, in the jurisprudence of the African Commission on Human and Peoples' Rights. It will also look at the jurisprudence of the Inter-American Court of Human Rights when awarding GNR in the redress of cases related to health issues, and to the jurisprudence of the European Court of Human Rights in the redress of pilot judgments in which health issues were discussed.

2. How regional human-rights bodies have addressed health related issues: some illustrative case law

This section will describe the awarding of GNR in the redress of right to health and health related cases, in three regional systems: African, Inter-American, and European. The distinction between 'right to health' and 'health related' cases is important since the right to health is not directly justiciable in all regional systems. As will be explained, only the African system of human rights allows the direct justiciability of the right to health.⁷¹⁰ In both the Inter-American Court of Human Rights and the European Court of Human Rights, the right to health is not directly justiciable, so these Courts have addressed it in an indirect way, usually through the protection of other rights, such as the rights to life, personal integrity, and a fair

⁷¹⁰ See OAU, African Charter on Human and Peoples' Rights, article 16 and OAU, African Charter on the Rights and Welfare of the Child (adopted on 11 July 1990, entered into force 29 November 1999) CAB/LEG/24.9/49 8 (1990) article 14.

trial.⁷¹¹ In these cases, courts refer to health related issues in their jurisprudence offering an indirect protection to dimensions of the right to health.

2.1 GNR in the redress of right to health cases: an analysis from the jurisprudence of the African Human Rights System

2.1.1 The direct protection of the right to health in the African Human Rights System

The African human rights system establishes the direct justiciability of the right to health by incorporating it in both the African Charter on Human and Peoples' Rights, and the African Charter on the Rights and Welfare of the Child. Article 16 of the African Charter states that:

1. 'Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick'.

⁷¹¹ For a presentation of the indirect approach of the Inter-American System of Human Rights, see Oscar Parra-Vera, 'La protección del derecho a la salud a través de casos contenciosos ante el Sistema Interamericano de Derechos Humanos' in, Laura Clerico, Liliana Ronconi, Martin Aldao, *Tratado de Derecho a la Salud* (Ed. Abeledo Perrot, Buenos Aires, 2013); and in the pilot judgments of the European Court of Human Rights see 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' (2010) 23 *Harvard Human Rights Journal* 51.

In turn, the African Charter on the Rights and Welfare of the Child establishes a right to health in similar terms,⁷¹² including more extensive and detailed obligations for the states in the protection of such a right. It establishes, for example, the obligation of states to reduce infant and child mortality rates, to ensure the provision of necessary medical assistance and health care, to ensure the provision of adequate nutrition and safe drinking water, to combat disease and malnutrition, to ensure adequate health care for pregnant mothers, to develop preventive health care and family life education, to integrate basic health service programs in national plans, to inform different sectors of the society in the use of basic knowledge of child health and nutrition, to ensure the participation of civil society in the planning and management of service programs for children, and, to support, through technical and financial means, the mobilization of local community resources in the development of primary health care.⁷¹³ As a consequence, the right to health can be directly protected by the African Commission and the African Court throughout the individual communication system.

While the African Court has not yet actively engaged in the protection of ESCR in its jurisprudence, the African Commission has had an active role in the development of recommendations in ESCR cases.⁷¹⁴ At the outset, the African Commission was not very detailed in either the analysis of the rights violated or the granting of remedies.⁷¹⁵ However, since 1999-2000 the Commission has been more detailed in

⁷¹² Article 14 establishes the right of children to enjoy 'the best attainable state of physical, mental and spiritual health'. (Underlining added).

⁷¹³ African Charter on the Rights and Welfare of the Child, article 14 (2).

⁷¹⁴ Instead, the African Court has still not ordered specific reparation measures in ESCR cases.

⁷¹⁵ In the *Free Legal Assistance Group and Others v. Zaire*, African Comm Hum & Peoples' Rights, Comm. No. 25/89, 47/90, 56/91, 100/93 (1995), the Commission found that there

both its analysis of the violations and its outline of remedies.⁷¹⁶ In the following cases, related to the right to health, the Commission has developed extensive recommendations.

In *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESCR) v. Nigeria*,⁷¹⁷ the African Commission found the Nigerian government responsible for gross violations of rights in the oil exploitation of the Niger Delta. The responsibility of the state stems both from the action of authorities who were responsible for several violations of the rights of the Ogoni people, and, in the state's negligent management in the Niger Delta, in not taking care of the rights of victims and appropriate protection of the environment, when such violations were denounced. The Commission found the government violated the rights to: equal treatment (article 2), life and integrity (article 4), property (article 14), the best attainable state of physical and mental health (article 16), protection of the family in its physical health and morals (article 18.1), peoples ability to freely dispose of their wealth and natural resources (article 21), and to the enjoyment of a general, satisfactory environment favourable to their development (article 24).

In regard to the right to enjoy the best attainable state of physical and mental health, the Commission found a violation of this right, alongside the right to a general _____ were 'serious and massive violations' of the right to education among other rights, but did not afford any specific recommendation for the redress of such violations. Also see, Morne van der Line & Lorette Louw, 'Considering the interpretation and implementation of article 24 of the African Charter on Human and Peoples' Rights in light of the SERAC communication' (2003) 3 *African Human Rights Law Journal* 167, p. 173, footnote 23.

⁷¹⁶ Van der Line & Louw *Considering the interpretation* [...] 172-173.

⁷¹⁷ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights (SERAC) v. Nigeria*, African Comm Hum & Peoples' Rights, Comm. No. 155/96 (2001).

satisfactory environment.⁷¹⁸ According to the Commission, the state violated its duties to both respect and protect these rights in favour of the Ogoni community.⁷¹⁹ The duty to respect the rights of the Ogoni was violated by 'attacking, burning and destroying several Ogoni villages and homes.'⁷²⁰ The state also violated its duty to protect the rights to health and to enjoy a general satisfactory environment, by failing to undertake an impact analysis, or to provide independent scientific monitoring of threatened environments. Also, the state did not undertake appropriate monitoring, or provide information about the dangers of oil projects to those affected, and/or provide opportunities to ensure participation in the decision-making process for development projects affecting their communities.⁷²¹

As the Commission found specific violations of the duties to respect and protect, in relation to the rights to health, and, to enjoy a general satisfactory environment, the recommendations were also oriented to redress such levels of protection. The Commission recommended different forms of remedies, which can be classified in accordance with the type of obligation in the right to health that it aimed to redress.

As table No. 1 shows, regarding the duty to respect, most of the recommendations are in the area of investigation, restitution and compensation, but there is nothing in terms of rehabilitation, and GNR. In this regard, the African Commission could have

⁷¹⁸ *idem* paras 54 and 55.

⁷¹⁹ In the analysis of rights, the Commission clearly endorsed the four levels of duties that correspond to the states, in regard to human rights obligations, namely the duty to respect, protect, promote and fulfill these rights. The Commission expressed that this obligation applies to all type of rights and 'entails a combination of negative and positive duties'. *idem* para 44.

⁷²⁰ *idem* para 54.

⁷²¹ *idem* para 53.

recommended the state provide, for example, physical and psychological rehabilitation to the next of kin of the people killed by security forces (rehabilitation), and human rights training to security forces, in order to prevent the future commission of such cases (GNR).

In contrast, regarding the duty to protect, most of the recommendations are in terms of rehabilitation, and GNR. The Commission ordered the state to provide appropriate environmental assessments for future oil development projects, the provision of information on health, and, environmental risks, as well as providing access to an effective decision-making process. It also ordered the Ministry of Environment to provide information on their work on environment-related issues in Nigeria, and the work of the Niger Delta Development Commission (NDDC), in order to address the environmental and social problems in the area. The wide-ranging, general recommendations awarded by the African Commission, not just in this decision but in others, contrasts with the very restrictive measures adopted by the European Court of Human Rights when granting general measures.⁷²² Particularly in this case, the recommendations may be related to the fact that the Nigerian government did not answer the allegations of the claimants, and the recommendations adopted by the Commission replicate the wording of the complaint.⁷²³ These measures are a good example of the type of general measures that Courts can award in the protection of the right to health.

⁷²² See the discussion on the awarding of general measures in pilot judgments by the European Court of Human Rights in section 2.3.2 of this Chapter.

⁷²³ Fons Coomans, 'The Ogoni Case before the African Commission on Human and Peoples' Rights' (2003) 52 *International and Comparative Law Quarterly* 749, p.10.

Table No. 1. Reparation measures in relation to the duties violated – *SERAC and CESC v. Nigeria* (African Comm. Hum & Peoples' Rights, Comm. No. 155/96)

	Investigation, prosecution and punishment	Restitution	Compensation	Rehabilitation	Satisfaction	GNR
Respect (killing and displacement of civilians by security forces)	Investigate the human rights violations perpetrated by officials of the security forces, the National Nigerian Petroleum Company (NNPC) and relevant agencies involved in human rights violations. ⁷²⁴	Stopping all attacks on Ogoni communities and permitting citizens and independent investigators free access to the territory. ⁷²⁵	Ensuring adequate compensation to the victims. ⁷²⁶			
Protect (not providing adequate insurance in the exploration of oil by mixed (public-private) corporations.				Cleaning up land and rivers damaged by oil operations. ⁷²⁷		Ensuring that appropriate environmental and social impact assessments are prepared for any future oil development, and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry. ⁷²⁸ Provide communities likely to be affected by oil operations with information on health and environmental risks, as well as meaningful access to regulatory and decision-making bodies. ⁷²⁹ Keep the Commission informed about the work of the Federal Ministry of Environment in addressing environmental and environment-related issues prevalent in Nigeria, and the work of the Niger Delta Development Commission (NDDC), which was established to address the environmental and social problems of the affected area. ⁷³⁰

⁷²⁴ idem para 69 (2)

⁷²⁵ idem para 69 (1)

⁷²⁶ idem para 69 (3)

⁷²⁷ idem para 69 (3)

⁷²⁸ idem para 69 (4)

⁷²⁹ idem para 69 (5)

⁷³⁰ idem para 69 (6) and (7)

Another case where the Commission recommended measures for the protection of the right to health is *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (Cohre) v. Sudan*.⁷³¹ In this case, the Commission studied the massive and systemic violation of rights in the Darfur region, which was the product of a confrontation between two armed groups and a State sponsored, Arab militia force. As a result of this confrontation, many civilians were affected; thousands were killed, homes and other structures were burned or destroyed, and more than a million people were forcibly displaced. Many villages, markets and water wells were raided and/or bombed.⁷³² The Commission found that these facts represented 'serious and massive violations of human and peoples' rights,'⁷³³ finding that they represented a violation of the rights to life, dignity, liberty, freedom of movement, property, family, and health.

Regarding the right to health, the Commission considered that 'the destruction of homes, livestock and farms as well as the poisoning of water sources, such as wells exposed the victims to serious health risks and amounts to a violation of Article 16 of the Charter.'⁷³⁴ The Commission seems to accept the claims of the complaint, according to which the state was complicit in destroying foodstuffs, crops and livestock, as well as poisoning wells, and denying access to water sources.⁷³⁵ The Commission referred to CESCR General Comment No. 14 on the right to health, to emphasise that violations to the right to health can occur through the direct action of

⁷³¹ *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (Cohre) v. Sudan*, African Comm Hum & Peoples' Rights, Comm. 279/03, 296/03 (2009) .

⁷³² *idem* paras 13 – 14.

⁷³³ *idem* para 102 and 225.

⁷³⁴ *idem* para 212.

⁷³⁵ *idem* para 207.

the state, or by other entities insufficiently regulated by States.⁷³⁶ By considering the state responsible, either for its own action, in destroying homes and polluting water sources, or complicity, with armed forces who carried out these actions, the Commission is protecting the right to health in the 'respect' and 'protect' dimensions.

As table No. 2 shows, in terms of the protection of the right to health, the Commission recommended the rehabilitation of economic and social infrastructure, such as education, health, water, and agricultural services, in order to provide conditions for the safe return of Internally Displaced Persons. It also recommended the establishment of the National Reconciliation Forum, in charge of addressing the long-term sources of conflict, the allocation of national resources to different provinces, as well as issues of land, water rights and distribution of livestock.⁷³⁷ The Commission also recommended the state conduct effective official investigations, undertake major legislative reforms, prosecute those responsible for human rights violations, and take measures to ensure that the victims of human rights abuses are given effective remedies.⁷³⁸

When recommending the rehabilitation of the general economic and social infrastructure that contributes to the better guarantee of the rights to health and water, the Commission seems to imply that such improvements should be made to re-establish the conditions before the conflict, for example, purifying water sources and replacing water wells. The Commission does not go further into the transformation of other dimensions of social rights. For example, it is well known that the Darfur region is characterized by a lack of development and high levels of

⁷³⁶ *idem* para 210.

⁷³⁷ *idem* para 229 (6).

⁷³⁸ *idem* para 229 (1 -4).

poverty.⁷³⁹ The Commission, however, does not go further in the redress of the poverty conditions that are also at the base of the displacement. In this regard, the rehabilitation measures awarded by the African Commission replicate the general trend of awarding measures that merely provide restitution for harms done, but do not go beyond, such as the transformation of the root causes of injustice linked to, for example, poverty.⁷⁴⁰

In terms of GNR, the Commission recommended establishing a National Reconciliation Forum that would address 'the long-term sources of conflict, [...] including [...] resolv[ing] issues of land, grazing and water rights, including destocking of livestock.'⁷⁴¹ As the measure is intended to remedy the 'long-term sources of conflict,' it has a preventive nature and is future-oriented, making it a clear GNR. The measure is far reaching, showing confidence in the Commission in terms of the provision of general measures. In this measure, the Commission follows the dialogical approach followed by some domestic courts.⁷⁴² Instead of directly indicating the specific measures to be adopted, it refers to the establishment of a 'National Reconciliation Forum,' which will decide on the measures to be taken. The Commission does not establish what the exact composition of the National

⁷³⁹ According to the Sudan National Baseline Household Survey 2009, the rate of poverty incidence in Sudan is 46.5% and 62.7% in the Darfur region. Sudan Central Bureau of Statistics, *Sudan National Baseline Household Survey 2009, North Sudan – Tabulation Report*, p.12, available at <http://ecastats.uneca.org/aicmd/Portals/1/Publications/Others/POVERTY%202009.pdf>

⁷⁴⁰ For the links between violence and Poverty in Sudan see: David Keen, *The Benefits of Famine. A political economy of famine and relief in Southwestern Sudan 1938-1989* (Princeton University Press, 1st edition, 1994).

⁷⁴¹ *COHRE v Sudan* para 229 (6).

⁷⁴² See Chapter V section 5.

Reconciliation Forum should be, leaving it open to being defined by the competent authorities. This approach seems to be more open to public deliberation of the measures among different actors. However, compliance with the measures has been largely neglected by Sudan, which refuses to take measures to secure implementation of the decision.

Table No. 2. Reparation measures in relation to the duties violated – Sudan Human Rights Organization & Centre on housing Rights and Evictions (Cohre) v. Sudan (African Comm Hum & Peoples' Rights, Comm. 279/03, 296/03)

	Investigation, prosecution and punishment	Restitution Compensation	Rehabilitation Satisfaction	GNR
Respect/ protect (the destruction of homes, livestock and farms as well as the poisoning of water sources)	Conduct effective official investigations regarding the abuses committed by members of military forces; and to prosecute those responsible of human rights violations in particular murder, rape, arson and destruction of property. ⁷⁴³ The state should also abstain from adopting amnesty laws in favour of perpetrators of human rights violations ⁷⁴⁴ .	'Rehabilitate economic and social infrastructure, such as education, <u>health</u> , water, and agricultural services, in the Darfur provinces in order to provide conditions for return in safety and dignity for the IDPs and Refugees.' ⁷⁴⁵		Undertake major reforms within the legislative and judicial framework in order to deal with cases of serious and massive human rights violations ⁷⁴⁶ . 'Establish a National Reconciliation Forum to address the long-term sources of conflict, equitable allocation of national resources to the various provinces, including affirmative action for Darfur, [and] resolve issues of land, grazing and water rights, including destocking of livestock.' ⁷⁴⁷

In *Purohit and Moore v The Gambia*,⁷⁴⁸ a petition was presented on behalf of the patients detained at the Campama Psychiatric Unit, and all the patients detained

⁷⁴³ idem para 229 (1 and 3)

⁷⁴⁴ idem para 229 (7)

⁷⁴⁵ idem para 229 (5).

⁷⁴⁶ idem para 229 (2)

⁷⁴⁷ idem para 229 (6).

⁷⁴⁸ *Purohit and Moore v. The Gambia*, African Comm Hum & Peoples' Rights, Comm. No. 241/2001(2003).

under the Mental Health Acts in The Gambia. The complainants alleged that legislation related to mental health, the Lunatic Detention Act (LDA), in The Gambia is outdated and includes stereotypes. They also alleged that the Campama Psychiatric Unit is overcrowded and that there is no requirement of consent to treatment, or a process by which one can request the review of continued treatment. In terms of the right to health, the Commission established that the LDA does not have sufficient resources and programmes for the treatment of persons with disabilities⁷⁴⁹ which implies a violation of Article 16 of the African Charter. This can be considered a part of the dimension of protecting right to health against the acts of third parties.⁷⁵⁰

As table No. 3 shows, the Commission's restitution measures included ordering the state to provide adequate medical and material care for persons suffering from mental health problems. It also ordered some general measures, such as legislative changes to make the Lunatics Detention Act compatible with the legislative regime for mental health. Additionally, it ordered the state to create an expert body to review cases of all persons detained under the Lunatics Detention Act. Since the violation is related to the general conditions of patients under mental health care in The Gambia, and the inadequacy of the Lunatic Detention Act, the general measures awarded are justified.

In terms of the protection to the right to health of persons with disabilities, the recommendations by the Commission could have included broader measures, such as to take effective measures to deal with overcrowded conditions of detention, manuals of protocols for health workers in the Campama Psychiatric Unit, in

⁷⁴⁹ *idem* para 83.

⁷⁵⁰ ESCR GC 14 paras 33 and 51.

accordance with international standards, and the dissemination of a list of patient rights. The limited GNR granted in this case contrasts with the approach taken by the Inter-American Court of Human Rights in a similar case, related to the treatment of patients with mental disability in Brazil.⁷⁵¹ The case against Brazil is discussed in section 2.2.1.4 of chapter IV, below.⁷⁵²

Table No. 3. Reparation measures in relation to the duties violated - <i>Purohit and Moore v. The Gambia</i> (African Comm Hum & Peoples' Rights, Comm. No. 241/2001)						
	Investigation, prosecution and punishment	Restitution	Compensation	Rehabilitation	Satisfaction	GNR
Protect (patients with mental disability from the act of third parties when admitted in mental health institutions)				'Provide adequate medical and material care for persons suffering from mental health problems.' ⁷⁵³		Repeal the Lunatics Detention Act and replace it with a new legislative regime for mental health compatible with human rights standards ⁷⁵⁴ . Create an expert body in charge of reviewing the cases of all persons detained under the Lunatics Detention Act and make appropriate recommendations for their treatment. ⁷⁵⁵

⁷⁵¹ *Case of Ximénes-López v. Brasil (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C. No. 149 (4 July 2006).

⁷⁵² See, pp. 252.

⁷⁵³ *Purohit and Moore v. The Gambia* para 85 (c).

⁷⁵⁴ *idem* para 85 (a).

⁷⁵⁵ *idem* para 85 (b).

In the decision on the *Children of Nubian Descent in Kenya*,⁷⁵⁶ the African Committee of Experts on the Rights and Welfare of the Child,⁷⁵⁷ considered the situation of Kenyan Nubians, who are treated like ‘aliens’ and who hold tenuous citizenship status. This treatment is particularly serious for Nubian children, who are not usually registered as Kenyan citizens at birth. Because of this, they lack the same entitlements that are granted to other children in Kenya. Most of the unregistered children live in poverty, with limited access to education and healthcare. At the age of 18, when most Kenyan children apply for identification cards, unregistered Nubians have to face a long and complex procedure in order to obtain them. As a result of the denial of status, the Kenyan government systematically refuses to provide basic services in Nubian neighbourhoods. The Committee found these facts were a violation of the African Children’s Charter’s guarantee of the rights to a nationality (articles 6.2, 6.3, 6.4), non-discrimination (article 3), health and health services (article 14.2), and education (article 11.3).

Related to the right to health, the Committee recognized that the lack of basic access to health facilities, as well as to primary and therapeutic health resources, is inconsistent with the respect for a child’s right to the highest attainable standard of health.⁷⁵⁸ The Committee found that the underlying conditions for achieving a healthy

⁷⁵⁶ *IHRDA & OSJI, (on behalf of children of Nubian descent in Kenya) v. Kenya*, African Committee of Experts on the Rights and Welfare of the Child, Comm. No 002/2009 (22 March 2011).

⁷⁵⁷ The African Committee of Experts on the Rights and Welfare of the Child is the body in charge of promoting and protecting the rights enshrined in the African Charter on the Rights and Welfare of the Child. Among other functions they have the role to monitor the implementation and ensure protection of the rights enshrined in this Charter. See African Charter on the Rights and Welfare of the Child, articles 32-46.

⁷⁵⁸ *idem* para 59.

life are protected by the right to health.⁷⁵⁹ In this context, the provision of plans and programs to provide health services in informal settlements and slum areas inhabited by Nubian people, is a duty of states under Article 14 of the African Children's Charter. In this regard, the Commission protected the right to health of Nubian children in the 'fulfil' dimension. Additionally, the Commission stated that Nubian children enjoyed less access to health services than comparable communities, due to the lack of confirmed status as Kenyan nationals.⁷⁶⁰ In doing so, the Committee protected the right to health in its dimension of non-discrimination and equal treatment.

As table No. 4 outlines the Committee recommended that the Government general measures consisting in the adoption of 'a short term, medium term and long term plan, including legislative, administrative, and other measures to ensure the fulfilment of the right to the highest attainable standard of health and of the right to education, preferably in consultation with the affected beneficiary communities.'⁷⁶¹ This measure is oriented to the redress of violations of the duty to fulfil the right to health. It is also clearly oriented to redressing the root causes of the problem, which, as determined by the Committee, are linked to the 'underlying conditions' for achieving a healthy life. Since such measures depend on the provisions of plans and programs to provide health services in the Nubian informal settlements, it is pertinent that the Commission decided to intervene in the creation and modification of such plans and programs. However, as the plan will have direct impact in the life of the community, the Committee was careful in recommending that such measures be taken in

⁷⁵⁹ idem para 59.

⁷⁶⁰ idem para 62.

⁷⁶¹ idem para 69 (4).

consultation with affected beneficiary communities. How such consultation should be done is something that the Committee did not explain.

Table No. 4. Reparation measures in relation to the duties violated - <i>IHRDA & OSJI, on behalf of children of Nubian descent in Kenya) v. Kenya</i> (African Committee of Experts on the Rights and Welfare of the Child, Comm. No 002/2009)						
	Investigation, prosecution and punishment	Restitution	Compensation	Rehabilitation	Satisfaction	GNR
Fulfil (lack of provision of primary and therapeutic health resources due to the inexistence of underlying conditions such as programs and policies that provide health services)						'[A]dopt a short term, medium term and long term plan, including legislative, administrative, and other measures to ensure the fulfilment of the right to the highest attainable standard of health [..], in consultation with the affected beneficiaries and communities.' ⁷⁶²

2.1.2 Advantages in the granting of recommendations in the case law of the African Commission on Human and Peoples' Rights

Since the right to health is directly justiciable in the African system, the recommendations made by the Commission, in terms of reparations, are more consistent with the adequate protection of this right. In general, the Commission has distinguished, although not explicitly, between the duties to respect, protect and fulfil in relation to the right to health, which has led to measures that correspond with each of these duties. In each case, the corresponding violations to the duties to respect, protect and fulfil are matched with recommendations in the form of compensation,

⁷⁶² idem para 69 (4).

restitution, satisfaction, rehabilitation, and guarantees of non-repetition. This analytical framework (respect, protect and fulfil) for the awarding of general measures, allows the implementation of general measures in a clear and structured way. Although the particular measures awarded could have been more ambitious in some cases, the analytical framework used is beneficial in terms of the clarity it brings to the awarding of general measures. An adequate doctrine for the redress of human rights should take this analytical framework into account in order to grant adequate reparation measures. A proposal for an analytical model in the understanding and awarding of GNR will be presented in chapter V.

2.2 GNR in the redress of health related issues: an analysis of the jurisprudence of the Inter-American Court of Human Rights

2.2.1 The indirect protection of the right to health in the Inter-American System of Human Rights and the granting of GNR

The right to health is explicitly recognized in three instruments of the Inter-American system. The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, also known as the 'Protocol of San Salvador', establishes that 'everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being.'⁷⁶³ The American Declaration of the Rights and Duties of Man also establishes that 'every person has the right to the preservation of his health through sanitary and

⁷⁶³ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 'Protocol of San Salvador' (adopted on 17 November 1988, entered into force 16 November 1999) OAS Treaty Series No 69 (1988) article 10.

social measures [...].⁷⁶⁴ In turn, the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, establishes that ‘persons deprived of liberty shall have the right to health, understood to mean the enjoyment of the highest possible level of physical, mental and social well-being.’⁷⁶⁵ References to health organizations and health facilities are also included in the Charter of the Organization of American States;⁷⁶⁶ the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance;⁷⁶⁷ and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.⁷⁶⁸

⁷⁶⁴ American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) article XI.

⁷⁶⁵ Resolution 1/08 Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (adopted on 13 March 2008) Principle X.

⁷⁶⁶ Article 45 (b) establishes that ‘work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family [...]’. Article 34 establishes that member states ‘agree to devote their utmost efforts to accomplishing the following basic goals: (I) Protection of man's potential through the extension and application of modern medical science.’

⁷⁶⁷ Both the Inter-American Convention against all forms of discrimination and intolerance and the Inter-American Convention against racism, racial discrimination and related forms of intolerance, establish in article 7 that ‘States Parties undertake to adopt legislation that clearly defines and prohibits racism, racial discrimination, and related forms of intolerance, [...], particularly in the areas of employment; participation in professional organizations; education; training; housing; health [...]’. Inter-American Convention against Racism, Racial Discrimination and related forms of intolerance (adopted on 5 June 2013).

⁷⁶⁸ Article 2 states that ‘violence against women shall be understood to include physical, sexual and psychological violence: [...] that occurs in the community and is perpetrated by any person, including, among others, rape, sexual abuse, torture, trafficking in persons,

In spite of the recognition of a right to health in several instruments, none of them explicitly establishes a mechanism for the enforceability of this right. The American Convention on Human Rights, (ACHR), allows for a system of individual petition.⁷⁶⁹ However, the Protocol of San Salvador does not recognize the right to health as one of the rights that can be used to initiate the application of the individual petition system. In turn, both the Declaration of the Rights and Duties of Man, and the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, are non-binding instruments so that the inclusion of the right to health has merely interpretative effects.

The lack of an express clause providing the direct justiciability of the right to health, in the main instruments of the system, has led the incorrect assumption that the right to health is non-justiciable in the Inter-American system of human rights. This understanding rests on the fact that the ACHR, the main instrument of the Inter-American System, does not explicitly include a right to health. The Convention distinguished between rights included in its chapter II on 'Civil and Political Rights' (Articles 3 to 25) and the rights established in its chapter III on 'Economic, Social and Cultural Rights'. Chapter III includes just one article, (Article 26,) on 'Progressive Development' which refers to the obligation of states to:

'undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate

forced prostitution, kidnapping and sexual harassment in the workplace, as well as in educational institutions, health facilities or any other place.'

⁷⁶⁹ *Protocol of San Salvador* article 19.6.

means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.⁷⁷⁰

Several authors have argued that article 26 of the ACHR could be interpreted in a way to provide direct and autonomous protection to the justiciability of economic, social and cultural rights, including the right to health.⁷⁷¹ In support of this position, the Inter-American Court has stated that ‘the Court has full jurisdiction over all matters pertaining to [the ACHR’s] Articles and provisions.’⁷⁷² Similarly, Judge Eduardo Ferrer Mac-Gregor, in a concurring opinion, argued that a systemic, evolutionary and *pro-homine* interpretation of Article 26 should lead to the direct

⁷⁷⁰ American Convention on Human Rights ‘Pact of San Jose’ (adopted on 22 November 1969, entered into force 18 July 1978), article 26.

⁷⁷¹ Tara Melish, ‘Rethinking the ‘less as more’ thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas’ (2006-2007) 39 *N.Y.U. Journal of International Law and Politics* 204; Julieta Rossi & Victor Abramovich, ‘La Tutela de los Derechos Económicos, Sociales y Culturales en el Artículo 26 de la Convención Americana sobre Derechos Humanos’ (2007) 9 *Revista Estudios Socio-Jurídicos* 34; Oscar Parra-Vera, *Justiciabilidad de los Derechos Económicos, Sociales y Culturales and el Sistema Interamericano* (Comisión Nacional de los Derechos Humanos, México, 2011), pp. 11-34; Christian Courtis, ‘La Protección de los Derechos Económicos, Sociales y Culturales a través del Artículo 26 de la Convención Americana sobre Derechos Humanos’, in Christian Courtis et al (eds), *Protección Internacional de Derechos Humanos, Nuevos Desafíos* (México, Porrúa-ITAM, 2005).

⁷⁷² *Case of Acevedo Buendía et al (Discharged and Retired Employees of the Comptroller) v. Peru (Preliminary Objection, Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C. No. 198 (1 July 2009) para 16.

enforcement of the right to health.⁷⁷³ This, however, is still a minority opinion in the Court.⁷⁷⁴

Nonetheless, both the Inter-American Commission, and the Inter-American Court have protected some health issues in an indirect way, by referring to civil and political rights provisions. For example, the Inter-American Court has referred to the right to life (Article 4 of the ACHR) and the right to personal integrity (Article 5 of the ACHR), in order to address particular health issues. The Court has also elaborated on the obligation of states to guarantee the inspection, vigilance, and control of health providers, and the obligation to protect persons in conditions of vulnerability, and found some obligations of states in relation to health issues.⁷⁷⁵ The next section of this chapter presents an analysis of the reparation measures addressing health related issues granted in the case law of the Inter-American Court.

2.2.1.1 Protection of health related issues through the application of the right to life (article 4 ACHR) and the concept of ‘Dignified life’

⁷⁷³ *Case of Suárez Peralta v. Ecuador (Preliminary Objection, Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C. No. 261 (21 May 2013) Concurring opinion of Judge Eduardo Ferrer Mac-Gregor Poisot.

⁷⁷⁴ In the majoritarian opinion of this decision, the Court found Ecuador had violated the rights to fair trial, judicial protection and human treatment. It however, did not find a direct violation to the right to health. *Suárez Peralta v. Ecuador (Merits)* para 229.

⁷⁷⁵ For a full presentation of these arguments, see, Parra-Vera *La protección del derecho a la salud [...]*; and Steven Keener & Javier Vasquez, ‘A life worth living: enforcement of the right to health through the right to life in the Inter-American Court of Human Rights’ (2008-2009) 40 *Columbia Human Rights Law Review* 595.

Health related issues have traditionally been protected in the Inter-American system, by referring to the right to life. By using Article 4 of the ACHR, the Inter-American Court has recognized states have some positive duties in the protection of the health of people. Such positive duties are comparable to the duty to fulfil the right to health, in as much as they are oriented to ensuring the provision of health care in different ways.⁷⁷⁶

The first case where the Court referred to some health related issues was *Villagrán Morales and others v Guatemala*.⁷⁷⁷ In this case, the Court considered the kidnapping, torture and death of four minors, and the murder of another minor by security forces. The minors were homeless (they were called 'street children') and lived in extreme poverty. The Court referred to the concept of 'dignified life' ('vida digna'), stating that the right to life includes, not only the right not to be arbitrarily deprived of life, but also 'the right that he will not be prevented from having access to the conditions that guarantee a dignified existence.'⁷⁷⁸ Although the Court did not specifically refer to the right to health, it did point out that the State has an 'obligation to adopt special measures of protection and assistance for the children within its jurisdiction.'⁷⁷⁹

As the case focused on justiciable elements of children's rights, the reparation measures were similarly focussed, without providing any measure that specifically redressed the health related issues in the case. The Court ordered the payment of compensation for both pecuniary and non-pecuniary damages, as well as the

⁷⁷⁶ ESCR GC 14 para 36.

⁷⁷⁷ *Case of the 'Street Children' (Villagrán Morales et al) v. Guatemala (Merits)* Inter-American Court of Human Rights Series C. No. 63 (19 November 1999).

⁷⁷⁸ *idem* para 144.

⁷⁷⁹ *idem* para 146.

transfer of the mortal remains of one of the children, the designation of an educational centre named after the victims, and an investigation into the facts of the case. As part of the GNR, the Court ordered the state to 'implement, in its internal legislation, the legislative, administrative or other measures that are necessary to adapt Guatemalan legislation to article 19 of the Convention on the rights of the child, in order to ensure that events such as those under consideration are never repeated.'⁷⁸⁰

These measures could have included more detailed aspects bearing upon the right to health. As the expert on the rights of the child, Emilio Garcia Mendez, suggested, in order to redress the systemic violence against children, it is necessary to take legislative measures, such as the inclusion of international standards on children's rights in the domestic law, the enforcement of a Children and Youth Code (1996) that includes international standards, reforms in institutions, and provisions to combat the impunity. These measures should be taken together with efforts aimed at increasing basic social policies of health and education.⁷⁸¹ In the measures awarded by the Court, it could have specifically mentioned the need to implement measures that are necessary to adapt Guatemalan legislation to the Convention in order to secure an adequate standard of living for the 'street children', including, particularly, an adequate standard of health.

⁷⁸⁰ *Case of the 'Street Children' (Villagrán-Morales et al.) v. Guatemala (Reparation and Costs)* Inter-American Court of Human Rights Series C No.77 (26 May 2001) para 98. The excessive focus of the Court on 'children rights' will be developed in section 2.2.2.2.

⁷⁸¹ *idem* para 56.

More extensive GNR were granted in *Juvenile Reeducation Institute v. Paraguay*⁷⁸² which related to the overcrowded conditions of a detention centre for young people, and the death of nine detainees who were killed in three fires. In this case, the Court found that the inmates of the Institute, many of them minors, were not given prompt and proper medical, dental and psychological care⁷⁸³ and that the State failed to take all the 'necessary positive measures to ensure to all inmates decent living conditions.'⁷⁸⁴ The Court established that the rights to life and to an adequate standard of living of children include an obligation to 'provid[e] them with health care and education, so as to ensure to them that their detention will not destroy their life plans.'⁷⁸⁵ As part of the reparation measures, the Court ordered the state to carry out a public act of acknowledgment,⁷⁸⁶ psychological and medical treatment for the inmates injured in the fires,⁷⁸⁷ vocational guidance to all persons who were inmates,⁷⁸⁸ and the payment of pecuniary and non-pecuniary damages.⁷⁸⁹

In what can be called a GNR, the Inter-American Court also ordered the state to prepare and map out, in partnership with civil society, a state policy for the short, medium and long term on the subject of juveniles in conflict with the law. The state's policy 'must include, inter alia, strategies, appropriate measures and the earmarking

⁷⁸² *Case of the Juvenile Reeducation Institute' v. Paraguay (Preliminary Objections, Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C. No.122 (2 September 2004).

⁷⁸³ *Juvenile Reeducation Institute v. Paraguay (Merits)* para 166.

⁷⁸⁴ *idem* para 176.

⁷⁸⁵ *idem* para 161.

⁷⁸⁶ *idem* para 316.

⁷⁸⁷ *idem* para 319.

⁷⁸⁸ *idem* para 321.

⁷⁸⁹ *idem* para 330.

of the resources needed [...] for the establishment of education programs and full medical and psychological services for all children deprived of their liberty.⁷⁹⁰ This measure directly tackles the health aspects of the case and is wider in scope than the measures adopted in *Villagrán Morales*. They are also very exceptional as they have a far reaching scope, with a clear preventive nature.

In other cases related to the protection of health in indigenous communities the Court has stated that the right to a decent existence includes the provision of health care. In the cases of the indigenous communities *Yakie Axa v. Paraguay* (2005) and *Xakmok Kasek v. Paraguay* (2010), the lack of access, and entitlement, to ancestral territories forced the communities to live in temporary settlements where access to water, appropriate sanitary conditions, food, health and education were restricted⁷⁹¹. In these cases, the Court found that the right to a dignified life includes 'minimum living conditions that are compatible with the dignity of the human persons and of not creating conditions that hinder or impede it.'⁷⁹² The Court found that the measures taken by the state were insufficient to correct the situation of vulnerability for indigenous communities⁷⁹³ and that the state had not guaranteed adequate access to health for members of the community.⁷⁹⁴

⁷⁹⁰ idem para 317.

⁷⁹¹ idem paras 74, 164-213. *Case of the Yakie Axa Indigenous Community v. Paraguay (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 125 (17 June 2005) paras 50.15, 50.92-50.105.

⁷⁹² *Yakie Axa (Merits)* para 162.

⁷⁹³ idem para 169.

⁷⁹⁴ *Case of the Xákmok Kásek Community v. Paraguay (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 214 (24 August 2010) para 208.

Although the facts of *Yakie Axa* and *Xakmok Kasek* are broadly similar, the reparation measures, and particularly GNR, are similar in some ways but different in others, showing the evolution of the Court in dealing with reparations for health related issues. First, as a result of the lack of adequate access to health care, in both cases the Court ordered the immediate and regular provision of medical care, including appropriate medicines and adequate treatment, to all members of the community and especially the elderly, children and pregnant women.⁷⁹⁵ In addition to this, the Court in *Xakmok Kasek* also ordered 'periodic vaccination and deparasitation campaigns that respect their ways and customs.'⁷⁹⁶ It also emphasized that medical care for women should include both pre and post-natal care, as well as care during the first months of the baby's life.⁷⁹⁷ These are very important measures that, following the framework of duties of the CDESCR, effectively address the duty to fulfil the right to health for these communities.

However, it is important to notice how these measures are titled in different ways depending on the case. Whereas in *Yakie Axa* such measures appear under 'guarantees of non-recidivism',⁷⁹⁸ in *Xakmok Kasek* they appear as 'rehabilitation'.⁷⁹⁹ In fact, if the right to health were justiciable in the Inter-American system, these measures would be better understood as measures of restitution. They are not aimed at preventing the inactivity of the state in guaranteeing adequate access to health services for the communities or at changing the root causes of the violation. Instead, the measures are oriented at forcing the state to fulfil an obligation (the duty to fulfil the right to health of these communities) that was not complied with before.

⁷⁹⁵ *Yakye Axa (Merits)* para 221; and *Xákmok Kásek (Merits)* para 301.

⁷⁹⁶ *Xákmok Kásek (Merits)* para 301 (b).

⁷⁹⁷ *idem* para 301.

⁷⁹⁸ *Yakye Axa (Merits)* paras 210-227.

⁷⁹⁹ *Xákmok Kásek (Merits)* para 300 to 306.

Second, the cases differ in the type of 'other measures' granted by the Court to redress the violations. In *Yakie Axa*, apart from ordering the immediate and regular provision of medical care, no general measures or GNR were awarded in relation to health issues. This situation was amended five years later in *Xakmok Kasek*, where more advanced measures were granted in relation to health related issues. In this case, the Court also ordered the state to prepare a comprehensive study, within six months, regarding the provision of potable water, medical and psycho-social care, delivery of medicines, supply of food for the community, and the supply of materials and human resources for the community's school. Related to the provision of health care, the Court indicated that the study should include:

'(1) the frequency required for the medical personnel to visit to the Community; (2) the main illnesses and diseases suffered by the members of the Community; (3) the medicines and treatment required for those illnesses; (4) the required pre- and post-natal care, and (5) the manner and frequency with which the vaccination and deparasitation should be carried out.'⁸⁰⁰

The scope of this measure is more extensive than the ones granted in *Yakie Axa*, and clearly incorporates the preparation of studies that will lead to the design of public policies that have a bearing upon the right to health of this community. It is also more detailed, allowing GNR not just for the provision of adequate medicines and medical care, but also emphasizing other elements of the right to health of vulnerable populations, in particular the inclusion of maternal care, and vaccination and deparasitation programs which were not mentioned in *Yakie Axa*. Even though

⁸⁰⁰ idem para 303.

this measure is under the title ‘rehabilitation,’ it can be considered a GNR as it is intended to change ‘the delivery of basic supplies and services to the members of the Community’⁸⁰¹ and, therefore, to prevent the repetition of the violations.

In addition to this measure, the Court indicated that the state should establish a health clinic, which has necessary medicines and supplies, in the place where the *Xakmok Kasek* community is temporarily located, as well as a system of communication for emergency cases, and transportation when required.⁸⁰² These are measures which address the obligation to fulfil the right to health of the community. In the section on ‘Guarantees of non-repetition’ in *Xakmok Kasek*, the Court also ordered the implementation of a program for the registration of births and the issuance of identity cards, as well as the establishment of an effective system for indigenous people to claim their right to property.⁸⁰³ These ‘guarantees of non-repetition’ are directly oriented to prevent further violations of the right to property of ancestral lands, but do not directly address health related issues, which were considered under the section on ‘rehabilitation’.

Another allegation that implicated the responsibility of the state, and links the right to life with some elements of health care, relates to the presumed responsibility of the state in the death of people from preventable causes. In both cases, the Commission alleged that the state was responsible for the deaths of several members of the community, which could have been avoided with adequate food and medical care. This allegation was, however, in each case, treated in a different way. In *Yakie Axa*, the Court did not find any evidence to establish state responsibility, claiming ‘it did

⁸⁰¹ idem para 305.

⁸⁰² idem para 306.

⁸⁰³ idem para 308.

not have sufficient evidence to establish the causes of said deaths.⁸⁰⁴ The Court's lack of sensitivity to this allegation was criticized in the concurring opinion of the case.⁸⁰⁵ Later, in *Xakmok Kasek*, the Inter-American Court seemed to correct the understanding of this type of violation, embracing a more extensive understanding of the right to life, by finding the state responsible for the death of thirteen members of the *Xakmok Kasek* community, due to illnesses that were easily preventable⁸⁰⁶ if the individuals had received prompt and adequate medical care⁸⁰⁷. Unlike other cases where the right to life was found to be violated, the Inter-American Court did not award compensation measures for material and moral damages as a result of these deaths.

The GNR awarded in *Xakmok Kasek* contrasts with the lack of express GNR for the prevention of health related violations in *Yakie Axa*. This demonstrates the evolution of the Court's jurisprudence on GNR for the redress of health related cases, even

⁸⁰⁴ *Yakye Axa (Merits)* para 177.

⁸⁰⁵ *Case of the Yakye Axa Indigenous Community v. Paraguay (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 125 (17 June 2005) Separate Dissenting Opinion of Judges A.A. Cançado Trindade and M.E. Ventura Robles, para 6; for commentary on this, see Keener & Vasquez *A life worth living* 610.

⁸⁰⁶ Such illnesses include tetanus, pneumonia, tuberculosis, anaemia, whooping cough, dehydration, and serious complications during labour. *Xákmok Kásek (Merits)* para 231.

⁸⁰⁷ In the *Xakmok Kasek* Case, the Court 'underscores that extreme poverty and lack of adequate medical care for pregnant women or women who have recently given birth resulting in high maternal mortality and morbidity. Because of this, States must design appropriate health-care policies that permit assistance to be provided by personnel who are adequately trained to attend to births, policies to prevent maternal mortality with adequate pre-natal and post-partum care, and legal and administrative instruments for health care policies'. *Xákmok Kásek (Merits)* para 233.

though the right to health is not directly justiciable in the Inter-American system. However, the direct justiciability of the right to health would be a step forward, in as much as it would increase the likelihood of granting GNR that are directly linked to health related issues.⁸⁰⁸ It also increases the likelihood of more detailed measures that redress specific components of the right to health, instead of generic formulations that merely call for an improvement in 'health conditions.'

2.2.1.2 Protection of health related issues through the application of the right to personal integrity (Article 5 ACHR)

Health related issues have also been protected in the Inter-American system through the right to personal integrity. In *Sebastián Furlán v. Argentina*⁸⁰⁹, the Court analysed the case of Sebastián Furlán who, at the age of 14, suffered an accident in a military field, hitting his head on a heavy beam. As a result, Sebastian developed difficulties in his speech and the use of his upper and lower limbs⁸¹⁰. His father filed a civil suit against the state, claiming compensation for injuries resulting from the accident⁸¹¹. The Court found that a twelve year delay in hearing the civil claim was attributable to the state authorities. They also found that the delay had a significant impact on the personal integrity of the victim, who was unable to receive adequate psychiatric treatment and rehabilitation, necessary to improve his quality of life⁸¹². The Court did not refer expressly to the right to health but instead stated that there was a violation

⁸⁰⁸ This argument is developed in more depth in section 2.2.2 GNR and rehabilitation measures.

⁸⁰⁹ *Case of Furlán and Family V. Argentina (Preliminary Objections, Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C. No. 246 (31 August 2012).

⁸¹⁰ *idem* para 74.

⁸¹¹ *idem* para 78.

⁸¹² *idem* paras 203-204.

of the right to personal integrity, because of the impact the denial of access to justice had on him obtaining adequate rehabilitation and health care.

The Court ordered several reparation measures. In terms of rehabilitation, the Court ordered that the state provide adequate and effective medical, psychological and psychiatric treatment to the victim and the next of kin, free of charge, through its specialized health care services⁸¹³. The Court ordered the creation of a multidisciplinary team to assist Sebastian in his social, educational, vocational and labour integration,⁸¹⁴ and also ordered the publication of the decision in an official newspaper.

In terms of GNR, the petitioners requested the state to issue regulations to the National Mental Health Act (Law 26,657) arguing that this law was not effective in the protection of the rights of persons with disabilities.⁸¹⁵ When analysing the request, the Court acknowledged that, in addition to the National Mental Health Act, the state had ratified the Convention on the Rights of Persons with Disabilities and had enacted other laws protecting the rights of persons with disabilities.⁸¹⁶ As a consequence, the Court considered that issuing additional regulations was not necessary. As in other cases, the refusal of the Court to order legislative reforms in

⁸¹³ *idem* para 284.

⁸¹⁴ *idem* para 288.

⁸¹⁵ *idem* para 291.

⁸¹⁶ The State had ratified the Convention on the Rights of Persons with Disabilities; and has enacted Laws 22,431 'which introduce the use of a single disability certificate and establish the system of basic integrated rehabilitation and training services for people with disabilities'; Law 24,901 which establishes rehabilitation services, therapeutic educational services, education and assistance services; and Law 22,431 which ensure that people with disabilities would have obtained medical care, education, and social security, and tax exemptions.

order to prevent the repetition of the facts was not related to lack of competence, or the inadequacy of the measure, but to the previous existence of legislative reforms. This is a relevant argument for those who deny the capability of the Court to order legislative reforms as part of the GNR.

So instead of ordering the enactment of regulations, the Court ordered the state to 'enforce the obligation of *active transparency* in relation to the health and social security benefits to which people with disabilities are entitled in Argentina' (italics added).⁸¹⁷ As a result, the Court ordered the state to provide the public with the maximum amount of information in order to access to such benefits. The information should be provided in a comprehensive, easily understood and simple language.⁸¹⁸ The Court also ordered that, as soon as a person is diagnosed with serious problems related to disability, this person should be provided with a charter of rights summarizing the benefits available to him or her, the standards for the protection of persons with mental disabilities, and the institutions that can provide assistance in demanding the fulfilment of their rights.⁸¹⁹ Although the right to health is not directly protected in the jurisprudence of the Inter-American Court, these measures implicitly contribute to the fulfilment of the elements of the right to health.⁸²⁰

2.2.1.3 Protection of health related issues through the application of the right to personal integrity (Article 5 ACHR) in cases of imprisoned people

⁸¹⁷ idem para 294.

⁸¹⁸ idem para 294.

⁸¹⁹ idem para 295.

⁸²⁰ ESCR GC 14 para 18 and 50.

The Court has protected some health related elements of the right to health in cases related to detention conditions. In *Velez Loor v. Panama*,⁸²¹ *Vera and other v. Ecuador*⁸²², *Díaz Peña v. Venezuela*⁸²³ the Court considered the lack of adequate medical treatment for people deprived of their liberty. In all cases, the victims were in detention and experienced health problems. Even though the victims required urgent medical attention, the state did not provide adequate and prompt health care, resulting in the deterioration of their health and even in death.

In terms of the justiciability of health related issues, the Court found, in all these cases, that the state has a duty to 'safeguard the health and welfare of prisoners, providing them, among other elements, with the required medical assistance.'⁸²⁴ Also, that the 'lack of adequate medical treatment for a person who is deprived of liberty and in the State's custody may be considered a violation of Article 5(1) and 5(2) of the Convention [right to personal integrity] depending on the particular circumstances of the specific person'⁸²⁵. In these cases, the lack of adequate

⁸²¹ *Case of Velez Loor v. Panama (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No. 218 (23 November 2010).

⁸²² *Case of Vera Vera v. Ecuador (Preliminary Objections, Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 226 (19 May 2011).

⁸²³ *Case of Díaz Peña v. Venezuela (Preliminary Objection, Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 24 (26 June 2012).

⁸²⁴ *idem* para 135. In the *Velez Loor* Case the Court established that 'the State has the duty to provide detainees with regular medical checks and care and adequate treatment whenever necessary'. *Vélez Loor (Merits)* para 220.

⁸²⁵ *Díaz Peña v. Venezuela (Merits)* para 137.

medical care in detention centres can be considered a violation of the duty to fulfil the right to health.⁸²⁶

Although the facts of the cases, and the reasoning of the Court, are similar, the reparation measures adopted in each case varies. The Inter-American Court went from ignoring health issues to awarding measures that expressly asked the state to provide 'adequate, decent and timely health care.'⁸²⁷

In *Velez Loor v. Panama*,⁸²⁸ an Ecuadorian migrant in Panama was detained by Panamanian authorities. According to the law of Panama, migrants should be transferred to special centres of detention for migrants. The victim, however, was transferred to a public prison. He apparently suffered from migraines and dizziness, due to a pre-existing cranial fracture. According to the prison physician, a CAT scan was required but it was not performed due to its cost.⁸²⁹ In this case, the Court ordered the state to provide a sum of money that covered specialized medical and psychological treatment for the victim in the place where he lives. In addition to the individual measures, and as part of the GNR, the Court ordered the State to:

'adopt, within a reasonable time, the measures necessary to provide facilities with sufficient capacity to accommodate persons whose detention is necessary and proportionate, specifically for immigration reasons. These establishments must offer suitable physical conditions

⁸²⁶ ESCR GC 14 para 36.

⁸²⁷ *Díaz Peña v. Venezuela (Merits)* para 154.

⁸²⁸ *Vélez Loor v. Panama (Merits)*

⁸²⁹ *idem* para 221.

and an appropriate regimen for migrants, and the staff working at such facilities must be properly qualified and trained civilians.¹⁸³⁰

It also ordered the implementation of a training program related to the obligation to initiate investigations, *ex officio*, in cases of torture, directed at the Public Prosecutor's Office, the judiciary, the National Police and medical personnel.⁸³¹ The Court rejected the requests of the Commission to order conditions of the prison, where the victim was detained, be adapted to international standards.⁸³² It also abstained from ordering the state to adequately define the crime of torture in its legislation, as a previous judgment from the Inter-American Court had ordered to the state.⁸³³ The Court also rejected the requests of the representatives to organize an event acknowledging the state's responsibility, to conduct an effective investigation against those officials that failed to open investigations for the alleged acts of torture, to draft protocols of physical examination, to create a mechanism of daily visits, and to implement a mechanism so imprisoned people can denounce acts of aggression that they are subjected to.⁸³⁴

In this case, none of the GNR granted are oriented to redressing the terrible health conditions of the prison centres where the victim was held. The representatives had requested the Court 'to guarantee that the Panamanian Prison System has sufficient doctors, who should be independent in order to properly perform their duties, and to draw up protocols for the medical examination of those detained.'⁸³⁵ However, the

⁸³⁰ *idem* para 272.

⁸³¹ *idem* para 280.

⁸³² *idem* paras 273-276. This aspect will be discussed in section 2.2.2.2.

⁸³³ *idem* para 292.

⁸³⁴ *idem* para 293.

⁸³⁵ *idem* para 274.

Inter-American Court rejected this request by considering that '[g]iven that this case refers to migrants and that it has been established that they cannot be held in such places, [...] it is not pertinent to order a measure such as the one requested.'⁸³⁶ As a consequence, the Court limited itself to reminding the state of the special position it has as guarantor of the right of persons deprived of liberty. This reasoning is quite narrow in terms of the protection of the rights of the victims. The decision focuses on the main allegations regarding the rights of migrants, forgetting about the impact the case has in terms of victims' health conditions. For example, it does not include any recommendation aimed at improving the health conditions of the detention facilities where the victim was held. Also, it does not include any of the requests made by the petitioners, in terms of the inclusion of more doctors and the drawing up of protocols for medical examination. Since the Court focused, in the arguments, on migrants, it was blind to the granting of measures for the redress of wider health related issues.

It is certainly true that the state had informed the Court of the adoption of specific measures for the improvement of health care conditions in prisons, such as 'the implementation of medical visits to the center of the interior of the country, [...] the provision of supplies to the clinics of the penitentiary centers, [...] [as well as] [...] an arrangement with the Ministry of Health in order to increase the medical service at the clinic at La Joya prison.'⁸³⁷ However, there was no information in the case as to whether such measures were adequately implemented by the state. Although the burden of proof for such information rests, in principle, with the Commission and the victims, the Court could have insisted on the duty of the state to improve the health conditions of the prison center where the victim was held, instead of just ensuring that the conditions of imprisonment in prison centres conform, in general, to

⁸³⁶ *idem* para 276.

⁸³⁷ *idem* para 275.

international standards.⁸³⁸ A higher level of detail in general measures, focusing on redress for health related violations, would have forced the state to undertake more effective measures in order to provide prisoners with adequate conditions of health care.

In *Vera and et al v. Ecuador*,⁸³⁹ the protection of health related issues is more visible in the GNR, but it is still not enough. In this case, a man was detained after being followed by a mob that accused him of assaulting people in a public street. As a result of the persecution he was shot. Mr Vera was referred to a hospital for examination but was discharged without extracting the bullet, because, according to the doctors, he did not merit hospitalization.⁸⁴⁰ After several days in pain, Mr. Vera was admitted to the hospital before being transferred to another for an operation. He died after the operation.

The Court ordered the payment of compensation for the costs his mother incurred in order for her son to receive medical care. In terms of GNR, the Court ordered the state to disseminate the judgement 'within the police and prison authorities as well as [with] the medical personnel'⁸⁴¹ in charge of caring for persons deprived of liberty. Here again the issues related to health are insufficiently protected. Although educational measures can be useful in preventing the repetition of these facts, the Court could have ordered bolder measures in order to actually change the root causes of the violation. In this sense, the victims requested the Commission 'to create a public policy that allows access to healthcare for persons deprived of

⁸³⁸ *idem* para 276.

⁸³⁹ *Vera Vera v. Ecuador (Merits)*

⁸⁴⁰ *idem* para 49.

⁸⁴¹ *idem* para 125.

liberty.⁸⁴² The argument was dismissed by the Court because it found that ‘the alleged current conditions of the prison system do not form part of the factual basis at hand’⁸⁴³ and that there was insufficient evidence to prove there was a generalized situation of inadequate medical care for persons deprived of their liberty in Ecuador.⁸⁴⁴ If the evidence was not enough to show there was a pattern of inadequate health care in detention centres in Ecuador, the Court could have ordered the state to ensure the provision of, at least, adequate measures of health care in the Provisional Detention Centre where the victim was held. Although the existence of a directly justiciable right to health is not a precondition for the Court to award more ambitious measures, the recognition of such a right would help to justify the adoption of bolder measures.

In *Díaz Peña v. Venezuela*,⁸⁴⁵ the Inter-American Court took a more proactive role in the protection of health related issues during the reparation stage. This case represents a step forward in the jurisprudence of the Inter-American Court regarding the provision of medical care for detainees. Mr. Díaz Peña was detained in a Pre-Trial Detention Centre. It was proved that, prior to his detention, he had suffered from problems in his ears and that in detention he developed a perianal abscess that required an urgent operation. In spite of the urgent need of medical treatment, Mr. Díaz Peña did not have the examinations requested by his doctors, and he was not given the required medical assistance in an opportune, adequate and complete manner. As a result, the Court found that, while detained, there was a progressive deterioration in his health.⁸⁴⁶

⁸⁴² idem para 138.

⁸⁴³ idem para 139.

⁸⁴⁴ idem para 81.

⁸⁴⁵ *Díaz Peña v. Venezuela (Merits)*

⁸⁴⁶ idem para 107.

The Court ordered the payment of compensation as reimbursement for expenses incurred for his previous medical care, and to cover future expenses for specialized medical treatment.⁸⁴⁷ In terms of GNR, the Court ordered the state to adopt all necessary measures to ensure that the conditions in the detention centres where the victim was held are in accordance with international standards.⁸⁴⁸ Particularly, the Court ordered the State to ensure that people deprived of liberty enjoy ‘[...] necessary, adequate, decent and timely *health care*’⁸⁴⁹ [emphasis added]. The express reference to ‘health care’ in the GNR reflects a positive development in the protection and adequate representation of health related issues, in the jurisprudence of the Inter-American Court. In this case, the lack of a directly justiciable right was not an impediment for the Court to award appropriate and extensive GNR. The Court, however, could have taken a more ambitious approach, for example, by detailing the type of measures that the state should take, such as access to light and natural ventilation, access to adequate sanitary installations, access to adequate and prompt specialized services, and the provision of adequate instruments to treat particular health problems.⁸⁵⁰ It is likely that in a model of direct justiciability of the right to health, more detailed measures addressing specific components of this right could, and would, have been awarded by the Court.

2.2.1.4 Protection of health related issues through the application of a duty of states to regulate, supervise and control the provision of health services

⁸⁴⁷ idem para 161

⁸⁴⁸ idem para 154.

⁸⁴⁹ idem para 154.

⁸⁵⁰ idem para 140.

The Inter-American Court has also provided reparations in cases where states are responsible for the lack of adequate regulation, supervision, and control, in the provision of health services carried out by third parties. This responsibility has arisen from the general obligation of states to respect rights and to adopt any provision necessary to give effect to the rights and freedoms established in the Convention (Articles 1 and 2 ACHR). These standards have been identified in several cases by the Inter-American Court of Human Rights. For example, in the cases *Ximenes Lopes v. Brasil* (2006),⁸⁵¹ *Alban Cornejo and others v Ecuador* (2007),⁸⁵² and *Suárez Peralta v. Ecuador* (2013)⁸⁵³ the Court considered the death of patients within medical centres operated by private parties. Whereas the first case related to the confinement of a person with a mental illness the other cases are related to medical malpractice in the performance of health procedures.

In *Ximenes Lopes v. Brasil*⁸⁵⁴, the facts of which resemble those in *Purohit and Moore v The Gambia* from the African Commission on Human and Peoples' Rights, a mentally ill person was hospitalized in inhuman and degrading conditions, and beaten by officers of the 'Casa de Reposo Guararapes' (Guararapes Rest Home), during psychiatric treatment.⁸⁵⁵ There was no investigation after the case, leading to the impunity of those responsible. The rest home was a private psychiatric clinic operated in the public health system of Brazil. In this case, the Court held that there

⁸⁵¹ *Ximénes-Lópes v. Brasil (Merits)*

⁸⁵² *Case of Albán-Cornejo et al v. Ecuador (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 171 (22 November 2007).

⁸⁵³ *Case of Suárez Peralta v. Ecuador (Preliminary Objections, Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C. No. 261 (21 May 2013).

⁸⁵⁴ *Ximénes-Lópes v. Brasil (Merits)*.

⁸⁵⁵ *idem* para 112(9) to (11).

is a state obligation to protect the rights to life and personal integrity of people, by regulating and supervising the health care services provided by private institutions. The Court found that states are responsible for regulating and supervising the provision of services and the implementation of public health care services in order to protect the right to life and the physical integrity of the individuals undergoing medical treatment.⁸⁵⁶

In addition to compensation for pecuniary and non-pecuniary damages, the Court awarded GNR, mainly related to training public officials and providing courses about how to ensure the protection of certain rights. In this case, the Court ordered the state to develop a training and education program for physicians and personnel working in mental health care institutions about the principles that govern treatment of patients with mental illnesses, in accordance with international standards.⁸⁵⁷

Other GNR with a larger scope were rejected by the Inter-American Court as they were considered not necessary for the redress of the violation. In *Ximenes Lopes*, it was proven that the deficiencies in medical care and the use of violence to control the patients were not exclusive to the victims of the case, but were part of an 'atmosphere of violence, aggression, and maltreatment' in the rest home.⁸⁵⁸ As a consequence, the representatives requested more extensive GNR, consisting of the establishment of procedures for supervising the operation of health units, the closing of certain psychiatric units, the approval and implementation of 'Rules on Persons with Disabilities', and the adoption of all necessary measures to eradicate the use of

⁸⁵⁶ idem para 99.

⁸⁵⁷ idem para 250. As part of the GNR the Court also ordered the state to 'investigate the events that amounted to violations in the instant case' and to publish the judgement. Idem para 246.

⁸⁵⁸ idem para 112 (56).

cruel, inhuman or degrading treatment in psychiatric institutions.⁸⁵⁹ However, such measures were not ordered by the Court as the state proved it had adopted a new National Mental Health Policy. The State not only acknowledged partial responsibility for the violations but also engaged in a variety of legislative and structural measures aimed at improving the conditions of psychiatric care in the region.⁸⁶⁰ In fact, prior to the judgement, the state had developed a process of reforming the model of mental care, starting in 1992 with the second National Conference on Mental Health,⁸⁶¹ continuing with the approval of a new law reforming the National Mental Health Policy in 2001 (Law 10216/2001), and leading to the closure of the Casa de Reposo Guararapes. According to Rosato and Coreia, there have been important advances in mental health policies in recent years, but no major training programs implemented, except for those ordered by the Court.⁸⁶²

In other cases related to medical malpractice, the Inter-American Court has recognised that states have a duty to exercise supervision and control, in those

⁸⁵⁹ *idem* para 214 (d).

⁸⁶⁰ Such as the creation of a commission to investigate responsibility in the Care Centre, the establishment of a Mental Health Care Network, the creation of a Psychiatric Admission Unit in the general hospital of the municipality; the creation of a Psychosocial Care Centre; among others. The State also enacted a Law (10,216/2001) on the “Psychiatric Reform Law”, and provided several seminars and conferences on Psychiatric Care. *Ximénes-Lópes v. Brasil (Merits)* para 243. According to Rosato and Correia, the final approval of the Law 10216, after 12 years of discussion in the Congress was speeded up by the Damiao Ximenes Case. Cassia Rosato & Ludmila Correia, ‘The Damiao Ximenes Lopes Case: Changes and challenges following the first ruling against Brazil in the Inter-American Court of Human Rights’ (2011) 15 *SUR* 91.

⁸⁶¹ *Ximénes-Lópes v. Brasil (Merits)* para 46 (2) (d).

⁸⁶² Rosato & Correia *The Damiao Ximenes Lopes Case* 106.

cases where private parties perform public services. In *Alban Cornejo v Ecuador*, a person admitted to the Metropolitan Hospital, a private health institution, died, allegedly due to negligence. The criminal complaints filed in the case were not successful. In one of the criminal complaints, the statute of limitations ran out, making any further investigation and punishment impossible.⁸⁶³ The Court held that there is a state obligation to protect the rights to life and personal integrity of people, by regulating and supervising the health care services provided by private institutions. The Court also found that ‘when related to the essential jurisdiction of the supervision and regulation of rendering the services of public interest, such as health, by private or public entities (as is the case of a private hospital), the state responsibility is generated by the omission of the duty to supervise the rendering of the public service to protect the mentioned right.’⁸⁶⁴

The Court ordered the state to ‘disseminate patients’ rights applying both domestic and international standards’. It also ordered the implementation of an education and training program for justice operators and health care professionals, relating to the Ecuadorian legislation on patients’ rights.⁸⁶⁵ These measures are directly linked with the duty to protect the right to health, in as much as they are oriented at making sure that both health personnel and patients know their duties and rights.

The Inter-American Court also rejected the request of the Commission and the victims, to order the state to enact specific legislation on medical malpractice. The state acknowledged the lack of more adequate criminal offences in the criminal code

⁸⁶³ Another complaint was also lodged asking for the investigation of the facts, however, it was also unsuccessful as the legal situation of that complaint was still pending a court decree when the case went to the Inter-American Court.

⁸⁶⁴ *Albán-Cornejo et al v. Ecuador (Merits)* para 119.

⁸⁶⁵ *idem* para 264.

by which to punish physicians and stated its intention to prepare a bill on medical malpractice. The Court, however, did not order specific legislative measures in this regard taking into account, first, the discretion of the state in including specific criminal descriptions for medical malpractice;⁸⁶⁶ and second, the promise of the state to 'endeavor to improve its health care and adapt its criminal legislation.'⁸⁶⁷ In this decision, the Court was very respectful of the discretion of the state to modify its domestic law. One argument that seemed to be decisive for the Court was the fact that, unlike genocide, torture, forced disappearance, and other crimes, there are not strict criminal definitions for medical malpractice in international law.⁸⁶⁸ In this regard the deference of the Court seems to be justified.

Similarly, in *Suárez Peralta v. Ecuador*,⁸⁶⁹ a 22-year-old woman was operated on for appendicitis. During the operation, the doctors made several mistakes, causing her severe injuries. The victim initiated a criminal procedure against the health professionals that performed the operation. Five years after ordering an investigation, a Court declared that the criminal action could not be brought because of a statute of limitations. The Inter-American Court found that the Ecuadorian judicial authorities did not take adequate measures to investigate, prosecute and punish those responsible, irrespective of the measures taken by the victims.⁸⁷⁰ State authorities did not act with the due diligence required to investigate and to ensure effective judicial protection, which implies a violation of Articles 8 and 25. Moreover, the state allowed someone, who did not complete the formal requirements for a medical licence, to operate as a medical doctor, which resulted in severe harm to the

⁸⁶⁶ idem para 133.

⁸⁶⁷ idem para 160.

⁸⁶⁸ idem para 136.

⁸⁶⁹ *Suárez Peralta v. Ecuador (Merits)*

⁸⁷⁰ idem

victim. As a consequence, the Court held there was a violation of the ACHR Article 5 on personal integrity.

In terms of GNR, the victim requested the state to adopt legislative and other measures to strengthen the civil and criminal liability of doctors and health workers. The Court did not award such a measure, taking into consideration that the State had amended the Ecuadorian Organic Health Act and had already put in place structural changes in the health system. The state had also agreed to present a bill including the pertinent reforms concerning medical malpractice and patients' rights. The Inter-American Court reiterated the order already awarded in *Alban Cornejo*, requiring the state to comply with education and training programs.

In these three cases, the Court awarded GNR for the redress of health related issues directly linked with the violations declared. Although more ambitious measures would have been desirable, such as public policy measures in *Ximenes Lopes*, and legislative reforms in *Alban Cornejo* and *Suárez Peralta*, the Court seems to justify its orders based on the measures already taken by the state.

2.2.1.5 Protection of sexual and reproductive health through the application of the rights to personal integrity, personal liberty and private and family life (Articles 5, 7 and 11 ACHR)

The Inter-American Court has studied one case on the protection of sexual and reproductive health. In *Artavia Murillo v. Costa Rica*, the Court protected the sexual and reproductive rights of the victims by referring to the rights to personal integrity (Article 5), personal liberty (Article 7), private and family life (Article 11), and the right

to raise a family (Article 17.2). The case relates to the total ban of the practice of in vitro fertilization (IVF) in Costa Rica, after a decision in 2000, of the Constitutional section of the Supreme Court of Justice.

The Inter-American Court held that the decision to have biological children using assisted reproduction techniques is part of the rights to private and family life (Article 11), to life, and to personal integrity (Articles 4 and 5, respectively). The Court considered that the right to private life is related to reproductive autonomy, by referring to Article 16(e) of the Convention for the Elimination of All Forms of Discrimination against Women, according to which women enjoy the right 'to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means that enable them to exercise these rights.'⁸⁷¹ The Court linked the rights to life and personal integrity with the concept of 'reproductive health', and through this concept, to the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to attain the highest standard of sexual and reproductive health.⁸⁷²

The Court also linked the right to private life and reproductive freedom, to the right to have access to the medical technology necessary to exercise that right. According to the Court, 'the right to have access to scientific progress in order to exercise reproductive autonomy and the possibility to found a family gives rise to the right to have access to the best health care services in assisted reproduction techniques

⁸⁷¹ *Case of Artavia Murillo et al. (in vitro fertilization) v. Costa Rica (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No.257 (28 November 2012) para 146.

⁸⁷² *idem* para 148.

and, consequently, the prohibition of disproportionate and unnecessary restriction, *de iure or de facto*, to exercising the reproductive decisions of each individual.⁸⁷³

According to the Court, these rights can be restricted by the state, as long as the restriction is not arbitrary, is established by law, pursues a legitimate aim, and complies with the requirements of suitability, necessity and proportionality.⁸⁷⁴ In this specific case, the Inter-American Court concluded that the Supreme Court of Justice protected the embryo in an absolute manner, without taking into account the rights of the victims. This had a disproportionate and discriminatory impact on the rights previously mentioned. In particular, the Court analysed the argument of the Supreme Court according to which the right to life (Article 4 (1)) established an absolute protection of the embryo. According to the Inter-American Court, taking into account that there is no life before conception, Article 4 could not be used to justify a total ban of IVF treatment.

The Court also found that the decision of the Supreme Court had a discriminatory effect on infertile couples whose only way to reproduce is by assisted technologies. The Court based its judgment on the opinion of the expert Paul Hunt, for whom 'involuntary infertility is a disability.'⁸⁷⁵ According to the Inter-American Court, persons with infertility are protected by the rights of persons with disabilities and, as a consequence, have the right to access necessary technologies that allow them to resolve their reproductive health problems.⁸⁷⁶ The Inter-American Court also found gender stereotypes affected women, in particular in relation to their reproductive

⁸⁷³ *idem* para 150.

⁸⁷⁴ *idem* para 273.

⁸⁷⁵ Some of the expert witnesses considered infertility as a form of disability only under certain conditions and presumptions and in determined cases. See, *idem* para 289.

⁸⁷⁶ *idem* para 293.

capacity.⁸⁷⁷ Finally, the Court found that some of the victims did not have the economic resources to access IVF technologies abroad, which resulted in a discriminatory effect in relation to their financial situation.⁸⁷⁸

As part of the reparation measures, the Court ordered the state to provide compensation for pecuniary and non-pecuniary damage, psychological rehabilitation, and to publish the decision in an official newspaper. In terms of GNR, the Court ordered the state (i) to ensure that the prohibition of IVF is annulled, in order to guarantee access to reproduction technology for everyone, (ii) to regulate those aspects necessary for the implementation of IVF, taking into account the standards settled in the judgement, and (iii) to make IVF available within its health care infertility treatments and programs.⁸⁷⁹ Although the first and second orders can arguably be linked to the violations declared by the Court, the third measure seems to exceed what was discussed in the decision. The wide scope of the Court's order will be discussed further in section 2.2.2.3 of this chapter.⁸⁸⁰

2.2.2 Difficulties in the granting of GNR in the jurisprudence on health related issues of the Inter-American Court on Human Rights

The lack of direct justiciability of the right to health in the Inter-American system has led to the indirect protection of such rights, mainly through the extensive interpretation of some of the rights contained in the ACHR, particularly the rights to

⁸⁷⁷ *idem* paras 294- 302.

⁸⁷⁸ *idem* 303-304.

⁸⁷⁹ The Court also ordered rehabilitation measures oriented to provide psychological treatment to the victims of the case, free of charge, for up to four years.

⁸⁸⁰ See, pp. 272-273.

life and personal integrity (Articles 4 and 5 ACHR, respectively). The following section will show how this strategy has only provided incomplete and limited remedies in relation to health.

2.2.2.1 Indirect justiciability of health related issues but not protection of the right to health

The analysis of the jurisprudence on health related issues of the Inter-American Court showed the Court has moved from ignoring issues related to health to their progressive inclusion in both the justiciability and the reparations stage. This inclusion has been carried out through several strategies. One of them has been the extensive interpretation of the rights to life and personal integrity (Articles 4 and 5 of ACHR, respectively). Another strategy has been the emphasis on the duty of states to regulate, supervise and control the provision of health services by third parties. The Court has also protected some elements of sexual and reproductive health, by linking the rights to personal integrity, personal liberty, and private and family life.

As outlined in the previous section, this strategy has led the Inter-American Court to recognize specific duties of states regarding health. For example, in *Instituto de Reeducation del Menor v. Paraguay*,⁸⁸¹ the Court recognised that, in regards 'to children deprived of their liberty and thus in the custody of the State, the latter's obligations include that of providing [the children] with health care and education'⁸⁸². It therefore found a violation of the rights of children. In *Xakmok Kasek v. Paraguay*, the Court referred to the 'right to a decent existence,' from which it implied states

⁸⁸¹ *Juvenile Reeducation Institute v. Paraguay (Merits)*

⁸⁸² *idem* para 161.

have a duty to guarantee access to health care services.⁸⁸³ In *Furlan v. Argentina*, the Court established that the denial of justice had a huge impact on the adequate rehabilitation and health service, which implies a violation of the right to personal integrity. In *Vera Vera and other v. Ecuador*, the Inter-American Court found that the lack of adequate and prompt health care was a violation of the rights to personal integrity and life. However, in none of these decisions did the Court find an explicit violation of the right to health.

Only in *Yakie Axa v. Paraguay* did the Inter-American Court explicitly mention the existence of a 'right to health' when stating that, the 'special detriment to the *right to health*, and closely tied to this, detriment to the right to food and access to clean water, have a major impact on the right to a decent existence and basic condition to exercise other human rights, such as the right to education or the right to cultural identity'⁸⁸⁴ [*italics added*]. In this case, however, the Court did not find a violation of the right to health, but to the rights to life, property, fair trial and judicial protection.

While the Court has not directly protected the right to health in its jurisprudence, the 'indirect approach' has led to the protection of specific elements of this right, as it is defined by the ESCR Committee in its dimensions of respect, protect and fulfil.⁸⁸⁵ In its dimension of *respect*, the Court has ordered states to abstain from enforcing discriminatory practices, such as the total ban of the IVF treatment.⁸⁸⁶ In this regard, the ESCR Committee has stated that the obligation to respect includes 'abstaining from enforcing discriminatory practices as a State Policy.'⁸⁸⁷

⁸⁸³ *Xákmok Kásek (Merits)* para. 203-208.

⁸⁸⁴ *Yakye Axa (Merits)* para 167.

⁸⁸⁵ ESCR GC 14 para 33.

⁸⁸⁶ *In vitro fertilization* para 336.

⁸⁸⁷ ESCR GC 14 para 34.

In its dimension of *protect*, the Court has recognized that states are responsible for regulating and supervising the provision of services, and the implementation of national programs regarding the performance of public quality health care services.⁸⁸⁸ This resembles the duty to protect the right to health established by the ESCR Committee, according to which states have a duty to 'adopt legislation or to take other measures ensuring equal access to health care and health related services provided by third parties.'⁸⁸⁹

In its dimension of *fulfil*, the Inter-American Court has recognized several positive duties for states in protecting health.⁸⁹⁰ For example, it has ordered states to include appropriate measures for the establishment of full medical and psychological services for children deprived of liberty,⁸⁹¹ the immediate and regular provision of medical care, including appropriate medicine and adequate treatment to all members of an indigenous community, especially the elderly, the children and pregnant women,⁸⁹² to safeguard the health and welfare of prisoners,⁸⁹³ to provide periodic vaccination and deparasitation campaigns,⁸⁹⁴ and to provide information about health rights, and the procedures and institutions, to demand the fulfilment of such rights.⁸⁹⁵

⁸⁸⁸ *Ximénes-Lópes v. Brasil (Merits)* para 99.

⁸⁸⁹ ESCR GC 14 para 35.

⁸⁹⁰ ESCR GC 14 para 36.

⁸⁹¹ *Juvenile Reeducation Institute v. Paraguay (Merits)* para 317.

⁸⁹² *Yakye Axa (Merits)* para 221; *Xákmok Kásek (Merits)* para 301.

⁸⁹³ *Díaz Peña v. Venezuela (Merits)* para 135.

⁸⁹⁴ *Xákmok Kásek (Merits)* para 301 (b).

⁸⁹⁵ *Furlán (Merits)* para 295.

The indirect protection of particular elements of the right to health through mechanisms of indirect justiciability shows the potential that this strategy may have in the progressive realization of the right to health in the Inter-American system. However, as the right to health remains non-justiciable there are certain problems that not even a wide interpretation of the rights contained in the American Convention can solve. Such difficulties will be developed in the next section.

2.2.2.2 Limitation of the ‘indirect model’ of justiciability in the protection of the right to health

As Tara Melish has argued, the indirect model of justiciability, which allows the protection of economic, social and cultural rights (framed in chapter III of the American Convention) through civil and political rights (framed in chapter II), bring with it risks of ‘underbreadth’ and ‘dilution’.⁸⁹⁶

In the context of the right to health, the problem of ‘underbreadth’ refers to the fact that violations of the right to health are not adequately protected by referring to civil and political rights. In *Villagrán Morales v. Guatemala*, for example, the facts of the case clearly indicate that there was a systemic violation of children’s rights in Guatemala, characterized by the lack of social, educative and health services, which created a cycle of exclusion of and criminalization against these children. Analysing the case from a right to life perspective led the Court to focus on the death of the children, but such analysis did not favour the visibility of the right to health aspects of

⁸⁹⁶ Tara Melish, ‘The Inter-American Court of Human Rights Beyond Progressivity’, in Malcom Langford, *Social Rights Jurisprudence Emerging Trends in International and Comparative Law* (Cambridge, 2009) p. 406.

the case. Although there is the reference to 'dignified life,'⁸⁹⁷ the Court does not elaborate on the specific elements of the right to health. In fact, the only references that the Court makes to 'health problems' are related to the mothers of the children and the suffering that they experienced after learning about their children's deaths.⁸⁹⁸ In this case, the Court did not address the systemic violations of the right to health and education, experienced by the children, who lived on the street and in extremely poor conditions. As a consequence, in this case, no specific measures, either individual or general, were awarded to redress the violations of the right to health.

Similarly, *Velez Loo v. Panama*, discussed previously, shows how the focus on the justiciability of civil and political rights may lead to an inadequate protection of the right to health, and therefore to inappropriate redress. In this case, the duty to provide health care was indirectly recognized through the analysis of the right to personal integrity (Article 5 ACHR). As a consequence, the award of reparation measures only indirectly redresses the harm caused, in terms of lack of health care. As for individual measures of redress, the Court ordered the state to cover the expenses of the specialized medical and psychological treatment in the place where the victim resided.⁸⁹⁹

However, when it came to GNR, the analysis of the case from a 'rights of migrants' perspective, led the Court to focus all the measures on preventing migrants from being detained in prison centres, but it did not grant general measures in order to protect the right to health of migrants once they were so detained.⁹⁰⁰ As outlined in

⁸⁹⁷ *Villagrán Morales et al (Merits)* para 146.

⁸⁹⁸ *idem* paras 65 (a) and 172.

⁸⁹⁹ *Velez Loo v. Panama (Merits)* para 263.

⁹⁰⁰ The Court ordered the state to adopt the measures necessary to provide facilities with sufficient capacity to accommodate persons for immigration purposes; to secure that the

section 2.2.1.3, above,⁹⁰¹ the Court did not award any GNR that directly tackle the problems of lack of access to potable water, and the provision of adequate health conditions in detention centres where the victims were held. According to the Court, '[g]iven that this case refers to migrants and that it has been established that they cannot be held in such places, [...] it is not pertinent to order a measure such as the one requested.'⁹⁰² As a consequence, the Court limited itself to reminding the state that it 'is especially obliged to guarantee the rights of persons deprived of liberty and, in particular, ensure an adequate supply of water at La Joya-La Joyita Prison and that the conditions of imprisonment there as well as in La Palma Prison conform to international standards.'⁹⁰³ The strict focus of the Court on the rights of migrants blinded the Court to granting measures that adequately redress their right to health. Although in other cases related to the health condition of imprisoned people, the Court has taken a more proactive role in the protection of the health aspects of the case,⁹⁰⁴ the risk of 'underbreadth' is still present, in as much as the adequate protection of health still relies on the elaborate reasoning of the Court.

A second risk with this model of justiciability is the 'dilution' of the right to health in the broad categories of life, human dignity and access to judicial protection. As Melish has pointed out, the right to health includes several dimensions that cannot

conditions of imprisonment in La Palma Public Prison conform to international standards on the matter; to implement training programs on the prohibition of torture; and to adopt all necessary measures to ensure that the process of application of its provisions, relating to immigration, conforms to the American Convention.

⁹⁰¹ See, pp. 245.

⁹⁰² *Velez Loo v. Panama (Merits)* para 276.

⁹⁰³ *idem* para 276.

⁹⁰⁴ *Díaz Peña v. Venezuela (Merits)*

be addressed under the generic concept of 'right to life.'⁹⁰⁵ Specific elements of the provision of medical care, such as quality, availability and affordability, are not necessarily covered by this concept.⁹⁰⁶ For example, in *Yakie Axa v. Paraguay*, the Inter-American Court links health to the right to a dignified life, in order to state that the 'special detriment to the right to health, [...] [has] a major impact on the right to a decent existence and basic conditions to exercise other human rights.'⁹⁰⁷ In the decision, the Court found proven that there was a 'lack of access to health care for the members of the Community for physical and economic reasons.'⁹⁰⁸ According to the facts of the case, the closest hospital was 70 kilometres away and the regional hospital was 200 kilometres away.⁹⁰⁹ Although the Court recognized that there was a violation of the elements of physical and economic accessibility, the Court did not actually develop such elements in its decision. The Court did not develop either the elements of acceptability and quality, beyond the reference to the CESCR General Comment 14, according to which 'indigenous people have the right to specific measures to improve their access to health services and care.'⁹¹⁰ In a model of direct justiciability the Court could have more easily awarded detailed measures to directly tackle specific components of the right to health, instead of sticking to ordering generic measures that require providing 'regular medical care and appropriate medicine.'⁹¹¹

⁹⁰⁵ Melish *The Inter-American Court of Human Rights Beyond Progressivity* 406 (see footnote 226).

⁹⁰⁶ *idem*.

⁹⁰⁷ *Yakye Axa (Merits)* para 167.

⁹⁰⁸ *idem* para 165.

⁹⁰⁹ *idem* para 50.98.

⁹¹⁰ ESCR GC 14 para 27.

⁹¹¹ *Yakye Axa* para 221.

A final risk of the indirect approach is limiting the analysis of right to health cases to the violation of more 'serious' human rights violations, such as disappearances, arbitrary killings, torture and inhuman treatment. In its first cases on health related issues, the Court did not address any case in which the right to health was the main or only violation. In most of its jurisprudence the Court considered cases where the victim(s) had been seriously ill-treated or were killed. Most recently, in *Suárez Peralta v Ecuador* and *Artavia Murillo v. Chile*, the Court was involved in cases where the victims had not experienced any 'serious' ill-treatment or torture and did not die.

Recognizing that the Court has made important progress in the protection of health within a framework of indirect justiciability, a more direct approach to the analysis of health issues would contribute to a more adequate protection of the rights of victims. For example, in the Ecuadorian cases related to medical malpractice, such as *Alban Cornejo* and *Suárez Peralta*, the Inter-American Court has usually found violations to the rights to life, personal integrity, and to the duty to provide due diligence. As a consequence, it has ordered mainly the training of health providers, and the dissemination of information about the rights of patients.⁹¹² A more direct analysis of these cases in terms of the right to health would have allowed the Court to provide direct protection to the victims by recognizing a violation of the duty of states to protect the right to health, instead of creating artificial links with other rights. This would have also allowed more adequate reparation measures that directly tackle the harm caused to the right to health of victims. For example, direct justiciability would have allowed the Court to examine the request for the modification of the legislation, applicable to medical malpractice, in a more open way, understanding that states

⁹¹² *Albán-Cornejo et al v. Ecuador (Merits)* para 157; *Suárez Peralta v. Ecuador (Merits)* para 207.

have a duty to protect people in those cases where private operators provide health services, by establishing appropriate legislative frameworks.⁹¹³

Moreover, in the cases of indigenous communities where health related issues were analyzed, such as in *Yakie Axa v. Paraguay* and *Xamok Kasek v. Paraguay*, a direct approach to the justiciability of the right to health would have allowed the Court to provide clearer protection by recognizing states have a duty to fulfill the right to health. This means, to provide a service that is physically and economically accessible and that is acceptable and of a good quality.

As explained in section 2.2.1 of this chapter,⁹¹⁴ some authors have argued that article 26 of the American Convention can be interpreted to provide direct justiciability to economic, social and cultural rights, including the right to health.⁹¹⁵ By

⁹¹³ For a similar argument, see Separate opinion of judge Sergio Garcia-Ramirez regarding the judgment rendered by the Inter-American Court of Human Rights in the Case of Alban-Cornejo et al (Ecuador) (22 November 2007).

⁹¹⁴ See, p. 230.

⁹¹⁵ Melish *Rethinking*; Julietta Rossi & Victor Abramovich 'La Tutela de los Derechos Económicos, Sociales y Culturales en el Artículo 26 de la Convención Americana sobre Derechos Humanos' (2009) 9 *Revista Estudios Socio-Jurídicos* 34; Oscar Parra-Vera, *Justiciabilidad de los Derechos Económicos, Sociales y Culturales and el Sistema Interamericano* (Comisión Nacional de los Derechos Humanos, México, 2011) available at http://200.33.14.34:1033/archivos/pdfs/DH_89.pdf , pp. 11-34; Christian Courtis, 'La Protección de los Derechos Económicos, Sociales y Culturales a través del Artículo 26 de la Convención Americana sobre Derechos Humanos', in Christian Courtis et al (eds), *Protección Internacional de Derechos Humanos, Nuevos Desafíos* (México, Porrúa-ITAM, 2005) [pp.1-66].

explicitly protecting the right to health, the Court would find it easier to award corresponding and effective reparation measures, including GNR.

In his concurring opinion in the case of *Suárez Peralta v. Ecuador*, Judge Eduardo Ferrer Mac-Gregor explained how the Inter-American system should approach its jurisprudence, explicitly from a right to health perspective, instead of referring to other rights or concepts, such as the right to life or a 'dignified life'. In order to support the direct justiciability of the right to health, he developed three arguments: first, economic, social and cultural rights, including the right to health, are interdependent and indivisible with civil and political rights. This means there is a reciprocal dependence between rights and that any separation, categorization or hierarchy among rights should be denied.⁹¹⁶ Second, there is no article in the Protocol of San Salvador that reduces or limits the scope of the American Convention. On the contrary, the Protocol of San Salvador can give interpretative guidance about the scope of the right to health, contained in Article 26 of the American Convention.⁹¹⁷ Third, Article 26 should be interpreted in accordance with an evolutive interpretation that recognizes the advances in both international human rights law and constitutional law.⁹¹⁸ This means recognizing that constitutional norms and the decisions of superior national courts should be taken into account in order to provide full content to article 26. In conclusion, according to Ferrer Mac-Gregor, the full recognition of Article 26, interpreted in the light of other international instruments and constitutional norms, should lead to the protection of the right to health as a social right in the Inter-American system.

⁹¹⁶ *Suárez Peralta v. Ecuador (Merits)* (Concurring Opinion Mac-Gregor) para 24

⁹¹⁷ *idem* para 47.

⁹¹⁸ *idem* para 97.

2.2.2.3 The protection of health related issues through rehabilitation measures and its limitations

The Inter-American Court has awarded measures related to the protection of health as both rehabilitation and GNR. As for rehabilitation measures, the Inter-American Court has usually ordered health care and psychosocial treatment to victims of serious human rights violations (disappearances, arbitrary killings, torture and inhuman treatment).⁹¹⁹ Such measures usually include the provision of medicines and health care, not just for the direct victims of the case, but also for the next of kin.

Although these reparation measures are indirectly linked with the protection of the right to health,⁹²⁰ they do not make the right to health directly enforceable. In all of these cases, the Court held civil and political rights had been violated, while the protection of health arose as a result of the redress of these rights. In spite of the

⁹¹⁹ For a full presentation of rehabilitation measures in the Inter-American Court of Human Rights, see Clara Sandoval, *Rehabilitation as a form of reparation under international law* (Redress, 2009) pp.47- available at <http://www.redress.org/downloads/publications/The%20right%20to%20rehabilitation.pdf>

⁹²⁰ Ruiz-Chiriboga has called this the “reparation approach” to the enforceability of ESCR. According to this author, this approach ‘understands ESCR as enforceable through the implementation of reparations measures ordered by the Court in contentious cases’. Osvaldo Ruiz-Chiriboga, ‘The American Convention and the Protocol of San Salvador: Two Intertwined treaties. Non enforceability of economic, social and cultural rights in the Inter-American System’ (2013) 31 *Netherlands Quarterly of Human Rights* 159 [footnote 9]. For other authors who have also referred to this approach, see: Monica Feria-Tinta, ‘Justiciability of Economic, Social and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions’ (2007) 27 *Human Rights Quarterly* 431, p.456-458.

relevance that this approach may have in the protection of the right to health, it cannot be the ideal model of protection. An approach like this masks the relevance of the right to health and makes it subsidiary to the protection of civil and political rights. Someone may argue this is just a formalistic problem about how to title the request of a specific remedy. However, the fact that the Court is blind to the protection of health issues may force the Court to use more artificial arguments to protect this right which may not be helpful for the protection of this right and in the long term do not tackle the main problem that originate the violation.

For example, in the case *Sebastián Furlán v. Argentina*, finding a violation to the 'right to health' instead of a violation to his 'quality of life' would have allowed the Court to justify in a clearer way the measures ordered. The Court could have referred to the duties of states to provided adequate access to health care to people with disabilities in order to mandate the provision of medical, psychological and psychiatric treatment to the victim, instead of referring to the broader term of 'quality of life'. It could have also referred to the duty of states to guarantee the right to everyone to seek, receive and impart health-related information in order to oblige the state to provide the maximum amount of information in its case law, instead of referring to the interesting but less known duty of 'active transparency'. In the long term, emphasising the case as a case of a violation to the right to health would have allowed the creation of more effective measures to the protection of the rights contained in the Argentinian legislation.

2.2.2.4 The protection of health related issues through GNR and its limitations

Since the justiciability of the right to health in the Inter-American system is still uncertain, the Court has granted extensive GNR in order to protect some dimensions

of health. This approach is also problematic. One particular problem of this approach is the absence of an adequate causal link between the violations declared and the measures awarded by the Court. This was particularly clear in *Artavia Murillo and others v. Costa Rica*, where the GNR awarded by the Court went beyond the violations declared.

In this case, the Inter-American Court found that the total ban of IVF treatment in the Costa Rican legal system, represented a violation of the rights to private life, intimacy, reproductive autonomy, access to reproductive health services, and to found a family for those persons whose only possible treatment for infertility is IVF. In order to redress the violation the Court ordered the state to:

'1) take the appropriate measures to ensure that the prohibition of the practice of IVF is annulled'; 2) 'regulate those aspects it considers necessary for the implementation of IVF, taking into account the principles established in this judgment'; and 3) 'the Costa Rica Social Security Institute must make IVF available within its health care infertility treatment and programs, in accordance with the obligation to respect and guarantee the principle of non-discrimination. The State must provide information every six months on the measures adopted in order to make these services available gradually to those who require them and on the plans that it draws up to this end.'⁹²¹

As established by the Court, the violation by the state consisted of prohibiting a medical treatment which, according to the Court, should be allowed. Applying the traditional respect/protect/fulfill framework for the analysis of ESCR, this violation can be understood as an infringement of the duty to respect the rights established in the

⁹²¹ *In vitro fertilization (Merits)* paras 336-338.

Convention.⁹²² The measure awarded by the Court, in ordering the state to remove the prohibition (order 1), keeps a natural causal connection with the violation, since it focuses on the restitution of a freedom that was previously restricted.

In contrast, the last order, (order 3), granted in this case is controversial since there is no clarity as to whether there is a causal link between the violations found by the Court and the measures awarded. The order to make IVF available within its health care infertility treatment and programs (order 3) is oriented towards protecting the duty to fulfill the right to health. However, there was not debate in the case whether the state had the appropriate resources to make IVF available within its health care infertility treatment. This may have implied the duty of the state to, for example, progressively realize the duty to provide IVF treatment to couples within the country. Such a duty, although plausible, was never analyzed in the decision. Nevertheless, the Court ordered the state to make the treatment available. As a consequence, such a measure goes beyond the violations declared by the Court due to lack of connection with the decision. The next table presents the link between the dimensions of the right of access to sexual and reproductive health services, and the reparations awarded:

An adequate GNR to redress the barriers found by the Court in the access to IVF treatment should have focused on preventing the repetition of the facts by tackling the root causes of the violation but, at the same time, maintaining a causal link with the violations declared by the Court. For example, assuming that the ban was a result of the lack of awareness of the judicial power on sexual and reproductive health, the Court could have focused, as it did it in other sections of the judgment, in the awarding of educational measures, such as courses on human rights,

⁹²² According to the ESCR Committee the obligation to respect entitles the obligation to 'abstaining from imposing discriminatory practices relating to women's health status and needs'. CESCR GC 14 para 34.

reproductive rights and non-discrimination, addressed to judicial employees and members of the judiciary.⁹²³ However, making IVF available within its health care fertility program is a measure that, although enhancing the sexual and reproductive health of couples in Costa Rica, was not discussed by the Court and, therefore, should not be awarded.

Table No. 5				
Causal links between the violations found by the Court and the reparations awarded - Case of <i>Artavia Murillo et al. (in vitro fertilization)</i> (Inter-American Court of Human Rights)				
Dimensions of the right to access to sexual and reproductive health services	The violation was discussed and declared by the Court	Individual reparation measures awarded	Possible guarantees of non-repetition	Existence of a causal link
<u>Duty to respect</u> Facts: The state restricted in a disproportionate way access to medical treatment.	The Court discussed this violation and found these facts violated articles 5(1), 7 11 (2) and 17(2) of the ACHR.	Annulment of the restriction.	Educational measures addressed to the judiciary.	Yes, reparation measures have a causal link with the violation.
<u>Duty to protect</u> Potential facts: Lack of regulation in the provision of a service or treatment.	Neither discussed nor found violation.	Reparation measures ordered an adequate regulation in the provision of a service.		Reparation measures do NOT have a causal link with the violation.
<u>Duty to fulfill</u> Potential facts: The state does not provide a service or treatment that is necessary for the realization of the right to health.	Neither discussed nor found violation.	Reparation measures ordered the states to make the services gradually available.		Reparation measures do NOT have a causal link with the violation.

2.2.2.5 Conclusion

The Inter-American Court has protected health related issues through the wide interpretation of the right to life and personal integrity in what has been called the 'indirect model of justiciability'. This model has allowed the protection of health in

⁹²³ idem para 267.

cases related to children, indigenous people, detained people, medical malpractice, and reproductive health. It has also allowed the Court to order states to undertake similar measures to the ones required by the right to health, in terms of: the provision of health services (duty to fulfil), the protection of people from the action of third parties (duty to protect), and the stopping of undue interferences to the access of health services (duty to respect).

However, the indirect model of justiciability is still insufficient in terms of the full and adequate protection of the right to health. Problems of 'underbreadth,' in which the right to health is not visible in the analysis of the Court, or 'dilution,' in which the different components of the right to health are not adequately addressed by generic terms such as 'dignified life' or 'personal integrity,' are the most common. The indirect model of justiciability is also problematic in terms of the awarding of remedies. In some cases, it has allowed the awarding of remedies that are beyond the violations found by the Court.

Whereas some authors and judges of the Inter-American Court have proposed a direct model of justiciability by referring to article 26 ACHR, this is still a minority view. However, the openness of the Inter-American Court, in its recent case law, to the analysis of health is a step towards the progressive recognition of a directly justiciable right to health in the Inter-American system.

2.3 General measures in the redress of health related issues: an analysis of the jurisprudence of the European System on Human Rights

2.3.1 The European Social Charter and the limited scope for the award of general measures and GNR

In addition to the European Convention on Human Rights, which establishes the protection of mainly civil and political rights, the European system of human rights establishes a European Social Charter for the protection of economic, social and cultural rights. The Social Charter explicitly incorporates a 'right to protection of health' in Article 11, according to which:

'the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia:

1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents'.

Other rights in the Social Charter also concern the right to health: Article 3 establishes 'the right to safe and healthy working conditions'; Article 7 establishes the duty to provide 'special protection against physical and moral dangers to which children and young persons are exposed'; Article 8 ensures 'the effective exercise of the right of employed women to the protection of maternity'; Article 17 provides 'the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities'; and Article 23 introduces 'the right of elderly persons to social protection'.

The European Committee of Social Rights is the institution in charge of monitoring whether or not states are in conformity, in law and in practice, with the provision of the European Social Charter. From the beginning, a system of states' periodic reporting was established in order to oversee compliance with the Charter. In 1995, an Additional Protocol to the European Social Charter was introduced, allowing trade unions, employers' organisation and NGOs to bring collective complaints before the

European Committee.⁹²⁴ In the analysis of collective complaints, the Committee considers the merits of the complaint and decides whether or not the respondent state has complied with the 'satisfactory application of the provisions' of the Charter.⁹²⁵ The conclusion is not binding as the Committee has to transmit the case to the Committee of Ministers, which decides the final disposal of the case.⁹²⁶

Regarding the award of reparations, nothing in the European Social Charter, nor in its Additional Protocol, establishes whether the European Committee is entitled to award or suggest compensation in cases of non-compliance with the Charter. According to Churchill and Khalia, the European Committee is not entitled to do so, as that request is not in accordance with the nature and purpose of the Protocol.⁹²⁷ In the case of *Confédération Française de l'Encadrement (CFE-CGC) v. France*, the complainant trade union asked the Committee to order the state to pay the sum of EUR 9,000 as compensation for the expenses incurred in preparing the complaint. The European Committee considered that the sum was excessive and transferred the matter to the Committee of Ministers, inviting it to recommend the payment of 2,000 EUR. The Committee of Ministers rejected the proposal.⁹²⁸ In spite of the relevance of this mechanism for the protection of the right to health, it appears that the Charter and the

⁹²⁴ Additional Protocol to the European Social Charter Providing for a System of Collective Complaints(1995) article 1.

⁹²⁵ *idem* article 8 (1).

⁹²⁶ Robin Churchill and Khaliq Urfan, 'The Collective Complaints System of the European social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights' (2004) 15 *EJIL* 417, p.437.

⁹²⁷ *idem* p.437.

⁹²⁸ Committee of Ministers, Resolution ResChS (2005)7, Collective complaint No. 16/2003 (adopted by the Committee of Ministers on 4 May 2005 at the 925th meeting of the Ministers' Deputies) available at <https://wcd.coe.int/ViewDoc.jsp?id=856675&Site=CM> (consulted 27 August 2015)

Committee have limited potential in terms of the awarding of any reparation measures, including general measures or GNR.

Once a case is transmitted to the Committee of Ministers, it may issue, by a majority of two-thirds, a recommendation to the respondent state to secure compliance with the decision.⁹²⁹ Because these recommendations or resolutions are not legally binding,⁹³⁰ the use of these mechanisms for the award of general measures or GNR for the protection of right to health is very limited. Thus, this research will focus on the mechanisms established under the European Convention on Human Rights.

2.3.2 The European Court of Human Rights: the application of general measures in the redress of health related violations

The European Convention on Human Rights focuses on the protection of civil and political rights. The inclusion of the peaceful enjoyment of possessions, and the right to education, in Articles 1 and 2 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter Protocol No. 1) are exceptions.⁹³¹ The European Social Charter, adopted in 1961, was intended to fill this gap by establishing a list of economic, social and cultural rights to be protected.⁹³² The difference between these two instruments is marked. Whereas the European Convention on Human Rights allows any person claiming to be victim of a

⁹²⁹ Additional Protocol to the European Social charter providing for a System of Collective Complaints, Strasbourg, 1995, article 9 (1).

⁹³⁰ Churchill & Ufan *The Collective Complaints System* 339

⁹³¹ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11(1952)

⁹³² European Social Charter (1961) article 21.

violation to bring individual applications before the European Court of Human Rights,⁹³³ the Additional Protocol to the European Social Charter only in 1995 established a collective complaints procedure.⁹³⁴

In spite of the lack of visibility of economic, social and cultural rights in the European Convention, the Court has protected certain economic, social and cultural rights indirectly, through the application of civil and political rights, in what can be called an 'integrated approach.'⁹³⁵ By using this approach, the Court has protected the right to health through the protection of Article 3 of the ECHR (prohibition of torture). The European Court of Human Rights has developed an extensive jurisprudence, finding that insufficient medical care in prisons,⁹³⁶ the existence of inadequate conditions of detention,⁹³⁷ the lack of appropriate medical treatment of persons deprived of liberty,⁹³⁸ or the failure to provide psychiatric treatment for those detainees in need of

⁹³³ European Convention on Human Rights, article 34.

⁹³⁴ Council of Europe, Additional Protocol to the European Social Charter providing for a System of Collective Complaints (adopted 9 November 1995) ETS 158

⁹³⁵ Referring to this approach, see Nifosi-Sutton *The Power of the European Court* 60. For a similar perspective, see Ellie Palmer, 'Protecting Socio-Economic Rights through the European Convention on Human rights: Trends and Developments in the European Court of Human Rights' (2009) 2 *Erasmus Law Review* 397.

⁹³⁶ *Istratii and Others v Moldova* App. nos. 8721/05, 8705/05 and 8742/05 (ECtHR, 27 March 2007); *Gorodnichev v Russia* App. no. 52058/99 (ECtHR, 24 May 2007); *Mechenkov v Russia*, App. no. 35421/05 (ECtHR, 7 February 2008).

⁹³⁷ *Dougoz v Greece*, App. no. 4907/98 (ECtHR, 6 March 2001); *Kalashnikov v Russia* App. no. 47095/99 (ECtHR, 15 July 2002); *Poltoratskiy v Ukraine*, App. no. 38812/97 (ECtHR, 29 April 2003); *Mayzit v Russia*, App. no. 63378/00 (ECtHR, 20 January 2005); *Novoselov v Russia*, App. no. 66460/01 (ECtHR, 2 June 2005).

⁹³⁸ *Popov v Russia*, App. no. 26853/04 (ECtHR, 13 July 2006); *Aleksanyan v Russia* App. no. 46468/06 (ECtHR, 22 December 2008).

psychiatric care,⁹³⁹ can amount to inhuman and degrading treatment and are contrary to Article 3. In other cases, the Court has also referred to Article 6 of the ECHR in order to protect health related issues. In *Taşkin and Others v. Turkey*, the Court established that the lack of compliance with a judgement that annulled the Ministry of the Environment's decision to issue a permit for a gold mine, which caused health and environmental problems for people, was a violation of the right to fair trial (Article 6 ECHR).⁹⁴⁰

However, as discussed in chapter II, Section 3.1.1,⁹⁴¹ most of the reparation measures awarded by the European Court in these cases refer to 'just satisfaction', and sometimes compensation, but do not normally award any general measure. Exceptionally, in some pilot judgements the Court has awarded more extensive measures of redress. The next section will consider the award of these remedies.

2.3.2.1 Pilot judgments and the award of general measures in the redress of health related issues

Chapter II analysed how the European Court of Human Rights has applied a more extensive approach in the award of reparations, mainly through pilot judgments. Although the first pilot judgments focused on violations of the right to property, other pilot decisions have indirectly given important protection to ESCR through an 'integrated approach'. In this way, the Court has awarded general measures in some

⁹³⁹ *Riviere v France*, App. no. 33834/03 (ECtHR, 11 July 2006); *Kucheruk v Ukraine*, App. no. 2570/04 (ECtHR, 6 September 2007).

⁹⁴⁰ *Taşkin and Others v. Turkey Application*, App. no. 46117/99 (ECtHR, 10 November 2004) para 138.

⁹⁴¹ See, pp. 94.

health related cases, basically through the justiciability of Article 6 on the right to a fair trial, and Article 3 on the prohibition of torture.

2.3.2.1.1 Awarding general measures in health related cases through Article 6 on the right to a fair trial

The Court allowed the protection of health related issues through Article 6, on the right to a fair trial, in *Burdov v. Russia*, which related to the prolonged failure of the state to enforce several domestic judgments awarding social benefits. In this case, the applicant was with the military authorities which took part in emergency operations after the nuclear plant disaster in Chernobyl. The applicant suffered from poor health after his involvement in the events.⁹⁴² As a result of the exposure to radioactive emissions, the applicant was entitled to several social benefits. In order to access such benefits, the applicant sued the state authorities several times, and domestic Courts ordered the payment of benefits in several instances. The judgments, however, remained unenforced for long periods of time. The Court found that the delay in the execution of the judgments, which ordered the payment of certain benefits to the applicant, represented a violation of the right to a fair and public hearing within a reasonable time (Article 6 (1) of the ECHR), in conjunction with the right to the peaceful enjoyment of his possessions (Article 1 Protocol No. 1). The Court ordered the payment of 3,000 Euros for non-pecuniary damages, to be paid within three months from the date the judgment became final.⁹⁴³

In spite of the decision in *Burdov v. Russia* (2002), the case had not been complied with by 2009. In 2009, the Court decided *Burdov v Russia* (No. 2), on the same case.

⁹⁴² *Case of Burdov v. Russia* (ECtHR, 7 May 2002) para 8.

⁹⁴³ *idem* operative paragraph, para 4.

The Court noticed that the problem of non-enforcement, or delayed enforcement of judgments, in Russia, was not exclusive to this case but was actually a recurring problem. More than 200 judgments had not been complied with since the first case, affecting not just the victims in Chernobyl but also other vulnerable groups.⁹⁴⁴ Since none of the remedies exercised by the applicant were effective in providing adequate and sufficient redress to the applicant, the Court found there was a violation of the right to an effective remedy (Article 13). As a consequence, the Court ordered the state to take general measures consistent with setting up, within six months, 'an effective domestic remedy or combination of such remedies which secures adequate and sufficient redress for non-enforcement or delayed enforcement of domestic judgments.'⁹⁴⁵

In terms of the provision of health care, the Court could have awarded more precise measures, such as the provision of health services to the victim. However, as the case is related to the protection of Article 6 of the ECHR (right to a fair trial) and the European Convention does not provide direct protection of the right to health, such measures were, understandably, not considered by the Court. The lack of justiciability of the right to health under the European Convention is one of the factors that prevents the award of general measures for the protection of this right.

Regarding the follow-up of the decision, and in spite of the short period provided by the Court for its implementation (six months), Russia managed to adopt a reform introducing a remedy for the non-enforcement of domestic judicial decisions. This

⁹⁴⁴ *Case of Burdov v. Russia* (No 2), App. no. 33509/04 (ECtHR, 15 January 2009) para 133.

⁹⁴⁵ *idem* operative paragraph, para 6.

has been considered a successful case of cooperation between Russia and the Court.⁹⁴⁶

2.3.2.1.2 Awarding general measures in health related cases through the application of Article 3 on the prohibition of torture

The Court has also indirectly applied general measures in health related issues, through an expansive interpretation of Article 3 on the prohibition of torture, in cases related to detained people in overcrowded prisons. As demonstrated by Nifosi-Sutton, between 2002 and 2009 the Court did not order specific, non-monetary reparations, concerning the consequences on the health of prisoners and detainees imprisoned in overcrowded conditions.⁹⁴⁷ The Court limited itself to providing declaratory relief, together with pecuniary and non-pecuniary damages. However, this trend was first modified by the Court in 2010, with the semi-pilot decision of *Orchowski v. Poland* (2010), and then with the pilot judgements *Ananyev and others v. Russia* (2012) and *Torreggiani and others v. Italy* (2013).

In *Ananyev and others v. Russia* and *Torreggiani and others v. Italy*, the applicants alleged they were held in overcrowded cells with less than four square meters per person⁹⁴⁸ and with inadequate sanitary conditions.⁹⁴⁹ In both cases, the Court found

⁹⁴⁶ Maria Issaeva, Irina Segeeva and Maria Suchkova, 'Enforcement of the Judgments of the European Court of Human Rights in Russia: Recent Developments and Current Challenges' (2011) 15 *SUR* 67, p.77.

⁹⁴⁷ Nifosi-Sutton *The Power of the European Court of Human Rights* 66.

⁹⁴⁸ In the Anayev Case it was reported that one of the applicants was held in a prison cell of less than two square metres, while Mr. Ananyev had less than one square metre. (*Ananyev*

that the lack of personal space, together with the inappropriate sanitary conditions, amounted to inhuman and degrading treatment, in violation of Article 3 of the Convention.⁹⁵⁰ It also held that states must ensure that detention conditions respect human dignity, that detainees are not subject to excessive distress or hardship, and that prisoners' 'health and well-being are adequately secured.'⁹⁵¹ The Court also found that these problems were not exclusive to certain prisons but were actually part of a structural and systemic dysfunction in the prison system, characterized by the lack of personal space in cells, a deficient number of sleeping places, limited access to natural light and fresh air, and inadequate sanitary facilities.⁹⁵² As a result, in both cases, the Court ordered the state to establish, within a specific time framework, an effective domestic remedy, or a combination of effective remedies, capable of affording sufficient redress in these cases.

The Court also discussed some general measures for the protection of health related issues of prisoners, in the semi-pilot cases *Orchowski v. Poland* (2009), *Mandic and*

and others v. Russia, App. nos. 42525/07 and 60800/08 (ECtHR, 10 January 2012) para 162).

⁹⁴⁹ In the *Ananyev and others* Case, the Court also found that, for most of the time, the applicants remained inside the cell and had just one-hour for outside exercise. Regarding the sanitary conditions of the prisons, the dining table and the lavatory pan were located, sometimes, less than one and a half metres, distance from each other (*Ananyev* paras 165-166).

⁹⁵⁰ In the *Ananyev and others v. Russia* Case the Court also stated that the lack of an effective domestic remedy that prevent the alleged violation and its continuation, and also provided the applicants with adequate redress was a violation of article 13 of the Convention. *Ananyev* para 117.

⁹⁵¹ *Ananyev* para 141.

⁹⁵² *Ananyev* paras 185 and 187, *Torregiani and others v. Italy* case, App. no. 43517/09 (ECtHR, 8 January 2013) para 96.

Jovic v. Slovenia (2012), and *Iacov Stanciu v. Romania* (2012). In these cases, the Court considered the applications of several detainees who were imprisoned in overcrowded facilities, with less than four square metres of living space per person, which is the minimum standard established by the Court for living conditions in prisons. In all cases, the applicants also alleged inadequate sanitary and detention conditions which had a negative effect on their health. According to the Court, these situations attained the threshold of inhuman and degrading treatment prohibited in Article 3. The Court applied Article 46 in all cases and, at least in the cases against Poland and Romania, the Court indicated that the cases were not isolated but were part of a structural problem.⁹⁵³ However, unlike the decisions issued against Russia and Italy, the Court did not order the state to take specific general measures in the operative paragraphs of the decisions, but limited itself to awarding just satisfaction in the form of compensation for pecuniary and non-pecuniary damages, as well as costs and expenses. Although in all cases the Court recommended that the state, in order to comply with the Convention, set up adequate and effective domestic remedies for the resolution of complaints,⁹⁵⁴ none of these recommendations were actually incorporated into the operative paragraphs of the decision.⁹⁵⁵

This recent jurisprudential trend of the Court challenges the thesis of Nifossi-Sutton, according to which the innovative remedial powers of the Court have focused on cases of the right to property and the right to liberty and security, but without

⁹⁵³ *Orchowski v. Poland*, App. no. 17885/04 (ECtHR, 22 October 2009) para 147; and *Iacov Stanciu v. Romania*, App. no. 35972/05 (ECtHR, 24 July 2012) para 195. In the case of *Mandić and Jović v. Slovenia*, App. no. 5774/10 and 5985/10, (ECtHR, 20 October 2011) the Court explicitly stated that it could not conclude that there exists a 'structural problem' (para 127).

⁹⁵⁴ *Orchowski* para 154; *Mandić and Jović* para 128 and *Iacov Stanciu* para 197.

⁹⁵⁵ This aspect of the decisions will be commented upon the next section of this chapter.

considering the health care of prisoners. On the contrary, the decisions in *Ananyev and others v. Russia*, *Torreggiani and others v. Italy*, *Orchowski v. Poland*, *Mandic and Jovic v. Slovenia*, and *Iacov Stanciu v. Romania*, shows that the Court has, in the last years, increasingly engaged in the health care of prisoners by linking health related violations with article 3.

In spite of the importance of this jurisprudential approach, the Court has kept a very conservative view on remedies. For example, the Court could have included other, more innovative, individual, and non-monetary remedies, such as ordering the provision of more personal space in cells, increasing the number of sleeping places, improvements in natural and fresh air, adequate sanitary facilities, and the enactment of specific standards for the treatment of prisoners. In terms of the protection of the health care of prisoners, and following Nifossi's suggestions, the Court could have also ordered, on the basis of article 3, regular and adequate provision of medical treatment to detainees, the transfer of detainees to civil hospitals with better equipment, and the transfer of prisoners in critical condition to individual cells.⁹⁵⁶ Moreover, most of these cases were not isolated but were part of a structural situation of precarious conditions in detention centres, requiring more extensive GNR, beyond the mere recommendation of the provision of adequate and effective domestic remedies. As Nifossi has proposed, the Court could have also awarded:

1. 'Adoption of a plan of action with a timetable putting forward temporary and permanent solutions to overcrowding and lack of sanitation in pre-trial detention facilities and prisons;
2. Creation of mechanisms for the effective implementation of regulations and legislation detailing medical care for prisoners and

⁹⁵⁶ Nifosi-Sutton *The Power of the European Court of Human Rights* 71.

- detainees with serious and life-threatening medical conditions and mandating separation of juveniles from adult inmates;
3. National strategy to address lack of medicines, medical assistance, and mismanagement of medical care in prisons and pre-trial detention centres;
 4. Regular inspections to verify that adequate medical care is provided to persons deprived of their liberty;
 5. Human rights training for medical officers of detention facilities; and
 6. Human rights training for detention facilities staff.⁹⁵⁷

These measures are, however, improbable from the Courts' perspective, not just because the Court may not adjudicate the right to health, but also because the Court has not developed the practice of awarding such ambitious general measures. Unlike the Inter-American and the African courts, which have been characterized by the awarding of very general and overreaching measures, the European Court has been extremely deferential to states, adopting a strict interpretation of its duty to provide 'just satisfaction.'⁹⁵⁸

2.3.3 Difficulties in the granting of general measures in the jurisprudence on health related issues of the European Court of Human Rights

In the jurisprudence of the European Court of Human Rights, there are also certain challenges that need to be addressed with the application of 'general measures' in health related issues. Perhaps the biggest problem is the Court's lack of consistency in the application of these remedial measures. In the cases discussed in the previous

⁹⁵⁷ *idem* 71-72.

⁹⁵⁸ European Convention on Human Rights, article 41 (1).

section, relating to overcrowding and inadequate conditions in prisons in Poland,⁹⁵⁹ Russia,⁹⁶⁰ Romania,⁹⁶¹ and Italy,⁹⁶² the strong remedial powers formulated by the Court were justified when taking into account that such situations represented a systemic problem in those countries. Also, the high number of pending applications relating to the same problem before the Court, confirms that the situations analysed were not isolated cases but part of a structural problem.⁹⁶³ However, in other cases where poor conditions of detention and overcrowding conditions have been documented as a generalized practice, the Court has not taken the same progressive remedial measures. In the cases of Greece, Ukraine, and other countries from Western Europe where, in recent years, high overcrowding conditions have been documented, and repetitive decisions have been issued by the Court, the Court has still not awarded general measures.⁹⁶⁴

Another point that is not clear in the jurisprudence relates to the criteria of the Court when granting either pilot, or semi-pilot, decisions in cases of similar violations. Whereas in the cases *Ananyev and others v. Russia* and *Torreggiani and others v. Italy*, the Court granted pilot judgements ordering states to set up an effective domestic remedy that gives redress to victims of overcrowding, in cases against

⁹⁵⁹ *Orchowski*.

⁹⁶⁰ *Ananyev*.

⁹⁶¹ *Iacov Stanciu*.

⁹⁶² *Torreggiani and others*

⁹⁶³ *Orchowski* paras 150 and 152; *Ananyev* paras 59-60; *Iacov Stanciu* para.196; *Torreggiani and others v. Italy* case, App. 43517/09 (ECtHR, 8 January 2013) Press Release ECHR 007 (2013) p.3.

⁹⁶⁴ Marcelo F. Aebi and Natalia Delgrande, Council of Europe Annual Penal Statistics: SPACE -2010, Survey 2010 (Strasbourg, 23 March 2012) available at http://www.coe.int/t/DGHL/STANDARDSETTING/CDPC/CDPC%20documents/SPACE-1_2010_English.pdf , p.51.

Poland, Slovenia and Romania, the Court applied article 46 and discussed some of the measures that should be adopted by the states in order to redress the situation, but without actually incorporating these into the operative paragraphs of the decision.⁹⁶⁵ The Court did not recognize the situation in Slovenia as a structural problem,⁹⁶⁶ but it expressly recognized that the situations in Poland and Romania were either a part of a 'structural problem'⁹⁶⁷ or constituted a 'recurrent problem' which would potentially justify the application of general measures.⁹⁶⁸

The lack of consistency in the application of general measures by the Court is not a problem exclusive to the application of measures in health related cases, but a general problem related to the application of expansive remedial powers by the Court. As discussed in Chapter II of this thesis, there is not a clear standard within the Court in applying this type of measure. Most of the time, the criteria corresponds to a political decision that does not necessarily take into account the best protection of rights, and is not consistent with the rest of the Court's jurisprudence. In future, the Court will have to clarify in which circumstances these expansive remedial powers should be applied.

According to PIL, it is arguable that GNR should be applicable at least in cases of systemic violations of human rights, gross violations of human rights, and cases of imminent repetition.⁹⁶⁹ If the Court applies the same standard, it would also be

⁹⁶⁵ In *Iacov Stanciu* para 97. The Court considers that in order to comply with the Convention 'an adequate and effective system of domestic remedies should be put in place' in order to grant appropriate relief.

⁹⁶⁶ *Mandić and Jović* para 127

⁹⁶⁷ *Orchowski* paras 147.

⁹⁶⁸ *Iacov* para 195.

⁹⁶⁹ UNGA, Sixth Committee (54th Session) 'Summary of the Discussions' (15 February 2001) A/CN.4/513, para. 57.

arguable that violations of a systemic character under article 3, should be redressed with general measures. Although this may imply an extension of the number of cases that are awarded with general measures, contrary to the exceptional character of this remedy, it would allow a more coherent and consistent application of the remedial powers of the Court.

2.3.4 Conclusion on the award of general measures in the jurisprudence on health related issues of the European Court of Human Rights

The analysis of the jurisprudence of the European Court demonstrates the strengths and difficulties in the award of general measures in the protection of health related cases. The mechanisms established under the Convention, in particular the application of pilot judgments, allows the potential awarding of general measures to the protection of health related cases. However, as the protection of health is allowed only in an indirect way, the reparation measures do not adequately focus on the protection of this right. If the right to health were justiciable, the European Court could have made additional efforts to provide more adequate forms of protection. However, the strict view of the European Court regarding the award of general measures makes this improbable. Moreover, even if the right to health were justiciable, the inconsistency of the European Court in the application of general measures, especially through the mechanism of pilot judgments, makes the award of general measures in regards to right to health cases unlikely.

3. Conclusion

This chapter has outlined the right to health in international human rights law. It has also explained how GNR and general measures have been increasingly applied in the protection of health related issues within the regional systems. Whereas the Inter-American system of human rights and the African Commission on Human and Peoples' Rights have developed broader reparation measures, the European Court of Human Rights has been more restrictive, showing a more deferential attitude towards states. Still, the European Court has applied its 'pilot procedure' and awarded 'general measures' in many health related cases by linking them to the protection of the prohibition of torture and right to a fair trial (articles 3 and 6 ECHR). The increasing application of these measures in health related cases among these regional systems suggests that the international law on human rights is open to the possibility of GNR in right to health and health related cases.

In spite of this openness, there are still difficulties for the award of general measures in right to health cases. One of the main problems is the lack of justiciability of the right to health in the Inter-American and European systems. Whereas in the African system the right to health is directly justiciable, making clearer the application of GNR, the situation is quite different in the Inter-American and European systems. As discussed in this chapter, the African Commission has rightly distinguished between the duties of respect, protect and fulfill in relation to the right to health, which has contributed to the adequate provision of reparation measures. In contrast, as we have seen, in the Inter-American system, the lack of direct justiciability of the right to health has led to several problems in the implementation of GNR. Problems of 'underbreadth', 'dilution', and subordination to more 'serious' violations were presented in this chapter. Similarly, in the European system, the lack of direct justiciability of the right to health, as well as the lack of clarity in the criteria for

deciding pilot judgments, has made difficult the application of general measures in health related cases, making it available only in very specific cases in which the European Court has agreed to provide a pilot judgment. Still the analysis showed that the European Court has ordered some general measures in pilot judgments related to the protection of cases where health issues were involved.

In this way, the awarding of GNR in health related and right to health cases does not distinguish itself from the awarding of GNR in civil and political rights. If the right to health were directly justiciable in all different regional systems, there would not be any theoretical barrier to award adequate reparation measures, including GNR. This seems to be coherent with the idea that every breach of international law creates an obligation for the state to repair the violation.⁹⁷⁰ It also seems to be in line with the idea of the 'indivisibility' of human rights, according to which all human rights (civil, political, economic, social and cultural rights) should be treated 'in a fair and equal manner.'⁹⁷¹

Besides these general principles, there is a lack of clarity, in both the literature and international law, about the way in which GNR should be granted when used for the protection of ESCR, particularly in right to health cases. None of the regional systems have developed a clear analytical framework for how GNR should be adequately awarded for the particular protection of ESCR. For example, does the fact that ESCR are subject to progressive realization have an impact on the way that GNR are granted? In order to provide some insights into these issues, the next section will discuss how GNR could be applied in right to health cases. In particular,

⁹⁷⁰ Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 2nd Edition, 2005) p. 51.

⁹⁷¹ Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para 5.

it will discuss the analytical framework in which the right to health should be granted, the type of measures that should be awarded for the violation of each duty implied by the right to health, as well as some of the characteristics that these measures should have. The next section will also analyze whether the progressive nature of the right to health makes a difference in the way that GNR should be granted.

CHAPTER V: HOW CAN GNR BE APPLIED IN THE PROTECTION OF THE RIGHT TO HEALTH: THE WAY FORWARD

Introduction

Chapter IV described how the practice of regional tribunals has been increasingly awarding GNR and general measures for the redress of violations to the right to health and health-related issues. It also showed the difficulties of awarding appropriate reparation measures in a context where the right to health is not justiciable, and how it is necessary to think of a clear criterion for the awarding of GNR. Based on the experience developed by regional tribunals and domestic courts, this chapter will develop an analytical framework on how GNR or general measures could be awarded in the redress of violations to the right to health, particularly by the Committee on Economic, Social and Cultural Rights (CESCR or 'the Committee'). The CESCR is one of the few mechanisms in international law that allows individual complaints to be brought for direct violations to the right to health.⁹⁷² In this regard, it

⁹⁷² Other mechanisms that allow the protection of the right to health are established in the International Convention on the Elimination of All Forms of Racial Discrimination (Article 14) and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (Article 2).

offers a window of opportunity for the adequate redress of violations to the right to health.

The chapter will focus on the nature, scope, circumstances, and the specific remedies to be granted, alongside the characteristics that the CESCR should take into account, in the awarding of GNR and general measures. As already mentioned, the chapter will draw on the experiences of regional tribunals in order to show the potential of general measures in the redress of right to health and health-related violations.

1. Addressing structural problems from a preventive and future-looking approach

The main characteristic of GNR is their future oriented approach. In chapter I, it was discussed how GNR are different from other types of reparation measures, such as compensation, restitution, and satisfaction, in as much as they are future oriented.⁹⁷³

This characteristic has been recognized by several bodies. The ILC Draft Articles states that GNR 'focus on prevention rather than reparation.'⁹⁷⁴ Similarly, in international human rights law, GNR have clearly been considered as a form of prevention. In the Basic Principles and Guidelines on the Right to a Remedy it was established that 'Guarantees of non-repetition should include, where applicable, any

⁹⁷³ See Chapter I Section 2.1, pp. 34-35.

⁹⁷⁴ ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) Doc. A/56/10 in II ILC Yearbook (2001) Part two, article 30, para. 9.

or all of the following measures, *which will also contribute to prevention*⁹⁷⁵ [emphasis added]. Also, the Inter-American Court has stated that states are obliged to ensure that human rights violations ‘never again occur in its jurisdiction.’⁹⁷⁶ Its future-looking and preventive dimension clearly distinguishes GNR from other forms of reparations such as restitution, which are clearly oriented to the past, in as much as they look for the ‘establishment or reestablishment of the situation that would have existed if the wrongful act had not been committed.’⁹⁷⁷

Another difference of GNR is related to the type of harm that they deal with. Whereas compensation and rehabilitation are usually oriented to deal with individual harm, GNR focus on the harm created to the society as a whole. In the case of the Inter-American system, Schoinsteiner has argued how GNR are implicitly linked to the concept of ‘society as a whole’ in as much as they are ‘directed to society and ha[ve] an implicit, exemplary component.’⁹⁷⁸

Applying this understanding of GNR to the redress of right to health violations, it is easy to see how the awarding of GNR or general measures in such cases is not an exclusive feature of the crafting of remedies in right to health or socio-economic

⁹⁷⁵ UNGA, ‘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’ (21 March 2006) A/RES/60/147, para 23.

⁹⁷⁶ *Case of Suárez-Rosero v. Ecuador (Reparation and Costs)* Inter-American Court of Human Rights Series C No. 44 (20 January 1999) para 106; and *Case of Castillo-Petruzzi et al. v Perú (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 52 (30 May 1999) para 222.

⁹⁷⁷ ILC Draft Articles, article 35, para. 2.

⁹⁷⁸ Judith Schonsteiner, ‘Dissuasive measures and the Society as a Whole: A working theory of reparations in the Inter-American Court of Human Rights’, 23 *American University International Law Review* (2007) p.145. For a discussion of this topic see Chapter III, p. 145.

rights. Instead, it is a general characteristic of the application of the standards of reparations in all civil, political, economic, social and cultural rights. Kent Roach has explained how socio-economic rights, in general, have been targeted with a common critique, the argument that the crafting of reparation measures for socio-economic rights, usually requires the awarding of future oriented, complex remedies, that obstruct the competence of other branches of power, and are difficult to implement.⁹⁷⁹ The analysis of GNR in international human rights law shows that this type of remedy is, by nature, future oriented, closer to a principle of distributive justice, and oriented to redress the general harm against the society. In these circumstances, the awarding of GNR in ESCR does not distinguish itself from the awarding of the same type of measures in CPRs. In both cases, GNR aim to redress the root causes of the violation by awarding measures with a structural component. Assuming that the redress of ESCR exclusively requires the awarding of GNR or general measures, ignores the fact that GNR, or general measures in the form of GNR, is a category already present in international human rights law, one that is applicable to all human rights.

2. Scope of the measures

Measures awarded under the form of GNR or general measures can be very broad in scope. Following the model established in the jurisprudence of the Inter-American Court of Human Rights, they may include: human rights training, institutional reforms, updating of manuals for public servants, creation of public policies, setting of

⁹⁷⁹ Kent Roach, 'The Challenges of Crafting Remedies for Violations of Socio-economic Rights' in, Malcolm Langford (ed) *Social Rights Jurisprudence Emerging Trends in International and Comparative Law*(Cambridge, 1th edition, 2008) p.2.

budgets, and creation of specific offices in charge of the implementation of a specific matter. As long as a causal link between the facts of the case, the violations declared, and the damage attributed, is proved, nothing prevents the application of these measures in right to health cases.

The awarding of GNR should be oriented to redress the root causes of the violation. Such causes are linked, not just to institutional factors, (i.e. inadequate or deficient legislative frameworks;⁹⁸⁰ inadequate manuals for public servants;⁹⁸¹ lack or deficient programs and public polices⁹⁸²) but also cultural factors (i.e. general preconceptions in society that create stereotypes and discrimination).

When awarded in right to health cases, GNR have an enormous potential in the modification of legislative, institutional, and cultural factors. In terms of legislation, GNR have proved to be effective in the modification of both constitutional and legal

⁹⁸⁰ In the Decision T-760-2008 the Constitutional Court found structural inequalities in the design of the health system in Colombia. As a consequence it ordered several governmental institutions to carry out specific actions in order to modify the health system in Colombia.

⁹⁸¹ *Case of Fernández-Ortega et al v. Mexico (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No.215 (30 August 2010) para 256; *Case of Rosendo-Cantú and other v. Mexico (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No. 216 (31 August 2010) para 242.

⁹⁸² In the *Rosendo Cantú Case* the Court argued that, since the state provided information about some public policies in place, and that the Commission did not object to the validity of the measures, there was not enough evidence or argumentation to grant the measures. See *Rosendo-Cantú (Merits)* paras 237-238. In the *Cotton Field Case*, the Court argued that without information about any structural defects and problems of implementation and impact, it was unable to order such measures. See *Case of González et al. (Cotton Field)* v. Mexico (*Preliminary Objections, Merits, Reparations, and Costs*) Inter-American Court of Human Rights Series C No.205 (16 November 2009) para 495).

provisions.⁹⁸³ For example, GNR can play an important role in the modification of domestic law that does not respect minimum standards for the protection of the right to health.⁹⁸⁴

In institutional terms, GNR have been beneficial for the creation of databases,⁹⁸⁵ the strengthening of certain state institutions,⁹⁸⁶ and even the allocation of specific budgets in order to secure human rights training.⁹⁸⁷ Similar measures can also be requested in the redress of right to health cases in order to update databases of beneficiaries, improve the coordination of a specific matter, and allocate budgets for the realization of certain core obligations of the right to health.

In respect of cultural factors, GNR have usually been requested in order to provide human rights courses to public servants,⁹⁸⁸ members of the judiciary⁹⁸⁹ and to

⁹⁸³ *Case of 'The Last Temptation of Christ' (Olmedo-Bustos et al.) v. Chile (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 73 (5 February 2001) para 103 (4)

⁹⁸⁴ *Case of Artavia Murillo et al. (in vitro fertilization) v. Costa Rica (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No.257 (28 November 2012) para 336.

⁹⁸⁵ *Cotton Field (Merits)* Orders, (20) and (21).

⁹⁸⁶ *Case of Ticona-Estrada et al v. Bolivia (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No.191 (27 November 2008) para 173; and *Case of Heliodoro-Portugal v. Panama (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No.186 (12 August 2008) para 263.

⁹⁸⁷ *Case of Fornerón and daughter v. Argentina (Reparations and Costs)* Inter-American Court of Human Rights Series C No. 242 (27 April 2012) para 182.

⁹⁸⁸ *Case of Radilla-Pacheco v. Mexico (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No.209 (23 November 2009) para 347.

society in general.⁹⁹⁰ Similar measures could be requested in right to health cases in order to provide adequate training to public servants in charge of running health systems, and to health practitioners. This type of measure could be beneficial in, for example, changing patterns of discrimination and ill-treatment in the provision of health services in prisons and public hospitals. The specific definition of the measures will depend on the circumstances of the case, the request of the plaintiffs, and the ability of adjudicative mechanisms to draft appropriate remedies.

However, other type of factors that are at the base of the violation, especially those linked with the existence of a particular economic system, have not always been adequately repaired by GNR. This is particularly clear in the redress of violations to the right to health that are linked with the existence of a particular economic system. Economic systems (capitalism, socialism, communism) have an inevitable impact on the way that health systems operate. However, GNR can not tackle these root causes as they go beyond what these legal remedies can redress. In this regard, the CESCR has expressed that ‘the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, [...], is recognized and reflected in the system in question.’⁹⁹¹

The inability of GNR to modify a structural economic system is clear in the Colombian judgment, T-760/2008. In this case, which will be discussed further, the health system was largely based upon neoliberal principles that trusted in the

⁹⁸⁹ *Case of Nadege Dorzema et al v. Dominican Republic (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No.251 (24 October 2012) para 267.

⁹⁹⁰ *Cotton Field (Merits)* para 543.

⁹⁹¹ UN, CESCR, General Comment No 3, The nature of States parties’ obligations (1990), U.N. Doc. E/1991/23 (1990), para 8.

efficiency of the market to allocate health services.⁹⁹² The Colombian Constitutional Court, however, did not order any measure that would have modified the underlying economic structure of the health system. For example, the Court did not change the system of private insurance companies which provide health services, and whose policy of denial of health services⁹⁹³ is the cause of the high number of tutelas on health issues. Instead, the Colombian Court focused on verifying the general mandates of the health model, established in law 100/1993, stating the minimum standards that the health system should take into account in order to be in accordance with the Constitution.

Thus, in spite of the impact that GNR can have in the modification of legislative, institutional and cultural factors that are at the base of right to health violations, they have a limited role in the modification of economic systems. In this regard, legal measures are generally insufficient in order to deal with socio-economic structures.

3. Circumstances for the awarding of GNR in right to health cases

⁹⁹² Alicia Ely Yamin and Oscar Parra-Vera, 'Judicial Protection of the Right to Health in Colombia: From Social Demands to Individual Claims to Public Debates' (2010) 33 *Hastings International & Comparative Law Review* 101, p.103; Daniel Alzate Mora, 'Health Litigation in Colombia: Have we Reached the Limit for the Judicialization of Health?'(2014) *Health and Human Rights Journal*.

⁹⁹³ A tutela is an easy, accessible writ for the protection of constitutional fundamental rights which should be solved by a judge within 10 days. See Patrick Delaney, 'Legislating for Equality in Colombia: Constitutional jurisprudence, *Tutelas*, and Social Reform' (2008) 1 *The Equal Rights Review* 50.

Chapter III showed how international human rights law has increasingly recognized the awarding of GNR in at least three circumstances: i) gross or serious violations of international human rights law; ii) large-scale or systemic violations, and iii) cases where there is a risk of repetition. These criteria should also be taken into account in the redress of right to health violations. The application of such criteria was awarded in order to avoid two extremes: on the one hand, awarding GNR for every human rights violation could be onerous in political, administrative and budgetary terms, making it impractical. On the other hand, not to award GNR at all would be too restrictive in terms of the rights of the victims in each case. Since GNR are already part of international human rights law, denying victims the possibility of access to this type of remedy would be a step back in the protection of human rights.

This chapter will propose that the same criteria can be applied in the redress of right to health cases.

3.1 Gross and serious violations of the right to health

The work of UN experts has clearly shown that the category of 'gross and serious' violation can also be applied for the redress of violations of ESCR. Previous to the publication of the 'Basic Principles and Guidelines', several UN experts indicated that the definition of gross human rights violations is not restricted to an specific category of rights, but also refers to gross violations of ESCR.

In 1992, in the Conclusions of the *Maastricht Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, several academics and experts concluded that:

'violations of other human rights, including violations of economic, social and cultural rights, may also be gross and systemic in scope and nature,

and must consequently be given all due attention in connection with the right to reparation.⁹⁹⁴

Similarly, in 1993, Theo van Boven emphasized in his *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, that:

“Given also the indivisibility and interdependence of all human rights, gross and systematic violations of the type of human rights cited above frequently affect other human rights as well, including economic, social and cultural rights.”⁹⁹⁵

In the same vein, in 1999, the study by Chernichenko, regarding the *Definition of gross and large-scale violations of human rights as an international crime*, referred to the Maastricht Seminar, reiterating that violations of economic, social and cultural rights, may also be gross and systematic in scope and nature, and should thus be adequately redressed.⁹⁹⁶ In view of this, it is possible to say that nothing prevents the

⁹⁹⁴ ‘Conclusions of the Maastricht Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms’, *Seminar on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental rights* (Maastricht, 11-15 March 1992) 12 *Netherlands Institute of Human Rights (SIM) Special 17*, para 11.

⁹⁹⁵ UNCHR ‘Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report submitted by Mr. Theo van Boven, Special Rapporteur’ (21 January 1993) E/CN.4/Sub.2/1993/8, para 12.

⁹⁹⁶ UNCHR, ‘Definition of gross and large-scale violations of human rights as an international crime, Working paper submitted by Mr. Stanislav Chernichenko in accordance with Sub-Commission decision 1992/109’ (8 June 1999) E/CN.4/sub.2/1993/10 para 14.

application of the concept of 'gross violations of international human rights law' to violations of ESCR.

However, in practice, few international tribunals have recognized violations to ESCR as being 'serious and gross'. Exceptionally, the African Commission on Human and Peoples' and Human Rights, recognized in Darfur, that 'the destruction of homes, livestock and farms as well as the poisoning of water sources, such as wells exposed the victims to serious health risks'⁹⁹⁷ and constituted a 'serious and massive' violation of human rights.⁹⁹⁸ In this case, the African Commission recommended the state to 'rehabilitate economic and social infrastructure, such as education, health, water, and agricultural service, in the Darfur provinces in order to provide conditions for return in safety and dignity for the IDPs and Refugees.'⁹⁹⁹

Similarly, in the *Akayesu* Case, the International Criminal Tribunal for Rwanda (ICTR) recognized that 'subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement' can be used for the purpose of interpreting the crime of

⁹⁹⁷ *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (Cohre) v. Sudan*, African Comm Hum & Peoples' Rights, Comm. 279/03, 296/03 (2009) para 212.

⁹⁹⁸ *COHRE v. Sudan* para 102. Similarly, Louise Arbour has stated that 'in Darfur, the systematic burning of houses and villages, the forced displacement of the population, and the starvation caused by restriction on the delivery of humanitarian assistance and the destruction of food crops are deliberately used alongside other gross human rights violations –such murder or rape- as instruments of war'. Louise Arbour, 'Economic and Social Justice for Societies in Transition' (2007-2008) 40 *N.Y.U. Journal of International Law and Politics* 1, p.9.

⁹⁹⁹ *COHRE v. Sudan* para 229 (5).

genocide.¹⁰⁰⁰ As this was a criminal case, the ICTR did not award specific remedies for the redress of these violations.

Apart from these two cases, no other cases in international law have referred to ESCR violations as gross violations of human rights. This is indicative of the lack of full recognition of ESCR in international law and the difficulties in making them directly justiciable.

However, much more has been done in protecting ESCR indirectly, by awarding reparation measures to protect a dimension of the right to health in cases where the main violation has been considered a gross violation of civil and political rights (e.g. massacres, large displacements of people).¹⁰⁰¹ In this regard, international tribunals have emphasized the impact that the redress of gross violations of human rights may have on health. In *Mapiripán*, a case related to the massacre of civilians by paramilitary forces in Colombia, the Inter-American Court of Human Rights stated that the displacement of people is a grave violation of human rights.¹⁰⁰² The representatives of the victims alleged that the displacement contributed to the lack of access to health care.¹⁰⁰³ The Court did not make any reference to this argument or recognise the violation of a 'right to health'. However, the Inter-American Court did order the state to pay non-pecuniary damages, and to provide psychological

¹⁰⁰⁰ *Prosecutor v. Jean-Paul Akayesu* (Judgment) Case No. ICTR-96-4-T (2 September 1998), para 506.

¹⁰⁰¹ For a full analysis of the indirect ways that the Inter-American Court has used to protect the right to health, see Chapter IV, Section 3.

¹⁰⁰² *Case of the 'Mapiripán Massacre' v. Colombia (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 134 (15 September 2005) para 304.

¹⁰⁰³ *Mapiripán (Merits)* para 165 (e) and 280 (a).

treatment, free of cost, to the next of kin of those victims who had been executed or made to disappear.¹⁰⁰⁴

In *Plan de Sanchez Massacre v. Guatemala*, the Inter-American Court considered the massacre of 268 people of Mayan origin, by members of the Guatemalan Army. The Court recognized that victims of, or witnesses to, serious violations of human rights could result in serious afflictions in the mental health of the victims and the wider community.¹⁰⁰⁵ As part of the reparation measures, the Court ordered the state to provide a specialized program of psychological and psychiatric treatments, free of charge. In both cases, even though the Inter-American Court did *not* identify right to health violations as gross violations of human rights, it did recognize that gross violations of human rights have serious implications for peoples' health. Similarly, in the same case, the Inter-American Court also ordered the implementation of a sewage system and potable water supply, as well as the establishment of a health centre in the village which included adequate personnel and conditions. These last measures were established under the title 'other measures' but could be labelled as GNR, in as much as they were oriented to prevent violations of the health-related rights of this community.

One of the problems of this indirect approach to protecting ESCR is that, as the right to health is not expressly recognised as one of the violated rights, the Inter-American Court cannot award reparation measures that directly protect all the violated dimensions of the right to health. As a consequence, if any reparation measure ends up protecting a dimension of the health of victims, it is just in an indirect manner. For example, in the previously mentioned case *Mapiripan*, the Court ordered rehabilitation measures consistent with providing adequate psychological treatment

¹⁰⁰⁴ *Mapiripán (Merits)* para 312.

¹⁰⁰⁵ *Case of the Plan de Sánchez Massacre v. Guatemala (Reparations)* Inter-American Court of Human Rights Series C No. 116 (19 November 2004) para 106.

to the next of kin of the victims.¹⁰⁰⁶ Although these measures have a direct impact on the mental health of the next of kin and, therefore, in their enjoyment of the right to health, this is simply the indirect result of the protection of the rights to freedom of movement and residence, as the victims were forcibly displaced.¹⁰⁰⁷ The fact that the right to health had not been recognized as one of the violated rights by the Court, is not just a theoretical problem in the argumentation of the case, but has particular consequences in terms of reparations. As the right to health was not one of the rights violated, the Inter-American Court did not award specific GNR to enable access to healthcare services for the displaced people. For example, the Inter-American Court could have ordered the establishment of a health centre in the municipality of Mapiripán for those who decided to return, or a general policy or program to provide mental health care for the returnees. None of these measures were awarded though.

International human rights law has not, often, recognized right to health violations as gross and massive violations of human rights, making it difficult to award any type of remedies, including GNR. More often, international courts have recognised that gross and massive violations of human rights have an impact on people's health. Through this indirect approach, international courts have awarded both rehabilitation and GNR which have an indirect impact in the protection of the right to health. However, there is nothing in theory that prevents the use of the term 'gross and mass violations' to violations of ESC rights in general, and the right to health in particular. International courts should be more open to use this term for the protection of ESC rights in order, not just to make visible different violations of the right to health, but also in order to provide adequate and more effective reparation measures.

¹⁰⁰⁶ *Mapiripán (Merits)* para 312.

¹⁰⁰⁷ *Mapiripán (Merits)* paras 188 and 189.

3.2 Large-scale or systemic violations of the right to health

The special quantitative character of large-scale and systemic violations of right to health would justify the awarding of general measures of redress. First, since large-scale violations usually involve the activity of more than one authority or state institution, general measures can be beneficial in the redress of this situation, in as much as they are oriented to provide general orders to more than one state institution, who will have to work in a coordinated manner in order to tackle the violation. Second, large-scale violations affect a large number of victims who are not always identified or easy to identify. In this sense, GNR or general measures can be an effective way to provide redress in cases where individual redress is difficult to achieve. Third, the redress of large-scale violations may usually require the creation of plans of action, policies, budget allocation, and measures with a general wider scope. In this way GNR or general measures are a significant means for providing such general redress.

In practice, however, few cases in international law have dealt with large-scale violations of right to health or even ESCR. The African Commission on Human and Peoples' Rights has made a step forward by recognizing that the destruction, by security forces, of Ogoni houses and villages, together with the harassment, beating and killing of people who attempted to return to their homes, constitutes 'massive violations of the right to shelter.'¹⁰⁰⁸ As a result, the African Commission recommended the state to 'ensure adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and [the] undertaking a comprehensive clean-up of

¹⁰⁰⁸ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights (SERAC) v. Nigeria*, African Comm Hum & Peoples' Rights, Comm. No. 155/96 (27 October 2001) para 62.

lands and rivers damaged by oil operations.¹⁰⁰⁹ In addition to compensation measures, the Commission also recommended that the Government carry out appropriate environmental and social impact assessments for any future oil project, and that oversight bodies guarantee the safe operation of any such projects. The Commission also recommended the state to provide information on health and environmental risks to the communities affected by oil projects, as well as access to regulatory and decision-making bodies. These measures can be considered as GNR and constitute an important step forward in the redress of large-scale violations of the right to health.

Interestingly, domestic courts have increasingly dealt with large-scale and mass violations of the right to health, awarding extensive reparation measures. As shown in section 4 of this chapter, the domestic experiences of Colombia and South Africa show how GNR can be awarded for the protection of large-scale and systemic violations of the right to health.¹⁰¹⁰ In each of these cases the right to health of large numbers of people were affected by either the existence of inadequate policies/regulations or the absence of adequate laws. In the *TAC Case*,¹⁰¹¹ the Constitutional Court of South Africa recognised HIV/AIDS is a pandemic in South Africa, and that the lack of an adequate policy that allows the distribution of the retroviral Nevirapine affected millions of people. In the Colombian Case, T-760-2008, the Constitutional Court analysed the systemic problems of the national health system related to the type of health services included or not in the Obligatory Health Plan, among others; the services required by minors; access to high cost health

¹⁰⁰⁹ *SERAC v. Nigeria* Recommendations para 69. For a full presentation of this case see Chapter V, Section 2.1.

¹⁰¹⁰ For a full presentation of these cases see Chapter V, Section 4.3.1, pp. 320.

¹⁰¹¹ *Minister of Health v Treatment Action Campaign* (TAC) (2002) 5 SA 721 (CC).

services; and treatments of catastrophic illnesses.¹⁰¹² In India, the High Court of Delhi ordered measures that affect a whole cluster of schemes designed by the Indian Government in order to reduce infant and maternal mortality in the country. Although the courts do not refer to these violations as large-scale violations, and to the reparation measures as GNR, they can be considered as such, as they are all reparations measures with a wider scope and a structural dimension.

3.3 Risk of repetition

It can also be argued that, whenever there is a risk of repetition, GNR should be applicable for the prevention of future violations. For example, in those situations where, despite individual reparations, legislation, programs and policies, that violate rights are still in place, GNR should be provided to order the state to modify or enact new legislations, programs and policies. Also, in those cases where the violation happened because of a particular context (e.g. inequality, prejudice, violence, impunity, corruption, among others) GNR should be oriented, as far as is possible, to the transformation of such situations. In this regard, a directive of human rights training in order to combat stereotyping,¹⁰¹³ or the design of specific programs to reduce impunity,¹⁰¹⁴ are good examples of measures to be taken. In this regard, violations to the right to health are no different from other type of violations to civil and political rights. In both cases, GNR are positioned to tackle the root causes of the violation in order to prevent their future occurrence.

In the context of health related violations, the risk of repetition can be seen in the cases *Alban Cornejo v. Ecuador*, and *Suarez Peralta v. Ecuador*. In these cases,

¹⁰¹² *Judgment T-760/2008* (31 July 2008) Constitutional Court of Colombia.

¹⁰¹³ *Cotton Field (Merits)* para 543.

¹⁰¹⁴ *Ticona-Estrada (Merits)* para 173; and *Heliodoro-Portugal (Merits)* para 263.

which were related to medical mal-practice and lack of due diligence of the state in the prosecution of crimes, the Inter-American Court ordered the state to disseminate patients' rights, applying both domestic and international standards, as well as an order to implement an education and training program for justice operators and health care professionals to inform them of Ecuadorian legislation on patients' rights¹⁰¹⁵. The measures ordered by the Court are justified, as the cases occurred within the context of a lack of knowledge by the population on how to exercise their rights, and knowledge by justice operators of patients' rights. Without effective measures that tackle these situations, the risk that these type of cases will happen in future, increases. The facts in these two cases are very similar, showing that, besides the order awarded in *Alban Cornejo*, the state did nothing to adequately redress the situation. This forced the Court in *Suarez Peralta* to reiterate the order provided in *Alban Cornejo*, to comply with an education and training program.

4. GNR for violations of specific duties of the right to health

The analysis provided in previous sections, shows that the practice of regional tribunals of human rights, mainly the Inter-American Court of Human Rights, and the African Commission on Human and Peoples' Rights, have not hesitated in awarding GNR and general measures for the redress of health related, and right to health, cases. As a corollary of these, this section will discuss whether the awarding of GNR in health related cases is similar or different to the awarding of GNR and general measures in civil and political rights. This question is particularly important when

¹⁰¹⁵ As part of the GNR, the Court also ordered the state to publish the judgement. *Case of Albán-Cornejo et al v. Ecuador (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 171 (22 November 2007) para 157.

taking into account that the right to health is subject to progressive realization and maximum available resources. GNR frequently imply a high expenditure of resources that are not always easy to find in low income countries. In those cases of gross, large-scale and systemic violations of the right to health, how would it be possible to award GNR that are compatible with the progressive nature of this right, as well as with the clause of maximum available resources?

This thesis will maintain that GNR are a specific form of reparation that can be awarded for the redress of any violation of human rights in all their different duties, including violations of the duty to respect, protect, and to fulfil the right to health. In those cases of violations of minimum core obligations, GNR or general measures should oblige the provision of such specific minimum, core obligations within a short term. Also, in those violations of obligations of progressive realization, special considerations should be taken into account in order to provide GNR that are respectful of this concept. In those cases, GNR should allow the state to develop the right in a 'progressive' manner, allowing the state to act with more flexibility. When GNR and general measures take the form of legislative reforms or the design of public policies, the orders should include opportunities for public participation and deliberation. In order to support this argument, I will analyse the awarding of GNR regarding each of the duties related to the right to health. Examples of GNR in each obligation will be presented, showing the variety of forms that GNR may take in the protection of this right.

4.1 GNR and violations to the duty to respect

As was discussed in section 1.2 of chapter IV,¹⁰¹⁶ the duty to respect 'requires states to refrain from interfering directly or indirectly with the enjoyment of the right to

¹⁰¹⁶ See, p. 203.

health.¹⁰¹⁷ In relation to this duty, the previously discussed case, *IVF v. Costa Rica*, can provide some relevant examples. In this case, the Inter-American Court of Human Rights found that the total ban by the state on the practice of In Vitro Fertilization (IVF) represented a violation to the rights to private and family life; personal integrity; sexual and reproductive health; the right to enjoy the benefits of scientific and technological progress; as well as the principle of non-discrimination. As a consequence, the Inter-American Court ordered the state to adopt necessary measures to ensure that the prohibition of IVF was annulled.¹⁰¹⁸

In addition to redress the duty to respect, the Court, in what can be a controversial decision, ordered GNR oriented to redress the duties to protect and fulfil. Regarding the duty to protect, the Court awarded GNR by ordering the state to adopt training programs and courses on human rights, reproductive rights and non-discrimination for judicial employees, at all levels of the judiciary.¹⁰¹⁹ This measure directly tackles one of the root causes of the problem, as the violations occurred in a context of conservatism and strong influence of the Catholic Church, in several levels of the judiciary system. The measure has a preventive dimension as it is oriented to influence the knowledge that judges have about international law and, therefore, to avoid judicial decisions based on religious arguments. Measures are also directly

¹⁰¹⁷ UN, CESCR, General Comment No. 14 (2000) 'The right to the highest attainable standard of health', U.N. Doc E/C.12/2000/4, para 33.

¹⁰¹⁸ In the IVF Case, the Inter-American Court ordered the state to i) ensure that the prohibition is annulled; ii) regulate those aspects necessary for the implementation of IVF and iii) to gradually make IVF available within its health care infertility treatments and programs. *Case of Artavia Murillo et al. (in vitro fertilization) v. Costa Rica (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C No.257 (28 November 2012) paras 336-338.

¹⁰¹⁹ *Artavia Murillo (Merits)* para 341

linked to redress and avoid the repetition of the main violation declared by the Court, namely, the duty to *respect* the rights to private and family life, personal integrity, sexual and reproductive health and the right to enjoy the benefits of scientific and technological progress.

As part of the GNR, the Court also awarded measures oriented to protect the duty to fulfil the right to health, by ordering the state to regulate those aspects necessary for the implementation of IVF, taking into account the standards settled in the judgement, as well as to make IVF available within its health care infertility treatments and programs.¹⁰²⁰ Some authors have criticized this last measure for clearly exceeding the competence of the Court.¹⁰²¹ In chapter IV, it was discussed how these measures went beyond the redress of the violations declared by the Court in the decision (the duty to respect), and is actually oriented to redress other obligations (the duties to protect and fulfil) which were neither discussed nor declared violated in the decision. GNR, as any other form of reparation, should have a clear connection between the facts and the violation declared.

When studying individual communications under the Optional Protocol to the ICESCR, the CESCR could follow the example established in this case related to the adoption of GNR oriented to redress the duties to respect. However, the CESCR should be careful in not awarding additional measures oriented to redress other duties (protect or fulfil) that are not adequately linked with the proved facts. Thus, for

¹⁰²⁰ The Court also ordered rehabilitation measures oriented to provide psychological treatment to the victims of the case, free of charge, for up to four years. *Artavia Murillo (Merits)* para 252-255.

¹⁰²¹ See Álvaro Paúl Díaz, 'La Corte Interamericana in Vitro: Comentarios sobre su Proceso de Toma de Decisiones a Propósito del Caso Artavia' (2013) 2 *Revista Derecho Público Iberoamericano* 303, p.338.

example, the CESCR could, among others, engage in ordering the repeal of specific legislation that contains discriminatory provisions, prohibits the use of traditional preventive care, or allows the commercialization of unsafe drugs. In all these measures, a direct link between the measures recommended and the violation should be made in order to justify their adoption. A failure to do so may result in the CESCR exceeding its authority, by ordering measures that are not related to the violations declared.

4.2 GNR and violations to the duty to protect

The duty to protect the right to health 'requires States to take measures that prevent third parties from interfering in the enjoyment of the right to health.'¹⁰²² In relation to this obligation, reparation measures, including GNR, should be oriented to prevent third parties continuing to violate the right to health. In this regard, the Inter-American Court has also developed both individual and general reparation measures for violations to the duty to protect, in cases related to medical mal-practice. In the *Alban Cornejo Case*, as discussed in chapter III, a person admitted to a private health institution in Ecuador died due to alleged medical negligence. Although the relatives of the victim filed a criminal complaint, this was unsuccessful as the statute of limitations made a criminal action impossible. The Inter-American Court underlined the responsibility of the state in terms of the duty to protect, by stating that 'the state responsibility is generated by the omission of the duty to supervise the rendering of the public service to *protect* the mentioned right.'¹⁰²³

¹⁰²² ESCR GC 14 para 33.

¹⁰²³ *Albán-Cornejo (Merits)* para 119.

In the section of the ruling on reparations, the Inter-American Court ordered, not only compensation for the death of the person due to presumed mal-practice by a doctor, but also GNR consistent with the dissemination of a booklet about patients' rights, to be available in all hospitals.¹⁰²⁴ As part of the GNR, the Inter-American Court also ordered the state to implement an education and training program for officers and civil servants of the judiciary system, and health care professionals, about the laws enacted by the state in relation to patients' rights, together with the appropriate punishment for violating them.¹⁰²⁵ The training measures are clearly oriented to ensure that people know their rights, and can have access to an effective remedy. In this way, reparation measures are directly linked to the main violation contained within the case, namely, the duty to protect people when accessing health services carried out by third parties.

Similarly, in *Ximenes Lopez v. Brasil*, discussed in chapter III, a mentally ill person was admitted to a mental hospital under 'inhuman and degrading conditions'. He was also beaten and finally died whilst being held under psychiatric care. The Inter-American Court found the state responsible for failing to protect the public interest in the provision of health care services, and particularly for failing to regulate and supervise the rendering of health services. In the section on reparations, the Inter-American Court ordered the state to pay compensation to the next of kin, as well as to publish the decision. In addition to this, and as part of GNR, the Court ordered the state to continue developing a training and education program for physicians and all other persons working in mental health institutions in the country.¹⁰²⁶ In these cases, the measures are also justified as they are designed to let health workers know their

¹⁰²⁴ *Albán-Cornejo (Merits)* para 162.

¹⁰²⁵ *Albán-Cornejo (Merits)* para 164.

¹⁰²⁶ *Case of Ximenes-López v. Brasil (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C. No. 149 (4 July 2006) para 250.

obligations, in terms of human rights and, in such a way as to prevent the repetition of such illegal acts. In this case, more ambitious measures (e.g. policy reforms, the creation of appropriate mental health services, the establishment of monitoring bodies, and the enactment of legal frameworks in accordance with international standards) were not awarded, as the state had already adopted measures aimed to improve conditions of psychiatric care in the institutions of the Sistema Único de Saúde [Uniform Health System], the SUS being the acronym used in Portuguese.¹⁰²⁷

The CESCR could take into account these examples from the Inter-American System, in order to recommend that states adopt general measures that prevent the repetition of such violations by private parties. In this regard, the Committee could recommend measures such as: the creation of monitoring bodies at the domestic level in order to make private health providers and health practitioners accountable; the establishment of adequate mechanisms of redress for individual victims; and the setting up of programs and public policies oriented to prevent harmful practices carried out by private parties. In all these situations, GNR and general measures should be linked to the facts and the violation found.

4.3 GNR and violations to the duty to fulfil

As discussed in the previous chapter, the obligation to fulfil requires the state to 'adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.'¹⁰²⁸ In this respect, it is important to distinguish between the awarding of GNR for the redress of minimum

¹⁰²⁷ *idem* para 243.

¹⁰²⁸ CESCR GC14 para 33.

core and non-core obligations. As presented in chapter IV, section 1.3,¹⁰²⁹ the CESCR has recognized the existence of minimum core obligations of states regarding the right to health. The Committee has also recognised that, in those other aspects that do not represent minimum core obligations, states have the obligation, within the limits of available resources, to take steps in order to progressively realise the full content of the right to health.¹⁰³⁰ As such, informed by the experiences of the Constitutional Court of Colombia, the Supreme Court of Delhi, and the Inter-American Court of Human Rights, the next section will develop some examples of how the Committee could award individual and general measures in the protection of cases on the right to health and the duty to fulfil.

4.3.1 GNR and violations of minimum core obligations: minimum core v reasonableness

In recommending individual measures, the Committee could make use of all forms of individual redress, such as compensation,¹⁰³¹ restitution¹⁰³² and rehabilitation¹⁰³³ which have been increasingly afforded by the different UN human rights treaty-

¹⁰²⁹ See, p.205.

¹⁰³⁰ CESCR GC14 para 30.

¹⁰³¹ CEDAW, *V.P.P. v. Bulgaria*, (2012) Comm. No. 31/2011, CEDAW/C/53/D/31/2011, para 10 (1); CEDAW, *Isatou Jallow v. Bulgaria* (2012) Comm. No. 32/2011, CEDAW/C/52/D/32/2011, para 8.8; CRDP, *Zsolt Bujdosó and five others v. Hungary* (2013) Comm. No. 4/201, CRPD/C/10/D/4/2011 para 10 (1); CRDP, *Szilvia Nyusti and Péter Takács* (2013) Comm. No. 1/2010, CRPD/C/9/D/1/2010, para 10 (1).

¹⁰³² CEDAW, *Cecilia Kell v Canada*, (2012) Comm. No. 19/2008, CEDAW/C.51/D/19/2008, para 11 (a) (i).

¹⁰³³ CEDAW, *T.P.F. v. Peru*, (2011) Comm. No. 22/2009, CEDAW/C/50/D/22/2009, para 9.1.

bodies. Whereas restitution measures will be more frequently awarded in those cases of violations to the duty to respect, (e.g. the imposition of restrictions in the enjoyment of a medicine that was freely available¹⁰³⁴), compensation measures would be recommended when restitution is not possible.

When awarding recommendations related to the duty of states to ensure access to minimum essential food, basic shelter, housing and sanitation, adequate supply of safe and potable water, and essential drugs, the Committee should be able to also recommend the provision of positive measures. Although these are not technically restitution measures,¹⁰³⁵ their awarding is defensible in as much as they are oriented to effectively redress the inaction of the state in the provision of a duty. In this regard, the CEDAW Committee, and the Committee on the Rights of the Persons with Disabilities, have consistently recommended measures which order a state to adopt positive actions for the adequate redress of rights. Such measures include: providing measures of protection;¹⁰³⁶ guaranteeing the physical and mental integrity of a person;¹⁰³⁷ ensuring that someone is given a safe home;¹⁰³⁸ remedying the deletion

¹⁰³⁴ *Minister of Health v TAC*.

¹⁰³⁵ Restitution measures were originally designed to remove the consequences of a violation, by restoring the victim to the previous state before the violation happened. In cases of violations to the duty to fulfil the right to health, when no action has been taken by the state to comply with its duties, returning the victim to the state that he/she was in before, is condemning the victim to remain in a state of dispossession.

¹⁰³⁶ CEDAW, *Ms. Zhen Zhen Zheng v. The Netherlands* (2009) Comm. No. 15/2007, CEDAW/C/42/D/15/2007, para 9.1 (I).

¹⁰³⁷ CEDAW, *A.T. v. Hungary* (2005) Comm. No. 2/2003, CEDAW/C/32/D/2/2003

¹⁰³⁸ *idem*

of someone's name from the electoral registers;¹⁰³⁹ remedying the lack of access of an individual to banking card services;¹⁰⁴⁰ and reconsidering the application of someone for a building permit for a hydrotherapy pool.¹⁰⁴¹

However, the awarding of general measures will also depend on the concept of 'minimum core' adopted by the Committee. As presented in chapter IV, section 1.3,¹⁰⁴² the ESCR Committee has supported the existence of a minimum core of obligations in the understanding of the right to health, in its general comments Nos. 3 and 14. In defining this minimum core, the CESCR has made reference, in General Comment No. 14, to obligations that were established by international experts and conferences, as well as to other obligations, in terms of access to food, shelter, housing, sanitation and potable water. However, its understanding of whether states can refuse to comply with the minimum core in contexts of lack of resources, or in the occurrence of natural disasters, is not clear. In General Comment No. 3, the Committee established that, in order to evaluate whether a state has not complied with its minimum core obligation obligations in respect of resource constraints, it must demonstrate 'that every effort has been made to use all resources that are at its disposition' in order to comply, in a priority manner, those minimum obligations. Even if resources are inadequate, the state should demonstrate that it has made every effort to guarantee the 'widest possible enjoyment' of the rights under the prevailing circumstances.¹⁰⁴³ However, in General Comment No. 14, the Committee took a

¹⁰³⁹ CRDP *Zsolt Bujdosó and five others v. Hungary* (2013) Comm. No. 4/201, CRPD/C/10/D/4/2011, para 10 (1).

¹⁰⁴⁰ CRPD *Szilvia Nyusti and Péter Takács v. Hungary* (2013) Comm. No. 1/2010, CRPD/C/9/D/1/2010, para 10 (1).

¹⁰⁴¹ CRPD *H.M. v. Sweden* (2012) Comm. No. 3/2011, CRPD/C/7/D/3/2011, para 9(1).

¹⁰⁴² See, pp. 205.

¹⁰⁴³ CESCR GC 3 paras 10 and 11.

more strict view by stating that the non-compliance of minimum core obligations is not justifiable and that the core obligations set by it are non-derogable.¹⁰⁴⁴ In order to answer the criticism against the affordability of such obligations in difficult contexts, the Committee emphasized the condition of the duty of states and other actors to provide ‘international assistance and cooperation.’¹⁰⁴⁵ Whether the non-compliance of minimum core obligations can be justifiable under certain contexts, certainly needs clarification by the Committee. As Craven has asked, if the obligations established as minimum core can be justified due to resource constraint, how are these obligations distinguishable from other obligations established under Article 2(1)?¹⁰⁴⁶

Recently, Article 8 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, established that the Committee shall consider the *reasonableness* of the steps taken by states in the implementation of the rights set forth in the Covenant. Although the interpretation of this provision is not totally clear, in a 2007 Statement, the CESCR, following the criterion of General Comment No. 3, established that:

‘in order for a State party to be able to attribute its failure to meet its core obligations to a lack of available resources, it must demonstrate that

¹⁰⁴⁴ CESCR GC 14 para 47.

¹⁰⁴⁵ CESCR GC 14 para 45.

¹⁰⁴⁶ Matthew Craven, ‘Assessment of the Progress on Adjudication of Economic, Social and Cultural Rights’ in John Squires, Malcolm Langford and Bret Thiele, *The Road To A Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (UNSW Press,2005) p. 41.

every effort has been made to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, those core obligations.¹⁰⁴⁷

Regarding the argument of 'resource constraints' in cases of violations of minimum core obligations, the Committee stated that such information should be considered on a country-by-country basis, and that the severity of the breach, and the guarantee of minimum core should be taken into account.¹⁰⁴⁸ In assessing the reasonableness of the measures, the Committee should also take into account factors such as the country level of development, the severity of the breach, the existence of a special 'context' such as a natural disaster or an armed conflict, whether the state has made the effort to identify low-cost options, and whether the state has sought for international assistance and cooperation.¹⁰⁴⁹

In the interpretation of these provisions the CESCR can make use of two models: on the one hand, the standard of *reasonableness* of the South African Court, which helped to create the wording of Article 8 of the Optional Protocol. On the other hand, the standard of 'minimum core' followed by the Colombian Constitutional Court, the Indian Court, and the Inter-American Court of Human Rights which has developed interesting standards on how to provide remedies in violations to minimum core obligations. These two models will be explained as follow.

4.3.1.1 Standard of reasonableness

¹⁰⁴⁷ UN, CESCR, 'An Evaluation of the Obligation to take Steps to the 'Maximum of Available Resources' under an optional protocol to the Covenant' (10 May 2007) U.N. Doc. E/C.12/2007/1, para 6.

¹⁰⁴⁸ *idem* para 10 (b).

¹⁰⁴⁹ *idem* para 10.

A good example of how courts have applied the standard of *reasonableness* in the award of GNR is in the case *Minister of Health v Treatment Action Campaign (TAC)*. In this case, the Constitutional Court of South Africa analysed the implementation of the drug Nevirapine, which was used in the prevention of the Mother-To-Child-Transmission of HIV/AIDS. Although the drug had been offered to the state for free, the government decided to introduce the anti-retroviral only in two pilot sites, leaving most mothers without access to this treatment. The Constitutional Court of South Africa decided that the decision to implement the treatment only in the pilot sites was *unreasonable* and violated constitutional rights. As a consequence, the Court ordered restitution measures oriented to solve the specific case by demanding the state to 'remove the restrictions that prevent[ed] Nevirapine from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics that are not research and training sites,'¹⁰⁵⁰ and to permit and facilitate its use when medically indicated¹⁰⁵¹ These measures should be taken 'without delay.'¹⁰⁵²

The Court also ordered general measures, oriented to prevent future violations, in the form of a supervisory injunction, ordering the state to:

'(a) [...] to devise and implement *within its available resources* a comprehensive and co-ordinated programme to realise *progressively* the rights of pregnant women and their new born children to have access to health services to combat mother-to-child transmission of HIV.

¹⁰⁵⁰ *TAC Orders*, para 135 (3) (a).

¹⁰⁵¹ *idem*, para 135 (3) (b).

¹⁰⁵² *idem*, para 135 (3).

(b) The programme to be realised *progressively within available resources* must include reasonable measures for counselling and testing pregnant women for HIV, counselling HIV-positive pregnant women on the options open to them to reduce the risk of mother-to-child transmission of HIV, and making appropriate treatment available to them for such purposes'¹⁰⁵³ [emphasis added].

The approach taken by the Court of South Africa is coherent with its own understanding of the character of the violation. Since the Court understands the case to be a violation of a *reasonable* duty, general measures are subject to the principle of progressive realization and maximum available resources. The Court of South Africa also engaged in what Tushnet has called, 'weak remedies',¹⁰⁵⁴ ordering the state to develop a 'comprehensive and co-ordinated programme' but without establishing exactly what the content of such a program should be.

4.3.1.2 Minimum core standard

The approach of the South African Court is clearly different from the one taken by the Inter-American Court of Human Rights, as well as by the Colombian Constitutional Court, and the High Court of Delhi, who applied a stricter idea of 'minimum core' when awarding GNR. Having established that there was a violation of minimum essential levels of health care, sanitation or food, in especially vulnerable people, these Courts engaged in the awarding of both specific measures, oriented to provide individual relief, and general measures, oriented to

¹⁰⁵³ TAC Orders, para 135 (2).

¹⁰⁵⁴ Mark Tushnet, 'Social Welfare Rights and the Forms of Judicial Review' (2004) 82 *Texas Law Review* 1895. pp. 1910-1911.

prevent the repetition of the violation. In the awarding of both types of measures, the Courts ordered the immediate provision of services, without making their implementation conditional on progressive realisation, or maximum available resources. They also employed what Tushnet calls 'strong forms of remedies,'¹⁰⁵⁵ usually by way of structural injunctions, ordering the state to design a completely new policy or program, and implementing strict provisions and deadlines.

In *Xákmok Kásek v. Paraguay*, discussed in chapter IV, the Inter-American Court of Human Rights studied how the lack of access to, and entitlement of, ancestral territories, forced communities in Paraguay to live in temporary settlements, where access to water, appropriate sanitary conditions, food, health and education were restricted.¹⁰⁵⁶ In this case, the Inter-American Court found that the right to life included the 'right to conditions that guarantee a decent existence.'¹⁰⁵⁷ According to the Court, the measures taken by the state were not sufficient to correct the situation of vulnerability of indigenous communities, and the state had not guaranteed to the members of the community, physical or geographical access to health,¹⁰⁵⁸ all of which implied a violation of the right to a decent existence or dignified life. In addition

¹⁰⁵⁵ Tushnet, *Social Welfare Rights and the Forms of Judicial Review* 1911-1912.

¹⁰⁵⁶ *Case of the Xákmok Kásek Community v. Paraguay (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 214 (24 August 2010) paras 74, 164-213; *Case of the Yakye Axa Indigenous Community v. Paraguay (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 125 (17 June 2005) paras 50.15, 50.92-50.105.

¹⁰⁵⁷ *Xákmok Kásek (Merits)* paras 182.

¹⁰⁵⁸ *idem* paras 208.

to this, the Court also found the state responsible for the deaths of thirteen members of the community, caused by illnesses that were easily preventable.¹⁰⁵⁹

In this case, the Court engaged in both individual and general relief for the community. As part of the individual measures of reparation, and under the title 'rehabilitation', the Court ordered the state to immediately and regularly provide medical care, including appropriate medicine and adequate treatment, for all members of the community, especially the elderly, children, and pregnant women.¹⁰⁶⁰ It also ordered the provision of 'psychosocial-attention' and 'periodic vaccination and deparasitization campaigns that respect their ways and customs';¹⁰⁶¹ and emphasized that medical care for women should include 'both pre and post-natal [care] and [care] during the first months of the baby's life.'¹⁰⁶² The Court was emphatic that these measures should be adopted 'immediately' and undertaken on a regular basis.¹⁰⁶³ The call for immediate compliance with these measures is understandable, as the Inter-American Court had previously considered that, in order

¹⁰⁵⁹ Such illnesses include tetanus, pneumonia, tuberculosis, anaemia, whooping cough, dehydration, and serious complications during labour. *idem* paras 231.

¹⁰⁶⁰ In the case of *Xakmok Kasek (Merits)*, the Court ordered the state to provide 'medical and psycho-social attention to all members of the Community, especially children and the elderly, together with periodic vaccination and deparasitization campaigns, that respected their ways and customs; [and the provision of] specialized medical care for pregnant women, both pre and post-natal and during the first months of the baby's life'; *idem* para 301.

¹⁰⁶¹ *idem* para 301.

¹⁰⁶² *idem* paras 301.

¹⁰⁶³ In the *Xamok Kasek*, the Court's wording was that the measures should be taken 'immediately, periodically, or permanently'. *idem* paras 301 and 302.

to ensure the protection of the right to life, states should generate the 'minimum living conditions that are compatible with the dignity of the human person.'¹⁰⁶⁴

The Inter-American Court did not stop there, but it also granted general relief. Under the 'titles' of rehabilitation and GNR, the Court ordered the state, within six months of notification, to prepare a study that established '(i) the frequency required for medical personnel to visit the Community; (ii) the main illnesses and diseases suffered by the members of the Community; (iii) the medicines and treatment required for those illnesses; (iv) the required levels of pre- and post-natal care; and, (v) the manner and frequency with which the vaccination and deparasitization programs should be carried out.'¹⁰⁶⁵

It is important to note that, in contrast to the South African Court, the Inter-American Court does not make this order subject to progressive realisation. In fact, the Inter-American Court ordered that measures should be complied to within a specific time-frame (six months)¹⁰⁶⁶ thus, making sure that the implementation of the order was almost immediate.

A similar approach was taken by the Colombian Constitutional Court in the Decision T-760/2006.¹⁰⁶⁷ In this case, the Constitutional Court joined twenty-two *tutela* actions

¹⁰⁶⁴ *Case of the Yakye Axa Indigenous Community v. Paraguay (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No. 125 (17 June 2005) para 162.

¹⁰⁶⁵ *Xákmok Kásek (Merits)* para 303 (b).

¹⁰⁶⁶ *idem* para 303.

¹⁰⁶⁷ For comments on this case see Alicia Ely Yamin & Oscar Parra-Vera, 'How do Courts set Health Policy? The Case of the Colombian Constitutional Court (2009) 6 PLoS Medicine 2; and, Yamin & Parra-Vera, *Judicial Protection of the Right to Health in Colombia* [...].

with common situations of complaint in the Colombian health system.¹⁰⁶⁸ The *tutela* actions revealed structural problems within the Colombian health system.¹⁰⁶⁹ One such problem related to the existence of a two-tier program of benefits: the ‘contributory’ system, available for workers, and a ‘subsidized’ system available for those people with limited resources and who could not afford the contributory system. Whereas the contributory system includes a full package of benefits, the subsidized system includes only a basic and simpler package of health benefits. Although this obligation is, in principle, of a progressive character,¹⁰⁷⁰ the Constitutional Court argued that the need to unify the system was more urgent for health benefits in respect of children, as the Constitution recognized them as subject to special protection, acknowledging that they have a fundamental right to health.¹⁰⁷¹

In this respect, the Constitutional Court also engaged in both individual and systemic relief provision. As for the individual cases, the Court ordered the state to protect the right to health of the children in the individual cases considered.¹⁰⁷² For example, in the case of a 15 year old girl who required a mammoplasty, the Constitutional Court

¹⁰⁶⁸ *T-760/2008*.

¹⁰⁶⁹ Structural problems related to: access to health services included in the Obligatory Health Plan (POS); access to health services not included within the Obligatory Health Plan but that, according to the jurisprudence of the Constitutional Court, should be paid by the health system; access to health services required by minors; access to high-cost health services; and treatments of catastrophic illnesses, such as the provision of diagnostic examinations. *T-760/2008*, Title II Numeral 2.

¹⁰⁷⁰ Even though the law obliges the state to progressively unify these two regimes in practice such unification had not been carried out. Law 100, Article 157.

¹⁰⁷¹ Colombian Constitution, article 44.

¹⁰⁷² *T-760/2008* section 5.4.3.

ordered the local authorities to fulfill the right of the girl to health, by providing the requested treatment.¹⁰⁷³

The Court, however, did not confine the award to the provision of individual relief, but also engaged in the awarding of general measures. According to the Court, the individual measures awarded did not sufficiently remove the structural barriers that some children faced in accessing health services, particularly those children who are not covered by either of the health systems described.¹⁰⁷⁴ As a result, the Court imposed a stronger measure for children than it did for adults, ordering the Regulatory Commission on Health 'to unify the benefit plans for the boys and girls of the contributory and subsidized regimen by the 1 October 2009' (fourteen months after the decision was issued).¹⁰⁷⁵

As the general relief related to the protection of an obligation that is considered 'fundamental', the Constitutional Court issued a measure that should be complied with within a specific period of time. Moreover, as the measure is related to the protection of what can be called a minimum core obligation, the Court ordered that, if, by the indicated date, the state had not taken the necessary measures to guarantee the unification of the plan of benefits for children, 'it will be [automatically] understood that the contributory system will cover the children of both the contributory and the subsidized system.'¹⁰⁷⁶ Thus, the Court provided an order that, although general, is of almost immediate implementation. Clearly, as the Court is dealing with what can be considered a minimum core obligation, it does not subject the order to progressive realization. This is, again, clearly distinctive from the approach taken by the South African Court.

¹⁰⁷³ *idem* section 5.4.3.1.

¹⁰⁷⁴ *idem* section 5.4.3.1.

¹⁰⁷⁵ *idem* 21st Order.

¹⁰⁷⁶ *idem* 21st Order.

Likewise, in the *Laxmi Mandal v. Deen Dayal Harinagar Hospital & Ors Case*¹⁰⁷⁷, the High Court of Delhi considered two cases regarding reproductive health. The cases related to the systemic denial of benefits to two women living below the poverty line, during and after their pregnancies, despite the existence of extensive benefit programs that would have allowed them to receive medical care, food supplements, and cash assistance. In both cases they were not able to access such benefits because they could not provide the relevant documents to certify their status. In the case of Shanti Devi, she was forced to carry a dead foetus for several days, having been denied attention by several hospitals. The hospitals alleged that her husband was not able to show a valid ration card for medical services, even though she qualified for one. Two years later, Devi died after giving birth at home to a premature baby girl, without receiving any medical attention. The second case related to Fatima, a poor, uneducated woman who delivered her child under a tree, in full public view. She did not receive any assistance from a hospital, in respect of nutrition or health care for her and her daughter, in spite of having informed the maternity home of the delivery, and going to it for vaccinations.

According to the Court, the failure to implement the schemes in both cases, implied a violation of the rights to health, the reproductive health rights of women, and to food, all closely linked to the right to life.¹⁰⁷⁸ In its decision, the Constitutional Court stated that the right to health includes the right to 'receive a *minimum* standard of treatment and care'¹⁰⁷⁹ [italics out of text] and that it formed an inalienable component of the

¹⁰⁷⁷ *Laxmi Mandal v. Deen Dayal Harinagar Hospital & ORs*, W.P. © Nos. 8853 of 2008.

¹⁰⁷⁸ *idem* paras 19-20.

¹⁰⁷⁹ *idem* para 19.

right to life.¹⁰⁸⁰ As part of the reparation measures the High Court ordered individual compensation measures to the victims, consisting of the refund of expenses, provision of benefits cards and scholarships, payment of a sum of money, as well as the provision of food, kerosene, and medicines, and the transfer of benefits to the next of kin.¹⁰⁸¹

In addition to these compensation measures, the High Court argued the cases were linked to several structural problems in the implementation of the schemes, relating to, among others: the lack of 'portability' of the schemes across states; confusion about the cash assistance under two of the schemes; overlapping of the schemes; problems in the administration of some of the scheme's programs; difficulties in the system of referral to private health institutions; lack of recognition of women as 'primary bread winners' that would allow them to award compensation to their partners in case of death; and a deficit in the statistics furnished by the State Government on the implementation of the programs.

As a consequence, the Court issued several general measures, ordering the state: to ensure that, if a person is below the poverty line, such a person will be assured the

¹⁰⁸⁰ *idem* para 20.

¹⁰⁸¹ In the first case a refund of the expenses, made by Shanti's husband for her treatment, was ordered. Likewise it was ordered that: a benefit card should be awarded to the family for her baby; a sum of money for an annual scholarship should be ensured for the child during the growing years, and that her daughter will receive the benefits for the annual scholarship; and, that a sum of money should be awarded to the husband for Shanti's avoidable death. As for Fatima, the High Court ordered the state to make sure that she received her full quota of grains, sugar and kerosene oil, her medication for epilepsy, and a sum of money for being compelled to give birth under a tree. Her daughter, Alisha, should also be granted benefits under the appropriate schemes.

continued availability of health services in any part of the country;¹⁰⁸² to make sure that the state did not deny pregnant women cash assistance;¹⁰⁸³ to make sure that there is an identified place which women can approach to be given the benefits;¹⁰⁸⁴ to establish 'specific measures to improve the operation of centres for the delivery of food for children';¹⁰⁸⁵ to guarantee 'safe and prompt transportation of pregnant women from their places of residence to public health institutions';¹⁰⁸⁶ that, in cases of maternal death, the family should get the cash benefit established for the death of the 'primary bread winner';¹⁰⁸⁷ to collect statistics on the performance of the implementation of the schemes;¹⁰⁸⁸ and, to take measures in order to secure that migrant, pregnant women could access all of the benefit programs.¹⁰⁸⁹

In the previous cases, the Inter-American Court, the Colombian Constitutional Court, and the Court of Delhi, did not make any of these measures subject to progressive realisation. These courts seem to understand the minimum core as part of an 'essential minimum' of a particular right.¹⁰⁹⁰ According to this view, the essential minimum elements of a right are selected in accordance with its link to a foundational norm, such as the right to life. In all cases, the courts linked the protection of the right to health directly to some dimension of the right to life. The Inter-American Court, for

¹⁰⁸² *idem* Order (i).

¹⁰⁸³ *idem* Order (ii).

¹⁰⁸⁴ *idem* Order (iii).

¹⁰⁸⁵ *idem* Order (iv).

¹⁰⁸⁶ *idem* Order (v).

¹⁰⁸⁷ *idem* Order (vi).

¹⁰⁸⁸ *idem* Order (vii).

¹⁰⁸⁹ *idem* Order (viii).

¹⁰⁹⁰ Katharine G. Young, 'The minimum Core of Economic and Social Rights: A Concept in Search of Content'(2008) 33 *The Yale Journal of International Law* 113, pp. 126-140.

example, found that the right to life included the ‘right to conditions that guarantee a decent existence’¹⁰⁹¹ and, as a consequence, the state should guarantee adequate access to health to the members of the indigenous community. The Colombian Court identified the right to health as a fundamental right based on its intrinsic nexus with the undeniable right to life.¹⁰⁹² Similarly, the Court of Delhi emphasised that the cases involved violations to the rights to health and reproductive rights which are ‘inalienable survival rights that form part of the right to life.’¹⁰⁹³

The CESCR may wish to learn from the experiences of the Inter-American Court of Human Rights, the Colombian Constitutional Court, and the High Court of Delhi, when recommending both individual and general measures, in cases of violations of minimum core elements of the right to health. As in cases previously discussed, if the CESCR wants to follow the ‘minimum core’ approach, it could imitate the strong remedial powers and structural injunctions used by these courts. The Committee could order changes in public policies and benefit programs, and the development of studies and reports that inform the situation of compliance regarding the specific element of the right to health, as well as demanding human rights training programs, in order to comply with minimum core obligations of the right to health. In all cases, the Courts established measures that went beyond the mere declaration of designing a new policy. They actually engaged in ‘strong remedies’,¹⁰⁹⁴ in the form of structural injunctions, by providing detailed orders oriented to build adequate policies. This contrasts with the South African model in which ‘weak remedies’¹⁰⁹⁵ were awarded, ordering the state ‘to devise and implement [...] a comprehensive and co-ordinated

¹⁰⁹¹ *Xákmok Kásek (Merits)* paras 182.

¹⁰⁹² Young, *The minimum Core of Economic and Social Rights* 125-40.

¹⁰⁹³ *Laxmi Mandal* para 2.

¹⁰⁹⁴ Tushnet, *Social Welfare Rights and the Forms of Judicial Review* 1911-1912.

¹⁰⁹⁵ Tushnet, *Social Welfare Rights and the Forms of Judicial Review* 1910-1911.

programme' without providing specific guidance on how such programs should be carried out. Although the orders are certainly bolder than in the South African model, the Inter-American Court, as well as the Colombian and Indian Courts, are respectful of the freedom that the state has in the selection of the means by which it complies with its obligations.

Moreover, in each of the three cases presented, the orders were not conditional upon progressive realisation and maximum available resources, as the measures dealt with violations to core obligations. In fact, in the cases of the Inter-American Court, and the Constitutional Court of Colombia, they provided very strict deadlines for the implementation of the measures, thus ensuring compliance within a relatively short amount of time.

This distinction between the different approaches to the understanding of 'minimum core' and *reasonableness* has been largely discussed in the relevant literature.¹⁰⁹⁶ As Lemaitre and Young explained, whereas the Colombian Constitutional Court has opted for a substantial approach, finding dignity and life more important than economic rationality, even in cases of high-cost illnesses, the Constitutional Court of South Africa has opted for a procedural approach, one that focuses on the type of interests that were taken into account, and the justification of the government to act

¹⁰⁹⁶ For a discussion about the minimum core v. reasonableness approach, see: Katharine G. Young & Julieta Lemaitre, 'The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa' (2013) 26 *Harvard Human Rights Journal* 179; Mesenbet Assefa, 'Defining the Minimum Core Obligations-Conundrums in International Human Rights Law and Lessons from the Constitutional Court of South Africa' (2010) 1 *Mekele University Law Journal* 1; and Margaux J. Hall & David C. Weiss, 'Human Rights and Remedial Equilibration: Equilibrating Socio-Economic Rights'(2010-2011) 36 *Brookling Journal of International Law* 453.

in certain way.¹⁰⁹⁷ The approach of the minimum core taken by the Constitutional Court has been criticized as being insensitive to its context.¹⁰⁹⁸ In fact, as Amartya Sen has argued, the requirements for survival are not always clearly identifiable, and may change depending on the group and the region.¹⁰⁹⁹ In turn, the approach of *reasonableness* taken by the South African Court may be seen as a way to empty the concept of 'minimum core' of all meaning, and as creating a 'culture of justification' in favor of government policies.¹¹⁰⁰

The CESCR will have to clarify exactly how to make coherent its interpretation of minimum core in General Comment No. 3 and 14, with its interpretation of *reasonableness* set in Article 8 of the Optional Protocol. If, following the Statement issued in 2007, the CESCR wants to follow a model of 'minimum obligations'¹¹⁰¹ it could take into account the models of the Colombian, Indian, and Inter-American Courts, by including the criterion of affecting vulnerable populations, such as children, pregnant women or indigenous people, as a way to determine the reasonableness of the measures. In the cases analyzed, the Colombian and Indian Courts seem to justify the special protection of 'minimum core' obligations based upon the fact that the violations affected people who should be specially protected. In the Colombian Case, the fact that the violation occurred against children, who

¹⁰⁹⁷ Young & Lemaitre, *The Comparative Fortunes of the Right to Health* 210-211

¹⁰⁹⁸ Young, *The minimum Core of Economic and Social Rights* 130-131.

¹⁰⁹⁹ Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford Clarendon Press, 1982), [cited in Katharine G. Young, 'The minimum Core of Economic and Social Rights: A Concept in Search of Content', 33 *The Yale Journal of International Law*, p. 131]

¹¹⁰⁰ Etienne Mureinik, 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) 8 *South African Journal on Human Rights* 464, pp. 470-474.

¹¹⁰¹ Young, *The minimum Core of Economic and Social Rights* 151.

should be especially safeguarded, was determinant in creating the strict measures applied. Similarly, the Court of Delhi emphasized that the petitions involved two mothers and their babies. Also, in *Xamok Kasek*, the Inter-American Court recognized that the measures taken by the state were not sufficient to correct the situation of vulnerability of indigenous communities. In all of these cases the protection of a 'minimum core' of rights was justified, among other reasons, because it affected vulnerable people.

Applying this rationality in the analysis of individual communications by the CESCR, in cases of violations to minimum core obligations, the CESCR will have to take appropriate measures in order to secure the compliance of such minimum core. Following the model of remedies of the Colombian and Indian Courts, as well as the Inter-American Court of Human Rights, the CESCR could engage in strong forms of remedies, ordering states to adopt programs and policies that comply with the minimum core obligations on the right to health. In ordering such measures, the CESCR could provide clear details of the general elements that such programs should include, or, outline some of the steps that authorities should take in dealing with this, as per the actions of the Inter-American Court, and the Supreme Court of Delhi, but always allowing the state to choose the final means of compliance. The measures would not be subject to progressiveness and maximum available resources, but instead should be complied with in a relatively short time.

4.3.2 GNR and the redress of violations of progressive realization

In those cases of violations of non-core obligations, states would have an obligation to take steps up to the maximum of their available resources, in order to achieve

progressively the full realization of the rights established in the Covenant.¹¹⁰² The expression 'up to the maximum of available resources' implies that states should be able to demonstrate that every effort has been made to use all available resources in order to fulfil the obligations established under the Covenant.¹¹⁰³ In turn, the duty to achieve 'progressively' the protection of ESC rights implies states have a duty to take steps in order to achieve this goal.¹¹⁰⁴ This duty also implies that any retrogressive measures should be avoided unless they are adequately and proportionately justified, in reference to the totality of the rights established in the Covenant.¹¹⁰⁵

In these situations, reparation measures should also address the specific harm originated in duties of progressive realization. For example, if the Committee finds that a certain state has not taken measures up to the maximum of the available resources in order to provide access to non-core elements of the right, or that it has undertaken retrogressive measures that are not adequately justified, the Committee could get involved in both individual and general relief.

In defining general relief, the Committee should also be consistent with the principles of progressive realization and maximum available resources. This is particularly important taking into account that GNR are broad in scope (taking the form of,

¹¹⁰² ICESCR, Article 2.1

¹¹⁰³ CESCR GC 14 para 47.

¹¹⁰⁴ Other circumstances for the evaluation of progressive obligations are: the extent that the measures are targeted towards the fulfilment of ESC rights; whether the measures are non-discriminatory; that the allocation of resources was in accordance with international human rights standards; that the policy adopted corresponds to the option that least restrict rights, and that the measures take into account the situation of disadvantaged and marginalized people. See, E/C.12/2007/1, para 8.

¹¹⁰⁵ CESCR GC 3 para 9.

among others, legislative reforms, educational measures addressed to state officials, adoption of manuals, and the creation of databases) and may imply a high expenditure of resources that are not often easily available in low income countries, where the right to health is violated.

Examples of both individual and general relief in an obligation of progressive realisation can also be found in the previously discussed decision, T-760/2008. In this decision, the Colombian Constitutional Court looked at cases of several adults who required different health services, not included in the plan of benefits.¹¹⁰⁶ Unlike the previously discussed minimum core obligation to provide right to health services to children, the Constitutional Court concluded that the obligation to actualize the plan of benefits for adults is, in principle, an obligation of *progressive realization*.¹¹⁰⁷ The Court considered that, in those specific cases where the services were required (or indispensable) in order to maintain the petitioners' health, and could not be afforded by the petitioners themselves, there was a duty of the state to provide such services.¹¹⁰⁸ As a consequence, in the cases analyzed in the decision, the Constitutional Court ordered the government to protect the individual rights of the petitioners by guaranteeing their effective access to health services.¹¹⁰⁹

¹¹⁰⁶ The claimants required access to medicines for diabetes (Case T-1328235) and to diagnostic, magnetic resonance images (T-1337845).

¹¹⁰⁷ According to the Constitutional Court, since these services were required for adults, as opposed to children, they were not part of a minimum core of the right to health. *T-760/2008* Section 6.1.2.1.1.

¹¹⁰⁸ The Constitutional Court has established that the right to health includes the right to access to health services that are required or indispensable in order to maintain the health of a person or that compromise the right to a dignified life and personal integrity. *T-760/2008* Section 4.4.3.

¹¹⁰⁹ See orders 8th and 10th, protecting the right to health of the petitioners and confirming the precautionary measures by which it authorized the effective access to the health services.

The decision of the Colombian Constitutional Court does not stop at the provision of individual relief, but also engages in general measures. According to the Court, these cases related to a more structural problem, linked to lack of updating and unification of the plans of benefits. In the Court's opinion the state had a legal obligation to actualize¹¹¹⁰ and *progressively* unify both the 'subsidized' and 'contributory' systems of health by 2000.¹¹¹¹ By the time the case was considered by the Constitutional Court, the government had not undertaken a systemic and comprehensive update in fourteen years of validity of the Obligatory Plans of Health (POS),¹¹¹² and had not carried out any program, or prepared any schedule with specific plans, to show any effort in the unification of such plans.¹¹¹³ As a consequence, the Constitutional Court ordered both the unification and comprehensive updating of the POS.¹¹¹⁴

In the awarding of general measures, the Court also gave full application to progressive realisation and maximum available resources. It ordered the National Commission on Health Regulation that, in the process of updating, it should indicate 'the services that are excluded, as well as those that will be *gradually* included.'¹¹¹⁵ The National Commission should also take into account the *economic sustainability*

¹¹¹⁰ Law 100/1993, Republic of Colombia, Article 162, para 2.

¹¹¹¹ The Constitutional Court founded its decision in Article 157 of Ley 100/1993, which states that 'from 2000 onwards, every Colombian ought to be part of the Health System through either the contributory or subsidized regimen, in which progressively the systems will be unified in order that all inhabitants of the national territory receive the Obligatory Health Plan established in article 162'. *T-760/2008* Section 6.1.2.1.1.

¹¹¹² *T-760/2008* Section 6.1.1.1.2.

¹¹¹³ *T-760/2008* Section 6.1.2.1.1.

¹¹¹⁴ *T-760/2008* Order 7th.

¹¹¹⁵ *T-760/2008* Order 7th (ii).

of the system.¹¹¹⁶ Regarding the Unification, the Court also ordered the National Commission on the Regulation in Health to adopt a program and timetable to *gradually and sustainably* unify both systems, taking into account (i) the priorities of the population according to epidemiological studies and (ii) its financial sustainability.¹¹¹⁷

It is highly important to note here how, in both individual and general orders, the Constitutional Court integrates the principle of progressive realization by including *gradual* obligations. In both cases, the Court also refers to the need to make the updating and unification process *economically sustainable*, consistent with the concept of maximum available resources.

Interestingly, the Constitutional Court did not specify exactly what should be the concrete content of the unification. Instead, it established some procedural principles and general standards that the Government should take into account. The Constitutional Court established, for example, that, in addition to being gradual and economically sustainable, the comprehensive updating of health packages should take into account the principles of 'integrality' and 'required attention.'¹¹¹⁸ In this regard, the Court was also aware that, as such actions are complex in their definition and require the coordinated effort of different branches of power, the legislative and the executive are the ones with more democratic legitimacy to define the content of such policies. Moreover, in order to provide a truly democratic meaning to the process, it ordered the National Commission to offer opportunities for the direct and

¹¹¹⁶ T-760/2008 Order 7th (iv).

¹¹¹⁷ T-760/2008 Order 22nd.

¹¹¹⁸ T-760/2008 Section 4.4.6.1.

effective participation of organizations that represent the interests of users and the medical community.¹¹¹⁹

This dialogic approach, one that enhances the participation of beneficiaries of policies in the creation of such policies, seems to be a good way of reconciling the deferential respect to the state in the drafting of its own policies, and the need to award meaningful remedies to the victims of violations. This resulted in several internet-based consultations, meetings with local authorities, consultations with experts, and the publication, on the internet, of details of the project to update the health plan.¹¹²⁰ Even though the process of consultation has resulted in practical difficulties,¹¹²¹ the order of the Constitutional Court could be seen, in Tobin's words, as a facilitator between the state and the right-holders, regarding the direction, content and speed of the steps taken by the state in order to fulfill their obligations.¹¹²²

¹¹¹⁹ T-760/2008 Sections 6.1.1.2.3 and orders 17th and 22nd.

¹¹²⁰ Resolution No. 005521(27 December 2013) Republic of Colombia, Preamble.

¹¹²¹ The problems were related to the complexity of the procedures, the formal nature of the requirement to be invited to participate, and the fact that the procedure was internet-based; this imposed a barrier, especially for those not living in the cities. In addition to this, the procedure was seen as mere 'socialization' rather than decision-making. Camila Gianella-Malca, 'A Human Rights Based Approach to Participation in Health Reform: Experiences from the Implementation of Constitutional Court Orders in Colombia' (2013) 31 *Nordic Journal of Human Rights* 84, p.100.

¹¹²² John Tobin, *The Right to Health in International Law* (Oxford University Press, 1st edition, 2012) p. 233.

4.4 Conclusion

This section analyzed how GNR have, in fact, been applied by different international and domestic tribunals in the redress of different duties of the right to health. Concretely, they have been used for the redress of violations of duties to respect, protect and fulfill the right to health. In all cases, GNR or general measures have been awarded, in addition to individual forms of reparation, as a way to prevent future violations.

Careful differentiation needs to be made when awarding GNR for the redress of the duty to fulfill the right to health. In those cases of violations to minimum core obligations, and following the model of the Inter-American Court, as well as the Colombian and Indian Courts, GNR or general measures are usually quite detailed in content and are designed to make sure that, in the future, the minimum core of the right to health is protected. They are also subject to strong form of remedies that call for almost immediate application of the measures. For example, in *Xakmok Kasek* and *T-760-2008*, the Court ordered the state to provide the specified general measures within six months of the enactment of the decision. In contrasts, when awarding GNR for the protection of duties subject to progressive realization, GNR are drafted in more generic terms, ordering the state to take measures in order to *progressively* realize the fulfilment of the right. The distinction between the different forms of GNR is compatible with the understanding that the Committee has about the nature of obligations on the right to health. In its general comments, the Committee has traditionally recognized that there is a minimum core of obligation on the right to health that states must comply with. If the Committee wants to be consistent with this understanding of the obligations, it should apply the same model in the awarding of general measures.

Table 6 provides a summary of the GNR awarded in relation to each type of violation:

Table No. 6. General measures awarded in relation to each type of violation of the right to health			
Obligations	Violation (Example)	Individual redress (compensation, restitution, rehabilitation)	General measures (GNR)
Respect Refrain from denying access to contraception or sexual or reproductive life.	The state enacts a law banning access to a form of assisted reproduction (<i>IACHR, IVF v Costa Rica</i>).	To provide access to IVF treatment to the couples that could not benefit from such form of assisted reproduction.	To withdraw the restriction. To set up courses on sexual and reproductive rights addressed to members of the judiciary and legislative in order to avoid the restrictive interpretation or the enactment of restrictive laws in the future.
Protect To ensure that privatization of the health sector does not constitute a threat to the [...] quality of health facilities, goods and services.	Lack of appropriate legislation, and mechanisms of accountability allowing private actors to fail to guarantee health services of good quality (<i>IACHR, Ximenes Lopez v. Brasil</i>)	To provide adequate access to justice and accountability mechanisms in order that people can access to adequate health services.	To draft the necessary policies, legislation, and mechanism of accountability needed in order to make private actors accountable in the provision of health services in that country.
Fulfill			
Minimum core To guarantee minimum core obligations in the right to health.	The state did not provide minimum health care to vulnerable populations (indigenous people, children and pregnant women) or minimum levels of food (<i>Xakmok Kasek v Paraguay; T.760-2006 and PUCL v Union of India & Ors</i>).	To provide access to health services or minimum levels of food to the claimant(s) in all cases. Measures should be precise and immediately enforceable.	To provide measures oriented to tackle the root causes of the violations (reports, changes in legislation, public policies, programs, etc. wherever is needed and keep a causal link with the violation) Measures should be precise but can be enforceable within certain time framework.
Progressive realization To guarantee in a progressive manner and in accordance with maximum available resources non-core health services.	The state did not guarantee adequate access to non-core health services in spite the fact that under a test of reasonableness there is an obligation of the state to protect such right. (<i>TAC Case and some sections of T-760-2006</i>).	Under the circumstances stated by the case the state should provide access to non-core health services to the claimant(s). Measures should be precise but can be progressively achieved.	To provide a plan that tackles the root causes of the violation and that <i>progressively</i> realizes that specific aspect of the right to health (i.e. to adopt a plan to progressively update the plan of benefits).

5. The need for a participatory process

The awarding of GNR or general measures can be very restrictive in terms of the margin of discretion that states have in defining its public policies and programs, particularly in obligations of progressive realisation. In order to balance this situation, domestic courts have increasingly awarded measures of a participatory nature, allowing relevant stake holders to participate in the definition of a particular legislation, program or public policy.

As mentioned in the previous section, the Colombian Case is emblematic in this regard. In T-760/2008, the Constitutional Court ordered the National Commission on the Regulation in Health to (integrally) update the Obligatory Health Plans (subsidized and contributive) according to the parameters established by law and the jurisprudence of the Constitutional Court.¹¹²³ In doing this, the Court ordered that ‘the Commission must ensure direct and effective participation of the medical community and the users of the health system.’¹¹²⁴ The Court also ordered that, in the progressive unification of the benefits offered in the two benefit plan (subsidized and contributive), direct and effective participation of both the medical community and the users of the health system should be allowed.¹¹²⁵ The Constitutional Court did not specify which institutions and actors should be invited in the participatory process but retained jurisdiction in order to verify whether the relevant authorities comply or not with the standards proposed.¹¹²⁶

¹¹²³ T-760/2008, order 17th.

¹¹²⁴ *idem*

¹¹²⁵ *idem*, Order 22nd.

¹¹²⁶ *idem*

In order to comply with the decision, between 2008 and 2010, the Minister of Social Protection undertook seminars with experts, workshops with relevant actors, and public consultations open to any citizen, mainly via internet. According to Gianella-Malca, this process suffered from a lack of clarity of the procedures, absence of an inclusive methodology for participation, lack of participation of groups entitled to special protection, and a lack of information about human and financial resources.¹¹²⁷ Since 2010, the process has been led by the Health Regulation Commission, but still several problems remained.¹¹²⁸

In spite of the difficulties in the process of participation, the order provided by the Court has been recognized as an important opportunity for the creation of a 'democratic deliberative process' in which people can discuss the type of health system they want.¹¹²⁹ The decision has been used as an historic moment to discuss, for the first time, the characteristics of the health system in Colombia.¹¹³⁰

Although it is unrealistic to think that a single judicial decision may 'fix' the structural problems of a health system, the establishment of participatory mechanisms in the judicial decision may contribute greatly in creating mechanisms that help to tackle

¹¹²⁷ Gianella-Malca, *A Human Rights Based Approach* 99. See also, Camila Gianella-Malca, Oscar Parra-Vera, Alicia Ely Yamin, and Mauricio Torres-Tovar, '¿Deliberación democrática o mercadeo social? Los dilemas de la definición pública en salud en el contexto del seguimiento de la sentencia T-760 de 2008' (2009) 11 *Health and Human Rights: An International Journal* 1, p. 8-9.

¹¹²⁸ The complexity of the procedures, a formal requirement to be invited to participate, and the internet-based procedure, created a barrier, especially for those living in cities that had less internet access. In addition to this, the procedure was seen as mere 'socialization' rather than decision-making. Gianella-Malca, *A Human rights Based Approach* 100.

¹¹²⁹ Gianella-Malca (et al), *¿Deliberación democrática o mercadeo social?* 8.

¹¹³⁰ Yamin & Parra-Vera *Judicial Protection of the Right to Health in Colombia* [...] 127.

the problems. As Rodriguez-Garavito has argued, unlike unilaterally imposing judges' criteria, structural and dialogical judicial decisions 'promote the transparent, public and reasoned deliberation about difficult decision of prioritization in the health system.'¹¹³¹ As a consequence they 'promote efficiency, transparency and accountability in decision-making within the health system.'¹¹³²

An adequate model for the awarding of GNR or general measures, in the redress of right to health violations, should take into account that the participation of stake holders is necessary in order to facilitate the creation of legislation, programs and policies from a human rights perspective. Without establishing specific ways to draft them, allowing the participation of victims in the definition of such measures may be the best way to provide adequate relief, in those cases where public policies are either non-existent or inadequate, in terms of human rights standards. In fact, CESCR has already recommended states to take appropriate measures with the participation of local actors in some of its concluding observations.¹¹³³ This is an interesting practice in which the CESCR could engage when deciding cases under the Optional Protocol to the ICESCR.

¹¹³¹ Cesar Rodriguez-Garavito, 'The judicialization of health care: symptoms, diagnosis, and prescriptions' in Randall Peereboom and Tom Ginsburg, *Law and Development of Middle-Income Countries. Avoiding the Middle-Income Trap*, (Cambridge University Press, 2014) p. 268.

¹¹³² *idem.*

¹¹³³ UN, CESCR, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Mexico' (1999) UN Doc. E/C.12/1/Add.4 para. 44. For a similar proposal see, Viviana Krsticevic and Brian Griffey, 'Remedial Recommendations' in Malcom Langford & others (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (Pretoria University Law Press, 2004).

6. Implementation and monitoring

The enforcement of the decision is very often the most difficult part of any litigation strategy. This is particularly problematic in the awarding of GNR which frequently link to structural measures and measures with wide scope. Whereas some other reparation measures are quickly implemented (e.g. the payment of compensation), GNR have a more complex implementation process usually requiring the coordination of several institutions, the carrying out of legal processes, and the appropriation of a specific budget (e.g. legislative reform and human rights training). As a result, states usually delay the implementation of this type of measures. Baluarte analyzed 91 reparation decisions issued by the Inter-American Court of Human rights between 1989 and 2009, and found that the payment of compensation, together with some symbolic measures of admission of responsibility (e.g. publishing pertinent parts of the decision and carrying out public events of acknowledgment of responsibility), are the measures with the highest level of compliance.¹¹³⁴ In contrast, GNR usually have a lower level of fulfillment. Among several forms of GNR, different levels of compliance can be identified: the order to carry out human rights training has 38% compliance; legislative measures were implemented in 19% of the cases analyzed, and the establishment of development funds was carried out in just 11% of the decisions.¹¹³⁵

¹¹³⁴ Whereas compensation measures were complied with in 60% of the cases analysed (126 out of 208), symbolic admissions of responsibility were implemented in 64% of the cases (84 out of 131). David Baluarte, 'The Evolution of a Compliance Phase of Inter-American Court litigation and the Strategic imperative for victims Representatives' (2011-2012) 27 *American University International Law Review* 263, p. 284.

¹¹³⁵ *idem* 293, 297 and 303.

Similar figures were found in a study by Hawkings and Jacoby, according to which, in the Inter-American System of Human Rights, the payment of material and moral damages have a higher level of implementation in comparison with measures ordering the amendment of domestic law.¹¹³⁶ The same study revealed that, in the European Court of Human Rights, 'just satisfaction has been [usually] paid but individual and/or general measures are very often stalled.'¹¹³⁷

The awarding of GNR in the redress of violations to the right to health is not very different. GNR may usually imply the coordination of several institutions and the appropriation of specific budgets. As a consequence, the enforcement of these measures can be even more complex and usually take more time.¹¹³⁸ Whereas it is understandable that the implementation of GNR or general measures is very costly for the states and therefore difficult to implement, this should not be a reason to deny granting them. There are several reasons that support this position.

First, there is a normative reason. GNR are part of the international law of human rights. As developed in chapters I, II and III, GNR are established in both the ILC Comments and in the Basic Principles and Guidelines on the Right to a Remedy and Reparations for victims of Gross Violations: both are 'soft law' documents that provide content in the interpretation of international law. In addition to this, regional

¹¹³⁶ Payment of material and moral damages has 40% and 43% compliance, respectively. In contrast, the amendment of domestic law was complied with in just 7% of the cases analysed. Darren Hawkings and Wade Jacoby, 'Partial Compliance: A Comparison of the European and inter-American Courts of Human Rights', (2010-2011) 6 *Journal of International Law and International Relations* 35.

¹¹³⁷ *idem* 71.

¹¹³⁸ No specific studies have been found showing whether there is a difference in the enforcement of GNR depending on whether it is a civil and political right, or an economic, social and cultural right.

courts of human rights have, in practice, affirmed the existence of such measures. Denying their existence would be to deny binding obligations that states undertake to fulfill. The normative existence of GNR does not mean that such measures should be awarded in all cases of violations of human rights. In chapter III, it was shown how a defensible theory for the awarding of GNR should focus the awarding of these measures on three circumstances: gross and serious violations of human rights, large-scale violations, and risk of repetition. Restricting the application of GNR to only these specific circumstances, would help to reduce the number of applications to those cases that strictly need GNR.

Second, the fact that GNR require money and effort should not be a reason to deny its application. Other reparation measures, such as compensation and rehabilitation measures, also require large expenditure by the state. It is true that the enforcement of GNR may require large amounts of money, especially when they are related to the compliance of general, overall programs and policies that, for example, require the provision of basic services. However, this should not be the case for the enforcement of all GNR. The enactment of specific legislation, the elaboration of reports about the state of compliance of a specific element of a right, the establishment of human rights courses, and the dissemination of information, do not require extensive financial sums and can be easily achieved when there is the political will.

In order to tackle this problem, international and domestic courts have, increasingly, invited local actors to participate in the monitoring of the decision by, for example, providing information about the level of its implementation. Although this may extend the process of following up decisions, and eventually increase the workload of tribunals, it may have the potential to provide the tribunal with different point of views about the difficulties of the process of implementation.

In this regard, the Colombian experience can be also relevant. In T-760/2006, the Constitutional Court invited several organizations, including health institutions, NGOs, users' organizations, universities and academics, to be part of the follow-up groups to discuss the implementation of the decision.¹¹³⁹ The Constitutional Court also issued specific orders to the Human Rights Ombudsman, the Attorney General, the Minister of Social Protection, and the National Superintendence of Health, to collect and provide information about the compliance of the decision.¹¹⁴⁰ This order resulted in the establishment of hearings where different stakeholders have had the opportunity to present their views.

Similarly, in the Inter-American system extended follow-up hearings have contributed to the implementation of measures. In these meetings both the state and the representatives of the victims are invited to express their views about the level of compliance with the decision, and to the Inter-American Commission to present observations of both the state and the victims' reports.¹¹⁴¹ As part of the hearings, the Court notes the advances made, draws the attention of the states in those cases where the lack of compliance arises from the lack of political will, and proposes alternatives to reach agreements. During these hearings the Court can also propose the undertaking of timetables for the compliance of decisions. The Inter-American Court has used this power in an innovative manner by carrying out joint hearings

¹¹³⁹ Colombian Constitutional Court, Order 09 (December 2008), Order 03 (December 2009); and Order 095 (21 May 2010).

¹¹⁴⁰ *T-760/2008* orders 20th; 21st, 22nd, 23rd and 26th.

¹¹⁴¹ Rules of Procedure of the Inter-American Court of Human Rights, (approved by the Court during its LXXX Regular Period of Sessions held from November 16 to 28 of 2009) Article 69.

related to the compliance of measures issued in different Colombian cases, all related to medical and psychological attention.¹¹⁴²

An adequate model for the compliance of GNR or general measures should include measures to facilitate the involvement of the relevant stake holders in the implementation and monitoring process. In this regard, CESCR has extended invitations to non-governmental organizations to monitor the implementation of concluding observations, and to report back to the Committee.¹¹⁴³ This practice, could be extended by the CESCR to facilitate compliance of measures arising from the Optional Protocol to ICESCR.

7. Conclusion

This chapter aimed to develop some of the standards on how GNR or general measures could be awarded by the CESCR, in the redress of violations to the right to

¹¹⁴² Resolution, 29 April 2010, related to reparation measures about medical and psychological attention, in the Colombian cases: 19 Merchants, Mapiripán Massacre, Gutierrez Soler, Pueblo Bello Massacre, La Rochela Massacre, Ituango Massacre, Escué Zapata y Valle Jaramillo, Inter-American Court of Human Rights (Resolution cited in Resolution of the 8th of February 2012, Monitoring Compliance with the measures of Reparation Concerning the Medical and Psychological Attention ordered in Nine Colombian Cases – Notice of a Private Hearing, available at http://www.corteidh.or.cr/docs/supervisiones/comerciantes_08_02_12_ing.pdf)

¹¹⁴³ UN, Economic and Social Council, 'Report on the Twenty-second, Twenty-Third and Twenty-Fourth Sessions' (7 June 2001) E/2001/22, Annex V, para 27. Cited in M. O'Flaherty, 'Concluding Observations of UN Human Rights Treaty Bodies' (2006) 6 *Human Rights Law Review*, p. 51.

health. It analysed the nature, scope, circumstances, the specific remedies to be granted depending on the duty violated (respect, protect, fulfil), the level of participation that they should include and some of the difficulties in compliance.

After the analysis of each of these elements, several lessons can be drawn for the Committee, the CESCR could i) understand general measures as future oriented measures, oriented to tackle the root causes of the violation; ii) learn from the wide scope of measures available in the awarding of GNR by different regional and domestic tribunals; iii) be motivated by the examples presented to award adequate and effective measures for violations to the duties to respect, protect and fulfil; iv) particularly in cases of violations to duties of the minimum core, CESCR could engage in 'strong remedies' that call for the implementation of public policies and programs that guarantee the fulfilment of the right to health; v) in cases of violations to duties of progressive realization, the Committee could learn from the participatory model proposed by the Colombian Constitutional Court, in order to provide measures that are both deferential to the state and meaningful to the victims; and vi) explore the development of new mechanisms for following up decisions, so as to allow the participation of social organizations and civil society in the adoption of general measures, as well as during their implementation process.

When comparing the awarding of GNR in the right to health and health-related cases, with the awarding of similar measures in civil and political rights, it was clear that there were not major differences. Regardless of the type of right to which they are assigned, GNR have a similar nature and scope, and are granted under similar circumstances. As a consequence, the common critique is overstated, i.e. the argument that the redress of right to health violations, and ESCR violations in general, require complex remedies involving the redistribution of scarce resources, obstruct the competence of other branches of power, and are difficult to implement.

This critique ignores the fact that GNR and general relief are increasingly deployed mechanisms of reparations in international human rights law that are applicable to all human rights.

However, when discussing the specific remedies to be granted depending on the type of duty violated, some differences were found. Whereas the awarding of GNR or general measures in the redress of violations to minimum core obligations may require, following the Colombian model, measures of almost immediate compliance, the awarding of GNR in violations of duties of progressive realisation should be subject to progressive realisation and maximum available resources. This differs significantly from the awarding of GNR and general measures in civil and political rights, which are not subject to progressive realisation and maximum available resources and, therefore, are not subject to this differential treatment.

CONCLUSION

In recent years there has been a growing interest by international bodies to award reparation measures of a general scope either in the form of GNR or as general measures. Both, the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights have consistently ordered or recommended states to adopt GNR. The European Court of Human Rights has also awarded general measures in the analysis of pilot judgments. Similarly, the CEDAW Committee and the Committee on the Rights of Persons with Disabilities have consistently recommended states to adopt general measures in order to comply with their obligations. Despite the increasing use of GNR, there is not yet a clear understanding of what they are, how to award this type of remedies and even less of how to do it in cases concerning violations of economic, social and cultural rights such as the right to health. This thesis aimed to make a critical contribution to the understanding of remedies in international law as there was little literature in the field of GNR. It also aimed to go further by studying its application in right to health cases. This also represented a key contribution to the literature as most of the academic work had focused in showing the difficulties of granting remedies for socio-economic rights but there were no contributions explaining how GNR could be actually awarded in the redress of this type of rights.

The research questions of this thesis can be summarized as follows. First, what is the nature and characteristic of the concept of GNR in both international law and international human rights law? Second, how can this type of remedy be applied to the redress of violations of the right to health? In order to answer these questions the

thesis was divided in two parts. Whereas the first part (chapters I to III) explored the nature and characteristics of GNR; the second part (chapters IV to V) explored its application to cases related with the right to health.

Nature, scope and circumstances for the award of GNR in international law and international human rights law

The first half of this thesis (chapters I to III) explored whether there is an obligation under international law to provide GNR; under what circumstances it applies, how GNR should be crafted, and what is the scope of the measures. The analysis of the concept of GNR in PIL (chapter I) showed GNR is a concept established in the ILC Draft Article of State Responsibility and the ICJ's case law. Besides the Draft Articles do not have binding force, so there is no clarity as to whether there is an international customary law obligation of states to offer GNR, the chapter showed there is an increasing practice of both international tribunals and states, as well as treaty law, recognising the existence of such duty. In addition to *LaGrand* which is perhaps the most important case in the ICJ's case law showing the recognition of GNR in a particular case, this thesis showed how other tribunals, mainly, human rights tribunals have increasingly incorporated this concept in their catalogue of reparation measures. At the same time, states have showed an increasing acceptance of the concept, not just by tacitly supporting the work of the ILC, but also by increasingly requesting GNR in their diplomatic use. Moreover, treaty law, particularly, as recognised in article 24 of the ICPPED, has also recognised GNR as a form of reparation. The detailed work incorporated in this thesis shows that even though GNR are not clearly recognized as customary law in PIL, there is an increasing practice in international tribunals, state practice and treaty law moving in that direction.

Chapter II analyzed the concept of GNR in global human rights instruments and UN human rights bodies. GNR were first developed in the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law*. Such guidelines find its origin in the reports authored by Theo van Boven and Luis Joinet as UN rapporteurs. The basic principles and Guidelines became in the most authoritative source on the right to a remedy and reparation under international human rights law. More recently, and as it was previously stated, core human rights treaties, such Article 24 (5) of the ICPPD, have also recognised GNR as a form of reparation.

In turn, UN Human rights bodies have also engaged in the adoption of GNR when recommending general measures in the analysis of individual communications. Both, CEDAW and the Committee on the Rights of Persons with Disabilities have been the most prolific ones in the application of such measures. The Human Rights Committee have been increasingly recognising the existence of such measures in its case law. In turn, the Committee against Torture has recognised the content of GNR, in its General Comment No. 3 on the 'Implementation of article 14 by States parties', although it has not incorporated the practice of recommending general measures in its case law. UN Committees have recommended a very wide scope of measures going from legislative changes to the formulation of policies, and from the provision of training to judges to the investigation and reparation of human rights violations. There are not, however, clear criteria as to in which cases should GNR be awarded.

This chapter also analysed the concept of GNR in the pilot judgments of the European Court of Human Rights. Pilot Judgments were created as an exceptional procedure to deal with repetitive complaints coming from structural or systemic violations of human rights. This mechanism has allowed the European Court to award general measures usually in the form of legislative changes, adoption of mechanisms of redress or compensation. Besides the European Court has been

very cautious in the application of this type of procedure applying it, just to very exceptional cases, and after a process of previous consultation with the state, general measures resemble in nature and function to GNR. In this regard, the chapter explained how the European Court could apply a more progressive understanding of reparations according to international standards by applying general measures in cases of gross violations of human rights and by expanding the scope of the measures recommended.

Finally, this chapter studied the concept of GNR in the case law of the African Court and African Commission on Human and Peoples' Rights. While the African Court has awarded GNR in the forms of legislative reform in just one case, the African Commission has developed an extensive case law. In these cases, the African Commission has recommended measures with a large a varied scope such as to modify the domestic legislation, to carry out assessments, to establish specific institutions or expert bodies to deal with a particular situation, and to undertake changes in state institutions such as the judicial power or the police. Here again, GNR or general measures were understood as a form of reparation with a preventive nature oriented to impact the root causes of human rights violations.

Chapter III was dedicated exclusively to the analysis of GNR in the Inter-American system of Human Rights. As one the human rights systems that has developed more ambitious reparations measures in the world, it deserved a whole chapter for its analysis. GNR have been present in the work of both the Inter-American Commission on Human Rights, particularly in friendly settlements, and the Inter-American Court of Human Rights when deciding contentious cases. The chapter analysed the origin, development and characteristics of the concept of GNR in the case law of the Court finding four relevant moments in its development: a moment of early reparations jurisprudence (1987-1998) where the Court did not get involved in the award of GNR, a second moment of development of measures (1998-2001)

where the Court ordered some legislative reforms and other structural measures but did not call them GNR, a third moment or 'contemporary' era (2001-2008) where the Court explicitly made use of GNR to a large extent of its jurisprudence and engaged in several forms of GNR; and an era of consolidation of remedial measures (2008-onwards) where the Court consolidated its jurisprudence about reparations and granted important GNR in high profile cases. The chapter also analysed the scope of the measures awarded by the Court being one of the most diverse. As for the circumstances of its awarding the chapter analysed both the substantive and procedural rules implicitly used by the Court. The chapter concluded with some recommendations as to how the Court can limit the application of GNR to the most serious violations in order to make these measures more efficient.

The analysis of GNR in chapters I, II and III confirmed this type of remedy is by nature future oriented, closer to a principle of distributive justice and aimed at redressing the harm of the 'society as a whole'. One important conclusion of this part of the thesis is that, besides some courts are still timid in the awarding of GNR and states are sometimes reluctant to enforce these measures, the analysis developed in these chapters showed that GNR are an increasing form of redress in international law. They are not any more considered an exceptional measure applicable in very few cases but a well known form of redress largely accepted in both international and domestic courts. The second important conclusion is that, while most of the cases analysed in chapters I to III in which GNR and general measures have been awarded dealt with violations of civil and political rights, this section also showed there is nothing in the nature of the concept that prevent its application to other type of rights such as the right to health. These two findings were fundamental for the development of the second part of this thesis.

The award of GNR in violations to the right to health and health related cases

Aware of the potential of GNR in the structural redress of all type of human rights violations, the second half of the thesis (chapters IV and V) explored the application of GNR in the particular context of the right to health. As it was presented in chapter IV, the lack of a richer jurisprudence on the right to health in some regional human rights bodies largely relies on the lack of recognition of the full justiciability of this right. For example, whereas in the Inter-American system of human rights the right to health is indirectly justiciable making the awarding of remedies vague, in the African system of human rights the right to health is directly justiciable, allowing a clearer and more adequate awarding of remedies. A direct justiciability of the right to health, particularly in the Inter-American System, will facilitate the awarding of reparations including GNR. In finding so, this thesis has demonstrated that GNR are applicable to violations of all civil, political, economic, social and cultural rights. As it was already mentioned, there is nothing in the nature of the concept of GNR that prevent its application to the redress of violations of the right to health. If human rights tribunals want to take seriously the protection of the right to health they must encourage, not just, its direct justiciability, but also the awarding of GNR for its protection.

As it was presented in chapter V, this finding also overthrows the traditional objection against the crafting of remedies for violations to socio-economic rights according to which, they require the awarding of complex remedies that are usually future oriented, aimed to distribute resources among large groups of people, obstruct the

competence of other branches of power and are difficult to implement.¹¹⁴⁴ In Kent Roach's words such assumption 'dramatically underestimates the remedial complexities that are already present in the enforcement of political and civil rights.'¹¹⁴⁵ The dichotomy between the simplicity of redressing civil and political rights and the inherent difficulty of crafting remedies for violations to socio-economic rights just deepens in the distinction between categories or families of rights (first v second generation of rights; civil and political v socio-economic rights) which is more a political rather than a normative difference. The advancement of the right to health as a human right requires the recognition that the right to health is not just fully justiciable but also that it is entitled to the same type of remedies. As a consequence, the question should not be whether GNR are applicable to the right to health but rather, *how* GNR can be adequately crafted for the adequate protection of these rights.

In defining the *how* of GNR, chapter V analyzed what should be the circumstances in which this type of remedies should be awarded and some of the elements that the CESCR should take into account when awarding general measures in the redress of violations of the right to health. With the entry into force of the Optional Protocol to the ICESCR, the CESCR has a remarkable opportunity to recommend states the adoption of general measures oriented to provide systemic relief in cases of gross, serious, systemic or large-scale violations of the right to health, when studying individual communications. As it was explained in chapter V, the CESCR could use the extensive scope of measures provided by different UN bodies, particularly the CEDAW Committee and the Committee on the Rights of Persons with Disabilities, as

¹¹⁴⁴ Kent Roach, 'The Challenges of Crafting Remedies for Violations of Socio-Economic Rights' in Malcom Langford (ed), *Social Rights Jurisprudence Emerging Trends in International and Comparative Law* (Cambridge, 2008) p.46.

¹¹⁴⁵ *Idem*.

well to domestic courts in the redress of right to health cases. Moreover, the CESCR could explore the use of mechanisms of participation with local actors as it has already made when inviting NGOs to monitor and report back to the Committee during its concluding observations on States' periodic reports,¹¹⁴⁶ or when recommending states to take appropriate measures with the participation of local actors.¹¹⁴⁷

This thesis has shown that the awarding of GNR can be an important window of opportunity for the transformation of gross, serious, systemic, and large-scale violations of the right to health around the world. When used within an organized litigation strategy, GNR are an important window of opportunity, among others, for the transformation of root causes of human rights violations. By referring to GNR, courts could order states legislative changes, human rights training, institutional modifications, and even the establishment of public policies and programs. It would be up to the petitioners to creatively request more and more diverse measures, to the courts and tribunals to adequately award these measures, and to the states to secure is prompt implementation.

¹¹⁴⁶ Viviana Krsticevic and Brian Griffey, 'Remedial Recommendations' in Malcom Langford & others (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (Pretoria University Law Press, 2004) (citing M. O'Flaherty, 'Concluding Observations of UN Human Rights Treaty Bodies' (2006) 6 *Human Rights Law Review* , pp. 27-52, at 51)

¹¹⁴⁷ UNCESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Mexico, 12/08/1999* (18 December 1999) UN Doc. E/C.12/1/Add.4, para. 44. For a similar proposal see, Krsticevic and Griffey *Remedial Recommendations*.

Further research

This thesis unpacked a particular form of reparation: GNR, and its application to violations to the right to health. The thesis understand that besides GNR and general measures cannot secure per se the transformation of a particular situation; they are a first step in the modification of the root causes of violation of human rights. Other factors such as social mobilization¹¹⁴⁸, involvement of domestic institutions and courts¹¹⁴⁹ as well as the participation of stake holders in the design of remedies measures¹¹⁵⁰ may have also an impact in the adequate implementation of these measures and, consequently, in the modification of the root causes of violations. Such factors were not, however, studied here. Further research would be required in order to understand how GNR and general measures could be fully complied by states and what the best practices are in order to secure the adequate follow-up by international courts and tribunals. In the meantime, courts, litigants and victims could benefit of the emerging international trend in reparations awarding and requesting GNR and general measures that allow a more adequate protection of the right to health. The research carried out in this thesis empowers all relevant stakeholders as

¹¹⁴⁸ Siri Gloppen, 'Public Interest Litigation, Social Rights, and Social Policy' in Anis A. Dani and Arjan de Haan (eds) *Inclusive States Social Policy and Structural Inequalities* (World Bank, 2008) p. 345.

¹¹⁴⁹ Alexandra Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 *Cornell International Law Journal* 493.

¹¹⁵⁰ Camila Gianella-Malca, 'A Human Rights Based Approach to Participation in Health Reform: Experiences from the Implementation of Constitutional Court Orders in Colombia' (2013) 31 *Nordic Journal of Human Rights* 84.

it provides a clear legal understanding of GNR under international law and important principles to craft them in the future.

APPENDIX I – LIST OF CASES REVIEWED

International Court of Justice

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Judgment) [2007] ICJ Rep 43

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Public sitting held on Tuesday 7 March 2006, at 10 a.m., at the Peace Palace, President Higgins presiding - Oral arguments on behalf of Bosnia and Herzegovina: Mr. Condorelli, Mr. Pellet and Mr. Franck) [2006] CR 2006/11, available at <http://www.icj-cij.org/docket/files/91/10606.pdf> (accessed on 23 June 2015)

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (Merits) [2005] ICJ Rep 168

Avena and Other Mexican Nationals (Mexico v. United States of America) (Judgment) [2004] ICJ Rep 12

Case Concerning the Factory at Chorzów (German v Poland) (Merits) [1928] PCIJ Series A No. 17

Certain Property (Liechtenstein v. Germany) (Preliminary Objections) (Judgment) [2005] ICJ Rep 6

Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France) (Judgment) [2008] ICJ Rep 177

- Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)
(Judgment) [2009] ICJ Rep 213
- Gabcikovo-Nagymaros Project (Hungary/Slovakia) (Judgment) [1997] ICJ Reports 7
- LaGrand Case (Germany v United States of America) (Judgment) [2001] ICJ Rep
466
- Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria:
Equatorial Guinea intervening) (Judgment) [2002] ICJ Rep 303
- Legal Consequences of the Construction of a Wall in the Occupied Palestinian
Territory (Advisory Opinion) [2004] ICJ General list 131
- Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Judgment) [2010] ICJ Rep
14
- Rainbow Warrior, (Ruling) Reports of International Arbitral Awards, Vol XIX, (6 July
1986)
- S.S. "I'm Alone" (Canada v. United States) [1935] 3 Report of International Arbitral
Awards 1609.

Human Rights Committee

- Aïcha Dehimi and Noura Ayache v. Algeria* (2014) Comm. No. 2018/2011, U.N. Doc.
CCPR/C/112/D/2086/2011.
- Andrei Olechkevitch v. Belarus* (2013) Comm. No. 1785/2008, U.N. Doc.
CCPR/c/107/D/1785/2008.
- Ann Maria Garcia Lanza de Netto v. Uruguay* (1984) Comm. No. 8/1977, U.N. Doc.
CCPR/C/OP/1 at 45.
- Ballantyne, Davidson, McIntyre v. Canada* (1993) Comms. Nos. 359/1989 and
385/1989, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1.
- Boodlal Sooklal v. Trinidad and Tobago* (2000) Comm. No. 28/2000, U.N. Doc
CCPR/C/73/D/928/2000.

Consuelo Salgar de Montejo v. Colombia (1982) Comm. No. R.15/64, U.N. Doc. Supp. No. 40 (A/37/40) at 168.

Devian and Narrain et al v. Mauritius (2012) Comm. No. 1744/2007, U.N. Doc. CCPR/C/105/D/1744/2007.

Edgardo Dante Santullo Valcada v. Uruguay (1984) Comm. No. 9/1977, U.N. Doc. CCPR/C/OP/1 at 43.

EminaKozljak and Sinan Kozljak v. Bosnia and Herzegovina (2014) Comm. No. 1970/2010, CCPR/C/112/D/1970/2010.

F.K.A.G. v. Australia (2011) Comm. No. 2094/2011, U.N. Doc. CCPR/C/108/D/2094/2011.

Fijalkowska v Poland (2005) Comm. No 1061/2002, U.N. Doc CCPR/C/84/D/1061/2002.

George Osbourne v. Jamaica (2000) Comm. No. 759/1997, U.N. Doc. CCPR/C/68/D/759/1997.

J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia (2000) Comm. No. 760/1997, CCPR/C/69/D/760/1997.

L.M.R. v Argentina (2011) Comm. No. 1608/2007, CCPR/C/101/D/1608/2007

M.I. v. Sweden (2013) Comm. No. 2149/2012; UN. Doc. CCPR/C/108/D/2149/2012.

M.M.M. et al v. Australia (2013) Comm. No. 2136/2012, U.N. Doc. CCPR/C/108/D.2136/2012.

Min-Kyu Jeong et al. v. The Republic of Korea (2011) Comm. No. 1642-1741/2007, U.N. Doc. CCPR/C/101/D/1642-1741/2007.

Moriana Hernandez Valentini de Bazzano v. Uruguay (1984) Comm. No. 5/1977, U.N. Doc. CCPR/C/OP/1 at 40.

Mr. Carlos Cabal and Mr. Marco Pasini Bertran v. Australia (2003) Comm. No. 1020/2001, U.N. Doc. CCPR/C/78/D/1020/2001.

Ms. Yekaterina Pavlovna Lantsova v. The Russian Federation (2002) Comm. No. 763/1997, U.N. Doc. CCPR/C/74/D/763/1997.

Pedro Pablo Camargo v. Colombia (1985) Comm. No. 45/1979, U.N. Doc.

CCPR/C/OP/1 at 112.

Petr Kuznetsov et al. v. Belarus (2014) Comm. No. 1976/2010, U.N. Doc

CCPR/C/111/D/1976/2010.

Shirin AumeeruddyCziffra and 19 other Mauritian women v Mauritius (1984) Comm.

No. 3/1978, CCPR/C/OP/1.

Slimane Mechani v. Algeria (2013) Comm. No. 1807/2008, U.N. Doc.

CCPR/C/107/D/1807/2008.

Tija Hero, Ermina Hero, Armin Hero et al v. Bosnia and Herzegovina (2014) Comm.

No. 1966/2010, CCPR/C/112/D/1966/2010.

Valery Aleksandrov v. Belarus (2014) Comm. No. 1933/2010, U.N. Doc

CCPR/C/111/D/1933/2010.

Zhanna Kovsh v. Belarus (2013) Comm. No. 1787/2008, U.N. Doc.

CCPR/C/107/D/1787/2008.

Concluding Observations

Concluding Observations: Colombia (3 May 1997) CCPR/C/79/Add.76.

Concluding Observations: Hungary (25 September 2002) CCPR/CO/74/HUN.

Concluding Observations: Libyan Arab Jamahiriya (6 November 1998)

CCPR/C79/Add.101.

Committee on the Elimination of Discrimination against women (CEDAW)

A.T. v. Hungary (2005) Comm. No. 2/2003, CEDAW/C/32/D/2/2003.

Cecilia Kell v Canada (2012) Comm. No. 19/2008, CEDAW/C.51/D/19/2008.

Fatima Yildirim v. Austria (2007) Comm. No. 6/2005 CEDAW/C/39/D/6/2005.

Inga Abramova v. Belarus (2011) Comm. No. 23/2009, CEDAW/C/49/D/23/2009.

Isatou Jallow v. Bulgaria (2012) Comm. No. 32/2011, CEDAW/C/52/D/32/2011.

Karen Tayag Vertido v. Philippines (2010) Comm. No. 18/2008,

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