The Determination of Non-Pecuniary Reparations by Regional Human Rights Courts

A cross-regional comparative study

Leiry Cornejo Chavez

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 09 December 2019

European University Institute
Department of Law

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ABSTRACT

How do human rights courts determine non-pecuniary reparations? For a long time, the granting of reparations has been considered to be a special feature of regional human rights courts, governed by their respective conventional provisions. In this light, courts developed dissimilar approaches to reparations. While the European Court of Human Rights (ECtHR) mostly favoured the granting of monetary compensation, the Inter-American Court of Human Rights (IACtHR) produced a broad array of non-pecuniary reparative measures. However, these reparative paths started to cross some years ago, as the ECtHR began occasionally ordering non-pecuniary reparations. Moreover, the African Court on Human and Peoples' Rights (African Court) has partially adopted this practice. Hence, these courts actually have a common reparative practice which has not been examined comparatively.

This dissertation explains how regional human rights courts are determining non-pecuniary reparations. Taking an integrated approach, this dissertation places the discussion within a single legal system, considering the influence of conventional provisions (*lex specialis*) and the norms of general international law which have a bearing on reparations notwithstanding their formal non-binding status *(lex generalis*). Through a comparative examination of the three regional human rights courts' practice, and occasionally the Human Rights Committee, this thesis inquires into the legal basis and purposes of reparations. Moreover, the ubiquitous, yet controversial, use of discretion in determining reparations is examined, finding that it can be exercised within the consideration of the principles of *restitutio in integrum* and equity. Additionally, this dissertation examines the IACtHR's innovative approach to reparations, noticing that non-pecuniary measures are used to achieve far-reaching goals. While said innovative approach challenges the traditional understanding of human rights adjudication, it is

recognised that a discretionary use of reparations may be allowed within a permissible framework. Finally, a suitable use of the IACtHR's innovative approach by other regional courts is examined.

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INTRODUCTION

Despite evidence of a growing interest and practice ordering non-pecuniary reparations, the factors considered for such a determination by regional human rights courts remain unidentified. While it is true that these courts justify the legality of such orders in their respective conventional reparative provisions, those formulations are so open-ended that courts cannot be effectively guided by them. Hence, in practice, regional human rights courts resort to *something else* for the selection of reparations.

This dissertation asks two overall research questions: What are the factors regional human rights courts take into consideration when determining non-pecuniary reparations? And, what legal sources could be used to strengthen the determination process? These two research questions are closely interconnected and need to be formulated together. The first one requires a more descriptive, yet necessary, analysis of the practice of regional human rights courts in order to understand the evolution of reparations and the actual purposes of their selection. The second question demands an integrated approach to the law on reparations, and has a prescriptive aim.

To help answering these questions, it is important to present, at the outset, an overview of the overall practice of regional human rights courts when determining reparations and their connected challenges. Regional human rights courts are authorised to order reparations from the moment of their conception. All regional human rights conventions (the Protocol to the African Charter in the case of the African system) include a provision which, despite following slightly different formulations, authorises the granting of reparations.[1] Nonetheless, the reparative practice of each regional court is unique and its development has followed its own path. Whereas the European Court of Human Rights (ECtHR) has had a careful approach to reparations, considering the declaration of a violation as sufficient redress and occasionally ordering monetary compensation, the Inter-American Court of Human Rights

[1] ACHR, Art 63; ECHR, Art 41: Protocol to the African Charter, Art 27.

(IACtHR) has embarked on a more active path, producing a broad array of non-pecuniary reparative measures in addition to the granting of monetary compensation. The African Court on Human and Peoples' Rights (African Court), despite its limited experience, also orders non-pecuniary reparations, however not to the extent of the IACtHR.

Yet, the expansion in the use of non-pecuniary reparations by regional human rights courts has not been accompanied by a sufficient explanation about their determination. Contrary to what happens in the case of monetary compensation, none of the regional courts have produced formal guidelines on how, or under which circumstances, it should allocate appropriate reparations in specific cases.[2] Moreover, the intrinsic characteristics of monetary compensation naturally allow their assessment through numerical calculations.[3] An assessment of non-pecuniary reparations, on the other hand, cannot take advantage of the same methods. Their various modalities and the appalling absence of significant discussion in judgments —even when reparative orders move away from regular practice— hinder a correct understanding of their determination. There is a lack of evidence-based research providing actual information to legal scholarship.[4] There are several reasons for studying this subject:

Firstly, regional courts, especially the IACtHR, seem to be developing a reactive reparative practice; that is, the selection of non-pecuniary reparation seems to be guided by the characteristics of cases at hand. While this is not necessarily problematic, the limited knowledge about the relevance of different characteristics makes difficult to assess the appropriateness of reparations. Much of the critique of regional human rights courts —and treaty bodies— involves the lack of clear criteria for granting reparations, especially regarding the connection between the finding of certain

[2] The ECtHR has issued guidelines for the granting of monetary compensation, see Practice Direction on Just Satisfaction, issued by the President of the Court in accordance with Rule 32 of the Rules of Court.
[3] However, arithmetical calculations have not been sufficient to assess the appropriateness of monetary compensation, especially when connected to immaterial damages.
[4] See Sano and Thelle (2009), 91 (arguing that lack of evidence-based research hinders the understanding of institutional processes and might be so because researchers know too little about the reality of human rights implementation).

violations and selected measures.[5] Exceptionally, since 2008, the IACtHR has constantly declared that chosen reparative orders in general have a causal link with the facts of the case, the alleged violations, and the proven damages, as well as with the measures requested to repair the resulting damages.[6] However, these declarations have not been followed by a more substantial explanation on how the Court appreciates these elements in concrete cases.[7] In other words, we know what the IACtHR says, but we do not know what the Court does.

Secondly, regional human rights courts seem to have engaged in judicial dialogue in regard to their reparative practice, without having previously clarified the selection of reparations. Indeed, although the ECtHR and the African Court order non-pecuniary reparations only sporadically, one cannot fail to notice that some of those reparative measures are similar to the ones ordered by the IACtHR.[8] Moreover, this dissertation will show instances in which these regional courts expressly recognise inspiration by each other's practice. While judicial dialogue is recognised to have a positive effect, aiding to the harmonisation of national, regional and international jurisprudence, this phenomenon has not yet proven to be a contribution to the development of the law on reparations.[9] This is arguably due to the limited courts' elaboration, if any, on the matter of the selection of reparations. Without a comparative study of these courts' practice is difficult to know whether legal transplants might be appropriate.

Thirdly, some recently adopted reparative measures seem to be indicating an increasing, more intrusive role of regional human rights courts within matters which are traditionally regarded as domestic. Although the IACtHR presents the most illustrative examples of this development, both the ECtHR and the African Court have also ordered reparations which demand domestic authorities to take highly political

[5] Ichim (2014), Shelton (2015), Pasqualucci (2013).
[6] IACtHR, *Ticona Estrada et al. v. Bolivia,* Para 110.
[7] See e.g. Calderón Gamboa (2013), 154 (recognising that decisions on reparations occasionally lack a relevant analysis of the purported causal connection with rights violations, damages and victims' requests).
[8] The African Court on Human and Peoples' Rights was established by a Protocol adopted on 9 June 1998, and came into force on 25 January 2004. To date the Court has jurisdiction over 30 States.
[9] Müller (2017), 525.

actions. The fact that conventional reparative provisions do not offer much detail about the determination of reparations might be used by the courts to expand intrusion beyond what is permissible. In fact, without a correct appreciation of the reparation's legal basis, it is difficult to ascertain what the permissible limits are. In this regard, it is not unreasonable to fear that intrusion might be more damaging than healing when some case circumstances are taken into account but not others.

These current developments in reparative practice create a sense of unpredictability — if not arbitrariness— and, therefore, negative consequences might be triggered, such as low compliance rates and animosity against regional human rights courts.[10] Moreover, even when we have not seen a significant dialogue between courts with regard to reparations, caution is called for in order to avoid legal transplants involving reparations without understanding their determination and function. Unlike monetary compensation, non-pecuniary reparations may take multiple forms, which makes difficult to anticipate the way victims and other beneficiaries could be affected. Within an adjudicative process, the obscure determination of reparations complicates the development of strategies by parties, both States and victims.

The subject of reparations has received only limited attention in international human rights law (IHRL) scholarship over the years. In her seminal work, Gray argued that the study of judicial reparations had been considered peripheral in international law due to the lack of compulsory jurisdiction.[11] Today, with almost a hundred States subjected to the compulsory jurisdiction of a regional human rights court, scholarly projects on this subject are only beginning to gain a bigger foothold. Undoubtedly, the vast work of Shelton, currently on its third edition, constitutes the cornerstone of the examination of reparative theory and practice by human rights courts.[12] Her work gives an account of the historical, institutional and substantial development of

[10] See e.g. the discussion on the link between the nature of the reparations requested by the African Commission on Human and Peoples' Rights and compliance rates in Baluarte and De Vos (2010), 101.
[11] Gray (1987), 1.
[12] Shelton (2015).

reparations in the field of human rights, also looking at its influence over other areas of international law. Her achievement certainly paves the way for a more detailed analysis of the reasoning and choices made by regional courts and quasi-adjudicatory bodies when determining reparations.

In the context of the ECtHR, its long practice of only offering declaratory judgments and occasional monetary compensation to victims failed to provide a breeding ground for relevant studies on reparations.[13] Only when the ECtHR began ordering non-pecuniary reparations —unsystematically or in the format of pilot-judgments—,[14] scholarly interest arose. However, most of these works give an account of reparative orders in specific areas, but do not inquire about the process of determination of such reparations. Moreover, prompted by the development of the pilot-judgment procedure, its ensuing varied reception, and States' calls for more subsidiarity and less intrusion, some studies deal with certain reparations from a more institutional perspective, focusing on aspects of legitimacy and effectiveness,[15] or specifically on pilot-judgments.[16] Among the very few works engaging with a more substantial analysis of reparations, Buyse for instance gives an account of the factors the ECtHR considers in choosing to grant reparations beyond compensation.[17] Interestingly, he lists legal reasons along with extra-legal ones, noticing that much remains under the discretion of the ECtHR.

Regarding the practice of the IACtHR, in spite of the vast reparative array produced by this Court over almost thirty years of practice, most works in this area focus on the characteristics and applicability of specific non-pecuniary reparations in relation to

[13] The most relevant study about the ECtHR's practice regarding monetary compensations was first published in 2014, see Ichim (2014).
[14] The pilot-judgment procedure was officially inserted into the rules of the ECtHR in 2011 (Rule 61) after a failed attempt to introduce it in Protocol 14. See 'Guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights, Addendum to the final report containing CDDH proposals (long version)', 35-36.
[15] E.g. Costa (2011); Donald and Leach (2016); Zysset (2016).
[16] E.g. Haider (2013); Tsereteli (2015); Lambert-Abdelgawad (2014).
[17] Buyse (2008), 133 et seq.

concrete right violations and their compliance.[18] Only few systematic studies on reparations exist. Among them, Antkowiak has focused on the participation of victims for achieving an effective design of reparative measures.[19] Nash analyses the reparative practice of the IACtHR by approaching the discussion from the perspective of State responsibility.[20] Schonsteiner skilfully examines the assumed role of the IACtHR in using reparations to heal 'society as a whole'.[21] Novak provides a systematic review of the IACtHR's reparative practice, classifying its broad reparative array, and distinguishing between reparations *per se* and complementary obligations.[22] Nevertheless, all these studies claim that the reparative practice of the IACtHR is disturbingly uncertain, and call for a re-examination of the system. Krsticevic, for instance, pleads for the reconsideration of existing structural challenges, contestation and retaliation by States, and the questioning of the Court's legitimacy, when asserting its role and designing reparations.[23]

In addition to the regional focus on reparations, there exist only few comparative studies. Starr compares the European and Inter-American regimes and warns against an excessively rigid design of reparations.[24] Neuman analyses strategies to comply with reparations (including negotiation) in the European and Inter-American systems of human rights.[25] Çali convincingly argues that variations between regional systems (including the African one), in regard to the degree of interference featured in their reparative orders, are mostly based on legal culture, yet also on legal design and case-history.[26] Saavedra Alessandri and others also compare the European and Inter-American reparative systems, asking for more dialogue between these courts.[27] For

[18] E.g. Huneeus (2015); Acosta López and Bravo Rubio (2008); Londoño Lázaro (2014); Sandoval (2018); Altwicker-Hamori, Altwicker, and Peters (2016); Cornejo Chavez (2013).
[19] Antkowiak (2008), (2011); Antkowiak and Gonza (2017).
[20] Nash (2009).
[21] Schonsteiner (2007-2008).
[22] Novak (2018).
[23] Krsticevic (2017).
[24] Starr (2010).
[25] Neuman (2014).
[26] Çali (2018).
[27] Saavedra Alessandri, Cano Palomares and Hernández Ramos (2017).

practitioners and academics, the exchange of experiences is indeed an indispensable method to identify best practices and lessons learned. Although institutional efforts are made to develop fruitful collaboration (e.g. a program of professional visits for the courts' staff), practical challenges mostly prevent it. Among other obstacles, language barriers prevent scholarly exchange, especially for Latin-American scholars living in a region where learning a foreign language is still a privilege. The dominance of the English language in international academia, together with the lack of resources to translate relevant decisions written in Spanish and other languages to English, create academic bubbles which are only accessible to the few. Hence, legal theories and practices are not correctly communicated between regions.

I. Research Design

As previously stated, this dissertation aims at answering two main research questions: What are the factors regional human rights courts take into consideration when determining non-pecuniary reparations? And, what legal sources could be used to strengthen the determination process? This dissertation examines these two questions simultaneously. This is necessary because the actual practice of the regional courts needs to be contrasted against the backdrop of a chosen theoretical framework, in order to be assigned a value. As argued by Taekema, it is important to recognise that legal scholarship has two distinguished but intrinsically connected components: the descriptive and the normative.[28] At the same time, the present author is also aware that the classic distinction between what *is* and what *ought* to be needs to be observed throughout the whole study, in order to evade what has been recently characterised as the 'naturalistic fallacy': 'deducing how law should be from how law is practiced'.[29]

The analysis conducted in this dissertation is situated under the overarching normative framework of the rule of law (RoL). Despite the long-lasting controversy

[28] Taekema (2018), 11-2.
[29] Holtermann and Madsen (2016), 7.

surrounding its existence,[30] the use of this principle allows for the evaluation of the actual reparative practice of regional human rights courts, and the formulation of suggestions to strengthen such a practice. From the times of Aristotle[31] to the present day, the concept of the RoL has been used to protect citizens from the abuse of power. Arguably, Dicey attributes three meanings to this concept: freedom from being subjected to the wide discretionary powers of State officials; equality before the law; and the fact that rights cannot be limited by a written constitution.[32] Thus, his conception of the RoL does not deny the exercise of discretion, as judicial decisions constantly shape the understanding of rights. There is, however, a rejection of the exercise of *wide* discretion. Here, it is worth noticing that wide discretionary powers have not only been rejected by supporters of a restrictive role of the State, but also by individuals subjected to discretionary State decisions who, while not rejecting discretion *per se*, demand more transparency in the way discretion is exercised.[33]

Several elements have been identified as the components of the RoL.[34] According to Raz, many principles derive from the idea of the RoL, bestowing qualities such as certainty, publicity, prospectivity, stability, openness, neutrality and access to an impartial judiciary.[35] Waldron, followed by Jowell, for instance, identifies four components: legality, certainty, equality and access to justice.[36] To Fuller, RoL contains standards of generality, public promulgation, non-retroactivity, clarity and comprehensibility, coherence or logical consistency, feasibility, enduring, and officially obeyed.[37] MacCormick argues that an important element of the RoL is the

[30] See Stimson (2008), 317-8 (presenting a partial account of the criticism against the conceptualisation and use of this principle).
[31] Aristotle (1932), Book III, Chapter XVI.
[32] Jowell (2019), 5.
[33] See ibid, 8 (giving examples of such situations).
[34] For an overview of the various characterisations of the rule of law, see Krygier (2012).
[35] Raz (1979), 214 et seq.
[36] Waldron (2011), 316-7; Jowell (2019), 10-4.
[37] Fuller (1969), Chapter 2 (Note that the terms have been borrowed from the Jowell's reading of Fuller, see Jowell (2019)).

separation of powers.[38] Establishing whether the inclusion of all those elements is correct goes beyond the scope of this dissertation. What is relevant to this study is that all those accounts include elements which imply a particular underlying purpose: they safeguard individuals from a free, unrestricted exercise of discretion.[39] It has already been advanced in the foregoing paragraphs that the use of discretion is not always unwelcome. Moreover, some argue that discretion might be reviewable, accountable and necessary for flexibility in order to pursue legitimate ends.[40] Nevertheless, arbitrary discretion goes against the *dignity* of individuals, depriving them of the faculty to predict, influence and contest decisions, even if they ultimately get a benefit from it.[41] As a normative concept, the RoL supposes that a certain degree of discretion is acceptable. The establishment of the limits of discretion needs, however, to be defined by a theoretical framework.

Before giving an account of the theoretical framework constituting the basis of this study, two caveats must be introduced. The first one concerns the application of the RoL concept to international law and, therefore, human rights. Notably, the concept of RoL has been generally discussed in respect to domestic or comparative law.[42] While some scholars have questioned the meaning and appropriateness of using this principle in the international context,[43] the term RoL has been picked up in international instruments and its relevance is now uncontested.[44] The Universal Declaration of Human Rights, the Statute of the Council of Europe (CoE)[45] and the

[38] MacCormick (2005), 5 (where he basically adopts the concept postulated by Montesquieu according to which judges' role was to apply the law, leaving formulation and execution of legislation to the other two powers of the State). See also Montesquieu (1989), Book 11.
[39] In a similar vein, it has been argued that the rule of law 'needs to be understood in terms of what it is for', see Krygier (2012), 240.
[40] Ibid, 236.
[41] Ibid, 242.
[42] E.g. Fuller (1969); MacCormick (2005); Stimson (2008).
[43] For instance, Krygier has rightly noted that international actors sometimes uses the RoL term to describe the consequences of its existence rather than its constitutive elements, see Krygier (2012), 241.
[44] See Kanatake (2016) (where she convincingly argues that the international RoL operates at three levels: a) state-to-state relations, b) authority exercised by governments against individuals and non-state entities, and c) authority exercised by international institutions).
[45] The Statute of the CoE also include the term in its Art. 3.

ECHR include this particular term in their preambles.[46] In other regions, this term has only been used sporadically. It has not been included in basic regional human rights instruments in the Americas and Africa,[47] although it is present in other key regional conventions.[48] Also at the international level, the idea of a RoL has also been used to describe a successful (in terms of functionality and acceptability) European legal order,[49] and to discuss inter alia issues of *jus ad bellum,*[50] refugee protection[51] and economic development.[52]

Notwithstanding the various uses of this term, it is hereby contended that the value of referring to the RoL lies in the assumption that order is required in the international legal system which prevents the abuse of power and arbitrariness. This is because, as Waldron argues, the requirements of 'regularity and law-bound character' for domestic RoL do not cease to exist when States act internationally.[53] Moreover, following Tomuschat's view, it is germane to note that the UN Charter implicitly speaks the language of the RoL when it declares the aim of establishing 'conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained'. Tomuschat concludes that RoL 'has taken a centre stage in international discourse on the legal elements of a satisfactory international order'.[54]

The second caveat concerns the application of RoL standards to international adjudication. The RoL has been accepted as a 'principle of governance', laying down conditions which, if complied with, positively qualify the actions of governments.[55] As such, it is thought that RoL observance offers guarantees against arbitrary discretion

[46] The text of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) do not expressly include this term.
[47] Neither the ACHR nor the African Charter include the term RoL.
[48] See e.g. Inter-American Democratic Charter; African Charter on Democracy, Elections and Governance.
[49] Alter (2003).
[50] McLeod (2015).
[51] Coen (2018).
[52] Nedzel (2018).
[53] Waldron (2011), 341.
[54] See Tomuschat (2013), 474-5.
[55] UN, Report of the Secretary-General (2004), Para 6.

by the executive power. This account is, however, not complete. As Waldron highlights, RoL sets a requirement that 'there be courts, which operate according to recognized standards of procedural due process or natural justice, offering an impartial forum in which disputes can be resolved, and allowing people an opportunity to present evidence and make arguments before impartial and independent adjudicators to challenge the legality of official action, particular when it impacts on vital interests in life, liberty, or economic well-being'.[56] Thus, RoL standards apply to the actions of all powers of the State, not just the executive. Transposed to the international level, respect for the RoL should also be required from international actors such as international courts. Agreeing with Tomuschat, the present author believes that the RoL serves as a yardstick to measure the lawfulness of a fact.[57] In this case, the fact is the determination of non-pecuniary reparations by regional human rights courts. It is argued that, by using the RoL as a yardstick, it is possible to assess whether arguments are 'objective and interpersonally testable, or purely subjective and political, having no special legal quality'.[58] The need to have a measuring tool is even greater when legal texts, such as conventional reparative provisions, are open-ended.

Besides the normative framework of the RoL, this dissertation is also underpinned by the theory of sources of international law. Although there are various theoretical approaches to the sources of international law, and disagreements about the validity and identification of custom, general principles of law and the so-called subsidiary sources of international law, the list of sources provided by Article 38 of the ICJ Statute remains to be considered the most authoritative one for identifying law.[59] As such, the

[56] Waldron (2011), 317. See also Rawls (1971), 235 et seq.
[57] Tomuschat (2013), 487.
[58] MacCormick (2005), 1.
[59] A very well-discussed account of the different theoretical approaches to the sources of international law has been gathered by Besson and d'Aspremont (2017).

importance of Article 38 to the ICJ Statue is expressly recognised in IHRL.[60] This recognition is predominant in the IHRL field as a branch of general international law (GIL), even when it is known that Article 38 of the ICJ Statute was designed for the World Court and not the international legal system as such.[61] Hence, Article 38 of the ICJ Statute is used in this dissertation to draw a roadmap for the identification of relevant reparative law. The vantage point provided by Article 38 is that it allows the separation of law from extra-legal moral or political arguments. This does not mean that the present author disregards the significance of moral and political claims in the determination of non-pecuniary reparations. In fact, it is not unreasonable to believe that regional human rights courts are affected by *inter alia* the perception (be it in terms of legitimacy, fairness, effectiveness, and etcetera) of their reparative orders, or the existence of a political crisis affecting various States in their regions.[62] However, it is argued that there is value in clarifying whether those claims are considered within the legal process for the determination of reparations or they play a role outside it. Such a distinction will aid to satisfy the RoL's requirements of *inter alia* certainty and equality.

It is also important to highlight that while examining the relevant sources of international law, this dissertation takes an integrated approach, situating the discussion of reparations within a single legal system,[63] and considering the influence of both *lex specialis* and *lex generalis*. That is, in addition to taking into account the norms enshrined in the respective regional conventions, the norms of GIL, influencing

[60] E.g. Chinkin (2014); Scheinin and Vermeulen (2013), 26; Tomuschat (2013), 487 (arguing that the legal foundation of the RoL should be found in the general principles of law, in accordance with Art. 38 of the ICJ Statute).

[61] Hernandez (2017), 614 (noting the remarks of Jörg Kammerhofer and Jean d'Aspremont).

[62] See e.g. Glas (forthcoming) (noting that the ECtHR'r reform process has been driven by political aims such as the concern of Danish politicians about the ECtHR's take on the issue of deportation of foreign criminals, besides the well-discussed problem of the Court's caseload); de Londras and Dzehtsiarou (2015), 534 et seq. (arguing that the ECtHR's reform process calls for attention to non-legal factors, and that the political stance of State parties on certain issues might affect the content of judgments).

[63] It does not escape the attention of the present author that some commentators regard with scepticism the definition of international law as a "system", see e.g. Koskenniemi's views in the ILC Report on Fragmentation of International Law, Paras 27 and 39. See also Raz (1971), 795 (arguing that the term 'legal system' is not a 'technical legal term' explaining what the law is, but rather how we think about it). A brief discussion about this issue is presented in Chapter I.

the determination of reparations notwithstanding their formal non-binding status, are also considered. Approaching the law on reparations from an integrated perspective gives regional courts a necessary common ground for building a solid reparative practice.[64] It widens the pool from which regional human rights courts can find law. The motivation of using this approach is not to create a more cohesive (non-fragmented) international law system —although it is undeniable that it contributes to this end—, but to really take advantage of the available sources of international law.[65]

While clear advantages stem from the values upheld by the RoL (e.g. certainty, consistency, predictability and equality), this dissertation does not propose that all regional human rights courts follow the same criteria for the establishment of reparations. Neither this dissertation aims at setting out a formula for finding the best reparation for each type of human rights violation. The aim of this thesis is to clarify the actual practice of the three regional human rights courts, identifying the factors they take into consideration when determining non-pecuniary reparations, and also to shed light into the potential use of other available sources. This work aspires to be a contribution to the construction of a reparative practice more attuned to RoL requirements, even if such a practice ultimately differs in each regional court. When Gray attempted to examine the law on reparations, she noticed that there existed no sufficient practice by international tribunals to use as guidance for the selection of suitable measures.[66] The uncertainty and ambiguity of regional human rights courts would only lead to a so-called self-serving circularity: there would be no consistent practice because the law would remain imprecise and there would be no precise law because there would be no practice.[67]

Apart from the view taken in this dissertation, other plausible approaches to the study of non-pecuniary reparations by regional human rights courts could be considered.

[64] See Pirker (2014), 58 (arguing about the necessity to have some sort of common justificatory framework within which international courts can make use of different standards of review).
[65] A discussion on the fragmentation of international law is presented in Chapter I.
[66] Gray (1987), 16.
[67] Ferstman (2017), 91.

One of these approaches might be inspired by a stricter appreciation of the *subsidiarity* principle, in the sense that sovereign States might be regarded as the primary architectures of the human rights reparative practice. In this light, domestic reparative practices would be the basis from which the international reparative system could be built. Although the present author is not aware of the existence of comparable proposals, the growing stress on *subsidiarity* in the three regional human rights systems might produce such views.[68] Thus, transit from the domestic to the regional level would occur through dialogue between national and regional courts. However, this approach would need to find an appropriate way to combine different theories and doctrines influencing the reparative practice at the domestic and regional level.

A different approach to the issue of non-pecuniary reparations could be grounded in a constitutional view of IHRL, according to which regional human rights courts hold a sort of constitutional power over sovereign States — mimicking the relationship between constitutional courts and lower domestic courts.[69] Undoubtedly, current constitutional views applied to the European and Inter-American regions contain many nuances and often adopt a softer form.[70] However, this view would encourage a top-down approach to reparations, where regional human rights courts might design their reparative practice considering factors such as the legitimacy and effectiveness of the system, and not solely the characteristics of the case at hand. Thus, it stands to reason that this view would favour prescriptive non-pecuniary reparations demanding specific actions from States and not just results. While this approach brings novelty to the field of reparations, encouraging a discussion on extra-legal factors which perhaps better reflects current reparative practice, the departing point of the discussion is not shared by the present author. Assuming a constitutional, top-down

[68] While an excellent example of the growing stress on *subsidiarity* in the European system is the reform process of the ECtHR (see Declarations of the High-Level Conferences at Izmir, Interlaken, Brighton, Brussels and Copenhagen), calls for *subsidiary* have also been directed at the IACtHR and the African Court, see Gargarella (2015b), Contesse (2016) and Ssenyonjo (2018), 42; Sibanda (2007).
[69] Greer and Wildhaber (2012); Sweet (2009).
[70] Ulfstein (2016); von Bogdandy (2017).

approach to reparations might direct regional human rights courts to develop a reparative practice which does not necessarily coincide with the requirements of the RoL; that is, the ambition of constitutionalisation might be used in detriment to the values of *inter alia* certainty and equality.

Discussions on the reparative practice of regional human rights courts might also be approached from a more sociological perspective. Significant attention to the role of victims in the determination of reparations and the 'benefits' they actually receive from reparative processes have been discussed in the fields of transitional justice and, recently, international criminal law.[71] Likewise, some commentators have discussed the issue of reparations considering various theories of justice.[72] These are all valid approaches, necessary for a better informed discussion on this subject, yet outside of the scope of the present dissertation.

II. Terminological Clarification

It is important to explain the terminological choice made in this dissertation. In IHRL, the right to a remedy is recognised as having two different aspects: *procedural* and *substantive.*[73] Whilst this dissertation focuses on the *substantive* aspect of this right, hereafter called reparations, a brief introduction to its *procedural* aspect is offered to secure a correct understanding of the former. The *procedural* aspect concerns the duty of States to provide for effective domestic remedies as enshrined in most human rights instruments. For instance, at the global level, this right is recognised in the Universal Declaration of Human Rights (Article 8); the International Covenant on Civil and Political Rights (ICCPR) (Article 2); the International Convention on the Elimination of All Forms of Racial Discrimination (Article 6); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 14); the

[71] Hearty (2018); Beristain (2008); McKay (2013); Balta, Bax and Letschert (2019); Zegveld (2019).
[72] Uprimny Yepes (2009); Londoño-Lázaro, Gutiérrez-Perilla and Roa-Sanchez (2017).
[73] Shelton calls them 'concepts', and van Boven refers to them as 'dimensions'. See Shelton (2005), 10 et seq. and van Boven (2009). Gray does not theorise about the different understandings of reparations in her work, see Gray (1987).

Convention on the Rights of the Child (Article 39). At the regional level, the African Charter on Human and Peoples' Rights (Article 7), the American Convention on Human Rights (American Convention or ACHR) (Article 25) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention or ECHR) (Article 13) also laid down the right to obtain a remedy in domestic procedures. A breach of these rights constitutes a human rights violation which may or may not be declared by an international adjudicative or quasi-adjudicative body.

The *substantive* aspect of the right to a remedy concerns the redress to which victims are entitled because of the violation of their rights: reparations. This right has been recognised throughout modern civilisation.[74] Hart included the 'rules requiring people to compensate those whom they injure in certain ways' among the most basic common rules existing in all legal systems.[75] The right to a reparation is recognised in all areas involving the responsibility of States. For instance, the right to a reparation is invoked in trade and investment law when States do not honour their commitments.[76] In the field of human rights, the occurrence of a human rights violation gives rise to the right to a reparation. One way to claim this right internationally is through the declaration of a human rights violation by a regional human rights court or treaty body. The substantive aspect of the right to a remedy then directly refers to the way in which regional human rights courts realise this right by ordering reparations.

Scholarly literature on this topic often uses the terms 'reparations' and 'remedies' indistinctively.[77] Additional terms used to contain the same meaning are 'redress' 'damages'[78] and 'indemnity'. Adding to the confusion, relevant regional human rights

[74] Shelton gives a historical overview of this right's evolution in her treatise on reparations, see Shelton (2005).
[75] Hart (1994), 3.
[76] Nedumpara (2016); Reguizzi (2018); Sabahi (2011).
[77] See, e.g. Squires, Langford and Thiele (2005); Antkowiak (2011); Starr (2010); Bekker (2013); Contesse (2016).
[78] Baginska (2016).

conventions feature different terminology in their texts.[79] This choice, however, may reflect, at least *prima facie*, the wish to give different content to the adjudicative bodies' faculties.[80] Only few scholars are explicitly aware of the potential confusion of using those terms interchangeably, and consciously select a careful definition.[81] However, even in those cases, authors do not agree on the use of the same terminology. Shelton, for instance, prefers to use the word 'reparations' to refer to redress in the context of inter-State relationships. Taking a broader linguistic perspective, this dissertation uses the term 'reparation' to refer to the substantive aspect of the right to a remedy, since this term is easily identifiable in both Spanish and French (*reparación* and *réparation* respectively), and cannot be confused with the terms referring to the procedural aspect in the same languages (*recurso* or *recours*).

III. Methodological Approach

In this part, I explain the methodological choices taken in order to answer the two main research questions posed in this dissertation. Since these questions demand a review of the practice of regional human rights courts but also require a normative assessment, two methodological approaches are used throughout all chapters of this dissertation.

Firstly, I adopt a legal-theoretical approach seeking to shed light on the core issues of the law on reparations. Using the legal interpretation method,[82] I aim at clarifying key concepts within the theory and practice of reparations such as the concepts of reparation laid down by regional human rights conventions, the various modalities of reparations in IHRL and GIL, the meaning of *restitutio in integrum*, equity and judicial discretion and the purposes of reparations. This approach also serves to conceptualise important existent synergies in reparative practice such as the relationship of *lex*

[79] Art. 41 of the ECHR uses the term 'satisfaction'; Art. 63 of the ACHR uses the verb 'remedy', and Art. 27 of the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights uses the verb 'remedy' which includes both 'compensation' and 'reparation'.
[80] This issue will be clarified in Chapter I.
[81] See e.g. Shelton (2005), 7; Buyse (2008), 113; van Boven (2009), Evans (2012), 13.
[82] Legal interpretation is still considered to be the cornerstone of human rights research methodology, see Andreassen, Sano and McInerney-Lankford (2017), 7.

specialis and *lex generalis*, and the use of sources of international law as put forward by Article 38 of the ICJ Statute. The legal interpretation pursued in this dissertation is not of the written texts of the law, but rather of the legal norms which lie underneath them.[83] To this end, various primary and secondary sources have been consulted, including literature from various disciplines, such as legal history, legal theory, constitutional and comparative law, judicial studies and social anthropology. Moreover, this dissertation offers a prominent analysis of legal norms embodied in *soft sources* such as declarations and reports.[84]

Secondly, I adopt an empirical approach to observe and describe reparative practice by regional human rights courts as institutional behaviour. That is, I conduct a comparative analysis of judgments containing three specific non-pecuniary reparative orders (i.e. legislative reform, release of prisoners and restitution of property) to discern the factors commonly considered by regional human rights courts in their determination. The three non-pecuniary reparations were selected at the beginning of the research due to the present author's awareness about their existence in the three regional courts — yet with some restrictions in respect to the African Court. At a more advanced stage, two more non-pecuniary reparations solely ordered by the IACtHR (i.e. granting of scholarships and establishment of a community development fund) were selected due to their special characteristics.

Case selection has been organised through the creation of a special database which compiles all relevant cases featuring non-pecuniary reparative orders issued by the IACtHR, ECtHR, African Court and some HRC's adoption of views. To the author's knowledge, no other database of this kind is available. Given the prominence of reparative non-pecuniary orders in the IACtHR's practice, all IACtHR's decisions on reparations are included in the database. Additionally, since the IACtHR also issues decisions on the interpretation of its judgments and on compliance, many such

[83] Scheinin (2017), 19.
[84] Ibid, 19 et seq.

decisions have been included in the database. In respect to the ECtHR, relevant decisions have been identified using the HUDOC database and through the review of secondary sources.[85] Several HUDOC searches have been conducted throughout the writing of this dissertation using different filters: a) search of HUDOC keywords such as '(Art. 41) Just satisfaction {Jurisdiction to give orders or grant injunctions}' and '(Art. 41) Just satisfaction {Non-pecuniary damages}'; b)search of specific terms in text box such as release, prisoner, detainee, restitution, property, legislation, legislative, reform, and etcetera; c) search of cases including specifically Article 41 and 46 (or both) of the ECHR, and combining those results with filters for Articles 2, 3, 4, 5, 6, 7, 13 of the ECHR and Article 1 of Protocol 1 to the ECHR. Given the numerous cases sometimes produced by using criteria a), b) or c), a combination of those filters has often been used to identify the relevant ones. In particular cases, information about compliance with the ECtHR has been obtained by reviews of the decisions by the Committee of Ministers (CoM). The database also includes all African Court's judgments due to their manageable number.[86]

In view of the integrated approach to reparations followed in this dissertation, which seeks to consider conventional, specific norms as well as norms from GIL, I decided to also include the review of HRC's adoption of views. As in the reparative practice of regional human rights courts, this treaty body has also considered the implementation of three non-pecuniary reparations (i.e. legislative reform, prisoner release, and restitution of property) as appropriate reparation. This dissertation does not review the bindingness or the level of compliance acquired by those views. However, given the similarities between the cases entertained by the HRC and the regional human rights courts, it finds value in the examination of the factors that HRC members took into consideration for the selection of reparations. The identification of the relevant HRC views was achieved using the JURISPRUDENCE database, through the search of

[85] Around 210 ECtHR's judgments have been examined.
[86] Over 50 judgments.

keywords and 'issues' (e.g. reparations, property rights, liberty of person, deprivation of liberty, enforced disappearance, legislative reform, legislative review). Some relevant case-law from the regional human rights courts and the HRC were also identified through the review of secondary sources, but these findings mostly confirm the results achieved by the databases' searches.

Once cases were selected, further examination consisted on textual analysis of each judgment. An initial glance of the judgments quickly made clear that the analysis needed to include the legal basis of the reparative orders, the causal connection and the conditionality with which such orders were issued. These elements could be extracted from the reading of the judgments at hand. At a later stage, when it was possible to appreciate that cases shared particular characteristics, it was decided to also analyse the emergence, purpose and contestation faced by reparations. The identification of determinant factors was confirmed by contrasting those cases with 'deviant ones' which obtained the same outcome despite same factors were not present or non-pecuniary reparations were not ordered despite their presence.

Additionally, a cross-regional comparative analysis was conducted in order to discern whether and how regional human rights courts are considering the same factors when ordering non-pecuniary reparations. The same elements analysed in relation to the three selected modalities of non-pecuniary reparation were compared between the three regional human rights courts and the HRC. This examination questioned whether the emergence and development of non-pecuniary reparations across regions was related to the same issues (e.g. connection to the same rights violations, requests by victims, lack of compliance, progressive broadening of the reparative rationale). Based on the results of this comparative exercise, some conclusions can be drawn on common trends, successful developments or shared challenges in regard to reparative practices. It needs to be pointed out that the asymmetric volume of case-law produced by the three regional courts and the HRC give nuance to these conclusions. For instance, the number of judgments including non-pecuniary reparative orders in the

IACtHR is evidently superior to the number of similar judgments in the African Court. Likewise, the years of experience of both IACtHR and ECtHR, compared to the limited experience of the African Court, give more relevance to changes occurring within the formers' jurisprudence. Nevertheless, it is argued that the textual analysis conducted in this dissertation, contrary to quantitative studies of case-law, allows to anyway peruse each regional court's determination process of reparations.

Both the theoretical and empirical analysis regarding the practice of the IACtHR has been complemented by a professional visit to the IACtHR and semi-structured interviews with some IACtHR judges.[87] Also, the author's first-hand experience dealing with pending IACtHR cases and the supervision of execution of judgments has greatly illuminated this work. Although no official interviews were conducted with ECtHR judges or personnel, significant information and opinions was acquired through conversations with a few ECtHR judges, ECtHR's Registry staff, and officers from the Department for the Execution of Judgments of the ECtHR. The dissimilarities of the Courts' composition (i.e. 47 judges distributed in a Grand Chamber, five sections, and several chambers in the case of the ECtHR; a unique chamber of seven judges in the case of the IACtHR; and a unique chamber of eleven judges in the case of the African Court) influenced in the decision to interview IACtHR's judges as their opinions would represent a more coherent view of the Court.

Even though this dissertation engages a substantial deal of data collection, this serves the specific purpose of the analysis of non-pecuniary reparations, focusing on the selected five reparative measures, and should not be understood as an empirical data collection in the strict sense of social science.[88]

[87] Reed and Padskociamite (2012), 16 et seq (arguing that semi-structured interviews are a recurrent method in legal scholarship which allows a necessary flexibility).
[88] Referring to the problem of legal methodology, it has been noted that legal scholarship blends methods of social science and humanities, see Taekema (2018), 10-1.

IV. Thesis Outline

This dissertation is organised in six substantial chapters followed by a final chapter presenting some conclusions and recommendations. Chapter I starts by introducing the practice of regional human rights courts through a theoretical discussion on the arguable conflict between *lex specialis* and *lex generalis* in the law on reparations. This chapter examines the constant and quasi dominant practice of regional human right courts of solely referring to the reparative articles of their ruling human rights instruments (ECHR, ACHR or the African Charter), thus ignoring the potential contribution of relevant GIL norms. By analysing the meaning of the maxim *lex specialis derogat legi generali*, discussing the interpretation of open-ended reparative conventional provisions, examining the recognition of some customary rules, and identifying relevant GIL norms, this chapter concludes that those rules are actually compatible. Hence, the nature of *lex generalis* is of assistance and reference to the interpretation of the reparative provisions laid down in the respective regional conventions.

Having established the potential relevance of GIL, Chapter II presents a systematised overview of the reparative norms provided by the instruments constituting *lex generalis*: The Articles on Responsibility of States for International Wrongful Acts (ILC Articles), the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and International Humanitarian Law (Basic Principles and Guidelines on the Right to a Remedy) and the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (UN Principles to Combat Impunity). Importantly, it is clarified in this section that this is not an exhaustive list of relevant instruments, and influence might be drawn from other sources. The chapter concludes that, in spite of the dissimilar classification of reparative measures appreciated in several GIL instruments, they provide some guidance in the identification of particular actions as reparative measures. However, this chapter also recognises that this

guidance is not sufficient to satisfactorily complement the open-ended conventional reparative provisions.

Continuing with the analysis of the sources of the law, Chapter III examines two general principles of law for the determination of reparations by regional human rights courts: the principles of *restitutio in integrum* and equity. These two principles are selected due to their prominent use in the regional courts' explanations for the selection of reparations. After a thorough analysis of the principles' scope and their actual weight in the regional human rights courts' rationale for the determination of reparations, this Chapter shows that, as happens with GIL norms, the principles of *restitutio in integrum* and equity do not offer sufficient guidance for the determination of non-pecuniary reparations. Nevertheless, focusing on the use of judicial discretion as a complementary tool for the application those principles, this Chapter proposes a new exploration of *restitutio in integrum* in the practice of regional human rights courts. Hence, it is argued that judicial discretion provides external but relevant considerations when the law is insufficient; yet, resort to discretion must be done through a permissible framework. Attention to judicial discretion allows to appreciate the consideration of non-legal considerations in the legal process of the determination of reparations. After considering some defences against the use of discretion, this Chapter proposes a three-prong permissible framework for the use of discretion, giving weight to the rationality of decision, the appropriate selection of factors to be considered for the determination, and the need for justifiable accountability.

Chapter IV presents a somehow disconnected but necessary topic for the analysis of the determination of reparations: their purpose. This Chapter starts by recounting the traditionally accepted purposes of reparations at the general level and in the field of IHRL. By revisiting the theoretical groundings of reparative purposes in the light of the current practice of regional human rights courts (represented by a small case sample), this chapter examines how, despite lack of recognition, those purposes have been expanded. This Chapter concludes that, despite the courts' traditional statements

restricting reparations to a restorative function, in practice, they are intended to perform a broader function, including the cessation of the acts constituting the rights violation, the deterrence of repetition, and, arguably, the transformation of social and economic circumstances leading to the repetition of violations. Acknowledging the existence of these purposes in the regional human rights courts' rationale is important to understand the determination process of non-pecuniary reparations.

Chapter V lays out a detailed examination of the reparative practice of regional human rights courts. It draws a comparative analysis of three reparative measures commonly considered across regions: orders to reform legislation, to release prisoners and to restitute property. This section seeks to review all judgments including one of those three measures, thus providing a comprehensive overview of the regional courts and the HRC's practice. The examination begins by establishing the legal basis for the granting of each non-pecuniary reparation in the light of both *lex specialis* and *lex generalis.* This Chapter also analyses the way in which each of those three non-pecuniary reparations was initially included in Court decisions and HRC views. The analysis continues by examining the causal connection between right violations, damages and reparations, the courts' purposes for granting those particular reparations, and the level of contestation those courts receive after ordering previous, similar ones. Despite clear differences within the practice of each adjudicatory and quasi-adjudicatory body, and across regions, this Chapter presents some conclusions. Moreover, this examination also shows that regional courts and the HRC are constantly using discretionary powers, especially to satisfy the *restitutio in integrum* principle.

It is precisely the use of discretionary powers which engages the analysis presented in Chapter VI. In view of the innovative approach developed by the IACtHR in the field of non-pecuniary reparations, this Chapter examines how discretionary powers are being used by this Court to satisfy the principle of *restitutio in integrum.* To this end, two unique, far- reaching reparative measures are selected, namely, orders to provide

educational scholarships and to establish a communal development fund. Because of their special characteristics, Chapter VI includes in the analysis of these measures the beneficiaries of reparations (whether they identity or other characteristics influence their selection). Finally, the IACtHR's use of judicial discretionary power is assessed considering its advantages but also its challenges.

Chapter VII presents final conclusions and recommendations.

CHAPTER I: THE LAW ON REPARATIONS IN THE PRACTICE OF REGIONAL HUMAN RIGHTS COURTS AND THE *LEX SPECIALIS* MAXIM

I. Introduction

Regional human rights courts have specific – albeit perfunctory – norms for the provision of reparations after the finding of a human rights violation. Said norms are introduced by the relevant regional conventions.[89] This chapter commences the perusal of the determination of reparations focusing on the first listed source of international law: international conventions.[90] By clarifying the role of conventional reparative provisions within the landscape of GIL, this Chapter aims at ascertaining their actual guidance in the determination process of non-pecuniary reparations. In the course of this examination, attention to the role of custom is also included (as a second source of international law). Two main questions are asked in this Chapter: Are conventional reparative provisions considered to be *lex specialis* in relation to *inter alia* the ILC Articles and other instruments ruling over the provision of reparations? If that is so, what is the influence of GIL and how should the interaction between relevant sources be conceived?

Whereas the relationship between GIL and especial legal regimes has been lively discussed, the implications of the relationship between the law on reparations and the maxim of *lex specialis* has not been substantively examined. As it will be shown in this Chapter, regional human rights courts resort, perhaps automatically, to the authority of their conventions' reparative provisions, without much reflection on their status as *lex specialis*. Specialised IHRL literature has not supplemented this omission. Significant discussions on *lex specialis* are however found in recent literature concerning the interaction between IHRL and international humanitarian law (IHL),[91]

[89] ACHR, Art 63; ECHR, Art 41; Protocol 1 to the African Charter, Art 27.
[90] ICJ Statute, Art. 38. No hierarchical value is attributed.
[91] E.g. Schabas (2007), 592; Chevalier-Watts (2010), 584; Müller (2013); Gowlland-Debbas and Gaggioli (2013).

investment international law,[92] and environmental law,[93] hence, the analysis in this chapter will be inspired by these debates.

In what follows, this chapter will first explain the nature of the *lex specialis* maxim, and consider existing different approaches and their consequences. It will also explain the identification of IHRL and specific reparative norms as *lex specialis.* Secondly, this chapter will look at the legal instruments and other norms which should be considered *legi generali.* Thirdly, the interaction of *lex specialis* and *lex generalis* will be examined, integrating the two preceding sections. Such an examination will clarify whether any conflict between rules categorised as *lex specialis* or *lex generalis* really exists through the assessment of compatibility between specific reparative norms and rules of GIL. The chapter concludes by proposing a compatible use of both normative bodies.

II. *Lex Specialis Derogat Legi Generali*

The *lex specialis derogat legi generali* maxim refers to situations in which a particular matter is subjected to various rules, all of them valid and *prima facie* applicable.[94] Faced with the question of which rule should be chosen, it is generally accepted that a rule which is considered to be *lex specialis* should be preferred over one which is considered to be *lex generalis.*[95] The reason for such a choice lies in the level of specificity of the rule, which, contrasted with the generality of other ones, offers the best fit to the relevant legal question.[96] Additionally, some argue that a *lex specialis* rule gives evidence of the intent of the legislator, which renders said rule more relevant and effective than any general one available.[97]

Despite the consensus regarding its main effect, the *lex specialis* maxim features a dual function which might cause it to play different roles depending on the context in which

[92] Reguizzi (2018), Sabahi (2011).
[93] Meyer (2018); Wewerinke-Singh (2019).
[94] ILC Report on Fragmentation, Para 46.
[95] Ibid, Para 56.
[96] See Pauwelyn (2003), 388; d'Aspremont and Tranchez (2013), 225.
[97] Chevalier-Watts (2010), 586. See also ILC Report on Fragmentation, Para 67.

it is applied. Such a double function is explained by the ILC Report on Fragmentation as being both a means of legal interpretation, and a conflict resolution technique.[98] On the one hand, when *lex specialis* functions as a tool of legal interpretation, the general rule is used to provide context for the specific rule, serving as a sort of guidance for the exercise of legal interpretation, and therefore it does not cease to be applicable or relevant.[99] This function does not require disagreement between general and specific rules, in the sense that the former complements the latter. On the other hand, when the *lex specialis* maxim functions as a conflict resolution technique, the competing rules are taken as conducive to opposite results. Therefore, only the specific rule should apply, setting aside the general one.[100] It is nevertheless important to highlight that, in order to choose between these two functions, an exercise of interpretation of the applicable rules must already be engaged in, since only through this process the plausible consequences of their application can be evaluated.

The ILC Report on Fragmentation is not the only account of the functioning dynamic of *lex specialis*. Although referring to the relationship between IHL and IHRL, Heintze has identified three theories explaining interactions between different disciplines which, despite overlapping with the approach taken in the ILC Report on Fragmentation in some aspects, are useful for the analysis at hand: separation, complementarity and integration.[101]

The separation theory introduces the idea that the competing rules are of such a nature that the application of the one hinders the application of the other. An illustration of the manner in which this theory applies to a particular context is given by Fellmeth and Horwitz, who argue that a rule qualified as *lex specialis* is 'deemed to apply notwithstanding contrary general principles of international law.' [102] Thus, the

[98] ILC Report on Fragmentation, Para 56. See also Fellmeth and Horwitz (2011) and Chevalier-Watts (2010), 584 (defining *lex specialis* as a principle) and Schabas (2007), 597 (defining *lex specialis* as a 'rule' of interpretation).
[99] ILC Report on Fragmentation, Para 65; Balendra (2007), 2479.
[100] ILC Report on Fragmentation, Paras 56 and 57.
[101] Heintze (2013).
[102] See Fellmeth and Horwitz (2011).

application of competing norms leads to opposite results, making it necessary to choose one over all the others. This theory clearly identifies the *lex specialis* maxim as a conflict resolution technique.

Under the complementarity theory, competing norms are able to assist each other in connection to particular issues, even if such norms have different origins and functions.[103] This is the most accepted understanding of the relationship between IHL and IHRL. For instance, in the *Advisory Opinion on The Legality of the Threat or Use of Nuclear Weapons*, the ICJ recognised that IHL, as *lex specialis,* should be used to clarify concepts of the *lex generalis.*[104] The ICJ further elaborated this argument in the *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, declaring that while *lex specialis* is applicable to certain situations, the protection of *lex generalis* does not cease to exist.[105] Moreover, the ICJ clarified that rights may be a matter of different branches.[106]

The third theory focuses on integration and implies a 'substantial overlap' of competing rules and 'opens the possibility for the cumulative application of both bodies of law'.[107] This view claims to take a step further than the complementary theory, arguing that, when a subject is regulated by two conventions, the full appreciation of one will require the consideration of the other in a substantial way. Hence, the determination of what constitutes *lex specialis* and *lex generalis* is not permanently set, but rather might alternate between rules depending on their specificity. This approach seems reasonable for interpreting uncertain rules in complex situations.

[103] Heintze (2013), 57.
[104] ICJ, *Advisory Opinion on The Legality of the Threat or Use of Nuclear Weapons*, Para 25.
[105] ICJ, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Para 106.
[106] Ibid*,* Para 106.
[107] See Heintze (2013), 61-2 (presenting the example of the Convention on the Rights of the Child and its relation with the rules of IHL regulating the participation of minors in combat, demonstrating that it is not possible to analyse IHL rules without taking into consideration the relevant human rights rules).

The two preceding accounts of the use of *lex specialis* show the importance of clarifying the type of relationship in which competing rules are involved. In the particular analysis of reparative norms in IHRL and GIL, there is a need to identify how these two systems of law relate to each other and whether there are indeed some differences between them.

Featuring a broad understanding of the term *conflict*, which does not necessarily imply the existence of completely opposite results, the ILC Report on Fragmentation analyses diverse techniques to deal with rule conflicts and situations which, *prima facie*, appear to be so.[108] The report recognises three kinds of conflicts: (a) conflicts between two general rules caused by the unorthodox interpretation of one of them; (b) conflicts between the general law and a specific rule; (c) conflicts between two specific rules.[109]

While conflict type (a) is not relevant for the analysis at hand, discussions on the relationship between IHL and IHRL mostly concern a conflict between two specific rules of international law, that is, conflict type (c). However, whether the law on reparations in the practice of regional human rights courts constitutes *lex specialis* of the general international law on reparations corresponds to conflict type (b): conflict between a rule of GIL and a specific rule (i.e. reparative articles enshrined in regional human rights conventions).

A. Weak and Strong *Lex Specialis*

Jurisprudence of the ICJ has already established that an entire branch of international law can be considered *lex specialis.* Indeed, in the *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, this tribunal recognised IHL as being *lex specialis* to IHRL, noting however that certain rights may be exclusive to a particular branch while others might be common to both

[108] ILC Report on Fragmentation, Paras 21 and 24.
[109] Ibid, Para 47.

branches.[110] This interpretation seems to be in line with the distinction made between a *weak* and a *strong* form of *lex specialis* by the Commentary to Article 55 ILC Articles. According to the Commentary, *weak lex specialis* corresponds to the divergent norms on a particular matter by certain provisions of an instrument, whereas *strong lex specialis* relates to divergent norms set by a *special* regime (also referred to as self-contained) as a whole.[111]

Nevertheless, it remains unclear whether IHRL, as a branch of GIL, is considered to be *lex specialis* as a whole. The ILC Report on Fragmentation explicitly considers IHRL to be a *special* regime containing a particular set of primary and secondary norms which deviate from the rules of GIL.[112] Moreover, this report considers that 'the rationale of special regimes is the same as that of *lex specialis'*.[113] Hence, it would seem *prima facie* logical to assume that IHRL is a type of *strong lex specialis.* However, this assumption should not be accepted without question. It ought to be noted, for instance, that arguments in favour of a *lex specialis* identification of IHRL attach great importance to the fact that human rights conventions feature special rules guided by the object and purposes of the human rights system, and would not make much sense if applied in other settings.[114] Yet, these rules are very particular, as is the case for the European Convention's rules of interpretation. Their existence singles out IHRL, providing it with special characteristics, but they do not imply that the whole legal body is separate from GIL. Interpretations of human rights norms are, in fact, overall embedded in GIL. Evidence of such embeddedness lies in the fact that both the ECtHR and the IACtHR have recognised that their interpretive methods 'are consistent with the relevant VCLT provisions', and regularly resort to this instrument in relation to issues of statehood

[110] ICJ, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Para 106.
[111] ILC Articles, Art 55, Commentary (5).
[112] ILC Report on Fragmentation, Paras 29; 129-30.
[113] Ibid, Para 191.
[114] Regarding this issue, some argue that human rights lawyer might invoke the 'particularity' of human rights law or, conversely, the necessity of systemic 'unity' at their convenience, see Simma and Pulkowski (2006), 511.

and immunity.[115] Thus, instead of assuming that IHRL is a form of *strong lex specialis*, it should be recognised that this branch of GIL may contain particular rules characterised by IHRL's special nature which, nevertheless, do not completely separate IHRL from GIL. Hence, IHRL should be considered a form of *weak lex specialis*. Moreover, the identification of certain rules as *lex specialis* does not preclude the influence of GIL in their interpretation. Since the specificity of a rule highly depends on the context in which it is interpreted, the interplay of *lex specialis* and *lex generalis* might be pendular, informing the interpretation of a rule at different levels. Similarly, Tams argues that the influence of either *lex generalis* or *lex specialis* cannot be determined by following strict rules, but it rather depends on a case-by-case analysis.[116]

Yet, should IHRL, as a whole branch of GIL, be considered *(weak) lex specialis*, it is also important to recall that IHRL is a system comprised of several universal and regional instruments. Therefore, particular regional instruments, ruling universal human rights within certain geographical delimitations, as in the case of the European and American conventions on human rights, should also be considered *lex specialis.* Extending the analysis even further to within the regional human rights conventions, these instruments also regulate particular issues which somehow deviate from, or even contradict GIL and each other. As mentioned above, this is the case for the dynamic interpretation of regional conventions by both the ECtHR and the IACtHR. Provisions authorising the granting of reparative measures after the finding of a human rights violation are also special legislation which *prima facie* deviates or contradicts GIL. In these cases, such particular rules should also be considered *lex specialis,* notwithstanding their status of limited or singe provision(s) rather than international instruments in their entirety.[117]

Despite the fair logic of this argument, it is not common to find literature referring to the law on reparations in IHRL as *lex specialis* to reparative norms in GIL. One of the

[115] Fitzmaurice (2013), 740.
[116] Tams (2005), 253.
[117] ILC Report on Fragmentation, Para 66.

reasons for this lack of attention might be the apparent discordance between regional provisions on reparations, and the fear that such fragmentation might weaken the argument of IHRL as *lex specialis*. Indeed, provisions authorising regional courts to order reparations are dissimilar and vague in the European and American Convention and the African Charter. Moreover, those provisions are subjected to extensive interpretation by their corresponding courts. Occasionally, the interpretation of such provisions have even provoked controversy and rejection by interested States.[118] Disregarding these challenges, in the view of the author there is no reason why these differences should preclude the appreciation of reparative norms by each regional human rights court as *(weak) lex specialis* in the face of GIL.

III. If Reparative Rules provided by Regional Human Rights Conventions are *Lex Specialis*, What is the *Lex Generalis*?

Up to this point, the argument has been made that particular provisions governing reparations in regional human rights conventions should be considered *(weak) lex specialis*. The task of clarifying the status of reparative norms is however not complete until *lex generalis* is also defined.

It is generally accepted that, even though no fixed hierarchical order exists in international law, *jus cogens* norms enjoy a privileged position by virtue of their nature, and therefore no derogation can be permitted. Consequently, in relation to the *lex specialis* maxim, *jus cogens* norms constitute both an absolute barrier to the invocation of norms which contradict them, and a contextualisation for all other norms.[119]

[118] See, for instance, the UK debate on *Hirst v. UK (No.2)*, and *Greens M. T. v. UK* (Pilot-judgment). See also the speech by UK Prime Minister David Cameron before the Council of Europe on 25 January 2012, www.theguardian.com/law/2012/jan/25/cameron-speech-european-court-human-rights-full, where he called for a stricter application of the principle of *subsidiarity* and *the margin of appreciation doctrine* in favour of States. See also reactions to *Del Rio Prada v. Spain* at www.nytimes.com/2013/10/22/world/europe/european-court-rules-against-spain-on-terror-sentences.html?_r=0

[119] See ILC Report on Fragmentation, Para 152, conclusion (2). See also ILC Articles, Art 55, Commentary (2), where peremptory norms are referred.

Other general norms directly influencing the provision of reparations in IHRL are the Charter of the United Nations (UN Charter), the Vienna Convention on the Law on Treaties (VCLT) and customary norms. Article 103 of the UN Charter establishes the supremacy of this instrument in the eventuality of conflict with any obligation stemming from another international agreement.[120] This means that, although the Articles governing the granting of reparations in the regional conventions are considered *lex specialis*, such Articles will not take priority over what is provided by the UN Charter. Likewise, the VCLT offers a necessary support for reparative norms in IHRL. Codifying the law of treaties, the VCLT is considered to be a reflection of customary law. Perhaps the most relevant VCLT Articles in the IHRL field are Articles 31 and 32, which deal with rules of interpretation and are 'always applicable unless specifically set aside by other principles of interpretation'.[121] This view is perfectly compatible with the identification of IHRL as a *special* regime and *(weak) lex specialis*. Some principles of interpretation adopted by the ECtHR and the IACtHR, as is the case of evolutive interpretation, favour the particular purposes of human rights regimes and clearly deviate from GIL. Nevertheless, the exercise of interpretation is not constricted to the special doctrines developed by the regional systems; on the contrary, interpretation still greatly and mostly benefits from the general rules established by the VCLT. The relevance of this treaty for IHRL is noticeably reinforced by the ILC when it states in its 'Conclusions' that all special regimes 'claim binding force' and accept to play by the rules of the VCLT, which make this instrument as a 'unifying frame'.[122]

The influence of custom in IHRL is undeniable. Article 38 of the ICJ Statute recognises international custom as a source of law. In the field of reparations, the arguably most important customary rule is that any State responsible for a breach has an obligation

[120] UN Charter, Art 103: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'
[121] ILC Report on Fragmentation, Para 174.
[122] ILC, 'Conclusions', Para 249.

to provide reparation.[123] A rule of customary law is binding on all States unless a State is considered to be a *persistent objector*[124] or when the rule has only been developed in a particular region. Regional customary law has prospered in Latin America for example. The ICJ has affirmed that, in this region, embassies have the right to provide asylum to persons persecuted for political reasons.[125] As far as human rights are concerned, the IACtHR contributes to broaden the scope of regional customary law, for instance, in the field of indigenous rights, by recognising the existence of local rights (linked to *inter alia* family or territory) not explicitly included in national legal systems, and demanding their realisation as long as they do not contradict the American Convention.[126] Likewise, on many occasions, the IACtHR has declared that Article 63(1) ACHR, which authorises it to order reparations, is a reflection of *customary law*.[127] International custom can be usually set aside by the explicit will of States, unless it refers to peremptory norms.[128] However, the sway it holds over States' agreements should be acknowledged. It is germane to notice, as Nollkaemper has rightly argued, that, although the customary State obligation to repair exists, there is not enough practice to assert that 'a *customary obligation to provide reparation* in the relationship between state and private parties' does.[129] Indeed, courts and tribunals declaring such an obligation usually refer to reparative conventional provisions, or a combination of those provisions and customary rules, rather than solely to custom.

So far, the norms of GIL influencing the whole international legal system have been recounted. Some additional norms exist which specifically govern the provision of reparations in international law. One of the most important norms are the ILC Articles on State Responsibility which provide detailed guidance for the selection of particular

[123] PCIJ, *Case Concerning The Factory at Chorzów* (Merits), 29.
[124] See ILA Report on the Formation of Customary Law, Part II (C). Also Thirlway (2014a), 86-88.
[125] See ICJ, *Asylum Case* (1950).
[126] See, Contreras-Garduño and Rombouts (2010), 15; and Eide (2006), 173 et seq. See also, Pasqualucci (2009-2010), 60.
[127] E.g. IACtHR, *Castillo Páez v. Peru* (Reparations and Costs), Para 50; IACtHR, *'Street Children' v. Guatemala* (Reparations and Costs), Para 62; IACtHR, *López Mendoza v. Venezuela*, Para 207.
[128] Condorelli (2012), 152-3; Dellapenna (2015), 500.
[129] Nollkaemper (2011), 183.

reparations in response to the committing of wrongful acts by States.[130] It is true that the obligation to redress a violation in the case of human rights is based on the text of the respective regional conventions which recognise such an obligation and authorise their courts to order reparative measures. At the same time, it must also be acknowledged that the obligation to provide reparation was first recognised in the *Factory* at *Chorzów* Case, and since then it has been considered to be a 'principle of international law'.[131]

Despite the IHRL's special nature due to the relationship between individuals and the State, rather than solely between States, it is undeniable that State responsibility doctrine lies at the root of the obligation to provide reparation.[132] While some commentators seem sceptical about attempts to accommodate inter-state logic to relations between States and individuals,[133] Shelton regards the ILC Articles as the 'starting point' for any matter of State responsibility, and, without hesitation, asserts their relevance for reparations in the field of IHRL.[134] Similarly, Scheinin clarifies that the ILC Articles 'could actually prove quite useful, particularly under those human rights treaties that do not specify what types of remedies can be afforded through the international complaints procedure'.[135] Although Scheinin is referring to the UN human rights treaties, the present author contends that this argument can also be applied to the vague reparative provisions of regional human rights conventions. Using a similar rationale, Ryngaert, for instance, claims that when the ECHR provides for an exhaustive and detailed regulation of an issue which is also prescribed by the ILC Articles, there is no justification for resorting to the latter.[136] Hence, the vagueness of a conventional provision could be complemented by the prescriptions of the ILC

[130] ILC Articles, Arts 34 to 39.
[131] PCIJ, Factory at Chorzów (Jurisdiction), 21.
[132] For instance, the IACtHR routinely seeks support for ordering reparations in the Factory at Chorzów Case. The ECtHR also resorts to this Case but only sporadically. See e.g. *Cyprus v. Turkey* (Just Satisfaction), Para 41.
[133] See e.g. Tomuschat (2014), 416-7.
[134] Shelton (2012), 367, 374-5.
[135] Scheinin (2012), 221-2.
[136] Ryngaert (2011), 88.

Articles. Taking a more cautious stand, Nollkaemper also argues that the fact that the right to reparation is set by particular conventions, does not make it irrelevant for the law of international responsibility.[137]

An additional argument in favour of the relevance and possible application of the ILC Articles in human rights law involves the inclusion of the term 'international community as a whole' in that legal body on four occasions.[138] Indeed, commentators have argued that the specific articles dealing with necessity and the invocation of responsibility by injured and third States show that the ILC Articles are not exclusively concerned about inter-State relationships.[139] Rather, issues of State responsibility exist within complex dynamics in which the interests of other subjects such as the international community might result equally affected. Said interests might include international human rights obligations, and directly affect individuals. Moreover, as affirmed by Brown Weiss, the "international community" does not solely consist of States but rather includes other actors.[140]

Very importantly, the specific inclusion of the term "international community as a whole" in Article 33 of the ILC Articles, which defines the scope of international obligations set in Part II, reinforces the claim for the applicability of the ILC Articles to the reparations regime in IHRL. Thus, the question of whether the obligations of responsible States might be owed to other subjects than States, including individuals, should be evaluated taking into consideration the character and content of the international obligation and the context in which the breach occurred. On certain occasions, the ECtHR has explicitly recognised the relevance of the ILC Articles regarding the interpretation of, for instance, Article 46 of the European Convention.[141] Some scholars argue that such an acquiescence by the ECtHR might be extended to

[137] Nollkaemper (2011), 182.
[138] ILC Articles, Art. 25, Art. 33, Art. 42 and Art. 48.
[139] See e.g. Ryngaert (2011), 83; Boerefijn (2009), 180-1.
[140] Brown Weiss (2002), 804.
[141] E.g. ECtHR, *Verein Gegen Tierfabriken Schweiz (Vgt) v. Switzerland (No. 2)*, para 85. See also Keller and Marti (2015), 823-4.

considering the guidance of the ILC Articles in the provision of more prescriptive reparative orders.[142]

Other influencing instruments specifically deal with reparations in response to human rights violations. In 2005, the UN Human Rights Commission approved the Basic Principles and Guidelines on the Right to a Remedy, which was adopted later that year by the UN General Assembly. In the same year, the UN Human Rights Commission took note with appreciation the updated UN Principles to Combat Impunity.[143] These instruments (norms) are not binding formally and are usually referred to as *soft law*.[144] Nevertheless, these instruments provide a rich understanding of the needs of victims, giving important direction for the selection and implementation of reparative measures.[145] In the case of the Basic Principles and Guidelines on the Right to a Remedy, this importance is clearly highlighted in its preamble which recognises that this instrument does not create new obligations but instead collects and systematises already existing legal obligations in international law.[146] Additionally, although approaching reparations from the different fields of IHL and IHRL, this instrument does not focus on the possible dissimilarities resulting from these two approaches, but rather puts the victim at the core of the reparative protection system, thereby acquiring a sort of universal relevance.[147]

For some scholars, the importance of these *soft law* instruments may not reside in the bindingness of their provisions, but in their influence and sometimes even their power to generate compliance.[148] According to this view, the instruments might be soft, but

[142] Koroteev (2010), 293-4.
[143] These principles have not been formally adopted by the UN Human Rights Commission or its successor, the UN Human Rights Council, or by the UN General Assembly.
[144] For a succinct review of the main scholarly approaches to the notion of *soft law,* see Guzman and Meyer (2016). See also Klabbers (1996) (opposing the idea of soft-law due to the lack of support of State or judicial practice, and weak theoretical underpinnings).
[145] See Gammeltoft-Hansen, Lagoutte, and Cerone (2016), 6-7 (arguing that soft law has two recognised functions: Norm-filling and norm-creating. The characteristics assigned to the mentioned instruments coincide with the first function).
[146] Preamble, Para 7.
[147] van Boven (2005).
[148] Shelton (2009). See also Gammeltoft-Hansen, Lagoutte, and Cerone (2016), 5 (arguing that the influence of *soft law* is defined as a 'degree of traction' exerted over States); and Klock (2013) (arguing that *soft law* is also

the content of certain *soft norms* is considered *hard* given that they are perceived as just or legitimate.[149] Another view, more compelling in the opinion of the author, analyses the nature of *soft law* beyond the formal characteristics of a source, rather examining the substance of the obligation.[150] In this light, Scheinin argues that instead of referring to *soft law*, the existence of *soft sources* which might contain *hard law* must be considered. Such *hard law* does not cease to be hard even though it is contained in a non-binding instrument, because it expresses a valid legal norm.[151] Moreover, norms which are considered as *soft law* at a certain point in time, might be 'hardened' through *inter alia* their incorporation in treaties or their transformation into customary law.[152] Therefore, these guidelines and principles might be considered to bear an important weight,[153] even though regional human rights courts have not yet made extensive use of sources such as the Basic Principles and Guidelines on the Right to a Remedy, and the UN Principles to Combat Impunity,[154] and the limited literature available that focuses on these instruments does not really engage in assessing their authority.[155]

Duly considering the fact that determining *lex generalis* in relation to *lex specialis* highly depends on the context in which the applicable norms need to be assessed, the existence of several norms that influence the provision of reparations following the

considered as an instrument to advance regulation on certain issues which due to their collision with national sovereignty cannot easily be the object of a definitive treaty).

[149] Kiss (2000). See also Boyle (2010), 123 (arguing that soft law is sometimes evidence of existing law).

[150] For more about differentiating formal and substantive criteria for the recognition of norms, see Dupuy (1991).

[151] Scheinin (2017), 19 et seq. The UN Declaration on the Rights of Indigenous Peoples is also an instrument (*soft source*) recognised to contain *jus cogens* norms and provisions reflecting customary law in addition to norms of a more aspirational character, see Gómez Isa (2016), 192 and 196-7.

[152] Shelton (2009).

[153] See Boyle (2010), 124 (who attributes relevance to the context in which soft *law* norms are used, arguing that 'once soft law begins to interact with binding instruments, its non-binding character may be lost or altered').

[154] The IACtHR started to cite the Basic Principles and Guidelines on the Right to a Remedy in 2008 though without much discussion about the specific application of this instrument.

[155] See e.g. Lawry-White (2015) (which heavily relies on the Basic Principles and Guidelines on the Right to a Remedy in order to discuss the relevance of truth seeking reparations, but does not consider the formal non-bindingness of this instrument); Ferrer Mac-Gregor (2016) (reviewing the evolution of the right to the truth in the jurisprudence of the IACtHR, building on several declarations and reports, while neglecting to discuss the challenges the IACtHR faces in basing its judgments on these instruments); Dudai (2011) (arguing that the Basic Principles and Guidelines on the Right to a Remedy are a central source detailing symbolic reparations, without discussing the weight of such source).

violation of human rights in a general way, is irrefutable. All these norms constitute a universe in which *lex specialis* is immersed.

IV. Interaction between *Lex Specialis* and *Lex Generalis*

Once the competing rules for the provision of reparations have been identified, i.e. *lex specialis* and *lex generalis*, and, following the rationale of this maxim, priority has been assigned to *lex specialis*, it is of utmost importance to examine the terms under which the interaction between the competing norms will take place. It has already been mentioned that *lex specialis* could be used as a mechanism for either the solution of norm conflict or as a method of interpretation, depending on the nature of the competing norms. Therefore, the first step to choose the adequate function for *lex specialis* is to examine whether there is an actual conflict between the competing norms.

On the one hand, there seems to be a common view that any rule considered *lex specialis* should automatically be taken as in conflict with *lex generalis*, and conflict means that the application of each competing rule leads to opposite results.[156] However, the ILC Report on Fragmentation clarifies the meaning of the term 'conflict'. In the report, Koskenniemi focuses on the compatibility or incompatibility between competing rules instead of using a categorical standard such as 'opposition'.[157] Thus, a loose notion of 'conflict' implies the existence of incompatibilities (be they significant or not) prompted by the rules' particular context (e.g. the aim and object of the instrument in which the rule is contained).[158] In this light, the finding of a valid conflict between rules will cause *lex specialis* to function as a conflict resolution technique. Consequently, only the rule considered *lex specialis* will be applicable as an exception to the general rule.[159] The loose notion of 'conflict' is highly relevant for the analysis at

[156] This is referred to as a 'strict notion' of conflict in the ILC Report on Fragmentation, Para 24.
[157] Ibid.
[158] See e.g. d'Aspremont and Tranchez (2013), 232 et seq.
[159] ILC Report on Fragmentation, Para 57.

hand given that it still is not clear whether reparative provisions enshrined in regional human rights conventions are in fact contrary to norms of GIL.

For instance, the ILC Articles provide that a State which is responsible for an international wrongful act, has the duty to provide full reparation.[160] Full reparation is then divided into three specific forms: *restitution, compensation* and *satisfaction*.[161] The wording of the relevant articles establishes a hierarchy between the mentioned types of reparation. *Restitution* is preferred to *compensation*, which, in turn, is preferred to *satisfaction*. The Commentary to the ILC Articles confirms this view, while noting that, in certain cases, the selection of the most appropriate measure will require flexibility.[162] Are these characteristics compatible with conventional reparative provisions? The following sections deal with this question, clarifying whether real conflict really exists between reparative provisions.

A. Compatibility of Article 41 of the European Convention with the ILC Articles

Comparison between the ILC Articles and the reparative provisions of the European Convention shows some dissimilarities between them. The European Convention provides that the ECtHR, on finding of a human rights violation, shall afford *just satisfaction*, if necessary.[163] A first observation concerns the burden assigned to the State in either jurisdictions. Whereas the ILC Articles clearly establish the 'obligation' of the State to provide reparations, the ECHR uses the auxiliary verb 'shall', placing responsibility on the Court instead. This expresses that the spirit of the instruments differs. However, the noted dissimilarity is only interesting at an abstract level given that the ECtHR case-law has always assumed States' duty to be unquestionable.

[160] ILC Articles, Art 31.
[161] Ibid, Art 34-37.
[162] Ibid, Art 34, Comment (6).
[163] ECHR, Art 41 Just Satisfaction: '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 concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.'

A second observation, after a quick comparison between the ILC Articles and the European Convention, is that while the former instrument recognises three different types of reparation – namely restitution, compensation and satisfaction, applicable individually or jointly–, the European Convention only provides for *just satisfaction*, and only when the responsible State has not succeeded in providing full reparation. This observation begs the question of whether the ILC Articles' concept of *satisfaction* is equivalent to the European Convention's *just satisfaction*. In the case of an affirmative answer, a plausible conclusion is to accept that while the ILC Articles, functioning as *lex generalis*, provide the possibility of obtaining redress through *satisfaction*, *restitution* and *compensation*, the European Convention has deviated from this norm, and only favours one of the three kinds: *just satisfaction*. However, if the concepts of *satisfaction* and *just satisfaction* are not considered equivalent, two possibilities exist: (a) *just satisfaction* is a new form of reparation, not included in the ILC Articles; (b) *just satisfaction* is a special denomination used by the European Convention which, in fact, comprises all three kinds of reparation envisaged by the ILC Articles. While the former would clearly lead to the conclusion that reparative provisions of the European Convention, as l*ex specialis*, depart from the provisions of *lex generalis*, the latter reconciles the two international instruments.

1. Notion of Just Satisfaction

In what follows, a detailed analysis of the concepts of *satisfaction* and *just satisfaction* is introduced in order to answer the question posed in the previous paragraph. According to the ILC Articles, *satisfaction* might include reparative measures such as the acknowledgement of the violation, an expression of regret, a formal apology or another appropriate modality.[164] The list is not exhaustive and the appropriateness of the selection depends on the particular circumstances of the violation. Comment (11) to Article 30 of the ILC Articles, dealing with cessation and non-repetition, provides another example of a measure of *satisfaction*: the repeal of the legislation which allowed

[164] ILC Articles, Art 37.

the breach to occur. Considering that one of the other measures of reparation is *compensation*, it is self-evident that the ILC Articles' definition of *satisfaction* does not include this kind of transaction. Conversely, *satisfaction* applies to the non-pecuniary aspects of the injury, aspects which cannot be financially assessed and, according to the Commentary, it does not necessarily pay attention to the consequences of the wrongdoing, which is one of the reasons why this reparation is used in cases where no pecuniary damages are claimed.[165] Thus, in the ILC Articles, *satisfaction* is understood as to include various measures of a non-pecuniary character and symbolic monetary compensation for non-pecuniary injury. The Commentary also clarifies that a declaration of the wrongfulness of an act, albeit commonly used by courts and tribunals, should not be seen as the only possibility of *satisfaction*. Moreover, it is argued that in cases where the only reparation granted was the declaration of wrongfulness of the act, such a result was obtained because the applicants only requested that specific reparation.[166]

The meaning of *just satisfaction* as provided by the European Convention is vague. In order to interpret this term, it is important to recall that this convention was drafted long before the ILC Articles were conceived. Nevertheless, the absence of a codification of State responsibility, as Ichim suggests, does not mean that there was no reference to it in GIL at that time.[167] Important case-law dealing with compensation as a form of reparation was already available (e.g. *Factory at Chorzów* Case; *Corfu Channel* Case) and the duty to provide reparation *per se* was already considered a well-established principle of international law.[168] Moreover, in the *Factory at Chorzów* Case – which is considered to be one of the fundamental Decisions on reparations –, the PCIJ, in spite of only ordering compensation, recognised that reparation may consist of many forms.[169] Additionally, this Decision suggested a sort of hierarchy among them,

[165] Ibid, Art 37, Commentary (4).
[166] Ibid, Art 37, Commentary (6).
[167] Ichim (2014), 18.
[168] PCIJ, Factory at Chorzów Case (Jurisdiction), 21. ICJ, Corfu Channel Case (Merits), 25-6.
[169] PCIJ, Factory at Chorzów Case (Merits), 27-8.

placing restitution in first place.[170] While this may be true, the fact that Article 41 ECHR only mentions *just satisfaction* as a means of reparation, neglecting to mention restitution for example, led some commentators to believe that the drafters purposely chose to assign a special meaning to the term *just satisfaction* which would address all damages, costs and expenses, and would only take the form of monetary compensation.[171] For some, this is sufficient to conclude that reparative norms in the European Convention are different and therefore *lex specialis* since '[i]t is beyond doubt that the judges have no intention to offer a type of satisfaction within the meaning of general international law'.[172]

However, this assertion is not grounded in the text of the Convention, but rather in the (not current anymore) practice of the ECtHR. The interpretation of Article 41 ECHR has experienced several changes throughout the fifty years of the Court's existence. Since the *Lawless* Case, the first one decided on the merits, the ECtHR has acknowledged that it is one of its prerogatives to grant compensation.[173] Later, in the *Vagrancy* Case, the Court established which conditions were necessary to grant these reparations.[174] It was not until 1975, in the *Golder* Case, that the ECtHR began affirming that a declaration of the incurred violation constituted sufficient reparation.[175] Thus, up to 2004, the only reparative measures ordered by the ECtHR were monetary *compensation* and declaration of the violation, which would be equivalent to *compensation* and *satisfaction* respectively when compared to the ILC Articles.

When the ECtHR was occasionally asked to grant non-pecuniary reparation, it replied in the negative.[176] Moreover, the Court has repeatedly argued that its judgments are

[170] Ibid, 47.
[171] Ichim (2014), 18; Christoffersen (2009), 423 (arguing that the ECtHR 'does not have jurisdiction beyond compensation').
[172] Ichim (2014), 17.
[173] ECtHR, *Lawless v. Ireland (No. 3).*
[174] ECtHR, *Wilde, Ooms, Versyp (Vagrancy) v. Belgium* (Art 50), Para 21.
[175] ECtHR, *Golder v. UK*. See also Antkowiak and Gonza (2017), 288 (qualifying the approach taken by the ECtHR in regard to reparations as 'overly cautious').
[176] See e.g. ECtHR, *Le Compte, Van Leuven and De Meyere v. Belgium* (Article 50), Para 13; ECtHR, *Dudgeon v. UK* (Art 50), Para 15; ECtHR, *Ulku Ekinci v. Turkey*, Paras 176-9.

'essentially declaratory in nature',[177] which has been interpreted as not allowing the granting of reparative measures beyond compensation. Nevertheless, the ECtHR has also recognised that the finding of a breach imposes 'a legal obligation [on the State] to put an end to the breach and make reparation for its consequences', and that such a reparation should be *restitutio in integrum* when possible.[178] Moreover, it has been generally accepted that, in accordance with the principle of *subsidiarity*, while States are obliged to grant reparation, they are also responsible for determining the types of reparative measures which are most appropriate to comply with ECtHR decisions.

Under the European Convention, it is the role of the CoM (a political organ composed of the Ministers for Foreign Affairs of State Parties or an alternate[179]) to supervise States' compliance with the decisions of the Court.[180] The Department for the Execution of Judgments of the ECtHR assists the CoM through the whole supervisory process. Traditionally, after the ECtHR informs the CoM of a final judgment, a supervisory process is conducted through a series of reports in which the State provides information on the measures it takes to implement the Court's decision. As soon as the CoM considers that the measures implemented satisfy the requirements of the ECtHR's judgment, it declares the closure of the supervisory process. Hence, this process highly depends on respondent States' *bona fide,* as they are in charge of the identification of appropriate reparations.[181] The CoM only performs a secondary role with no real possibility to compel States in case of non-compliance.[182] Nevertheless, the declarations made in the recent ECtHR judgment on the first 'infringement

[177] See e.g. ECtHR, *Assanidze v. Georgia*, Para 202; ECtHR, *Verein Gegen Tierfabriken Schweiz (Vgt) v. Switzerland (No. 2)*, Para 61.
[178] ECtHR, *Papamichalopoulos and others v. Greece* (Art 50), Para 34.
[179] Statute of the Council of Europe, Art 14.
[180] ECHR, Art 46(2).
[181] Note that the CoE describes the States' faculty to decide on the type of reparation as a 'margin of appreciation', see www.coe.int/en/web/execution/the-supervision-process#{%2214997657%22:[1],%2214997692%22:[1]}
[182] The CoM discussed and supported the extension of its power so that it could initiate 'infringement proceedings' before the ECtHR Grand Chamber in case of non-compliance. It also proposed that the Court could be authorised to impose fines for the delay. With Protocol 14 of the ECHR, many reforms were established, the punitive fines were never approved however. See Mowbray (2003), 304.

proceeding', implicitly recognising the CoM's interpretative powers over the open-ended Court's orders, raise many questions about the actual role of the CoM.[183]

Regardless of the fact that States could select any type of reparative measures for redressing a violation, the ECtHR traditionally interpreted Article 41 of the ECHR as only allowing it to issue a declaration of the violation and to order monetary *compensation*. Of course, the State obligation to provide full reparation was applicable, but was viewed as parallel to the ECtHR's reparative powers and more connected to the supervision of the execution of judgments by the CoM.

Over the last decade, however, this understanding has been challenged by the introduction of new developments. In response to its increasing backlog, in 2004, the ECtHR began the practice of what is one of its most important reforms: the pilot-judgment procedure. Among its innovations is the inclusion, in the operative paragraphs of the judgment, of orders directed towards the States, granting general and sometimes individual reparative measures separate from monetary *compensation*. These measures —some of them already well-developed in the practice of the IACtHR— include the amendment of legislation, [184] improvement of detention conditions for prisoners,[185] and setting up domestic mechanisms to redress failure to execute final domestic decisions.[186] It is worth noting that orders issued within the framework of pilot-judgment procedures are made by invoking the authority of Article 46 ECHR, and not Article 41. However, besides pilot-judgments, the ECtHR has also included non-pecuniary orders in the so-called quasi-pilot judgments in which the Court identifies appropriate measures constituting redress, but does not declare the existence of a systemic problem.[187]

[183] The 'first infringement proceeding was filed by the CoM in December 2017 and decided by the ECtHR's Grand Chamber in May 2019, see ECtHR, *Ilgar Mammadov v. Azwerbaijan* (Article 46§4 Proceedings), Para 186.
[184] ECtHR, *Greens and M.T. v. UK,* op Para 6.
[185] ECtHR, *Rezmiveș and Others v. Romania,* op Para 4; ECtHR, *Neshkov and Others v. Bulgaria*, op Para 7(a).
[186] ECtHR, *Burdov v. Russia (No 2)*, op Para 6; ECtHR, *Olaru and others v. Moldova*, op Para 4; ECtHR, *Gerasimov and others v. Russia*, op Para 12.
[187] E.g. ECtHR, *Del Rio Prada v. Spain*, op Para 3.

The wording of Article 46, which deals with the binding force and execution of judgments, does not include any express reference to reparative orders.[188] Nevertheless, Article 46 is interpreted as authorising the ECtHR to assist States with the identification of reparations in order to secure an effective implementation of judgments.[189] This has provoked mixed reactions from scholars and practitioners. On the one hand, ECtHR's Judges Zagrebelsky and Kovler, for instance, have criticised the legal weakness of the pilot-judgments' orders, arguing that they fall outside of the competence of the ECtHR.[190] Others have accused the ECtHR of playing an 'activist' role.[191] On the other hand, other commentators welcome the new practice. Sicilianos argues that the pilot-judgment procedure has a strong legal basis in the European Convention, GIL and the ECtHR's practice, and that the task of supervision of its execution should be complementary to the one by the CoM.[192] Indeed, it seems that the new approach to Article 46 considers the selection of reparative measures subsumed in the supervisory task of implementation of judgments.[193] This task is now seen as a

[188] ECHR, Article 46: 'Binding force and execution of judgments
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.
3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the committee.
4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph1.
5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.'

[189] See e.g. ECtHR*, Broniowski v. Poland*, Para 193; ECtHR, *Gerasimov and others v. Russia*, Para 210; ECtHR, *Varga and Others v. Hungary*, Para 95.

[190] ECtHR, *Hutten Czapska v. Poland,* Partly Dissenting Opinion of Judge Zagrebelsky. See also interview with Anatoly Kovler, in Leach et al. (2010), 20.

[191] Hertig Randall and Ruedin (2010), 421–443.

[192] Sicilianos (2014), 253.

[193] This view is confirmed by the ECtHR's declaration in ECtHR, *Ilgar Mammadov v. Azwerbaijan* (Article 46§4 Proceedings), Para 186.

participatory 'model of accountability' in which both the ECtHR and the CoM play important (and sometimes overlapping) roles.[194]

Thus, the selection of reparative measures might be effected by several actors at different stages of the judicial and supervisory process. The ECtHR has the first opportunity to order appropriate reparative measures when deciding on the merits of the case (e.g. measures identified in pilot-judgment procedures). After the process of supervision has been initiated by the CoM, respondent States are in charge of finding adequate reparations in order to comply with the ECtHR's orders. Additionally, in the case of 'enhanced supervision'[195] – which deals with cases requiring urgent individual measures, pilot-judgments, inter-State cases, and cases raising complex structural problems –, the ECtHR Secretariat plays a pivotal role in assisting States in the selection of reparations and the preparation and implementation of action plans.[196]

While the legality of the pilot-judgment procedure is an interesting debate, in the above discussion, I consider that the relevant issue for this dissertation is the conceptualisation of the general and specific measures ordered by the ECtHR in pilot-judgments and quasi pilot-judgments. Commentators have found different explanations for the nature of those measures. Colandrea looks at the doctrine of State responsibility and considers that neither general nor specific measures ordered under the authority of Article 46 are reparations in a true sense. He sees specific measures as directed towards stopping a violation, which implies that they should be allowed only in cases of continuing violation, and therefore equates them with the measure of *cessation* as provided by Article 30(a) of the ILC Articles.[197] In the case of general

[194] See Lambert-Abdelgawad (2013), 276 (discussing the role of the Parliamentary Assembly and the influence of its interaction with the CoM over supervisory processes). It should be also noticed that the Pilot-judgment procedure has been criticised because it allows the ECtHR to strike down unresolved similar cases from its list and pass them on to the CoM, see Kindt (2019).

[195] CoM, 'Consolidated document – New working methods: Twin-track supervision system', takes into account the following documents: CM/Inf(2010)28 and CM/Inf(2010)28 rev, CM/Inf/DH(2010)37, CM/Inf/DH(2010)45 final, CM/Inf/DH(2011)29, as well as the Decisions adopted by the CoM in this respect, available at www.coe.int/t/cm/iGuide/III19_en.asp

[196] Lambert-Abdelgawad (2013), 278.

[197] Colandrea (2007), 401.

measures, Colandrea argues that they do not aim at stopping a violation but at preventing its recurrence, and therefore he concludes that they should be considered as *guarantees of non-repetition*, in accordance with Article 30(b) of the ILC Articles.[198] Ichim partially agrees with Colandrea, arguing that since the identification of the mentioned measures is made under the authority of Article 46 instead of Article 41, they should not be considered to be reparations, but rather 'an element of the states' obligation to abide by final judgments'[199] and *guarantees of non-repetition*, even if not recognised as such by the Court.[200] In summary, these authors claim that measures ordered by the ECtHR, which are neither monetary compensation nor the mere declaration of a violation, do not constitute reparative orders.

This section proposes two arguments in order to reject this conclusion. The first one refers to the purpose of the measures as worded in the ECtHR decisions. Despite invoking the authority of Article 46 when ordering the mentioned measures, the Court attaches a reparative aim to them. For instance, in *Assanidze v. Georgia*, the Court ordered the release of a prisoner arguing that 'by its very nature, the violation found in the instant case does not leave any real choice as to the measures required to *remedy* it.'[201] The same justification has been repeated almost verbatim in the Judgment of the ECtHR's Chamber of the Third Section in *Del Rio Prada v. Spain,* which was later confirmed by the ECtHR's Grand Chamber.[202] It is worth noting that, in this Case, a joint, partly dissenting opinion was issued recognising *inter alia* that the order of release pursuant Article 46 was considered to be a measure of *just satisfaction,* which clearly shows that there was still no consensus among ECtHR judges about the nature of these measures.[203] When it comes to other non-pecuniary measures, the Court has also justified them invoking a reparative aim. In *Karanovic v. Bosnia,* the ECtHR

[198] Ibid, 409.
[199] Ichim (2014), 254.
[200] Ibid, 253.
[201] ECtHR, *Assanidze v. Georgia*, op Para 14 and Para 202 (emphasis added).
[202] ECtHR, *Del Rio Prada v. Spain*, Para 138 and op Para 3.
[203] See Joint Partly Dissenting Opinion of Judges Villinger, Steiner, Power-Forde, Lemmens, and Griţco in ECtHR, *Del Rio Prada v. Spain*.

included orders in the operative paragraphs to enforce a domestic Decision by transferring the applicant to the Federation of Bosnia and Herzegovina Pension Fund.[204] In spite of not including further explanation in the operative paragraphs, the Court declared that such a measure was required to *remedy* the found violation.[205] Thus, it is clear that this measure aimed at redressing the consequences of the violation committed against the applicant.

The analysed case-law therefore suggests that, although the ECtHR asserts that non-pecuniary measures are ordered under the authority of Article 46, following the principle of *subsidiarity*, those measures are actually ordered with the specific purpose of repairing the consequences of wrongful acts, therefore, constituting reparative measures.

The second argument is related to the doctrine of *evolutive* interpretation. It has already been mentioned that Article 41 has been interpreted traditionally as authorising only *just satisfaction* in the form of monetary compensation and declaration of the violation. The few times that the ECtHR has ordered non-pecuniary measures, it has generally done so while discussing the consequences of the application of Article 46 which establishes States' obligation to abide by the Court's decisions. The Court argues that, while it recognises that States are the ones bearing the primary responsibility for the selection of appropriate means to remedy a breach, it orders non-pecuniary measures with the purpose of assisting States in the identification of such measures. However, there is nothing preventing these innovative measures from being considered to be reparative measures identified by the Court in an effort to assist States in selecting appropriate means of redress. That is, *just satisfaction* includes non-pecuniary measures (such as release of prisoners or amendment of legislation) as a result of an *evolutive* interpretation of Article 41 in the light of Article 46, as developed in the recent

[204] ECtHR, *Karanovic v. Bosnia*, op Para 3 (i).
[205] Ibid, Para 29.

practice of the Court.[206] Such an *evolutive* interpretation is neither based on the explicit text of the Convention nor on the original intention of the States Parties,[207] but rather on the special nature of the European Convention, which aims at the protection of human rights in an effective manner. Yet, it should be noted that Articles 41 and 46 are not incompatible with the inclusion of non-pecuniary reparations.

Nonetheless, it is easy to appreciate that the basis for the *evolutive* interpretation of Article 41 is not entirely robust. First, the exercise of *evolutive* interpretation has mostly been connected to the interpretation of substantive rights, not procedural ones. Whereas *evolutive* interpretation has been applied to modernise the understanding of *inter alia* the right to life,[208] the right to freedom of speech,[209] and the right to private and family life,[210] only in very few cases has the Court assessed the possibility of expanding the understanding of a procedural provision.[211] Nevertheless, it should be recalled that the ECtHR has recognised, in relation to the Convention as a *living instrument*, that this approach 'is not confined to the substantive provisions of the Convention, but also applies to those provisions […] which govern the operation of the Convention's enforcement machinery'.[212] Moreover, the Court has already dealt with a similar matter which should be considered as an important precedent. In *Cruz Varas v. Sweden*, the ECtHR questioned whether the power of the European Commission of Human Rights to issue interim measures could be derived from Article 25(1) (no longer in force) even though this provision did not explicitly recognise such power.[213] Although the ECtHR answered the question in the negative, it should be

[206] The *evolutive* interpretation of the ECHR is understood as a special method of interpretation which awards particular consideration to the special legal nature of the Convention and its obligations. See Fitzmaurice (2014), 183.
[207] Cf Bjorge (2014) (arguing that *evolutionary* or *dynamic* interpretation is not different from the regular method of interpretation followed in general international law (Arts 31-33) since both seek to elucidate what is the objective intention of the parties). See also Letsas (2010) (asserting that there is no general method of interpretation – understood as fixed rules – but that every instrument needs a particular approach).
[208] ECtHR, *Vo v. France*.
[209] ECtHR, *Handyside v. UK*.
[210] ECtHR, *Cossey v. UK*; ECtHR, *Dudgeon v. UK*; ECtHR, *Goodwin v. UK*.
[211] ECtHR, *Cruz Varas v. Sweden*. See also ECtHR*, Loizidou v. Turkey*.
[212] *ECtHR, Loizidou v. Turkey*, Para 71. See also Nolte (2013), 255.
[213] ECtHR, *Cruz Varas v. Sweden,* Paras. 97-103.

acknowledged that the mere fact of posing and considering this kind of question confirms that procedural provisions are also subject to *evolutive* interpretation.

The second issue of concern is related to Article 31(3) of the VCLT, which points to certain elements to be considered when engaging in the exercise of interpretation. Paragraphs (a) and (b) refer to *subsequent agreement* and *subsequent practice* respectively.[214] Notwithstanding the fact that ECtHR has referred to *subsequent agreements* in its case-law, albeit on few occasions, it has never really clarified this concept, and therefore its application remains obscure.[215] Despite this challenge, and focusing on the issuance of non-pecuniary reparations, one might ask whether the declarations resulting from the High Conferences on the Future of the ECtHR (Izmir, Interlaken, Brighton, Brussels and Copenhagen)[216] should be considered to be 'agreements' between parties of the European Convention. Examination of those five declarations shows that, although the parties encouraged the ECtHR, State parties and the CoM to search for more effective ways to deal with repetitive cases and execution of judgments, emphasis has always been placed on the principle of *subsidiarity*, seeking to give States enough room to manoeuvre regarding the implementation of the Convention. While it may be true that some of the calls made in those declarations could be interpreted as allowing a certain flexibility in the granting of non-pecuniary reparations by the ECtHR, the language used is very vague. For instance, when the conference asks the Court to '[e]stablish and make public rules foreseeable for all the parties concerning the application of Article 41 of the Convention, including the level of just satisfaction which might be expected in different circumstances'[217] and to

[214] VCLT, Article 31(3): 'There shall be taken into account together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties.'
[215] Nolte (2013), 246.
[216] CoE, 'Interlaken Declaration'; 'Izmir Declaration'; 'Brighton Declaration', 'Brussels Declaration' and 'Copenhagen Declaration'.
[217] 'Izmir Declaration', Follow up plan F(2)(d).

'ensure that clarity and consistency of judgments are increased even further',[218] it cannot be concluded that the declaration is in fact consenting to a broader concept of *just satisfaction*.[219]

Subsequent practice, in contrast to *subsequent agreement*, has enjoyed more attention from the ECtHR. When assessing this issue, the Court seeks to clarify whether States signal support for a conduct which has not yet been explicitly recognised as protected by the European Convention. Usually, the procedure followed by the ECtHR is to examine whether State parties have regulated such conduct in their domestic legislation or through judicial procedures.[220] Thus, the Court searches for a sort of *consensus*, – which does not need to be absolute, in the practice of State parties. However, *subsequent practice* cannot be used to recognise new rights or obligations.[221] When discussing the potential power of the European Commission of Human Rights to issue interim measures, the ECtHR declared that there is a difference between interpreting the Articles of the European Convention and creating new rights which were not included in the European Convention at the outset.[222]

In the case of non-pecuniary reparations, however, it is not possible for States to regulate or independently decide on the granting of new types of reparations under the umbrella of *just satisfaction,* since the practice of granting such reparations exclusively corresponds to regional human rights courts.[223] Thus, evidence for *subsequent practice* should be found elsewhere. Two alternative approaches exist for assessing States' support for this practice. The first one is grounded in the claim, proposed by the Committee on International Human Rights Law and Practice of the International Law Association (ILA), that human rights tribunals and treaty bodies'

[218] 'Brighton Declaration', Para 25(c).
[219] In fact, some commentators affirm that declarations by State parties (e.g. 'Brighton Declaration') are used by States as a 'reaction to what is seen as political or unrealistic interpretative developments by international human rights institutions and judiciaries', see Gammeltoft-Hansen, Lagoutte, and Cerone (2016), 7.
[220] Nolte (2013), 247.
[221] ECtHR, *Cruz Varas v. Sweden*, Para 100.
[222] Ibid.
[223] The practice of domestic courts regarding the granting of reparations following human rights violations are governed by different rules and therefore cannot be compared.

findings represent *subsequent practice*.[224] The second approach resorts to the concept of *tacit consent* within the context of *subsequent practice*.[225]

Subsequent practice as provided by the VCLT only refers to the practice of States, not the practice of other legal entities. However, this view has been challenged in several ILA Reports.[226] The International Human Rights Law and Practice Committee of the ILA (the Committee) proposes a modern approach which considers human rights tribunals and treaty bodies' findings as sources of international law. Traditionally, the views of treaty bodies are not regarded as possessing a binding nature due to overall rejection of this attribute by States, and a poor record of compliance.[227] Such claims have caused that, for example, the ILC does not regard those findings as representing *subsequent practice* in the terms of Article 31(3) (b) of the VCLT.[228] However, the Committee correctly notes that the VCLT ignores the existence of monitory mechanisms and supposes that only States are in charge of guarding each other's compliance.[229] Therefore, the Committee looks at the specificity of international human rights adjudication, which is carried out by special bodies devoted to this task, suggesting that the understanding of *subsequent practice* should be broadened in a way that recognises the relevance of the findings of treaty bodies and tribunals.[230] Such relevance is grounded in the participatory process leading a treaty body to the adoption of a finding. In other words, the Committee notes that general comments and general recommendations, for instance, are highly influenced by States' Reports containing their opinions with regard to several issues, including the interpretation of

[224] Committee on International Human Rights Law and Practice (2004) *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies* (ILA Report 2004).
[225] See Scheinin (2009), 33 (noticing that tacit approval of some of the parties was considered by the *traveaux preparatoire* of the VCLT).
[226] ILA Report 2004; Committee on International Human Rights Law and Practice (2009) *Final Report on the Impact of International Human Rights Law on General International Law* (ILA Report 2009).
[227] Rodley (2013), 634. Similar claims have been raised, although sporadically, against the authority of the IACtHR's Decisions: On 16 October 2006, after the notification of the Final Decision in the *Almonacid Arellano and others v. Chile* Case, the President of the Chilean Supreme Court declared that the Judgments of the IACtHR are only suggestions for the States, thereby denying their binding nature.
[228] ILA Report 2004, Para 21.
[229] Ibid, Para 22.
[230] ILA Report 2004, Para 22.

rights and the treatment of particular cases. This exchange contributes to the legitimacy of treaty bodies' findings as a source of international law, because they are made after the consideration of States parties' reflected opinions.[231]

While the approach of the ILA Committee is convincing in the case of treaty bodies' general comments and recommendations, more caution should be exercised when considering it in relation to adversarial procedures. In those cases, treaty bodies and human rights courts mainly consider the arguments of the applicants and the State accused to be responsible of a human rights violation. Such State arguments should be carefully considered as they are posed in a context of contention (*litis*) about a particular situation, forming part of a strategy designed to minimise or dismiss State responsibility, and not necessarily reflect an agreed general view on the issues examined. Neither the IACtHR nor the UN treaty bodies hearing individual communications accept the submission of amicus briefs from third States. The ECtHR and, potentially, the African Court are the only regional human rights courts allowing this kind of contribution.[232] Moreover, of the total number of amicus briefs received by the ECtHR, the majority are submitted by non-State actors (e.g. non-governmental organisations).[233] Another form of State participation connected to the findings of treaty bodies and human rights courts takes place in inter-State application procedures. Even though the three regional human rights courts have jurisdiction over inter-State applications, only the ECtHR has actually received this kind of application, and even so very sporadically. Consequently, it is not plausible to argue that regional human rights courts' decisions are representative of *subsequent practice* based on the consideration of States' opinions by these courts.

[231] Ibid, Para 23. Also consider Hathaway (2008), 122 (who grounds delegation of authority by States to international law bodies in a modern conceptualisation of sovereignty, thus taking issue with the view that State sovereignty and delegation of authority are in irreconcilable conflict).
[232] Protocol 1 to the African Charter, Art 5(2): 'When a State Party has an interest in a case, it may submit a request to the Court to be permitted to join.'
[233] A recently published empirical study found that 68 per cent of all amicus briefs sent to the ECtHR's Grand Chamber between 1994 and 2014 were submitted by non-governmental entities, see Dolidze (2015), 864.

The second approach concerns the notion of *tacit consent*,[234] also referred to as 'acquiescence' by the ILA Committee on International Human Rights Law and Practice. This concept was used in the well-known Case of *Anglo-Norwegian Fisheries* by the ICJ.[235] There, the Court inferred that the lack of a negative reaction on the part of the UK to Norway's establishment of a maritime delimitation signalled the acceptance of said boundary.[236] By the same token, States' compliance with or lack of negative reaction to the issuance of non-pecuniary measures –under the authority of Articles 41 or 46 ECHR– might be considered to amount to *subsequent practice* by *tacit consent*.[237]

Lack of reaction is however not the case for non-pecuniary reparations. Rather, States have responded clearly (if differently) to the issuance of several non-pecuniary measures (e.g. orders to amend legislation and to release prisoners). For instance, while in the UK, the government delayed, over several years, the implementation of the *Greens M. T.* Pilot-Judgment which ordered legislative reform to eliminate a blank ban on prisoner voting,[238] Spain complied with an order to release a prisoner less than 48 hours after the communication of the ECtHR's Judgment, and issued additional orders for the release of more prisoners under similar conditions.[239] Lively debate has been spawned at the domestic level where national authorities and public opinion have taken issue with ECtHR Decisions.[240] In summary, States have reacted to the

[234] ILA Report 2004, Para 21.
[235] ICJ, *Anglo-Norwegian Fisheries* (*UK v Norway*), 121.
[236] The resort of the ICJ to *tacit consent* has, however, been criticised in e.g. Koskenniemi (2006), 293-7. See also Fitzmaurice (1953), 28-30, for a discussion on the difference between inaction and tacit acquiescence.
[237] This view is defended by Fyrnys who argues that State compliance with orders to amend legislation given by pilot-judgments is enough justification for broadening the understanding of Art 46 ECHR, see Fyrnys (2011), 1252.
[238] In December 2018, the CoM declared that the UK had complied with the obligations imposed by the ECtHR in this and other judgments [including ECtHR, *Hirst v. UK (No 2)*], after administrative measures were taken by the UK government to allow prisoners released on temporary licence and on home detention curfew to vote, see CoM Decision CM/ResDH(2018)467, 06 December 2018. However, noting that said reform is not legislative but only administrative, and that it only potentially enfranchises up to one hundred prisoners, the CoM's decision to close the examination of those cases has been characterised as a 'capitulation' and a signal of 'institutional weariness', see Adams (2019), blogpost.
[239] http://politica.elpais.com/politica/2013/11/20/actualidad/1384949416_884384.html
[240] See for instance the UK debate on the *Hirst v. UK (No.2)* and *Greens M. T. v. UK* Cases; see also the speech by UK's Prime Minister David Cameron before the Council of Europe on 25 January 2012 at www.theguardian.com/law/2012/jan/25/cameron-speech-european-court-human-rights-full, calling for a stricter application of the principle of *subsidiarity* and *the margin of appreciation doctrine* in favour of States.

issuance of innovative measures, but these reactions are significantly diverse and mostly directed towards the appropriateness of the specific measures in terms of democratic and moral challenges. Not much has been said about the ability of the Court to broaden the concept of *just satisfaction*, something which could actually support the claim that there is a tacit consent by States. However, conclusions are difficult to draw given the limited ECtHR's case-law concerning non-pecuniary reparations and the criticism occasionally voiced by some States.[241]

However, as pointed out by Legg, the role of State consent should not be overestimated.[242] While the appreciation of *subsequent agreement* and *practice* informs the assessment of *evolutive* interpretation, it is important to avoid taking the VCLT's rules of interpretation as a dogma.[243] The fact that no definitive conclusion could be drawn from the analysis of *subsequent agreement* and *practice* in relation to the States' acceptance for considering innovative measures as *just satisfaction*, should not prevent the development of an *evolutive* interpretation of Article 41.[244] State consent has already been taken as not indispensable by the ECtHR when dealing with (invalid) reservations, severing them from the States' declaration of recognition of jurisdiction, while leaving the latter declaration valid nevertheless.[245] This view has been followed by the HRC[246] and, although not explicitly recognised, is presumably inspired by the ICJ Advisory Opinion on the Reservation to the Genocide Convention.[247] Hence, even though Article 31 VCLT is a reflection of customary international law and therefore *subsequent* agreement and *practice* should be analysed in order to appreciate the degree

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See also reactions on the *Del Rio Prada v. Spain* case at www.nytimes.com/2013/10/22/world/europe/european-court-rules-against-spain-on-terror-sentences.html?_r=0

[241] See Ichim (2014), 205 (pointing out that it would be 'simplistic to suppose that conceptual transformations in the system are permitted without the consent of member states').

[242] Legg (2012), 105.

[243] See Scheinin (2009), 26; Legg (2012), 106-7.

[244] See Benvenisti (1999), 854 (arguing in a similar analysis regarding the MoA doctrine, that there is no place for State practice in the consideration of a right's violation).

[245] See e.g. *ECtHR, Loizidou v. Turkey*; ECtHR, *Belilos v. Switzerland*.

[246] See HRC General Comment No. 24. Also see Scheinin (2009), 30.

[247] ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.

of State consent, the *evolutive* interpretation of Article 41, in the light of Article 46, by the recent practice of the ECtHR should not be limited by the lack or indeterminacy of State consent.

The previous argument should not be regarded as an attempt of fragmenting interpretation in IHRL from interpretation in GIL. On the contrary, this argument gives significant weight to Article 31 VCLT reconciling *evolutive* interpretation in IHRL with general rules of interpretation. In this regard, attention to the *object and purpose* of the instrument to be interpreted is of the greatest importance.[248] As noticed by Scheinin, the notion of *object and purpose* combined with the principle of *effet utile* can bring important consequences to State parties.[249] Thus, in the case of reparations ordered by the ECtHR, the consideration of the ECHR's *object and purpose* to effectively protect the rights of individuals under its jurisdiction entails the inclusion of non-pecuniary reparations in the concept of *just satisfaction* provided in Article 41 ECHR. The ECtHR's practice clearly shows that it has developed a new understanding of its abilities to order reparative measures. The practice is not limited to the pilot-judgment procedure and the regular invocation of Article 46, but also involves cases in which reparative orders have been issued under the sole authority of Article 41. The fact that the ECtHR does not clearly identify the legal basis of such orders (apart from arguing that in doing so it assists States in the identification of appropriate measures) does not preclude their recognition as reparative measures.

The two arguments hereby presented lead to the conclusion that non-pecuniary measures such as orders to release prisoners or to amend legislation are in fact reparative measures ordered under the authority of Article 41 of the ECtHR. Therefore, the term *just satisfaction* actually does not only comprise monetary compensation (*compensation* in Article 36 ILC Articles) but also measures which are considered to be *restitution* and *satisfaction* in Articles 35 and 37 ILC Articles respectively. This approach

[248] VCLT, Art 31(1).
[249] Scheinin (2009), 30.

is supported by the similarities encountered when comparing the instruments. For instance, a declaration of a violation has been recognised as a reparative measure by the ECtHR in several cases,[250] sometimes even being considered as a sufficient redress.[251] This measure is included in Commentary (6) to Article 37 ILC Articles, which identifies a 'declaration of the wrongfulness of the act' as '[o]ne of the most common modalities of satisfaction.' Likewise, Commentary (1) to Article 35 ILC Articles clearly identifies the 'release of persons wrongly detained' as a measure of *restitution*, and Commentary (5) to the same Article introduces the notion of 'juridical restitution', as a type of *restitution,* referring to the 'revocation, annulment or amendment of a constitutional or legislative provision enacted in violation of a rule of international law'.

Consequently, *just satisfaction* is in fact a denomination used by the ECtHR, *prima facie* easily confused with *satisfaction (*as provided by Article 36 ILC Articles). Actually, *just satisfaction* comprises all reparative types provided in GIL: *restitution, compensation* and *satisfaction.* Hence, as far as types of reparations are concerned, no conflict exists between GIL and the European Convention. Therefore, even though reparative rules provided by the European Convention should be considered *lex specialis*, it does not follow that they are incompatible with *lex generalis.*

B. Compatibility of Article 63 of the American Convention with the ILC Articles

While the wording of Article 41 of the European Convention has been accused of obscurity, resulting in a very limited use of reparative measures, Article 63 of the American Convention might be regarded as an open door to redress.[252] Making use of

[250] ECtHR, *Golder v. UK*; ECtHR, *Assanidze v. Georgia*.

[251] ECtHR, *Nikolova v. Bulgaria*; ECtHR, *Aquilina v. Malta*. Note also the dissenting opinions of Judge Bonello in these Cases.

[252] ACHR, Art 63: '1. 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. 2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons,

this provision, the IACtHR has built a reputation based on various innovative and widely praised reparations.[253] Article 63(1) orders that after the finding of a violation, the IACtHR might consider three actions conducive to redress: (a) to order the enjoyment of the right or freedom violated; and, when appropriate; (b) to remedy the consequences of the violation; (c) to order the payment of fair compensation. Thus, similarly to the practice of the ECtHR, the IACtHR orders monetary compensation in most cases and declares that the finding of a violation is in itself a means of redress. Yet, the IACtHR does not limit itself to these measures. It broadly interprets the verb 'remedy' as authorising the selection of non-pecuniary reparative measures. It is worth noticing that this understanding was not present in the first judgments of the Court, in which only monetary compensation was ordered.[254] The IACtHR evolved quickly to this state and now considers Article 63(1) as a reflection of *customary law*.[255] Thus, the Court has ordered, on several occasions, non-pecuniary measures such as the construction of memorial sites and monuments, the production of video and text documentaries, the provision of scholarships, the staffing of schools, and etcetera.

The position taken by the IACtHR has not been spared from criticism. Important actors in the Inter-American System of Human Rights (Inter-American system) have objected to some of the ordered reparative measures. A recent example of disagreement between a State and the IACtHR is the Venezuelan denunciation of the American Convention (resulting in its withdrawal from the IACtHR's jurisdiction), arguably prompted by the IACtHR's order to grant reparation to a person accused of terrorism.[256] In addition, some critical notes have come from inside the Court. In a dissenting opinion, Judge Vio Grossi reminded the Court that it 'must interpret and

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the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.'

[253] E.g. Starr (2010), 484; Antkowiak (2008).

[254] IACtHR, *Velásquez Rodríguez v. Honduras* (Reparations and Costs); IACtHR, *Godinez Cruz v. Honduras* (Reparations and Costs).

[255] IACtHR, *'Street Children' v. Guatemala* (Reparations and Costs), Para 62; IACtHR, *López Mendoza v. Venezuela*, Para 207.

[256] Venezuela denounced the American Convention on September 2012 (effective in September 2013). See IACtHR, *Diaz Peña v. Venezuela*.

apply the Convention, instead of assuming the role of the Inter-American Commission of Human Rights or the lawmaking function.'[257] Specifically, IACtHR judges have voiced their concerns regarding the selection of non-pecuniary reparations by the Court. For instance, Judge Montiel-Argüello expressed his disagreement with the orders to release prisoners.[258] Additionally, although most scholars recognise the IACtHR's great efforts in creating an effective protection of human rights in the region,[259] the tension between this Court and some domestic courts in the implementation of IACtHR's reparative orders is difficult to deny.[260] In spite of these signs of divergence, the Court stands by its own jurisprudence.

Many of the non-pecuniary measures ordered by the IACtHR coincide with the examples put forward in the Commentary to the ILC Articles. For instance, the IACtHR has ordered the release of prisoners[261] and the amendment of legislation,[262] which are measures considered to be *restitution* in the Commentary to Article 35 of the ILC Articles. Moreover, the IACtHR has expressly recognised in several Decisions that Article 63(1) 'codifies a rule of common law that is one of the fundamental principles of contemporary international law on State responsibility',[263] and that the legal duty to make reparations is also based on principles of GIL.[264] Consequently, it is concluded that the American Convention's provision on reparations authorises the IACtHR to order measures that fall under each type of reparation considered by the ILC Articles: *restitution, compensation* and *satisfaction.*

[257] See IACtHR, *Artavia Murillo et al. (in vitro fertilization) v. Costa Rica*, Dissenting Opinion of Judge Eduardo Vio Grossi, 1.
[258] See IACtHR, *Loayza-Tamayo v. Peru* (Merits), Dissenting Opinion of Judge Montiel-Argüello, Para 11.
[259] Antkowiak (2014), 51.
[260] Huneeus (2011).
[261] IACtHR, *Loayza-Tamayo v. Peru* (Merits); IACtHR*, Mendoza et al. v. Argentina*.
[262] IACtHR, *Osorio Rivera and Family v. Peru*; IACtHR, *Rosendo-Cantú and other v. Mexico*.
[263] IACtHR, *Blake v. Guatemala*, Para 33; IACtHR, *Suarez Rosero v. Ecuador* (Reparations), Para 40; IACtHR *Castillo Paez v. Peru* (Reparations), Para 50.
[264] IACtHR, *Loayza-Tamayo v. Peru* (Reparations and Costs), Para 84.

V. Conclusion

The arguments presented in this chapter regarding the compatibility of reparative rules provided by, on the one hand, the European and American Conventions, and, on the other hand, the ILC Articles, favours the view that *lex specialis* is actually not in conflict with *lex generalis*, but rather departs from it. Through interpretation, the regional human rights conventions include in their provisions authorisation to grant non-pecuniary reparations that coincide with the ones considered by the ILC Articles, which are a reflection of *customary law*. Therefore, as no real conflict exist, *lex specialis* will assume the function of an instrument for legal interpretation, when conventional provisions are uncertain.

The nature of this function is one of assistance and reference. Koskenniemi clarifies in the ILC Report on Fragmentation that when *lex specialis* serves as guidance to interpretation, 'one rule should be interpreted in view of the other of which it is only an instance or an elaboration.'[265] Thus, the interpretation of provisions governing reparations in the regional human rights conventions should set them against the background provided by the reparative rules of the ILC Articles, and not consider the former completely independent from the latter.

Some commentators assign a disputable *lex specialis* quality to the reparative norms provided by regional human rights conventions. For instance, Crawford considers Article 41 of the European Convention as an example of a special regime modifying some aspect of the general law.[266] This argument implies that the ILC Articles do not have any influence over the interpretation of Article 41. Another example is provided by Ichim, who considers that, as a special regime, European Convention's reparative norms can 'sometimes refer[] to the general rules of responsibility or to other rules of international law whenever the judges deem it necessary to give stronger justification

[265] ILC Report on Fragmentation, Para 28.
[266] Third Report on State Responsibility (2001), Para 420.

to the interpretation of the internal norms.'[267] This reasoning leaves open a possibility of the Court not considering other rules of international law, *inter alia,* the ILC Articles, which does not reflect the real nature of *lex specialis* as an interpretation assistant. Reparative provisions of the ILC Articles should always provide context for interpretation.

While this Chapter concludes that GIL norms are in fact relevant for the determination of reparations, and regional human rights courts must resort to them for guidance when conventional reparative provisions prove not to be sufficient, the lack of a 'system' of GIL reparative provisions discourages their examination. The following chapter sheds light on the content of some of the instruments offering guidance in the determination of non-pecuniary reparations.

[267] Ichim (2014), 16-7.

CHAPTER II: REPARATIONS AS PROVIDED BY LEX GENERALIS

I. Introduction

Chapter I has shown that there are compelling reasons for acknowledging GIL's necessary influence in the field of reparations, notwithstanding the fact that it is usually set aside, serving only as a referential source by regional human rights courts at the moment of selection of reparative measures. It has been argued that claims for a strict separation of the treatment of reparations ordered by regional human rights courts and the relevant GIL norms are unjustifiably based on a fear for fragmentation and the uniqueness of human rights norms.[268] Likewise, Chapter I has provided examples on the way the ILC Articles are found to be relevant for the assessment of IHRL issues and reparations in particular. Accordingly, the present author contends that the potential sway of GIL as *lex generalis* should indeed be exploited, especially considering the openness of reparative conventional provisions. Thus, it is important to examine the range of possibilities offered by the already identified *lex generalis*: The ILC Articles, the Basic Principles and Guidelines on the Right to a Remedy, and the UN Principles to Combat Impunity.

In the following, a short, systematised summary of the provision of reparations by these three instruments is presented, paying special attention to the way they could be used specifically to complement the reparative provisions found in regional human rights conventions.

II. Ontological Understanding of Reparations

In spite of the existence of various international instruments dealing partially with the issue of reparations,[269] these three instruments have been selected due to their potential application in the three examined regions. Part Two of the ILC Articles sets the legal consequences of an internationally wrongful act by a State. It provides that two core

[268] See Chapter I, Part III.
[269] E.g. The Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation; CoE Convention on Violence against Women and Domestic Violence.

obligations stem from a violation: to cease the wrongful conduct (Art 30), and to provide full reparation (Art 31).[270] Importantly, the Commentary to the ILC Articles mentions that said legal consequences may also be relevant for relations between the State responsible for the wrongful act and persons or entities other than States.[271] Thus, State responsibility also extends to human rights violations, but such responsibility applies without prejudice to the rights directly attributed to persons and entities other than a State.[272] Hence, the Commentary recognises the character of *lex specialis* of the reparative provisions existing in regional human rights conventions.[273] Additionally, regarding causation, the ILC Articles state that, in general, it is a 'necessary but not a sufficient condition for reparation',[274] suggesting that the correspondence between injury and reparation is a complex one in need of a case by case assessment.

In contrast to the ILC Articles, the Basic Principles and Guidelines on the Right to a Remedy take a victim-oriented approach and do not focus on State obligations *per se* but rather on victims' rights. In this view, gross violations of IHRL and serious violations of IHL prompt remedies consisting of three separated victims' rights: (a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; (c) access to relevant information concerning violations and reparation mechanisms.[275] While rights (a) and (c) refer to the conditions to be implemented by States so victims can be effectively heard and receive reparation for said violations,

[270] Further obligations are foreseen in case the wrongful conduct implies the violation of a peremptory norm of GIL. Commentary (2) to Article 28 ILC Articles sustains that such obligations for the responsible State and other States might be to 'cooperate to bring the breach to an end, not to recognize as lawful the situation created by the breach and not to render aid or assistance to the responsible State in maintaining the situation so created.'
[271] ILC Articles, Art 28, Commentary (3).
[272] Ibid, Art 28, Commentary (3) and Art 33. For a more elaborated discussion on this issue see Chapter I, Part III of this dissertation.
[273] See Crawford (2013), 460.
[274] ILC Articles, Art 31, Commentary (10).
[275] Basic Principles and Guidelines on the Right to a Remedy, Principle 11.

right (b) deals with the particular types of reparation which may be granted for suffered harm.[276]

The approach taken in the UN Principles to Combat Impunity is *prima facie* similar to the ILC Articles, as they take as the point of departure an obligation of States to provide reparation. Yet, the UN Principles to Combat Impunity raises two important issues when they declare, in Article 31, that 'Any human rights violations gives rise to a right to reparation'. The first issue relates to the unrestricted inclusion of *any* human rights violation, departing from the specific object of this instrument which is to combat impunity. The second issue is the bold recognition of reparation as a right ascribed to victims or their beneficiaries. Both issues have exposed Article 31 to great criticism, commentators having declared that the right to reparation 'is both "necessary" and "impossible"', and that it might be more of a *moral* right than a *legal* one.[277] Nevertheless, even when those claims are substantially grounded, they do not diminish the ability of the UN Principles to Combat Impunity to guide and inform human rights adjudicative bodies about the determination of reparations.

III. Classification of Reparations

The ILC Articles classify reparations in three specific types: restitution, compensation and satisfaction.[278] Reparative measures may be granted individually or jointly, and their overall aim is to provide full reparation (*restitutio in integrum*) for the injury caused.[279] Apart from reparations, the ILC Articles recognise two independent, but interlinked, obligations: the obligation to cease – in the case of continuous violations –, and the obligation to offer appropriate assurances and guarantees of non-repetition –

[276] It has been argued that this principle addresses two different (but frequently interchangeable) rights: the right to remedy and the right to reparation, see Peters (2016), 177 and 176 (fn 27). Also note that Crawford has taken a similar approach separating reparations from remedies (including restitution, compensation and satisfaction), see Crawford (2013), chapters 15 and 16.
[277] Haldemann (2018), 335, 337 and 348.
[278] ILC Articles, Arts 34, 35, 36 and 37.
[279] Ibid, Arts 31 and 34.

if circumstances so require.[280] The obligation to cease is an automatic consequence of a wrongdoing, and applies to continuous and repetitive violations.[281] While certain measures of restitution might be indistinguishable from cessation (e.g. return of property), a fundamental characteristic differentiates these two concepts: cessation is not subject to the condition of proportionality which otherwise affects reparations.[282] Moreover, the obligation to cease subsists even when the injured State declines to claim reparations.[283] Appropriate assurances and guarantees of non-repetition might be used when trust needs to be reasserted, as they are preventive and of exceptional nature. The Commentary highlights that, notwithstanding requests of injured States, these measures depend on the context – 'including the nature of the obligation and of the breach' – and are only deemed relevant when appropriate.[284] Assurances or guarantees of non-repetition could also be confused with reparative measures. For instance, the repeal of the legislation allowing the breach to occur overlaps a guarantee of non-repetition and a measure of satisfaction.[285] With respect to their formal characteristics, the Commentary argues that while assurances are usually made in a verbal manner, guarantees of non-repetition are more elaborate, for instance involving preventive measures to be taken by the responsible State. Despite being provided together with 'cessation' in Article 30 of the ILC Articles, measures of non-repetition are not explicitly exempted from the proportionality test.

The Basic Principles and Guidelines on the Right to a Remedy recognise the same three forms of reparation (i.e. restitution, compensation, and satisfaction) and add

[280] ILC Articles, Art 30. This separation has not been always asserted in the ICJ case-law; see ICJ, *LaGrand (Germany v. US)* 485, where that tribunal considered assurances and guarantees of non-repetition to be remedial measures. In some other cases, the ICJ has referred to these measures without further explaining its legal nature; see e.g. ICJ, *Jurisdictional Immunities* (Germany v. Italy), Para 138. In the case of orders issued by the IACtHR, Crawford argues that those are based on Article 1 of the ACHR, Crawford (2013), 474.
[281] ILC Articles, Art 30, Commentary (4). The ECtHR has determined that repetitive violations, that is, "the accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions" constitute practice; see ECtHR, *Ireland v. UK*, Para 157.
[282] ILC Articles, Art 30, Commentary (7).
[283] Crawford (2013), 465.
[284] ILC Articles, Art 30, Commentary (13).
[285] Ibid, Art 30, Commentary (11).

rehabilitation and guarantees of non-repetition to the classification. Hence, this instrument takes a different approach from the ILC Articles, assigning a different status to guarantees of non-repetition and cessation. While guarantees of non-repetition take the shape of an individualised form of reparation, cessation of continuing violations is subsumed under the reparative form of satisfaction.[286] Contrary to the ILC Articles' provisions, cessation is not considered an independent and primary obligation stemming from the violation itself.

The UN Principles to Combat Impunity identify the right to reparation as one of the three rights forming a sort of recipe to combat impunity: right to know, right to justice, and right to reparation/guarantees of non-recurrence. Even though the title of the right to reparation might suggest the opposite, the UN Principles to Combat Impunity keep guarantees of non-repetition (non-recurrence) clearly separated from reparations as two distinct obligations.[287] Hence, this instrument classifies reparations in only four categories: restitution, compensation, rehabilitation, and satisfaction.[288] Noticeably, the UN Principles to Combat Impunity only offer limited content for the concept of each form of reparation. Moreover, without adequate conceptualisation, inconsistencies may easily be found in the text of the instrument. For instance, victims' right to know the whereabouts of their family members (disappeared or clandestinely executed) is an expression of their right to know the truth, but is also included within the scope of the right to reparation.[289] Possibly, this inconsistency could be explained as an example of the recurrent overlapping between reparative measures and other existing State obligations, as has already been explained in the Commentary to the ILC Articles.[290]

[286] Basic Principles and Guidelines on the Right to a Remedy, Principle 22.
[287] Mayer-Rieckh (2017), 424. See Principle 32 of the UN Principles to Combat Impunity, which includes the access to a remedy (in the procedural sense) within the scope of the right to reparations.
[288] UN Principles to Combat Impunity, Principle 34.
[289] Ibid, Principle 4 and 34.
[290] ILC Articles, Art 30, Commentary (11) (highlighting the overlap between measures of non-repetition and satisfaction).

As a result, it is clear that the instruments constituting *lex generalis* in regard to the provision of reparations have chosen to classify them differently. A comparison of the particular forms in which reparations are classified, will follow.

A. Restitution

The understanding of restitution in the Basic Principles and Guidelines on the Right to a Remedy follows the approach taken in the ILC Articles, as both seek to re-establish a concrete situation – the one existing before the violation took place.[291] Thus, these instruments do not demand the execution of complex calculations and hypothetical inquiries.[292]

1. Causality

The Commentary to the ILC Articles declares that the determination of a restorative measure frequently depends on the content of the primary obligation which has been breached, clearly establishing a causality link between these two elements.[293] The Commentary assigns more importance to this connection in the case of continuous violations or where peremptory norms of GIL have been breached, as measures of restitution may overlap with cessation.

2. Limitations

Although the ILC Articles clearly set restitution as the preferred reparative measure, its selection is subjected to two specific limitations: (a) it is not materially impossible; (b) it does not involve a burden out of proportion to the benefit deriving from restitution instead of compensation.[294] In the light of the first limitation, impossibility means that the object of restitution has either been lost or destroyed, or has

[291] Basic Principles and Guidelines on the Right to Remedy, Principle 19; ILC Articles, Art 35.
[292] ILC Articles, Art 35, Commentary (2). The UN Principles to Combat Impunity do not conceptualise restitution.
[293] ILC Articles, Art 35, Commentary (6). Shelton argues that the causal link between victim and harm suffered must be proved for the right to reparation to arise. She points out several factors to identify harm: the right that was violated, the gravity of violation, whether it was repetitive or systematic, victims' pre-existing conditions or injuries, gender, age, personality and experience, wealth, family, culture, social position and community reaction (stigma); see Shelton (2015), 14.
[294] ILC Articles, Art 35 (a) and (b), and Commentary (7).

deteriorated in such a way that it is considered valueless.[295] The Commentary also warns that legal (e.g. legal constraints at the domestic level) or practical difficulties in effecting restitution should not label it as impossible.[296] The Commentary also concedes that certain situations might be of such a complexity in the domestic arena that make restitution impossible although the object has not been destroyed (e.g. extensive damages, repercussion for the rights of third parties).[297] Crawford, for instance, sets the example of the *Forest of Central Rhodopia* case to explain that, although restitution of a terrain is possible, a change in the quality of its resources might make restitution unadvisable.[298] Additionally, interference with the rights of third parties does not automatically translate into rejection of restitution, but it depends on whether third parties acted in good faith and without notice of the claim to restitution.[299] The Commentary adds that restitution may not be preferred when its value to the injured State is significantly reduced.[300]

The second limitation involves a proportionality assessment. It only applies when there is a significant disproportion between the cost borne by the respondent State and the benefit of the recipient, and refers to considerations of equity and reasonableness. When the balancing exercise does not indicate a clear disproportion, restitution remains the preferred measure. Restitution is also preferred when its denial jeopardises the political independence or economic stability of the injured State.[301] According to Buyse, this limitation 'is rather one of pragmatism than of justice for the wrong done'.[302]

[295] Ibid, Art 35, Commentary (8).
[296] The IACtHR has adopted the former criterion, repeatedly declaring that the duty to make reparations 'may not be altered or breached by the respondent State by invoking domestic legal provisions', see IACtHR, *Almonacid Arellano et al. v. Chile*, Para 136; IACtHR*, Ituango Massacres v. Colombia*, Para 347.
[297] ILC Articles, Art 35, Commentary (9).
[298] Crawford (2013), 513.
[299] ILC Articles, Art 35, Commentary (10).
[300] Ibid, Art 35, Commentary (4).
[301] Ibid, Art 35, Commentary (11).
[302] Buyse (2008), 115.

3. Forms

The ILC Articles and the Basic Principles and Guidelines on the Right to a Remedy both recognise certain forms of restitution such as the release of prisoners and the return of property.[303] Legislative reform (including revocation or annulment of a constitutional or legislative provision), reform of administrative acts, and the requirements that 'steps be taken (to the extent allowed by international law) for the termination of a treaty' are also considered as forms of restitution by the Commentary to the ILC Articles.[304] The Basic Principles and Guidelines on the Right to a Remedy also include among those measures, the 'enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment.'[305]

B. Compensation

Compensation is the second preferred form of reparation according to the ILC Articles, and the most commonly used reparation in international adjudication in general. Based on the case-law of the PCIJ and the ICJ, some commentators have argued that compensation is 'inherent in the powers of international courts and tribunals'.[306] However, this assertion should be appreciated in the light of the context in which it is made: Courts deciding on whether a breach has occurred, are also authorised to decide about the corresponding reparation (including compensation).[307]

1. Causality

The ILC Articles and the Basic Principles and Guidelines on the Right to Remedy both consider that compensation should cover any financially assessable damage including loss of profits.[308] This includes, for instance, moral damages suffered by individuals

[303] ILC Articles, Art 35, Commentary (1) and (5); and Basic Principles and Guidelines on the Right to a Remedy, Principle 19. Property might include territory, ships, documents, works of art, share certificates, etc.
[304] ILC Articles, Art 35, Commentary (5).
[305] Basic Principles and Guidelines on the Right to a Remedy, Principle 19.
[306] Christoffersen (2009), 410. See also Crawford (2002), 218.
[307] See *The Factory at Chorzów (Jurisdiction)*, 23.
[308] ILC Articles, Art 36, Commentary (1); and Basic Principles and Guidelines on the Right to a Remedy, Principle 20.

represented by a State (e.g., by way of diplomatic protection), but not moral damages suffered by States, which should be addressed by satisfaction.[309]

The examples provided by each of the examined instruments show that there is some consensus about the kind of damage addressed by compensation: material damages such as loss of property (e.g. aircrafts; ships; diplomatic premises), and medical treatment including psychological services.[310] Some other damages are only mentioned by one of those instruments, although they clearly provide non-exhaustive examples: costs incurred in responding to pollution damage; costs related to pensions; lost opportunities, including employment, education and benefits; costs required for legal or expert assistance and social services.[311]

The ILC Articles indicate that there are three factors to analyse when determining compensation: the primary obligation breached, the behaviour of the parties, and reaching an equitable and acceptable outcome.[312] In turn, the Basic Principles and Guidelines on the Right to Remedy subject compensation to the conditions of appropriateness and proportionality, depending on the gravity of the violation and the circumstances of each case.[313]

The ILC Articles add that compensation does not have a punitive or exemplary nature.[314]

2. Forms

Generally, compensation implies a monetary payment but it can also consist of something similar. The Commentary states that the rules and principles developed

[309] Crawford (2013), 517.
[310] See ILC Articles, Art 36, Commentary (8), and Basic Principles and Guidelines on the Right to a Remedy, Principle 20.
[311] Ibid.
[312] ILC Articles, Art 36, Commentary (7).
[313] Basic Principles and Guidelines on the Right to a Remedy, Principle 20.
[314] ILC Articles, Art 36, Commentary (4).

inter alia by international human rights tribunals in regard to compensation 'can be seen as manifestations of the general principle stated in article 36'.[315]

C. Satisfaction

Satisfaction is the third preferred reparative measure according to the ILC Articles and is also recognised by the Basic Principles and Guidelines on the Right to a Remedy and the UN Principles to Combat Impunity, although no formal hierarchy is suggested in these instruments.

1. Causality

The ILC Articles provide that satisfaction is to be granted when neither restitution nor compensation can satisfactorily provide full reparation.[316] According to this instrument, satisfaction is a measure of an exceptional character, addressing non-financially-assessable damage linked to the breach of an obligation.[317] Crawford argues that this concept is equivalent to moral damage to a State.[318] The Commentary provides examples of injuries suitable to be addressed by satisfaction: 'insults to the symbols of the State, such as the national flag, violations of sovereignty or territorial integrity, attacks on ships or aircraft, ill-treatment of or deliberate attacks on heads of State or Government or diplomatic or consular representatives or other protected persons and violations of the premises of embassies or consulates or of the residences of members of the mission.'[319] Neither the Basic Principles and Guidelines on the Right to a Remedy, nor the UN Principles to Combat Impunity offer relevant information in this regard.

[315] Ibid, Art 36, Commentary (6).
[316] Ibid, Art 37, Commentary (1).
[317] Ibid, Art 37, Commentary (3).
[318] Crawford (2013), 527 and 528 (arguing that moral damage to individuals is instead redressed through monetary compensation).
[319] ILC Articles, Art 37, Commentary (4).

2. Limitations

Only the ILC Articles establish limitations concerning the provision and selection of satisfaction. Article 37 specifically refers to the proportionality principle, securing that the measure does not exceed the injury. On that subject, Crawford notes that the issue is not discussed in practice, and suggests that the proportionality balance may only be applicable to monetary payments constituting satisfaction.[320] Additionally, Article 37 refers to the non-punitive nature of satisfaction in the sense that this measure should not be humiliating to the responsible State.[321]

3. Forms

The ILC Articles set some examples of measures of satisfaction frequently seen in State practice (i.e. acknowledgement of the breach; expression of regret; formal apology), which have later been picked up by the Basic Principles and Guidelines on the Right to Remedy. Among them are the verification of the facts and full and public disclosure of the truth, the search for the whereabouts of disappeared persons, clarification of identities (all the above corresponding with due inquiry), official declaration or judicial decision acknowledging the incurred breach, public apologies, judicial and administrative sanctions against persons responsible for violations, and commemorations and tributes to victims.[322] Examples provided by both documents are neither exhaustive nor signal any preference.[323] In fact, the Commentary clarifies that the selection of satisfaction measures is context related and impossible to be pre-determined. This document adds more examples to the list. Some of those measures may easily be compared to the ones used by the IACtHR. For instance, a new form of satisfaction is the '[i]nclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in

[320] Crawford (2013), 531.
[321] ILC Articles, Art 37, Commentary (3) and (8).
[322] Ibid, Art 37 (2); and Basic Principles and Guidelines on the Right to a Remedy, Principle 22 (a), (b), (c), (d), (e), (f), and (g).
[323] ILC Articles, Art 37 (2). See also Crawford (2013) 527-8.

educational material at all levels'.[324] This measure coincides with the reparative practice of the IACtHR, which has repeatedly ordered States to provide training in several aspects of human rights *inter alia* to the armed and police forces, judiciary, administrative and medical personnel, and etcetera.[325] Other examples, also coinciding with the practice of the IACtHR, are 'a trust fund to manage compensation payments in the interests of the beneficiaries, and the award of symbolic damages for non-pecuniary injury.'[326]

The Commentary also states that certain measures, such as assurances or guarantees of non-repetition, may also constitute satisfaction. The declaration of the wrongfulness of an act is the most common measure of satisfaction. This especially reflects the practice of the ECtHR, which has considered this measure as sufficient reparation many times. However, the Commentary warns that, although strongly associated with satisfaction, such declarations are primarily a necessary step in the adjudication of any matter rather than a reparative measure, as they stem from the jurisdictional power to declare the lawfulness of an act.[327] Therefore, a declaration of wrongfulness could be considered the first measure of satisfaction – leading to other measures –, or it could stand alone when no other measures have been requested.[328] In regard to apology as a form of satisfaction, the Commentary states that it may be given verbally or in writing by an 'appropriate official or even the Head of State'. Apologies are an often-used form of satisfaction in the diplomatic arena, producing significant efficacy where these are requested or offered.[329] Nevertheless, in certain circumstances, apologies may be considered insufficient to make injured parties whole, as was the Case of *LaGrand*

[324] Basic Principles and Guidelines on the Right to a Remedy, Principle 22 (h).
[325] See IACtHR, *Favela Nova Brasilia v. Brazil*; IACtHR, *Barrios Family v. Venezuela*; IACtHR, *Gonzáles Lluy and others v. Ecuador*; IACtHR, *Tibi v. Ecuador*; IACtHR, *Yarce and others v. Colombia*. See also Cornejo Chavez (2018).
[326] ILC Articles, Art 37, Commentary (5).
[327] Ibid, Art 37, Commentary (6).
[328] Ibid.
[329] Ibid, Art 37, Commentary (7).

where foreign nationals had not been advised without delay of their consular rights when detained.[330]

D. Guarantees of Non-Repetition

Guarantees of non-repetition are considered as a form of reparation by the Basic Principles and Guidelines on the Right to a Remedy, in clear contrast with the provisions of the ILC Articles. The latter consider them as an independent State obligation.[331] Taking a different approach, the UN Principles to Combat Impunity consider guarantees of non-repetition a right held by victims of human rights violations, parallel to their right to be granted reparation. In practice, as shown below, the ICJ has dealt with guarantees of non-repetition as a form of reparation instead of an independent State obligation, yet it has avoided to discuss the legal basis for such a decision and to expressly consider the ILC Articles.

1. Causality

Despite dissimilarities found between the ILC Articles and the Basic Principles and Guidelines on the Right to a Remedy on the categorisation of guarantees of non-repetition, both instruments highlight their preventive nature. Indeed, the reparative status assigned by the Basic Principles and Guidelines on the Right to a Remedy does not impede their appreciation as means of deterrence. Conversely, this instrument approaches guarantees of non-repetition even more directly, pinpointing their particular capacity to prevent recurrence through the address of structural problems. In this light, wide-ranging goals such as effective civilian control over military and security forces, independence of the judiciary, and education in human rights and international humanitarian law, can be targeted by such measures.[332] Moreover, the Basic Principles and Guidelines on the Right to a Remedy do not limit the granting of

[330] ICJ, *LaGrand (Germany v. US)*, Para 123.
[331] See Crawford (2013) 469 et seq. (noticing that the adoption of ILC Articles, Art 30 was contentious and subject to various debates regarding its status as a legal or political consequence of responsibility).
[332] Basic Principles and Guidelines on the Right to a Remedy, Principle 23.

guarantees of non-repetition to a strict correspondence with the facts of the case or the concrete damages occurred, but they rather look beyond these elements, allegedly to the conditions allowing the occurrence of human rights violations.[333] Thus, guarantees of non-repetition look to the future consequences of the wrongdoing – rather than past ones. In that sense, non-repetition goes beyond the traditional understanding of the *restitutio in integrum* principle, implying that redress of a violation is not limited by it. Besides their direct connection with case victims, who may be persecuted and targeted through repetitive violations, they also affect other individuals and society in general.

The approach taken by the UN Principles to Combat Impunity with regard to the right of victims to obtain guarantees of non-repetition, is based on three overall goals: to 'undertake institutional reforms and other measures necessary to ensure respect for the rule of law, [to] foster and sustain a culture of respect for human rights, and [to] restore or establish public trust in government institutions'.[334] Furthermore, this instrument provides that measures designed to implement these goals must comply with conditions of adequate representation of women and minority groups, as well as victim participation and consultation.

2. Forms

While the ILC Articles offer only limited examples of guarantees of non-repetition, the Basic Principles and Guidelines on the Right to a Remedy and the UN Principles to Combat Impunity present more illustrative lists. The most representative guarantee of non-repetition, recognised by the three instruments, is the reform of legislation – be it annulment, enactment or modification.[335] This measure has been addressed by the ECtHR and the IACtHR as they have ordered the reform or implementation of certain

[333] Ibid.
[334] UN Principles to Combat Impunity, Principle 35.
[335] ILC Articles, Art 30, Commentary (11); Basic Principles and Guidelines on the Right to a Remedy, Principle 23 (h); and UN Principles to Combat Impunity, Principle 38.

legislation in order to prevent repetition of human rights violations or to facilitate the effective realisation of human rights.[336]

Among the measures of non-repetition that are expressly considered in the Basic Principles and Guidelines on the Right to Remedy and the UN Principles to Combat Impunity are the effective civilian control over military and security forces, the independence of the judiciary, the respect for the RoL in civil proceedings, and human rights education and training of State agents.[337] Noticeably, the broad formulation of these measures allows a more detailed design of measures in accordance with the context of the case and additional particular circumstances.

The UN Principles to Combat Impunity give additional examples of non-repetition measures (e.g. disintegration of parastatal armed forces; reintegration of children involved in armed conflict), also providing substantive detail about their characteristics and goals and means to implement them.[338] This instrument's special focus on non-repetition measures is explained by noticing its ultimate aim to find viable means for fighting against impunity, especially in the context of serious deficiencies in the implementation of the RoL.

E. Rehabilitation

The Basic Principles and Guidelines on the Right to a Remedy, and the UN Principles to Combat Impunity both classify rehabilitation as a reparative measure.[339] In spite of the lack of reference to rehabilitation in Part II of the ILC Articles, this particular measure is implicitly considered as a form of reparation in the Commentary to the ILC Articles, Part III.[340]

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[336] The practice of the remedial measure of legislative reform is dealt with extensively in the following chapters of this dissertation.
[337] Basic Principles and Guidelines on the Right to a Remedy, Principle 23; and UN Principles to Combat Impunity, Principle 36.
[338] UN Principles to Combat Impunity, Principles 36, 37 and 38.
[339] Basic Principles and Guidelines on the Right to a Remedy, Principle 21; and UN Principles to Combat Impunity, Principle 34.
[340] See ILC Articles, Art 43, Commentary (4) and Art 45, Commentary (5).

According to the Basic Principles and Guidelines on the Right to a Remedy, rehabilitation consist of medical and psychological care as well as legal and social services. The phrasing of this provision reveals the desire of securing that States are able to provide medical, psychological, legal and social services when circumstances so require. Conversely, the same instrument considers that expenses resulting from the provision of medical, psychological, social and legal services (no matter the identity of the actual provider of said services) should be addressed through compensation, that is, responsible States should take care of the expenses already incurred to repair the injury.[341]

Besides classifying rehabilitation as a reparative measure, the UN Principles to Combat Impunity do not define this concept. It is however noticeable that the societal reintegration of children involved in armed conflict, which classifies as a rehabilitation measure including medical and psychological treatment, is considered as a guarantee for non-repetition (not a proper reparative measure) by this instrument, thereby revealing existing overlaps between reparative and other measures.[342]

IV. Hierarchy between Reparative Measures

The ILC's Commentary explains that, while an injured State can freely choose among the three established forms of reparations, there is indeed a hierarchical order to be observed by respondent States: restitution, compensation and satisfaction. [343] Nevertheless, two circumstances may change this order: a) preference of the injured State; b) impossibility of providing one or any of the three forms of reparations.[344] Moreover, the ILC's Commentary recalls that, in some arbitral cases, arbitrators have

[341] This follows the approach taken by the ILC Articles, Art 36, Commentary (8).
[342] UN Principles to Combat Impunity, Principles 35 (d) and 37.
[343] ILC Articles, Art 35, Commentary (3). In her seminal work, Gray has noted that this hierarchy might be rather formal than practical, see Gray (1987), 13.
[344] See ILC Articles, Art 43 (2)(b) and Art 34, Commentary (4) and (6). The Commentary gives two examples in which injured States chose compensation instead of the restitution: PCIJ, *Factory at Chorzów* (Jurisdiction), 17; ICJ, *Passage through the Great Belt (Finland v. Denmark)* (Provisional Measures). Recently, in ICJ, *Ahmadou Sadio Diallo (Guinea v. DRC)* (Merits), Para 161, Guinea also requested reparations. However, Crawford noted that, in this case, the ICJ may have taken into consideration that there was insufficient information available about Mr. Diallo's property, and therefore compensation seemed more suitable, see Crawford (2013), 509.

inferred from the terms of the compromise or the position of the parties that they have discretion to award compensation instead of restitution.[345]

This apparent flexibility has been criticised in part by some commentators arguing that the ILC's efforts to adapt to reality, which many times favours compensation over all other types of reparation, might be to the detriment of the primacy of restitution.[346] However, the Commentary clearly warns that respondent States cannot simply 'pocket compensation and walk away from an unresolved situation'.[347] Indeed, this document recognises that, in situations dealing with the 'life or liberty of individuals or the entitlement of a people to their territory or to self-determination', the injured State's right to choose is not absolute, as compensation settlements may not give due consideration to the position of other parties (e.g. a group of States or the international community as a whole).[348] Interestingly, the aforementioned situations are similar to the context of two reparative practices selected for this study: orders to release prisoners and orders to restitute property.

Neither the Basic Principles and Guidelines on the Right to Remedy nor the UN Principles to Combat Impunity establish any sort of hierarchy between reparative forms.

V. Proportionality

As a general reparative provision, the ILC Articles warn that the granting of reparations should not enrich injured States.[349] Another concern is that the aspiration to full reparation could place States responsible for violations in an untenable position, threatening their economy or even survival.[350] By using the principle of proportionality, the ILC Articles seek to secure a balanced, non-detrimental approach to reparations.

[345] See ILC Articles, Art 35, Commentary (4).
[346] See Crawford (2013), 506-10, and Gray (2010), 589-90.
[347] ILC Articles, Art 43, Commentary (6).
[348] Ibid, Art 43, Commentary (6) and (7).
[349] Ibid, Art 34, Commentary (3). This disclaim is also repeatedly found in IACtHR case-law.
[350] Ibid, Art 34, Commentary (5).

The assessment of proportionality permeates each form of reparation: 'restitution is excluded if it would involve a burden out of all proportion to the benefit gained by the injured State or other party. Compensation is limited to damage actually suffered as result of the internationally wrongful act, and excludes damage which is indirect or remote. Satisfaction must "not be out of proportion to the injury".'[351]

Similarly, the Basic Principles and Guidelines on the Right to a Remedy introduces the principle of proportionality to reparations in general. Proportionality is assessed in accordance with two specific factors: the gravity of the violations and the harm suffered.[352] Additionally, the same document states that proportionality may also depend on the circumstances of each case.[353] Compared to the ILC Articles, where proportionality balances the burden of providing reparations borne by responsible States with the damages suffered by injured States, the assessment of proportionality seems to be more relaxed and subjected to discretion in this case. The inclusion of the gravity of the violation does not refer to the damages experienced, which are already covered by the reference to 'harm suffered', but rather provides room for a retributive – maybe even punitive – component based on the characteristics of the violation. These characteristics could be appreciated in a subjective manner; the same might happen with the assessment of the circumstances of each case.

VI. Conclusions

The examination of the three instruments guiding the provision of reparations at the level of GIL shows that each one has chosen to classify reparations differently. Three forms of reparation are commonly accepted among those instruments (i.e. restitution, compensation and satisfaction), while two others are partially shared only by the Basic Principles and Guidelines on the Right to a Remedy and the UN Principles to Combat Impunity (i.e. rehabilitation and guarantees of non-repetition). These differences

[351] Ibid.
[352] Basic Principles and Guidelines on the Right to a Remedy, Principle 15.
[353] Ibid, Principle 18.

might be explained by observing the purpose of each instrument. Whereas the ILC Articles focus on State obligations, the other two instruments take a victim-oriented approach – albeit to different degrees.[354] Only the ILC Articles specifically establish a hierarchical order among reparative measures. In some cases, there is clear overlap between measures that are considered reparations and other types of measures. For instance, the restitution of property is an act of cessation of the violation but also a measure of restitution. An important difference between the status of reparative and other types of measures (e.g. cessation) is explained in the ILC Articles, which expounds that only reparative measures are subject to the proportionality test. That is, non-reparative measures may be chosen without taking into consideration the burden of responsible States and the benefit of injured ones. By using proportionality, responsible States and tribunals can determine whether certain reparative measures are appropriate. Likewise, identifying certain measures as non-reparative ones exempts them from a proportionality test, and allows adjudicators to look beyond occurred damages in order to consider contextual and other factors.

Guidance offered by these three instruments is thus appreciated, and very useful in some cases. However, the continuing existence of silences and overlaps between measures makes it difficult to assert if the information available in those three instruments is sufficient complementary guidance to the provision of reparation in human rights adjudication.

Following this rationale, it stands to reason that the guidance of GIL norms might depend on the stance regional human rights courts take regarding the nature of the measures they order. For a measure ordering the stop of acts constituting a rights violation, solely considered as a cessation measure, the guidance of *lex specialis* (not necessarily a reparative provision) together with GIL might be sufficient. Such orders, however, have not been expressly granted by regional human rights courts. Reparative

[354] The Basic Principles and Guidelines on the Right to a Remedy approach the subject by focusing on the rights of victims, while the UN Principles to Combat Impunity combine a set of rights and State obligations.

measures, on the other hand, might be more difficult to be guided by *lex specialis* and GIL alone. Additional guidance is, therefore, necessary. In the next Chapter, additional guidance is sought in the third source of international law: the general principles of law.

CHAPTER III: RELEVANT GENERAL PRINCIPLES OF LAW FOR THE DETERMINATION OF REPARATIONS BY REGIONAL HUMAN RIGHTS COURTS

I. Introduction

The examination of the relevant regional human rights conventions and other international instruments complementing their appreciation (i.e. *lex generalis*) shows that, although international judicial and quasi-judicial bodies receive some guidance in identifying specific non-pecuniary reparations, instructions are still insufficient, leaving many questions unanswered. Conventional reparative provisions are open-ended and their interpretation needs to focus beyond their textual format. Reparative provisions in GIL offer some clarification in regard to reparations' classification, causality and limitations, but this guidance sometimes results contradictory. Yet, this situation has not prevented courts and treaty bodies from issuing orders and suggestions identifying numerous non-pecuniary measures. What else might be inspiring regional courts to develop such a reparative practice?

In order to have a real appreciation of the law on reparations, it is important to consider all sources of international law. So far, this analysis has focused on the first and second sources of international law, namely treaties and customary law.[355] The findings have shown that neither conventional reparative provisions nor documents reflecting customary law (e.g. ILC Articles) give sufficient guidance for the determination of non-pecuniary reparations. Consequently, the third source of international law should be examined, namely, the general principles of law recognised by civilised nations.[356]

[355] ICJ Statute, Art 38(1) (a) and (b). Many scholars also support the identification of the right to an effective remedy resulting from a human rights violation as customary law, see Bassiouni (2006), 207; Francioni (2007), 15 et seq.; Wellens (2004), 1162.
[356] ICJ Statute, Art 38(1)(c).

II. General Principles of Law used in the Determination of Reparations

The task of analysing general principles of law is undoubtedly expansive. However, the fact that only two specific concepts are commonly invoked concerning the determination of reparations in the practice of regional human rights courts substantially limits this study. Indeed, regional courts repeatedly refer to *restitutio in integrum* and *equity* as general principles of law, albeit occasionally considering them of a different nature. In the following, the use of these two concepts will be clarified. The purpose of this inquiry is to analyse to what extent they, when used as principles, guide regional courts in the determination of reparations. Hence, this study does not question whether *restitutio in integrum* and *equity* are in fact general principles of law (e.g. by pursuing a comparative analysis of domestic law), but rather examines whether the role assigned to them by international courts and tribunals provides sufficient guidance for the determination of reparations.[357]

Prior to the analysis of each concept, it is necessary to recall some important characteristics of general principles of law. The first is that Article 38(c) of the ICJ Statute was included to avoid a declaration of *non liquet*, that is, the lack of resolution of a conflict due to the absence of applicable law.[358] In other words, the possibility of resorting to general principles of law was created to prevent the occurrence of exhaustion of the law. Therefore, general principles of law are intrinsically recognised to contribute to the determination of the law, enriching it with something beyond its text and customary understanding.

The second characteristic is that the identification of general principles of law has been a controversial issue since the first discussions of the Advisory Committee of Jurists in charge of presenting a proposal to the League of Nations in 1920. [359] Major

[357] ICJ Statute, Art 38 (1)(d). Some studies on general principles of law have resorted to the same methodology; see e.g. Burke (2013) Chapter 2.
[358] See e.g. Comments about the work of the International Committee of Jurists in Thirlway (2014b), 104; Judge Cançado Trindade, Lecture on "The General Principles of Law as a Source of International Law".
[359] A brief but comprehensive summary of the discussions is provided in Cheng (1953), 6 et seq.

disagreements involve the ambit from which these principles should be chosen,[360] the methodology to be used for identification,[361] the meaning of the term 'civilized nations',[362] and etcetera. Despite disagreements about the determination of general principles of law, some principles have indeed been recognised to exist by the ICJ and its predecessor (e.g. the diplomatic protection of foreign nationals;[363] non-intervention in inter-State relations;[364] self-determination;[365] res judicata[366]).[367] Scholars generally

[360] Existing approaches range between giving predominance to principles recognised by municipal law and ones recognised by international law, with nuanced variations between those two poles. Among commentators supporting the identification of general principles through a comparative review of domestic legal systems see Bassiouni (1990), 816-7; Hudson (1943), 611; Akehurst (1976), 818; Crawford (2012), 34-5. Another approach considers that general principles should be picked up from the international ambit, and only exceptionally from the national one, see Anzilotti (1929), 117-8. Another representative of this approach, ICJ Justice Cançado Trindade, points to what he considers to be evidence of already accepted practice supporting this argument. First, he recalls that the addition of a heading for Article 38, resulting from the San Francisco Conference in 1945, already recognised that the function of the ICJ was to 'decide in accordance with international law', which in itself should count as a recognition of the relevance of international law as a source. Second, he quotes several judgments from both the PCIJ and the ICJ, showing that when judges resort to Article 38 (c) of the ICJ Statute, they refer to general principles of *international* law. Hence, he argues, it is clear that the practice of the PCIJ and the subsequent ICJ has assumed, from early on, that general principles not only originate in the domestic realm, but they are found in the international arena as well. To deny this fact is, according to him, a static and conceptually flawed conceptualisation. See Judge A. A. Cançado Trindade Lecture on 'The General Principles of Law as a Source of International Law'. Note also that others have added that some principles of international law have no equivalent in national legal systems, see Carpanelli (2015), 128. Mixed approaches are represented by for instance Voigt (2008), 8; White (2004), 108. This view is similar to the argument posed by Tunkin, which only allows the identification of general principles as provided in Article 38 (1)(c) when they are proven also to exist internationally, see Tunkin (1974), 202.

[361] Some commentators suggest that the assessment should also consider the fourth source of international law, i.e. the writings of the 'most noted publicists', see Bassiouni (1990), 769.

[362] Article 38 (1)(c) provides that the applicable general principles of law are the ones 'recognized by civilized nations'. Despite prior major controversy, currently, it is generally agreed that said term should be read as referring to all States. See Bassiouni (1990), 768; Carpanelli (2015), 126; Simma and Alston (1989), 102.

[363] PCIJ, *The Mavrommatis Palestine Concessions* (Greece v. Great Britain) (Objection to the Jurisdiction of the Court), 12.

[364] ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Paras 55, 185, 202 et seq.

[365] ICJ, *Legal consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding with Security Council Resolution 276* (1970), Advisory Opinion, Para 52; *ICJ, Western Sahara,* Advisory Opinion, Para *54* et seq.*;* I*CJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, Para 88*; ICJ, Case Concerning East Timor (Portugal v. Australia)* (Merits) Para 29.

[366] ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Merits) Para 115 et seq.; ICJ, *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (Application by Honduras for Permission to Intervene), Para 66 et seq.

[367] Some other declarations are disputed, such as the one saying that it is a well-established principle of law that 'mere proximity confers per se title to land territory' ICJ, *North Sea Continental Shelf (Federal Republic of Germany/Denmark and Germany/Netherlands)* (Merits) Para 43. Additionally, some scholars add human rights to the body of general principles of law. For instance, De Schutter argues that evidence of the fact that human rights are a source of international law is the ICJ's reliance on human rights instruments and other references in some of its Decisions (e.g. the ICJ's resort to the Universal Declaration of Human Rights in *United States*

recognise that general principles of law have normative force, and are at the same level of treaty and custom.[368] In this respect, Cançado Trindade has argued that, without principles, there is 'no legal system at all' because they provide an axiological dimension to the settlement of disputes.[369] Although this position has been criticised for appealing to ethical concepts beyond the scope of Article 38(1),[370] general principles are seen as a useful source, contributing to the constant revision and modernisation of international law, especially when treaty law appears to be outdated or insufficient.[371]

A. *Restitutio in Integrum*

In the field of reparations, the Judgment on merits in the *Factory at Chorzów* Case is well-known for declaring that '[i]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation'.[372] This declaration is regarded as one of the most fundamental moments in the reparation regime since it broadened the application of the rules of State responsibility to the whole field of public international law.[373] Moreover, the influence of this principle has been recognised in the jurisprudence of the three regional human rights courts.[374] A further and equally important contribution of the

Diplomatic and Consular Staff in Tehran (United States v. Iran) (Merits), 42; and to 'elementary considerations of humanity' in *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland-Albania)*, 22). However, occasionally, he seems to be mixing up or simply not making a distinction between general principles of law and customary law (e.g. when discussing the broad accession to the Hague and Geneva Conventions, the ICJ stated that some of those rules 'constitute intransgressible principles of international customary law', yet De Schutter uses this reference anyway to argue in favour of the ICJ's reliance on human rights as principles of law, see Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (Para 79)). Consequently, it is not clear whether the inclusion of human rights as a source of international law is actually based on their consideration as general principles of law, rather than its acceptance as customary law, see de Schutter (2014), 66-7. See also Simma and Alston (1989), 105-8.

[368] Burke (2013), 96.

[369] See Judge A. A. Cançado Trindade, Lecture on 'The General Principles of Law as a Source of International Law'. See also ICJ, *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Separate opinion of Judge Cancado Trindade, Para 203.

[370] Thirlway (2014b), 105.

[371] Voigt (2008), 4-5.

[372] PCIJ, *Case Concerning The Factory at Chorzów* (Merits) at 29. Although the PCIJ described the principle *Ubi ius, Ubi Remedium* as a 'principle of international law' instead of 'a general principle of law', there is much consensus supporting its identification as the latter; see e.g. Burke (2013), 119.

[373] Sabahi (2011), 43.

[374] E.g. ECtHR, *Papamichalopoulos and others v. Greece* (Merits), Para 34; ECtHR, *Cyprus v. Turkey* (Just Satisfaction), Para 41; IACtHR, *El Amparo v. Venezuela* (Reparations and Costs), Para 61; IACtHR, *Castillo Páez v. Peru* (Reparations and Costs), Para 50; ACtHPR, *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema Alias*

Factory at Chorzów Case is the introduction of the concept of 'full reparation', which is characterised as an 'essential principle', and described as the obligation to '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.'[375] In later judgments, the ICJ has ascribed customary status to this principle.[376] The PCIJ envisioned restitution in kind as a means of complying with the obligation to provide full reparation, or, should restitution be impossible, equivalent monetary compensation plus an additional compensation for losses sustained.[377] Thus, the most influential Decision on reparations establishes a sort of hierarchy of reparative measures, placing restitution in kind first. Although the PCIJ did not explain the conditions under which impossibility might be declared, this is an issue which this dissertation will pick up later on account of its high relevance for the provision of reparations for human rights violations.[378]

Two additional aspects of the *Factory at Chorzów* contribution need further examination. They deal with whether and – if so – the way in which, the principle of full reparation or *restitutio in integrum* has been embraced by regional human rights courts. At the outset of this analysis, a caveat must be set: a State's obligation to provide reparation is independent from the powers which regional human rights courts have to order it. That is, States responsible for wrongdoings have a duty to provide full reparation of the damages incurred even if there is no adjudicatory process determining such an obligation. This duty is an element of the 'actual notion of an illegal act',[379] impossible to be set aside. Then, the question of whether regional human rights courts have embraced the principle of full reparation is not equivalent to asking whether those

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Ablasse, Ernest Zongo and Blaise Ilboudo & The Burkinabe Movement on Human and Peoples' Rights v. Burkina Faso (Reparations), Para 60.

[375] PCIJ, *Case Concerning The Factory at Chorzów* (Merits), 47.

[376] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), Para 152; *Case Concerning Pulp Mills on the River Uruguay*, Para 273.

[377] PCIJ, *Case Concerning The Factory at Chorzów* (Merits), 47.

[378] Note that the parties to the case had agreed that such impossibility existed; see PCIJ, *Case Concerning The Factory at Chorzów* (Merits), 48.

[379] PCIJ, *Case Concerning The Factory at Chorzów* (Merits), 47.

courts are actually ordering the necessary measures to fully repair violations. Specifically, the question seeks to understand the underlying foundation that the courts build on when they order reparations. Depending on the position taken by the regional human rights courts in this respect, it will be possible to get a better grasp on their intention.

The practice of the two most active regional human rights courts seems to be dissimilar regarding the embracement of *restitutio in integrum.* Already in the 1970s, the ECtHR began to include this principle as a guiding reference, and later, in *Papamichalopoulos and others v. Greece*, it asserted its supremacy.[380] In doing so, the ECtHR directly invoked the *Factory at Chorzów* Decision, clearly resting on the State responsibility doctrine.[381] In subsequent case-law, the ECtHR has continued asserting the respondent States' obligation to provide full reparation, yet always framing such an obligation as part of the scope of States' activities corresponding with the principle of subsidiarity. At the same time, it should be remarked that the ECHR provision authorising the granting of reparations speaks of its subsidiary role in providing *just satisfaction* 'if the internal law of the High Contracting Party concerned allows only partial reparation to be made'.[382] Therefore, the suggestion is that *just satisfaction* should secure the attainment of full reparation. Noticing that the provision of *just satisfaction* has been mostly materialised as just compensation, commentators have suggested that a difference exists between a theoretical primacy of *restitutio in integrum* and the real standard of just compensation.[383] Certainly, the *restitutio in integrum* obligation seems to bypass the ECtHR itself in most of the ECtHR's practice in spite of the text of the ECHR. The obligation passes from respondent States to the CoM.[384]

[380] Ichim (2015), 29 citing several ECtHR decisions. See also ECtHR, *Papamichalopoulos and others v. Greece (Art. 50)*, Para 34.
[381] ECtHR, *Papamichalopoulos and others v. Greece (Art. 50)*, Para 36. See also Ichim (2015), 11.
[382] ECHR, Art 41.
[383] Ichim (2015), 16.
[384] The CoM has recognised its role of supervising State compliance with measures which are deemed to constitute *restitutio in integrum*. See *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights*, 10th Annual Report of the Committee of Ministers 2016, Appendix 8 Remarks on the supervision of the execution by the Committee of Ministers: new working methods, 291, Para 40.

Nevertheless, certain subtle changes have been introduced in the ECtHR's role. For instance, while early judgments of the ECtHR explicitly declared that the Court did not have 'the power nor the practical possibility' of granting full restitution,[385] this practice has been discontinued.[386] While the specific way in which the obligation to provide *restitutio in integrum* should be satisfied by the ECtHR or respondent States remains unclear, some commentators directly connect the goal of *restitutio in integrum* with individual measures, setting aside general measures of non-repetition.[387]

Although the American Convention does not have a specific reference to the concept of *restitutio in integrum*, the IACtHR has included it from its first Decision on reparations.[388] In fact, the IACtHR's understanding of *restitutio in integrum* has been praised as one of its most important contributions to international law.[389] Under the premise of full reparation, the IACtHR orders not only monetary compensation but also individual and general reparative measures. The text of the American Convention, authorising the IACtHR to order that 'the consequence of the measure or situation that constituted the breach of such right or freedom be remedied' in addition to fair compensation, serves as a basis for this practice.[390] Furthermore, although an argument could be made that the phrase 'if appropriate' calls for a subsidiary role – as in the European Convention –, the IACtHR has progressively but rapidly adopted a very comprehensive array of reparations. In addition to the measures expressly considered in Article 63 ACHR (i.e. guarantee of enjoyment of the breached right; reparation of the damages caused; monetary compensation), the IACtHR also considers that measures securing non-repetition are a constitutive element of the obligation to provide reparation.[391]

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[385] ECtHR, *Papamichalopoulos and others v. Greece* (Art 50), Para 34.
[386] E.g. ECtHR, *Saghinadze v. Georgia* (Just Satisfaction); ECtHR, *Vasilevski v.'"The Former Yugoslav Republic of Macedonia'*.
[387] See e.g. Saavedra Alessandri, Cano Palomares and Hernandez Ramos (2017), 215.
[388] IACtHR, *Velásquez Rodríguez v. Honduras* (Reparations and Costs), Para 26.
[389] See e.g. Saavedra Alessandri, Cano Palomares and Hernandez Ramos (2017), 228.
[390] ACHR, Art 63(1). See, Shelton (2015), 228.
[391] See e.g. IACtHR, *Almonacid Arellano et al. v. Chile*, Para 136. This declaration has been repeated in several judgments.

While the concept of *restitutio in integrum* has been adopted by both regional human rights courts, the way in which each court sees its own role in the realisation of full reparation is particular. Whereas the ECtHR is cautious, mostly leaving respondent States and the CoM to assess the fulfilment of this duty, the IACtHR actively tries to find adequate measures to satisfy this obligation. However, this analysis is still incomplete. In order to fully understand whether *restitutio in integrum* really offers adequate guidance for the granting of reparations, it is imperative to examine the meaning regional human rights courts assign to that concept.

In the *Factory at Chorzów* Merits Judgment, the PCIJ stated that the purpose of *restitutio in integrum* was to *re-establish*, to the extent possible, 'the situation which would, in all probability, have existed if that act had not been committed.'[392] Thus, the PCIJ does not demand that a situation be restored to the conditions existing at the moment of the violation; it rather requires a calculation of the most probable development of such conditions until the moment at which reparation is ordered. Although the possibility of actually affording *restitutio in integrum* is not foreign to cases before the PCIJ and its successor, its realisation is much more difficult in cases dealing with human rights violations, especially in those involving breaches of the rights to life, liberty and personal integrity due to their irreplaceable nature.[393]

The approaches taken by the ECtHR and the IACtHR, albeit differently, reflect this reality. Although the ECtHR does not strictly calculate the most probable approximation to an alternative unharmed reality, this Court uses compensation for material and immaterial damages (including, for instance, compensation for loss of earnings) in combination with measures to effectively redress damages directly identified by respondent States, the ECtHR itself and the CoM. Nevertheless, the ECtHR has not referred to *restitutio in integrum* uniformly. For instance, in cases dealing with return of property – to be examined in detail later –, the ECtHR has not

[392] PCIJ, *Case Concerning The Factory at Chorzów* (Merits), 47.
[393] Several commentators have indicated this difference, e.g. Ichim (2015), 21, 24.

always followed the standard set by the PCIJ, sometimes adopting a more 'narrow' approach seeking the reestablishment of the situation which existed prior the violation.[394] In spite of this apparent confusion, the position of the ECtHR is quite clear as it has occasionally ordered or referred to non-pecuniary measures complementing compensation with the explicit intention to guarantee *restitutio in integrum*.[395] Thus, the ECtHR's approach to this concept is not focused on the reestablishment of the exact situation in the past but on a realistic redress of the damages in the present.[396]

The perception of *restitutio in integrum* by the IACtHR is quite similar. Although confusion also exists due to the adoption of different standards throughout the IACtHR case-law,[397] its practice demonstrates a holistic approach to redress through a combination of measures. In recent judgments, the IACtHR has further developed the understanding of *restitutio in integrum* – even if not referring to it specifically –, explaining that reparation must consider, for instance, strengthening the cultural identity of affected communities and contributing to their development in accordance with their own views.[398] However, the IACtHR is well-aware that, in many cases dealing with human rights violations, *restitutio in integrum* is primarily an aspiration and that is precisely the reason for its constant search for effective reparative measures.[399]

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[394] See Table A.

[395] E.g. ECtHR, *Papamichalopoulos and others v. Greece* (Art 50), Para 38; ECtHR, *Brumarescu v. Romania* (Just Satisfaction), Para 22; ECtHR, *Z and Others v. UK*, Para 56; ECtHR, *Ocalan v. Turkey*, Para 80; ECtHR, *Xenides-Arestis v. Turkey* (Just Satisfaction), Para 114.

[396] Ichim (2015), 21. It is worth noticing that dissonant voices have been heard among ECtHR judges. For instance, Judge Costa has argued that measures to satisfy *restitutio in integrum* should be mandatory only when they do not affect the rights of third parties acting in good faith; see ECtHR, *Assanidze v. Georgia*, Partly concurring opinion by Judge Jean-Paul Costa, Para 5.

[397] See Table B.

[398] IACtHR, *Garífuna Punta Piedra Community and its Members v. Honduras*, Para 316. The IACtHR repeated this rationale in IACtHR, *Kaliña and Lokono Peoples v. Suriname*, Para 272. However, it should also be noticed that a recent IACtHR judgment merges both approaches, causing some confusion, see IACtHR, *Garífuna Triunfo de la Cruz Community and its Members v. Honduras*, Para 255.

[399] For instance, consider the statement by former IACtHR Judge García Ramírez, who declared that full restitution 'is conceptually and materially impossible', see IACtHR, *Bámaca Velásquez v. Guatemala* (Reparations and Costs), Concurring opinion of Judge García Ramírez, 1.

In summary, although the definition of *restitutio in integrum* has sometimes been confusing and even contradictory in both regional human rights courts, it is clear that the courts accept the overall obligation of States to provide full redress to the victims of human rights violations. Moreover, while the obligation to redress is born with the occurrence of the violation in the past, the means to attain redress are connected to the present. Thus, *restitutio in integrum* consist of measures which do not merely look at the violation itself but also at its effects for victims and other individuals – and even the community. However, the ECtHR and IACtHR sometimes differ in the identification of the bearer of the obligation. Whereas both accept that States are the principal subjects, the ECtHR occasionally avoids a more active role in the determination of reparations invoking the principle of *subsidiarity*.

While the holistic understanding of *restitutio in integrum*, accepted by regional courts, definitely serves to guide the selection of reparative measures in a variety of cases, it is important to recognise its limitations in some others. For instance, when human rights violations involve damage to property, it might be easy to identify that the right to property needs to be redressed. Moreover, it could be the case that full restitution can be satisfied by the returning of the property (if it was seized) or by repairing it (if it was damaged). In some cases, full restitution may demand additional monetary compensation. However, many human rights violations deal with damages which are impossible to measure and to repair. Thus, the principle of *restitutio in integrum* commands an obligation that cannot be completely fulfilled, but need to be approximated. However, this principle does not provide sufficient guidance for the selection of specific reparative measures – at least not in the way regional human rights courts occasionally engage with it.

B. Equity

Regional human rights courts commonly invoke equity when selecting reparative measures.[400] The concept of equity has been formally introduced to the reparative regime of each regional system through conventional provisions including the terms 'fair compensation'[401] or 'just satisfaction'.[402] Although various terms have been used (e.g. *equity*, *equitable principles*, *fairness*), the IACtHR and ECtHR have recognised that the concept of equity invoked in their relevant conventions indeed refers to the principle of equity.[403] However, these statements have not been followed by a more detailed explanation about the use of general principles of law.[404] The lack of a more substantial basis for the use of equity becomes especially troubling when recalling Malanczuk's discussion on the possibility that courts – national or international – are not always referring to general principles of law when they use the term 'equity', but rather to the standalone idea of justice or fairness.[405]

The practice of regional human rights courts shows that the use of equity is *prima facie* limited to the granting of monetary compensation.[406] For instance, the IACtHR calls upon equity when granting compensation for material and immaterial damages as well as costs and expenses.[407] The ECtHR follows a similar practice, yet in a subtler

[400] In several IACtHR Cases, the Spanish word 'equidad' has been translated as 'fairness' or 'equity' undistinguishably. Former PCIJ Justice Hudson recalled that precedent of the use of equity in relation to the determination of reparations may be found, for instance, in the Treaty of Versailles of 1919 which provided that the Reparations Commission should be guided by 'justice, equity and good faith'; see Hudson (1943), 616 citing Part VIII, Section I, Annex II, paragraph 11 of the Treaty of Versailles. See also separate opinion of Judge García Ramírez in the IACtHR Judgment *Bámaca Velásquez v. Guatemala* (Reparations and Costs) Para 4.
[401] ACHR, Art 63 and Protocol to the African Charter, Art 27.
[402] ECHR, Art 41. The term 'just satisfaction' translates into 'satisfaction équitable' in the official French text of the convention, thus making explicit reference to the concept of equity. There exist several ways in which the principle of equity might enter into international law, see *inter alia* the relevant discussion in the Separate Opinion of Judge Weeramantry Para 74 et seq. in ICJ, *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway)* Judgment of 14 June 1993, and Gourgourinis (2009), 340 et seq.
[403] ECtHR, *König v. Germany (Art 50)*, Para 19; IACtHR, *Velásquez Rodríguez v. Honduras*, Para 27; IACtHR, *Aloeboetoe et al.v. Suriname* (Reparations and Costs), Para 86.
[404] See Ichim (2015), 46 (accusing the ECtHR of not being willing to 'engage in interpretative exercises).
[405] Malanczuk (1997), 55-6.
[406] The experiences of the PCIJ and the ICJ are similar, see Akehurst (1976), 802-3.
[407] See e.g. IACtHR, *Veláquez-Rodríguez v. Honduras* (Reparations and Costs), Para 27; IACtHR, *Acosta et al. v. Nicaragua* (Preliminary Objections, Merits, Reparations and Costs) Para 234, 239 and 242.

manner.[408] Even the limited case-law of the African Court follows this practice, apparently inspired by the jurisprudence of the IACtHR.[409] Despite this seemingly limited connection, the influence exercised by this principle is undeniable.[410] Hence, it is important to understand the particular way in which regional human rights courts are using this concept, and whether it could be relevant for the determination of non-pecuniary measures.

1. Concept of Equity

Francioni defines equity as a 'polymorphous concept' which may mean either, on a general level, 'what is fair and reasonable in the administration of justice' or, at the specific level, the power of courts to decide *ex aequo et bono*.[411] Although the exact definition of equity (or 'equitable principles')[412] is undecided, the existence of equity as a general principle of law which is recognised by all civilised nations, and included in Art. 38(1)(c) ICJ Statute, has been confirmed in several studies,[413] including a thorough examination of its application at the domestic level in order to be transposed in an analogous manner to the international one.[414] Through the perusal of this source, equity is acknowledged as a principle of international law by international jurisprudence and the opinion of recognised jurists, even when there is a clear unwillingness explicitly to declare it to be so.[415] It should be noted that a few

[408] See Practice Direction on Just Satisfaction, Paras 12 and 15. It must be noticed that the ECtHR is allowed *prima facie* to use equity for awarding a lower amount than the actual loss of material damage. See also, ECtHR, *Brumarescu v. Romania (Just Satisfaction)*, Para 27; ECtHR, *Assanidze v. Georgia*, Para 201; and ECtHR, *Xenides-Arestis v. Turkey (Just Satisfaction)*, Para 42.
[409] E.g. ACtHPR, *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo and Blaise Ilboudo & The Burkinabe Movement on Human and Peoples' Rights v. Burkina Faso* (Reparations), Para 61.
[410] Lowe (1989), 54.
[411] Francioni (2013) (Additionally, he refers to other meanings of the concept of equity). Some commentators have also focused on the difference between the concept of equity per se and equity in the context of *ex aequo et bono*, see e.g. Chattopadhyay (1979), 385; Kotzur (2009), Para 11. For a short recount of the use of equity's various conceptions see Gourgourinis (2009), 329.
[412] Recognised commentators coincide in the denomination of a set of 'equitable principles' instead of a single determinate 'principle of equity'; see e.g. Lauterpacht (1977-1978); Akehurst (1976), 814 arguing that 'equitable principles are simply a sub-set of general principles of law'.
[413] Francioni (2013); White (2004), 116.
[414] See Burke (2013).
[415] Francioni (2013). See also Burke (2013), 116 (arguing that general principles of law are being recognised by the back door).

commentators, sharing a different view, see equity as a source of international law in its own right, seemingly based on a particular reading of Article 38(2) of the ICJ Statute.[416] Regardless, as some have remarked, it is difficult to distinguish between these two applications of equity – as a general principle of law or as independent from treaty, custom or general principles in the sense of Article 38(2) ICJ Statute –, because there are very few occasions on which the application of the former can produce a result which cannot be obtained by applying the latter.[417]

2. Application of the Principle of Equity

The recognition of equity as a general principle of law by the world court offers direction for its application in the international arena.[418] In Burke's study on equity as a general principle of law, he concludes that the concept of equity is still vague after an examination of the presence of equitable principles in several domestic orders. This confirms that there is an imperative need to resort to the decisions of the world court providing (albeit limited) substance to this juridical entity.[419] Moreover, in the present study, it is not only necessary to analyse the PCIJ and ICJ's conceptualisation of the principle of equity, but also the way in which equity has been adopted by the regional human rights courts, as the special nature of human rights may provide it with unique qualities.

As a point of departure, the practice of the world court and regional human rights courts coincide in that invocation of the principle of equity does not give *carte blanche* to the adjudicator: Equity should be differentiated from 'personal predilections',[420] the

[416] Art 38(2) of the ICJ Statute provides that States might agree to subject themselves to a decision *ex aequo et bono*, a Latin expression which refers to 'what is fair and good', see Kotzur (2009). A representative of this view appears to be Judge A. A. Cançado Trindade; see lecture on 'The General Principles of Law as a Source of International Law'.
[417] Lowe (1989), 69, 81.
[418] Notice that neither the PCIJ nor the ICJ have ever decided a case based on equity alone. As early as 1937, justices of the PCIJ, disagreeing with the majority, recognised the existence and application of equity as a general principle of law. See PCIJ, *Diversion of Water from the Meuse (The Netherlands v. Belgium)* Dissenting opinions of Judge Manley Hudson and Judge Dionisio Anzilotti, 76 and 50, respectively.
[419] Burke (2013), Chapter 3.
[420] Hudson (1943), 617.

free exercise of 'discretion or conciliation',[421] and the 'judge's subjective conviction of what is reasonable'.[422] Not meeting these requirements makes judges' decisions arbitrary since it allows them a high degree of discretion.[423] Moreover, the jurisprudence of the ICJ has established that equity should operate within the borders of existing law: Equity serves to 'liberalize and to temper the application of law'[424], within the context of the rule of law,[425] and as a solution based on the applicable law.[426] It has also been established that equity has a direct relationship with justice: Decisions based on equity are to be guided by justice,[427] as equity serves 'to prevent extreme injustice',[428] but is different to the application of 'distributive justice'[429]. Thus, the principle of equity is a tool which courts ought to use when several plausible interpretations of the law exist in order to choose the closest one to justice.[430]

Moreover, the application of equity must be consistent and predictable.[431] An example of the diverse use of equity, framed by this rationale, is the ECtHR's establishment of the Article 41 Unit. This office was created to secure equity in pecuniary compensations, avoiding the granting of different or disproportionate amounts for equivalent violations.[432] The ECtHR calculates the amounts of monetary compensations according to internal compensatory tables and the standard of living

[421] ICJ, *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* 24 February 1982, Para 71.
[422] Ichim (2015), 45-6. See also ICJ, *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Merits, Para 69.
[423] Ichim (2015), 45-6. In a parallel reasoning, Voigt argues that general principles of law act as a sort of limitation to the exercise of judicial discretion, see Voigt (2008), 11.
[424] Hudson (1943), 617.
[425] ICJ, *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* Judgment 20 February 1969, 48. See Chattopadhyay (1979), 399 (arguing that, in that Case, the ICJ recognised that the 'basis of law is to be found in social utility').
[426] Ichim (2015), 45-6.
[427] ICJ, *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) Judgment 20 February 1969, 48.
[428] Hudson (1943), 617.
[429] ICJ, *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* 24 February 1982, Para 71.
[430] Ibid.
[431] Ichim (2015), 45. See also, ICJ, *Continental Shelf (Libyan Arab Jamahiriya/Malta) (Merits)*, Para 45. The requirement of consistency is indeed deemed necessary for a court's institutional legitimacy; see Voeten (2013), 556.
[432] Harris, O'Boyle and Warbrick (2014), 155.

in the applicants' States so they may obtain different but equivalent amounts.[433] With all the data as reference, the determination of compensatory amounts ultimately remains in the hands of the judges who are free to decide in line with equity. Additionally, it has been argued that ECtHR's reparative orders do not comply with the requirements of consistency and predictability when invoking equity, as they rather depend on the judges' personal and cultural convictions.[434]

Similarly, the IACtHR has declared that resorting to the principle of equity does not mean that the Court enjoys 'discretion in setting the amounts of compensation', but that it uses 'the methods ordinarily used in the case law' and the standards of prudence and reasonableness.[435] More recently, the IACtHR stated that, although the principle of equity has a role in the determination of compensation, parties must submit evidence of concrete damage and relevant connection between the facts of the case and claims for compensation.[436] Nevertheless, contrary to the experience of the ECtHR, the IACtHR has also made reference to the use of 'reasonable juridical discretion' in combination with equity.[437]

Thus far, the jurisprudence of the ICJ and regional human rights courts has suggested that they indeed recognise the principle of equity as a guiding principle for the determination of reparations. Equity is however mostly applied to the determination of compensations rather than to the whole reparative array of measures. Although certain limitations to its application can be identified (i.e. to be effected within the framework of the RoL; referencing the premises of consistency, predictability, prudence and reasonableness), the meaning and applicability of the principle of equity

[433] Harris, O'Boyle and Warbrick (2014), 156. Note also that the ICJ stated that '[e]quity does not necessarily imply equality', see ICJ, North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Para 91.
[434] Ichim (2015), 45-6. See also Antkowiak and Gonza (2017), 289.
[435] IACtHR, *Aloeboetoe et al. v. Suriname* (Reparations and Costs), Para 87. The IACtHR did not elaborate on what those 'methods ordinarily used' might be.
[436] IACtHR, *Kichwa Indigenous People of Sarayaku v. Ecuador*, Para 314. Pasqualucci noticed that equitable principles are used in the determination of moral (i.e. non-material) damages, taking into account the specific affected rights and the particular suffering experienced by victims, see Pasqualucci (2013), 238-9.
[437] IACtHR, *Molina Theissen v. Guatemala* (Reparations and Costs), Para 65; IACtHR, *Acevedo Jaramillo et al. v. Peru*, Para 308; IACtHR, *Cantoral Huamaní and Garcia Santa Cruz v. Peru*, Para 175.

remains obscure. Relevant commentators have suggested some measures for shedding light on the application of equity: Courts should give reference to specific equitable rules (e.g. abuse of right, estoppel or proportionality) instead of to an unrestricted notion of equity;[438] Courts should carry out a strict analysis of the 'legal substance' of judgments.[439] These suggestions have not been followed by the Courts when ordering reparations. Therefore, no conclusion can be drawn about the actual factors being considered by any regional court when applying equity. An important observation is that while courts seem to reject *prima facie* the use of discretion, the IACtHR has given signals that this concept might be used to complement the application of equity.

C. Judicial Discretion

Although discretion is not a general principle of law, this power undeniably has a place in the performance of the adjudicatory function. The use of discretion is quite controversial in international law, notwithstanding its common use in, for instance, domestic sentencing theory.[440] It seems that international courts share the belief that the use of discretion should be avoided. For instance, the ICJ and regional human rights courts warn against the use of unrestrictive discretion in the application of equity.[441]

Yet, the IACtHR has gone from denying the use of discretion to recognising its reasonable and juridical use.[442] Furthermore, some commentators recognise the intrinsic nature of discretion in the adjudicatory practice, accepting that judges – besides considering substantive law – also weigh considerations about the impact and context of the decisions they take.[443] Some others see discretion as part of the general

[438] Ichim (2015), 51.
[439] Burke (2013), 221.
[440] For examples on how discretion is used in criminal sentencing, see Frase (2013); Young and King (2013); von Hirsch, Ashworth and Roberts (2009); Tata (2002).
[441] See, ICJ, *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Para 71; IACtHR, *Aloeboetoe et. al. v. Suriname* (Reparations and Costs), Para 87. See also Ichim (2015), 45-46.
[442] IACtHR, *Molina Theissen v. Guatemala* (Reparations and Costs), Para 65; IACtHR, *Acevedo Jaramillo et al. v. Peru*, Para 308; IACtHR, *Cantoral Huamani and García Santa Cruz*, Para 175.
[443] Kavanagh (2008), 194.

canons of adjudication, that is, an element of procedural law of residual character existing in international adjudication.[444] Likewise, an argument has been made that judges exercise a *margin of discretion* when applying equity.[445] Thus, it seems that discretion is now regarded as having a place within the application of the principle of equity, in correspondence with the notion of equity *infra legem* (i.e. equity within the law).[446]

The use of discretion is an interesting subject to consider when analysing the law and practice of reparations in IHRL. In the view of the author, discretion does not only find a place within the application of equity, but also within the principle of *restitutio in integrum*.[447] Discretion thereby serves as a complementary tool when analysing both principles, providing external but relevant considerations when the law on reparations is insufficient, yet restricting itself to a permissible scope.[448] This concept is especially useful when the applicable law does not offer satisfactory determinacy.

By understanding discretion as a complementary tool for the determination of reparations, an analysis can be made whether judges integrate external, non-legal considerations in their decisions.[449] Factors such as, for example, the victims' socio-economic situation or the judges' personal preferences might be identified as being

[444] Focusing on the canon of judicial economy, Palombino shares the opinion that both rules of procedure (requiring judges to act in particular ways) and fundamental canons of adjudication (requiring judges to follow some guidelines through every stage of proceedings, without being codified or expressly provided in the pertinent instruments) can be transposed from domestic adjudicative procedures to international adjudication; see Palombino (2010).

[445] Note the use of this term by Francioni (2013), Paras 7 and 21.

[446] See Chattopadhyay (1979), 388 (affirming that "where there is no discretion, there is no law. Discretion helps bring out the natural reason of the case"). See also Francioni (2013), Paras 7 and 11.

[447] The author does not take issue with the opinion that equity might function as an interpretative tool given its virtue of an 'evolutionary principle' offers substantial guidance to the application of treaties, see Voigt (2008), 19-20. See also Aksenova (2016), 12 (arguing that general principles of law are a source of international law in themselves but also serve as means to assist interpretation of principles already existing in other sources, such as treaty and custom).

[448] This concept resembles Hart's description of judicial discretion proposed in the long-lost essay written in 1956 and first published in 2013 by Geoffrey Shaw, see Hart (2013). The concept was moderated in Hart's later work, see Hart (1994) and, to some extent, purposely severed, see Lacey (2013).

[449] Some commentators admit that judges indeed include such considerations, see Klatt (2007), 508 (referring to a resort to extra-legal standards), and Besson (2013), 421 (referring to extra-legal materials).

part of judges' considerations.[450] In spite of the lack of attention on this topic, the inclusion of extra-legal considerations, such as ensuing policy consequences in contrast to the text of the law or the legislative history, are recognised to exist by even the most conservative contemporary commentators on judicial reasoning.[451]

It is evident that the ECtHR is authorised to exert a certain degree of discretion when granting reparations. The ECtHR President's direction to take into consideration the economic situation of respondent States when awarding compensation illustrates this point.[452] Without discretion, the indeterminacy of that direction would force the ECtHR to anticipate every possible economic situation and provide corresponding adjustments to the calculated compensations, hampering its normal performance. Therefore, discretion provides a necessary means of accommodation.

Another example of the use of discretion is the methodological device of *margin of appreciation* as a form of standard of review in favour of State parties.[453] Some commentators have explicitly noticed that exerting deference (through discretion) also occurs at the stage of the determination of reparations.[454] Yet, no study has examined what kind of discretion courts use or claim from respondent States when ordering particular reparative measures above others, bundling all possible reasons together under the umbrella of subsidiarity.

For a correct appreciation of the use of discretion, two issues must briefly be clarified. First, discretion is not to be confused with the exercise of interpretation, in spite of being closely linked to it.[455] As de Blois has correctly stated, the existence of several

[450] See de Blois (1994), 39 (noticing that ECtHR judges' personal views are influenced *inter alia* by psychology, philosophy, religion, social position, and training). Voeten has also found that the possibility of reappointment arguably increases national bias in the conduct of ECtHR judges, see Voeten (2008).
[451] See late U.S. Supreme Court Justice Antonin Scalia (1989), 515.
[452] Practice Direction on Just Satisfaction, Para 2.
[453] Gruszczynski and Werner (2014), 4.
[454] See McGoldrick (2016), 27 (briefly making this connection). See also Harris, O'Boyle and Warbrick (2014), 156-7. It is also worth noticing that some commentators have applied the assessment of the margin of appreciation to analyse possible variation of standards of proof in the ECtHR, see Ambrus (2014), 235 et seq.
[455] Some commentators seem to equate the interpretative freedom exercised by international courts with the judicial discretion effected by judges, see for instance Langvatn (2016), 363.

plausible interpretations provides room for judicial discretion.[456] Second, discretion operates within a permissible framework; beyond that, only arbitrariness exists.[457] Whereas discretion welcomes resort to a plethora of elements to be taken into account for the determination of reparations, abuse of discretion is an issue of concern and measures must be taken for avoiding it.[458] Thus, it is important to identify which elements limit discretion's permissible framework.

Advocates of courts' deference to the reasoning of States (e.g. MoA) generally set three reasons for this preference: Expertise, democratic legitimacy and common practice of States. They argue that States are better positioned to decide on domestic affairs based on these factors.[459] The author's suggestion is that attention to these factors will likewise help to clarify the boundaries within which *discretion* might be effected in relation to the determination of reparations.

1. Expertise

Experts questions whether regional human rights courts are sufficiently informed to take decisions which would correspond *prima facie* to States. It is frequently argued that States are more able than regional courts actually to understand a case, including the facts, the political and social context surrounding it, and the possible effects of eventual decisions.[460] A perceived danger of the use of discretion is that it might serve to influence domestic policies. Since human rights litigation is limited by the arguments brought forward by the parties – according to their own interest –, some

[456] de Blois (1994), 51.
[457] The need for limiting discretion in the performance of judicial activities is broadly appreciated; see Ford (1994), 36.
[458] Concern for the abuse of discretion can be found, for instance, in the comments of Lord Phillimore suggesting that giving 'too much liberty' to judges should be avoided, in Advisory Committee of Jurists of the PCIJ (1920) *Procès-Verbaux of the Proceedings of The Committee June 16th–July 24th 1920 with Annexes*, 333. In the US context, Peters has studied available means to effectively constraint judicial adjudication and reduce the risk of abuse of discretion, see Peters, C. (2015).
[459] ECtHR, *Handyside v.UK*, Para 48. This argument has been repeated throughout the ECtHR's jurisprudence. Yet, this court has also declared that such margin of appreciation goes 'hand in hand with a European supervision'. See also Legg (2012), 17. In Constitutional Law, deference to the legislative power is also justified in the *expertise* of the latter in addition to *competence* and *constitutional legitimacy*, see Kavanagh (2008), 192, 203 et seq.
[460] Legg (2012), 26-6, 145 et seq. See also Alkema (2000), 60; Lambert Abdelgawad (2008).

scholars warn against establishing public policies based on related judgments. However, others contend that it is impossible to isolate human rights adjudication, and that human rights courts should take into consideration the socio-political and economic context in order to find effective redress.[461]

When the ECtHR applies the MoA methodology, it recognises that States have expertise that it itself lacks. ECtHR judgments are generally concise; they do not present a detailed description of the facts or of the testimonies given by witnesses and expert witnesses, and the Court only sporadically engages in fact-finding.[462] The ECtHR relies on the adequate legal representation of applicants;[463] public hearings are exceptional. Thus, ECtHR decisions are mostly declaratory and rarely direct States on how to attain compliance. In contrast, the IACtHR is well-known for its lengthy decisions and great detail, frequently engaging in extensive fact-finding.[464] Even though proceedings follow an adversarial model, judges question witnesses and evaluate evidence following an inquisitorial model.[465] The IACtHR may obtain evidence *muto proprio*,[466] and decides about the weight of all submitted evidence. Public hearings are scheduled in most cases and IACtHR judges question State parties for clarification of facts. When the IACtHR grants specific reparative measures beyond monetary compensation, their connection to the facts of the case – which evidence has been either offered by the victims' representatives or gathered through the IACtHR's fact-finding function – is sometimes evident, yet the IACtHR does not signal such connections with enough clarity.

Hence, it is plausible to argue that while the ECtHR defers to the expertise of respondent States – supervised by the CoM – for the determination of adequate

[461] Cavallaro and Brewer (2008), 777.
[462] E.g. when it is suspected that domestic judicial proceedings have been deficient, see Harris, O'Boyle and Warbrick (2014), 143.
[463] Once an application has been notified to the State, applicants should be represented by lawyers, see Council of Europe, 'Questions & Answers', available at www.echr.coe.int/Documents/Questions_Answers_ENG.pdf
[464] Some argue that, although not much attention has been drawn to fact-finding, this is indeed one of the main functions of international adjudication, see Alvarez (2014), 166.
[465] Pasqualucci (2013), 150-1.
[466] Rules of Procedure of the IACtHR, Art 58(a).

reparation, the IACtHR actively attempts to acquire expertise usually through engaging in fact-finding activities.[467] It is noteworthy that whenever the ECtHR took a more active role in investigations, for example gathering testimony of dozens of witnesses *in situ*, it granted non-pecuniary measures.[468]

2. Democratic Legitimacy

The establishment of international human rights judiciary challenges the traditional balance between executive action and judicial control. At the domestic level, policy choices are justified by political representation through a democratic process subject to review by the judiciary. When regional human rights courts exert either weak or strong review over State organs' decisions,[469] the system may become uneasy because such a review cannot be subjected to the same control mechanisms.[470] Thus, the authority of international courts to interfere with decisions taken by domestic organs legitimately authorised and subject to accountability, is challenged.[471] In order to deal with this issue, when the ECtHR encounters matters of general policy on which opinions within a democratic society generally differ, it exercises restraint and gives significant weight to domestic policy-makers, instead of becoming one itself.[472]

Resistance to the judgments of regional human rights courts has not been a matter of concern until very recently, although State authorities have occasionally voiced their disagreements.[473] Compared to non-pecuniary measures of reparation, monetary compensation enjoys the best rates of compliance of all regional systems.[474] Plausible

[467] Note that fact-finding activities by the HRC are even more limited.
[468] ECtHR, *Ilaşcu and Others v. Moldova and Russia*, Paras 12-5 and op Para 22.
[469] For a convincing conceptualisation of weak and strong judicial review, see Waldron (2016), 199-201.
[470] Schaffer, Føllesdal and Ulfstein (2013), 17-8.
[471] Bellamy (2013), 247. See also Besson (2011), 129 (arguing that 'supranational judicial review affects the national separation of powers').
[472] McGoldrick (2016), 34.
[473] See e.g. the German response to the ECtHR judgment in *Görgülü v. Germany*, in which a German Court declared that '[t]he judgment of the ECHR remained a judgment that at all events for the domestic courts was not binding, without any influence on the finality and non-appealability of the decision…', see BVerfG, Order of the Second Senate of 14 October 2004 - 2 BvR 1481/04, Para 17-8. See also Egbert (2012), 264 –271.
[474] See Baluarte and De Vos (2010), 28 (drawing on case analysis from the ECtHR, IACtHR, African Court and the HRC). See also de Londras and Dzehtsiarou (2015), 528.

explanations for this phenomenon are based on the simplicity of the order (i.e. to pay)[475] and the general acceptance of monetary compensation as a result of the courts' function as a mechanism of dispute settlement.[476] Regional human rights courts have not experienced significant contestation against its orders to pay compensation, except in particular cases.[477] This certainly does not mean that those courts enjoyed outstanding compliance with its decisions;[478] however, it indicates that States' criticism did not specifically target the courts' authority to order reparative measures.

Resistance to human rights courts is strongly connected to the reparative practice ordering general and individual measures of reparation. At the ECtHR, much concern has been raised about the pilot-judgment procedure and other decisions issuing this kind of orders or indications.[479] In the Americas, several governments have voiced severe disagreement with certain IACtHR Decisions,[480] and two States successfully withdrew from the jurisdiction of the court after complaining about its orders.[481] Nevertheless, such concerns and disagreements do not necessarily indicate that regional human rights courts are being perceived as not democratically legitimated.

[475] Lambert-Abdelgawad (2008), 12.
[476] Bogdandy and Venzke (2012).
[477] Notable Cases in which monetary compensation has been actively contested by States are, for instance, ECtHR, *Loizidou v. Turkey* where ordered payment for compensation for damages made in 1998 was denied by the Turkish government until 2003; and ECtHR, *Oao Neftyanaya Kompaniya Yukos v. Russia* in which this court ordered the State to pay over EUR 1.8 billion to the applicant company's shareholders for monetary damages in 2014. The Russian Constitutional Court declared in 2017 that execution of the judgement was impossible due to its incompatibility with the Constitution of the Russian Federation; see English translation of the judgment of the Constitutional Court of the Russian Federation of 19 January 2017, 'In the case concerning the resolution of the question of the possibility to execute in accordance with the Constitution of the Russian Federation the Judgment of the European Court of Human Rights of 31 July 2014 in the case of DAO Neftyanaya Kompaniya Yukos v. Russia in connection with the request of the Ministry of Justice of the Russian Federation' available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806f5ff4
[478] In 2007, when the Directorate General of Human Rights and Legal Affairs began to monitor the execution of ECtHR judgments, over 5000 judgments were pending before the CoM.
[479] Helfer (2008), 148-9; Sicilianos (2014); Alastair Mowbray (2017). Also, Besson has noted that (at least until 2011) Western European States led the resistance based on democratic grounds, see Besson (2011), 111.
[480] For instance in 2008, the Supreme Court of Venezuela declared a judgment of the IACtHR as non-executable, and recommended that the government to denounce the American Convention. In 2006, the President of Chile publicly had to correct the President of the Supreme Court who had declared that IACtHR decisions were not binding, see Cornejo Chavez (2013), 528-9. However, States have not challenged the finality of IACtHR Judgments (Art 67 ACHR).
[481] Trinidad and Tobago (1998) and Venezuela (2012). Peru unsuccessfully tried to withdraw from the jurisdiction of the IACtHR in 1999 during the authoritarian government of Alberto Fujimori.

For instance, differentiating popularity from illegitimacy, Çali and others argue that while the ECtHR does not always enjoy the former, its legitimacy is rarely questioned.[482] Likewise, States voicing disagreement with IACtHR's Decisions do it only in respect to particular, politically sensitive issues rather than to the overall system.[483] An argument could also be made that States withdrawing from the IACtHR only used their complaints to disguise a real unwillingness to remain subjected to any sort of legal monitoring. That is, States which withdrew were going to withdraw anyway given their political preferences.[484]

Only in particular cases is possible to observe that States complain about a democratic deficit in the issuance of non-pecuniary reparative orders. In the ECtHR, the cases of *Hirst* and the subsequent *Greens and M.T. v. UK* pilot-judgment have brought up academic and political discussions about the ECtHR's power to change rules adopted by well-functioning democratic States.[485] In the IACtHR, the annulment of amnesty laws passed by several States has raised most controversy.[486] These objections have generated anxiety within regional human rights systems, prompting all kinds of reactions. In the ECtHR, concerns have resulted in the inclusion of the subsidiarity principle in the Preamble of the ECHR after repeated calls for its enhancement in the context of reform process.[487] Furthermore, these observations are said to have permeated the CoM and affected its way of monitoring the execution of judgments.[488] Specific reactions in the Inter-American system are difficult to identify since the

[482] Çali, Koch and Bruch (2011) asserted that only 1 out of 107 interviewed stakeholders (domestic politicians, apex court judges and lawyers litigating cases at the ECtHR) declared that the Court did not enjoy legitimacy.
[483] Sensitive issues involve *inter alia* access to in vitro fertilisation procedures in Costa Rica (IACtHR, *Artavia Murillo v. Costa Rica*); recognition of Dominican nationality for persons of Haitian ancestry born in the territory of Dominican Republic (IACtHR, *Girls Yean and Bosico v. Dominican Republic*).
[484] For a brief but interesting description of the mistrust between Venezuela and the Inter-American system, see von Bogdandy et al (2017), 14 and 19. In regard to Trinidad and Tobago's withdrawal, see former IACtHR Judge Garcia Ramirez (2017), 309, fn 45 (alluding to the desire of Anglophone Caribbean States to maintain the death penalty in their judicial systems).
[485] See Donald and Leach (2016), 129; Føllesdal (2013), 290. See also Mignon and Rouquet (2015).
[486] Gargarella (2015a).
[487] Protocol 15 to the ECHR, not yet into force. See also Declarations of the High-Level Conferences at Izmir, Interlaken, Brighton, Brussels and Copenhagen.
[488] Donald and Leach (2016), 125.

IACtHR has not addressed the criticism directly and no major reforms have been implemented. However, it seems that the Court is now considering a more nuanced approach to amnesty laws under certain conditions.[489]

In spite of the aforementioned reasons supporting the challenge of democratic legitimacy in relation to the use of discretion for ordering reparations, it is germane to note that this argument is, in turn, bound by several factors. For instance, McGoldrick argues that States with a record of serious human rights violations, including wrongdoings against ethnic or national minorities, have their own democratic legitimacy discredited and cannot invoke it to evade international review.[490] In this sense, domestic democratic legitimacy might be qualified as a 'rebuttable presumption' which, similar to the principle of subsidiarity, favours especially the local as long as there are not reasons to believe that it cannot properly perform its tasks.[491]

Additionally, an argument is made that the election of judges to the regional courts, be it directly or indirectly by States parties, provides those courts with a certain democratic legitimacy.[492] Indeed, States have voluntarily ratified the corresponding human rights conventions, granting power to regional human rights courts. Moreover, States nominate the individuals who will be in charge of exerting such a power, acting as trustees not of their own States but of the common goals which States have agreed on.[493]

3. Common Practice of States

The common practice of States refers to the identification of legal standards that are generally accepted (yet not necessarily unanimously) by the States parties to a convention. In the context of the ECtHR, the so-called *European consensus* is used as an

[489] See IACtHR, *Massacres of El Mozote and surrounding areas v. El Salvador*, Concurring Opinion of Judge Diego Garcia-Sayán.
[490] McGoldrick (2016), 36.
[491] Jachtenfuchs and Krisch (2016), 6 et seq.
[492] McGoldrick (2016), 36.
[493] The understanding of international courts as trustees has been raised by Alter (2008).

interpretative method for striking a balance between competing rights. A charitable approach to consensus argues that it secures coherence in the ECtHR jurisprudence as it allows the Court to influence the interpretation of rights in sensitive matters, in this way asserting the principle of subsidiarity.[494] Some others are however not convinced of the benefits of this concept. Critics argue that consensus is sometimes used for avoiding 'politically difficult' cases,[495] and it is only a 'convenient subterfuge' for pursuing a certain agenda.[496]

In the Americas, the idea of a regional consensus as an interpretative method has not gained momentum. Among the reasons for this lack of development is the nature of the cases dealt with by the IACtHR, especially during the first two decades of activity. Since the Court mostly addressed cases of forced disappearances and extra-judicial executions at the hands of State agents, to resort to the practice of those States was understandably out of question. However, as the IACtHR is beginning to receive cases dealing with a variety of human rights and requiring more attention to rights' exceptions, limitations, and balance, it is reasonable to expect calls for a regional use of consensus.

The issue of consensus has so far only referred to the interpretation of substantive rights, rather than procedural ones. Doing the latter would require an analysis of the way in which States establish a link between the occurrence of a violation and the selection of reparations. Although such an analysis promises to be an interesting research avenue in comparative law, in the opinion of the author, it would not provide the necessary information to assert consensus in the determination of reparations. Certainly, the analysis would show the manner in which domestic courts react to human rights violations, but it would not necessarily shed light on the way *regional* human rights courts might do so. Since the law on reparations deals with procedural

[494] Dzehtsiarou (2015), 7.
[495] Roffee (2014), 548. See also Kavanagh (2008), 189 (arguing that courts sometimes use 'deference for prudential reasons' as a way to avoid conflict with hostile legislature and other actors).
[496] Benvenisti (1999), 844.

rights, instead of substantive ones, the practice of domestic courts cannot be examined in a vacuum, not taking into account the extent to which domestic courts are authorised to respond to human rights violations. Domestic judicial powers are unquestionably subjected to detailed regulation, compared to the international judiciary, and stepping outside those limits would render reparative orders unlawful. The same would not necessarily happen in international adjudication. Hence, the concept of consensus is not useful for determining whether discretion might be limited by deference to States in the granting of reparations.

4. Assessment

In summary, the preceding examination of the three factors generally invoked when granting discretion to States, and thus limiting the action of international courts, suggests that there is a place for discretion within the performance of regional human rights courts. States cannot argue that they hold a privileged position to select adequate reparations in all cases, because regional courts might acquire the necessary expertise during court proceedings. States can neither argue that courts fully lack democratic legitimacy because the granting of reparations is authorised by human rights conventions which States have willingly ratified. An argument is likewise made that the common practice of states cannot guide the granting of reparations since their actions are anchored in different legal frameworks.

Nevertheless, a question remains open: What differentiates discretion from arbitrariness? What factors should be considered for securing that discretion is exerted within a permissible scope? To answer these questions, the author considers Hart's understanding of judicial discretion, based on three central elements: rational process; the appropriate selection of factors for consideration; and justifiable accountability.[497] The author makes the argument that these elements, *mutatis mutandis*, constitute a permissible framework for the use of discretion in the determination of reparations.

[497] Hart (2013).

Chapter V will enter into how the three regional human rights courts are already applying some (or all) of these elements in the determination of particular reparations, with the addition of making corresponding suggestions. The present section will explain in a more general fashion how those three elements should be approached.

a) Rationality

Hart describes discretion as a *rational exercise*. Rationality refers to the cognitive process carried out in arriving at a specific result. The requirement and assessment of rationality is not foreign to the practice of international courts.[498] Regional human rights courts engage in review of the quality of domestic Decisions providing reparations – particularly the quality of reasoning used in order to arrive to relevant conclusions.[499] In this regard, it has been observed that, in spite of the general reluctance of the IACtHR to defer to the reasoning of domestic courts, it has occasionally done so by invoking the principle of subsidiarity after verifying that the latter had developed objective, reasonable and effective criteria for the granting of reparations.[500]

In this study, however, rationality is looked at as a control element of legal argumentation of international courts' Decisions. Within a discretionary exercise, one of the demands of a rational process is that judges need to explain their reasoning clearly, especially if it includes extra-legal considerations. Moreover, it is generally accepted that the submission of reasoned decisions signals that judges act fairly by considering all arguments presented by the parties.[501] Congruence between arguments,

[498] For a comprehensive study on the use of 'rationality' in international law, see Corten (1997).
[499] Klatt (2015) (Note that this study focuses on domestic judicial review).
[500] IACtHR, *Manuel Cepeda Vargas v. Colombia*, Para 246. This choice caused a lot of criticism, even from IACtHR's judges themselves, who argued that the preferred domestic standard offered less protection than the IACtHR's existing jurisprudence; see Partially Dissenting Opinion of Judge Alberto Pérez Pérez, Para 9 in the same Case. That the IACtHR's invocation of the principle of subsidiary would justifying deference to domestic criteria was also criticised; see Partially Dissenting Opinion of Judge Manuel E. Ventura Robles, 3, in the same Case. Compare with the Concurring Opinion of Judge Diego Garcia Sayán, who highlighted the role of the principles of complementary and subsidiary in the selection of reparations, Paras 13, 14 and 15. See also comments about IACtHR *Memoli v. Argentina* in Tsereteli (2016), 1102.
[501] See Fuller and Winston (1978), 357, 366, and 388 (arguing that adjudication is more than a simple settlement of disputes because it serves as a form of social ordering which is characterised by bearing a *burden*

evidence and judgment equally signals high quality and contributes to the successful implementation of such decisions.[502] The assessment of rationality is, nevertheless, so subjective and context-sensitive that it needs to be used with precaution and not seen as dogmatic in itself.[503]

b) Appropriate Selection of Factors to be considered

The two remaining elements singled out by Hart are closely interlinked with the requirement of rationality. The appropriate selection of factors to be considered when exerting discretion helps to obtain a balanced decision. Relevant factors might include the nature of the violation, characteristics of the victims, the respondent State's human rights-compliance record, the goals of the particular reparation under consideration, the financial situation of the State or the beneficiaries, and etcetera. Discretion might also include moral considerations, as for instance related to the socio-economic condition of victims.[504] In this particular regard, Shelton has argued that, in the ECtHR's practice, sympathy for the applicant has influenced the determination of satisfaction.[505] Certain factors are nevertheless discarded as being allowed to be part of the consideration of judges. It should be recalled that Hart specifically excluded 'private interest and prejudice' from the factors constituting rational process,[506] hence the consideration of extra-legal factors such as, for instance, political leanings, judges' career motivation and panel composition, are not valid within the proposed permissible framework for discretion.[507] Other factors are however arguably situated

of rationality. Other types of social ordering are elections or contracts). See also Fredman (2013) (arguing that decisions must also pass the test of having considered not only majoritarian concerns).

[502] See Fuller and Winston (1978), 388-9; and Çali and Koch (2014), 312. Correspondence between remedies awarded and the injury suffered had been already recognised in 1923, in *The Opinion on Lusitania Cases* (1 November 1923), in United Nations Reports of International Arbitral Awards, Vol. VII, 32-44, at 35.

[503] An interesting critique about the theorisation of the use of rationality in international law is presented by Koskenniemi (2000).

[504] The relationship between morality and law has been recognised as unavoidable; see Besson (2013), 426. See Waldron (2009) (declaring that both the legislative and judicial reasoning includes moral considerations in their processes, but that they carried out in different manners). In the context of the ECtHR, Letsas has argued that 'the content of rights […] is informed by the morality of human rights…', see Letsas (2006), 707.

[505] Shelton (2005), 345-8, 352.

[506] Hart (2013), 664.

[507] However, these factors may play an important role in the rulings of a court, yet their analysis is more appropriately approached from a non-legal angle, see e.g. Voeten (2013).

on the margins since they involve institutional interest (e.g. desire to attain compliance, influence policy, and etc.).[508]

When discussing judicial review, some commentators have already noted the importance of particular factors to be considered for striking a balance between positive rights, and include among them the financial stability of the national budget, human rights and collective goods.[509] The selection of factors is context-dependent, that is, no exhaustive list of relevant factors exists and selection should be made on a case-by-case basis.

c) Justifiable Accountability

Deeply interlinked with the demand of a rational process, judges are required expressly to explain the reasons for the selection of considered factors and the balance effected in order to select a particular reparative measure. However, Hart has warned that while discretion should be justifiable, it is not necessarily vindicable.[510] In other words, judges are not required to demonstrate that they selected the correct reparative measure (product of a rational process). In fact, this requirement would be difficult to fulfil, not to mention outside the competence of regional human rights courts as they stand.

Nevertheless, justifiable accountability allows regional human rights courts to learn from their own experiences and it also creates a rich area of comparative assessment. Indeed, a major difficulty in the existing judicial dialogue between regional human rights courts is the absence of appropriate explanations for the selection of reparative measures. Thus, even though courts seem to be learning from each other about which particular measures are eligible in certain cases, there is no substantial discussion on

[508] See e.g. Voeten (2013), 556.
[509] Klatt (2015) (Note that this study focuses on the domestic judicial review and calls the mentioned factors as 'material principles').
[510] Hart (2013), 660.

the reasons behind the selections.[511] Hence, the inclusion of accountability in the selection of reparations would be useful not only to maintain consistency and predictability in the practice of a particular court, but also to further a productive dialogue between courts.

III. Conclusions

This Chapter has presented an analysis of the third source of international law: the general principles of law. It has been shown that two particular principles of international law are considered predominantly in the regional human rights courts' reparative practice, and therefore this examination has focussed on the principles of equity and *restitutio in integrum*. The conducted analysis demonstrates that while in some cases those principles offer adequate guidance for the determination of reparations, in others, especially those demanding the selection of non-pecuniary measures, these principles seem to fall short of that purpose. In other words, although regional courts repetitively invoke those two principles when selecting non-pecuniary measures, the content ascribed to those principles sometimes cannot really guide judges in the selection of reparative measures. This situation creates clear challenges for IHRL.

The fact that regional human rights courts and treaty bodies are constantly engaging with the determination of reparations, often including the most innovative measures seen to date, demands that those challenges be addressed. A very under-discussed issue, yet ubiquitous in international adjudication, is the use of discretion as a complementary tool for the application of the principles of *restitutio in integrum* and equity. Attention to this issue allows an examination of how and to what extent the selection of reparations is actually influenced by conventional reparative provisions (*lex specialis)* and when *lex generalis* should play a complementary role. Through this analysis, it is also possible to indicate at which point judges stop being influenced by

[511] In Chapter V, a comparative account of the existing dialogue between regional human rights courts in respect to reparations will be provided.

the law and start being influenced by 'something else' when selecting reparations. Although the exercise of judicial discretion remains obscure, in this chapter, three factors have been identified to observe for its correct use: rationality, appropriate selection of the factors to be considered and justifiable accountability. Yet, in order to see how discretion is being actually used, it is necessary to examine practical human rights adjudication involving the selection of non-pecuniary reparations.

Prior to the introduction of an original study of the practice of the three regional human rights courts and the UN Human Rights Committee (Chapter V), this dissertation turns its attention to an issue under-discussed but very important for the determination of non-pecuniary reparations: the purpose of reparations. Although IHRL recognises that reparations have a compensatory purpose, in the sense that they are directed to repair damages (material or immaterial) caused by a human rights breach, there are signals that this approach has changed. The following Chapter discusses this possibility, examining what those new purposes might be, and how they could affect the determination of reparations.

CHAPTER IV: THE PURPOSE OF REPARATIONS

I. Introduction

Up to this point, this dissertation has discussed the way in which conventional reparative provisions and other GIL norms influence the determination of reparations. Said discussion has used the theory of sources of international law as a theoretical underpinning. Hence, in the first three Chapters, relevant treaties and other instruments, customary law and the principles of equity and *restitutio in integrum* have been examined to ascertain their guidance and influence in the process of reparative determination. In the course of those chapters, it has been concluded that although all those norms offer valuable guidance, the determination of reparations remains obscure. Nevertheless, it is argued that judicial discretion might be used as a complementary tool for the consideration of the principle of *restitutio in integrum*, thus offering a way to integrate extra-legal considerations to the reparative determination process.

What extra-legal considerations regional human rights courts take into account for the determination of reparations? A plausible way to answer this question is to focus on the purpose regional human rights courts ascribe to them. It is accepted that a distinctive characteristic of regional human rights courts is their ability to issue reparative orders conducive to the redress of human rights violations. Conversely, in the general landscape of the law, reparations serve several different purposes depending on the field in which they are applied. Some aim to compensate financial damages suffered by affected persons, while others focus on the prevention of future wrongdoings. In special circumstances, as in the case of criminal proceedings, reparative orders carry a condemnatory or retributive charge. Nevertheless,

reparations of a punitive nature are traditionally not considered to hold a relevant place in the special field of human rights adjudication.[512]

In this chapter, the most accepted purposes of reparations in the general field of the law will be reviewed: compensation, deterrence, restorative justice or reconciliation, and condemnation and retribution. A discussion on reparative purposes in IHRL will subsequently be provided, giving an account of the evolution of the practice of the ECtHR and the IACtHR in respect of the granting of reparations and the possible inclusion of reparative measures serving non-traditionally recognised purposes. Due to the limited practice of the African Court, its relevant case-law will be discussed throughout this chapter to complement the analysis. Through the examination of selected case-law, reparations ordered by the three regional courts will be shown to perform a combination of different functions on certain occasions, mixing traditionally accepted purposes – such as compensation and restoration – with non-traditional ones – such as reconciliation, non-repetition through social transformation and, arguably, punishment. These findings shed light on the way regional human rights courts conceive reparations, and the factors they take into account when designing them.

II. The Purpose of Reparations

Although the awarding of reparations varies according to the traditions, jurisdictions and characteristics of the field in which they are ordered, four main purposes are commonly recognised: compensatory or remedial justice; deterrence; restorative justice or reconciliation; and condemnation or retribution.[513]

A. Compensatory or Remedial Justice

Compensation is the most accepted purpose of reparations, and features in both domestic and international reparative measures. It is used to redress the occurrence of a wrongdoing, restoring a situation to what it would have been before the violation

[512] Shelton (2013) Conference Presentation 'Remedies and Reparations in Regional Human Rights Systems'. See also Schonsteiner (2007-2008).
[513] Shelton (2005), 10.

occurred. The compensatory purpose is victim-centred, because it looks at the victim's circumstances *ex ante* and *ex post* the violation, and seeks to eliminate the consequences of that change. The fulfilment of this purpose requires the judge to make a prospective analysis of the victim's situation from the moment of the violation up to the moment of awarding the reparation, in order to calculate what the victim's position would have been had the violation not occurred. Several measures are used when seeking to fulfil the compensatory purpose; among them monetary compensation is considered to be the 'official standard to reparation,' but it is certainly not the only one.[514] Certain human rights violations are easily redressed following this 'official' formula, for example: loss of property, the termination of a labour contract based on discriminatory criteria, and etcetera. Certain other violations cannot be directly compensated in this manner, since some lost legal goods are irreplaceable, as is the case with regard to forced disappearances and extra-judicial execution. In the latter case, the ECtHR usually affords redress anyway in the form of monetary compensation (leaving the determination of other possible measures to States), while the IACtHR uses a combination of reparative measures, including monetary compensation and non-pecuniary reparations such as, *inter alia*, the publication of documentaries about the victims' life and work.[515]

B. Deterrence

The goal of deterrence is intrinsically present within all reparative measures, although it is difficult to achieve. Ranging from administrative fines to the imposition of capital punishment, an easily identifiable goal of reparations is to prevent the reoccurrence of the wrongdoing by the responsible party or any other actor.[516] To fulfil this purpose, the reparative order must be of such a nature as to create a sufficient incentive for rational actors not to engage in wrongful behaviour. Sometimes, punitive measures, as well as other types, can carry a deterring element. Yet, as Markel has explained, the

[514] Ichim (2014), 16.
[515] IACtHR, *Manuel Cepeda Vargas v. Colombia*.
[516] See Medina Quiroga (2015), 121 (considering the role of the IACtHR as a custodian of the public order).

purpose of deterrence is not to put the offender in a worse position, but rather to make him/her lose the will to commit the misconduct.[517] Specifically in the Inter-American system, deterrence is recognised as a fundamental purpose of reparations ordered by the IACtHR.[518]

Nevertheless, to secure deterrence is not an easy task. It is contested, for instance, that pecuniary reparations ordered by regional human rights courts (i.e., monetary compensation) create strong incentives for States not to commit human rights violations, due to the relatively easy access they have to public financial resources.[519] This might be true in some cases. However, the way incentives work is highly dependent on the actual number of claims and victims, as well as the domestic legal limitations for the disposition of budgetary allocations.[520] For instance, in his work on State responsibility, Crawford has referred to States' inability to pay compensation as an issue which worried the drafters of the ILC Articles. They feared *inter alia* that the amount of claims would endanger the subsistence of certain populations in particular cases.[521] Financial difficulties might also arise in cases where truth and reconciliation commissions claim reparations for widespread human rights violations. In those cases, pecuniary reparations benefitting a multitude of victims have the potential of causing serious crises in a State's budget.[522] Moreover, constitutional and administrative legislation—or the lack thereof—may thwart efforts to make a State comply with orders to pay compensation.[523]

Nevertheless, high compensatory amounts could be necessary to spark public awareness, and thereby concern, about human rights violations against otherwise neglected parts of the population. Considering the caveats mentioned above, it may be

[517] Markel (2008–2009), 242.
[518] Medina Quiroga (2015), 121.
[519] See e.g. Bowring (2012) (arguing that the ECtHR should go beyond monetary compensation to redress cases involving torture).
[520] I thank Prof. Martin Scheinin for this important insight.
[521] Crawford (2013), 481.
[522] de Greiff (2006), 451, 456-7.
[523] de Vos (2013).

useful to contemplate mobilising public opinion by also resorting to different types of reparations. The 'naming and shaming' of States could be an effective tool to create deterrence, especially if combined with public statements from other States or international organisations. One must recall that in the *travaux préparatoires* to the ECHR, most State representatives agreed that public opinion would be such as to exert a moral pressure upon States, forcing them to act.[524] However, the effectiveness of these measures may be completely dependent on the political and economic context of the States concerned.

C. Restorative Justice or Reconciliation

Reparations aimed at the restoration of justice or reconciliation are usually society-centred.[525] In the human rights field, these purposes are closely related to the psychological and sociological impact of violations, and are concerned not only with direct victims of human rights violations but also with the society of which they are part. Means to 'heal' societal relations may include public acts of apology and regret. A common instrument for reconciliation in Latin America is the formation of truth commissions, which are established after the dissolution of authoritarian regimes or dictatorships that engaged in widespread violations of human rights. Among the aims of truth commissions, de Greiff includes the determination of the truth and the identity of the victims and perpetrators, and providing a voice to victims who had kept silent because of fear, or who had been ignored by state authorities.[526] Another goal of truth commissions, although controversial, is the reintegration of perpetrators into the community.[527] This is especially relevant in situations where multiple violations took place and were committed by a large number of perpetrators, where it has been impossible to prosecute both those who were responsible for the planning, as well as the physical carrying out, of the violations in question. In the context of international

[524] CoE, Preparatory Work on Article 50 of the ECHR, 3.
[525] In criminal law, however, restorative justice is understood as giving priority to the "victim concerns and needs", see Gromet (2012), 10.
[526] de Greiff (2006).
[527] Mamdani (2007), 114.

prosecution of war crimes and crimes against humanity, this goal has also encountered opposition.[528]

D. Condemnation or Retribution

As reparative aims, condemnation and retribution are found, first and foremost, in criminal law's reparative orders, although they can also be found in administrative and tort-law sanctions, known as punitive damages, which normally entail the payment of large amounts of money.[529] These aims are perpetrator-centred, because they focus on the 'blameworthiness of the conduct,'[530] rather than the consequences for the victim. That is, instead of compensating the victim, reparations featuring these aims seek to punish the wrongdoer. Clearly, there is a psychological justification for the imposition of such reparations — victims and others who feel 'anger and outrage' towards injustices feel their suffering alleviated when perpetrators are punished.[531] According to Shelton, condemnation, or retribution, has the ability of restoring the victim's 'moral authority,' which has been damaged by the perpetrator.[532] It has also been correctly noted that punitive damages do not constitute the sole element of punishment in a judgment, but increase the gravity of such punishment.[533] In International Criminal Law, for instance, the sentencing of perpetrators has been recognised as combining deterrence with retribution.[534] This combination is also seen in the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY), where prosecution is explicitly recognised as contributing to the 'process of national reconciliation', and the 'restoration and maintenance of peace.'[535] Moreover, recent reparation practice by the

[528] Ellis (2001).
[529] For a thorough discussion on the functions of punitive damages in tort law, see Calabresi (2005).
[530] Cane and Conaghan (2009).
[531] See Gromet (2012), 11 (citing studies on psychological explanations regarding perpetrator punishment).
[532] Shelton (2005), 12.
[533] Ibid, 354.
[534] *See* ICTY, *Prosecutor v. Tadić*, Sentencing Judgment after Referral (1999), Paras 7–9; ICTR, *Prosecutor v. Akayesu*, Judgment (1998), Para 19. See also Cassese (2008), 366–77.
[535] S.C. Res 955, U.N. Doc. S/RES/955 (Nov. 8 1994) and S.C. Res 827, U.N. Doc. S/RES/827 (1993) (May 25 1993).

International Criminal Court (ICC) adds elements of reconciliation and transitional justice to the retributive purpose of conviction and sentencing of perpetrators.[536] Nevertheless, given that the use of sanctions varies greatly in accordance with the different domestic legal orders in which they are issued, it is difficult to find a common standard by which a punitive purpose is inserted in reparative measures.

Some attention has been given to the use of punitive damages in GIL. The Commentary to the ILC Articles has clarified that the reparation of *satisfaction* 'is not intended to be punitive,' which seems to be a very straightforward declaration.[537] However, it should be recalled that the ILC Articles discuss the consequences of wrongful acts between States and that, even though they offer an important reference to the nature and allocation of reparations, they cannot therefore be completely transposed to the IHRL arena.[538] Thus, when the ILC declares that *satisfaction* is not punitive in nature, the Commentary refers to the '[e]xcessive demands' made by injured states and the necessity to 'prevent abuses' which are incompatible with the *principle of equality of States*.[539] Here, it is important to notice that clear differences exist between the capability to claim for disproportionate *satisfaction* held by an injured State, and the power to demand reparations possessed by individuals who are victims of human rights violations committed by their own State. While States may not always establish relationships on equal terms — for example, donor States versus aid recipient States; creditor States versus debtor States—, the nature of the relationship between States and individuals (especially its own nationals) will always be asymmetric in favour of States. Thus, even though States are recognised to be obliged to compensate for damage caused,[540] it is difficult to see how individuals could abuse the availability of such an obligation. Clearly, States are not regarded as being subject to punishment in the same way individuals are.

[536] See ICC, *Katanga* (24 March 2017) and ICC, *Lubanga* (03 March 2015)
[537] ILC Articles, Art. 37, Commentary (8).
[538] McCorquodale (2009), 236-7.
[539] ILC Articles, Art. 37, Commentary (8).
[540] PCIJ, *Factory at Chorzów* (Jurisdiction).

III. Purpose of Reparations in International Human Rights Law

None of the regional human rights courts recognises the right of victims to be granted punitive or exemplary reparations.[541] While it is true that these courts grant monetary compensation (also called monetary awards or compensatory damages), the concept of damages addressed by this type of reparation differs between the three jurisdictions. [542] Shelton classifies monetary compensation (referred to as 'compensatory damages' by her) as addressing three types of damages:

> . . . nominal (a small sum of money awarded to symbolize the vindication of rights and make the judgment a matter of record); pecuniary damages (intended to represent the closest possible financial equivalent of the monetary loss or harm suffered); and moral damages (compensation for dignitary violations, including fear, humiliation, mental distress).[543]

The practice of the ECtHR and the IACtHR shows that these courts have strong, and differing, preferences concerning the kind of damages to be addressed by compensation.[544] The reparative practice of the African Court, however, is too incipient to allow for general conclusions about compensation. Nominal compensation does not exist in the practice of regional human rights courts since all measures ordered by them are formally addressed to repair actual harm. However, as discussed later in this chapter, the ECtHR sometimes grants monetary compensation as a symbolic award (minimal amount), which may also be read as constituting nominal compensation.[545] Monetary compensation for pecuniary and moral damages is awarded by the three regional courts, although their respective conventional authoritative provisions do not

[541] In fact, the examination of the *travaux préparatoires* of the ECHR does not show that State representatives discussed the purposes of reparations beyond stating that the goal of ECtHR judgments was to ensure the protection of the European Convention, see CoE, Preparatory Work on Article 50 of the ECHR.
[542] In this context, damages refer to the harm suffered by victims or their next-of-kin.
[543] Shelton (2005), 292-3.
[544] Ibid; Ichim (2014).
[545] Similarly, the African Court has granted 'symbolic' compensation consisting of one CFA Franc, see ACtHPR, *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo and Blaise Ilboudo & The Burkinabe Movement on Human and Peoples' Rights v. Burkina Faso* (Reparations), Para 67.

establish standards for calculation. Pecuniary damage is the most uncontroversial type of damage since it addresses concrete harm such as the destruction of property or the loss of salary. Moral damages are also addressed by the three regional courts. However, while the IACtHR clearly differentiates between awards for pecuniary and moral damages, the ECtHR has preferred to address both types of damages through a single monetary award.[546] Nevertheless, in some cases, the ECtHR has refused to grant compensation for moral damages, despite strong evidence of the victims' suffering.[547] Whereas the African Court has sometimes followed the IACtHR's practice, differentiating pecuniary from moral damages, it frequently reserves this issue for long-pending decisions on reparations.[548]

Notwithstanding the formal rejection of punitive damages by the ECtHR and the IACtHR, some discussions exist regarding the possibility of punitive damages being collected in the form of non-pecuniary reparations. The former President of the IA Commission, Dinah Shelton, and the former President of the IACtHR, Antônio Cançado Trindade, have argued that even though the IACtHR has never awarded compensation based on punitive damages, some reparations ordered by the IACtHR have punitive elements.[549] This may particularly be observed in cases where State agents have been responsible for *aggravated* violations of human rights. Both commentators refer to, for instance, the extra-judicial execution of persons who were considered dangerous by their States' governments at the time, and orders for which were given by high governmental authorities. Cançado Trindade called this type of action a 'state crime,'[550] and identified orders to investigate and punish such crimes as reparations punitive in nature. In his particular view—which is not broadly supported in academia—, the use of punitive reparations is justified by the need to combat

[546] Ichim (2014), 119–120.
[547] Shelton (2010), 252–3.
[548] E.g. ACtHPR, *Anudo Ochieng Anudo v. United Republic of Tanzania*.
[549] Shelton (2005), 361. IACtHR, *Myrna Mack Chang v. Guatemala* (Concurring Opinion of Judge Cançado Trindade).
[550] IACtHR, *Myrna Mack Chang v. Guatemala* (Concurring Opinion of Judge Cançado Trindade).

impunity; no other reparation can effectively redress the wrongdoing of States in those cases.[551]

A plausible justification for awarding punitive damages is that of generating incentives to denounce wrongdoings even in the case of very small pecuniary loss.[552] This argument seems reasonable in the Inter-American context, where trust in the domestic judiciary rates low and the average citizen avoids denunciation when the expectation of actual redress is minimal.[553] In the European context, however, the argument results more difficult to sustain due to the introduction of the *significant disadvantage* admissibility criterion, which limits the review of these kinds of cases by the ECtHR.[554] It could also be argued that the granting of punitive damages, especially in the form of monetary compensation, generates expectations and therefore provokes an increase of applications with the consequence of worsening the Court's backlog. While the procedure of individual application carried out by the ECtHR makes this fear reasonable, as regards to the IACtHR, a larger backlog would affect the Inter-American Commission rather than the IACtHR, since the former acts as a filter to the latter.[555]

The emergence of non-pecuniary reparations might also be seen through the lens of a recent *transformative* theory. Two decades ago and mostly focusing on domestic transitional processes, some scholars began questioning the traditional purpose of reparations which often placed victims back to a pre-existing disadvantaged position.[556] This theory conceptualised how reparations set after gross human rights

[551] Ibid. For others, however, the type of entity responsible for the wrongdoing should not be a factor to consider when determining reparations, see Ferstman (2017), 68.
[552] Shelton (2005), 354.
[553] Buscaglia and Ulen (1997).
[554] This criterion is provided by Article 35(3)(b) ECHR, and was introduced by Protocol 14 to the European Convention as a means to reduce the backlog of the ECtHR. Despite the statements made in the Explanatory Report to Protocol No 14, this reform has raised concerns about the rights to individual application and access to justice in general, see Vogiatzis (2016). It is worth noticing that the conditions for admissibility set by this criterion will become even stricter after Protocol 15 to the European Convention enters into force. Additionally, an empirical study of the application of this criterion finds it mostly ineffective for reducing the ECtHR's workload, see Shelton (2016).
[555] ACHR, Art 61(1).
[556] E.g. Uprimny Yepes (2009), Daly (2001).

violations had the potential to address and possibly change long-existing situations of discrimination and vulnerability. The concept of transformative reparations —although dissimilarly understood— has been rapidly pick up by legal scholarship.[557] More recently, this theory is being used in the field of international criminal law, especially in order to address the role of reparations for victims of sexual violence,[558] and lately in the practice of the ICC.[559] At the domestic level, some reconciliation programs have also included the transformation of victims' socio-economic status.[560] Undoubtedly, the idea of addressing underlying inequalities is appealing to legal and political discourses, and, unsurprisingly, the desire to change the status quo has found fertile ground in countries with a high percentage of empoverished population.

Regional human rights courts —especially the IACtHR— hearing cases of gross human rights violations affecting a large number of victims, sometimes also dealt with in domestic transitional processes, have not admitted the use of transformative reparations. However, few scholars have noted the potential use of non-pecuniary reparations to change structural patterns,[561] and to induce "large-scale social change".[562]

A caveat needs to be introduced at this point. The present author argues that there is a misconception about the meaning of transformation. It is not uncommon to find that organisations and institutions dealing with human rights violations are ascribed a transformative task. Transformation is regarded as an institutional objective, demanding its realisation through institutional outputs. However, it is argued in this dissertation that transformation actually is a means or a (welcome) consequence, not an end in itself. For instance, the work of the Peruvian Truth and Reconciliation

[557] Fraser and McGonigle (2019); Manjoo (2017); von Bogdandy et al (2017).
[558] E.g. Chappell (2017); Williams and Opdam (2017); Walker (2016); Williams and Palmer (2016).
[559] ICC, 'Lubanga Principles', Para 34.
[560] See e.g. Colombia's Ley de Víctimas y Restitución de Tierras (Ley 1448). See also a recent application of this theory to the Colombian transitional justice process in Weber (2018).
[561] Abramovich (2009).
[562] Soley (2017).

Commission has been characterised as 'transformative'.[563] Yet, its mandate only authorises it to draft proposals for the reparation and dignification of victims and their next-of-kin, and recommend institutional, legal and other reforms directed to avoid repetition of the human rights violations occurred during the Peruvian armed conflict.[564] Despite the commendable work performed by the Commission, it was not established to find a way to transform victims' lives or the unequal Peruvian society. After all, its recommendations had to be subjected through the ordinary legal, political and administrative channels for approval and implementation.[565] Another example is the misleading attribution of transformative objectives to the Canadian Truth and Reconciliation Commission, which has led scholars to conclude that this organ did not take advantage of its full potential.[566] In these cases, it is necessary to understand that transformative effects might follow from the Commissions' findings and proposals, but transformation is not their main objective.

By the same tolken, reparations ordered by regional human rights courts are sometimes given an unnecessary 'transformative' branding. As will be demonstrated in the following chapters of this dissertation, reparations might be ordered with the purpose of deterring certain conducts. That is, reparations might be designed aiming at non-repetition of the facts constituting human rights violations, for the benefit of case victims but also potential ones. Hence, depending on their design, reparations' consequences might be indeed transformative. Qualifying reparations as transformative is then stating the obvious. The same happens when transformative reparations are said to diverge stress on compensation and re-direct it to other measures at the individual, institutional and structural levels.[567] That is precisely the characteristic of most non-pecuniary reparations.

[563] See Friedman (2018), 702, arguing that the '[Peruvian Truth and Reconciliation Commission] is an institution that self-consciously took on a strong transformative justice mandate.'
[564] Law for the Creation of the Peruvian Truth and Reconciliation Commission, Art. 2(c) and (d).
[565] Ibid, Art. 2(d).
[566] Czyzewski (2011).
[567] Manjoo (2017), 1196.

A plausible explanation for the aforementioned confusion lies in the fact that the idea of transformative reparations was originally introduced in the context of conflict resolution, as a mediation technique to repair the relationship between parties of a conflict.[568] Conceptualised in such a way, transformative reparations were certainly neither designed to give full redress to victims nor be a product of an adjudicative process. Rather, that concept was subsumed in a reconciliatory rationale.

Hence, a transplant of the concept to IHRL adjudicative processes needs a careful consideration of the context in which the 'tranformative' goal is applied. The acceptance of a 'transformative purpose' in IHRL adjudication is by no means certain. It is perhaps more correct to nominate those measures as reparations with a purpose of non-repetition leading to social transformation.

From the above discussion, the observation could be made that, although the ideas of punitive reparation or reparations with a purpose of non-repetition leading to social transformation have not been explicitly admitted by the regional human rights courts under examination, neither the courts nor their respective conventions offer a satisfactory explanation of the purposes served by their reparative measures. If it is true that the goal of reparations is *restitutio in integrum*, is it possible that these measures have additional purposes to those expressly recognised by the courts? Moreover, to what extent can innovative reparative measures be considered as going beyond having a sole compensatory purpose?

A. Expansion of the Purpose of Reparations by the ECtHR

In Chapter I is presented an account of the changes that the ECtHR has undergone in regard to the issuance of reparative orders. Shifting from only granting monetary compensation and making declarations of a violation to issuing general and specific reparative orders has made the ECtHR be perceived as less cautious. In spite of this

[568] Coyle (2017), 776-7 (giving an account of the literature on transformative theory in the context of mediation starting in the mid 1990s).

change, the ECtHR has not admitted that some of its reparative measures might follow a different purpose than a mere compensatory one.

Requests for reparative purposes beyond compensation have nevertheless been made occasionally. For instance, the ECtHR received its first request to award punitive damages – called 'special damages' – in *Silver and others*, but it dismissed the petitioners' arguments without addressing either the meaning of 'special' damages or the Court's power to grant them.[569] To date, the use of punitive reparations by the ECtHR remains obscure. However, in more recent case-law, the Court declared that reparations are not designed to enrich applicants and that 'there is little, if any, scope under the Convention for directing governments to pay penalties to applicants which are unconnected with damage shown to be actually incurred.' [570] This shows an unwillingness to legitimise punitive reparations in the Court's practice.

Despite the observed unwillingness, ECtHR Judge Pinto de Albuquerque has argued that the ECtHR has in fact used punitive reparations.[571] He asserts that there are three types of cases in which punitive reparations are essential: gross human rights violations involving multiple, repeated or single continuing violations; prolonged and deliberate noncompliance; and cases where victims are prevented from fully accessing the ECtHR. [572] In these cases, he argues, the fact that State agents have either intentionally or recklessly committed a wrongdoing prompts the ECtHR to seek punishment.[573] To support his argument, he identified a series of ECtHR Decisions that can arguably be considered to feature a punitive aim. Focusing solely on awards of monetary compensation as a means of punishment (by ordering the State to compensate victims as a form of punishment), Pinto de Albuquerque argues that, while traditionally compensation is granted in strict connection to the pecuniary and

[569] ECtHR, *Silver and others v. UK*.
[570] ECtHR, *Varnava and others v. Turkey*, Paras 223–4. Note that the ECtHR does not elaborate on whether 'damage actually incurred' includes both pecuniary and non-pecuniary damage, or whether such damages may be satisfactorily redressed through pecuniary compensation.
[571] ECtHR, *Cyprus v. Turkey* (Just Satisfaction) (Judge Pinto de Albuquerque concurring, joined by Judge Vučinić).
[572] Ibid, Para 18.
[573] Ibid.

non-pecuniary damage caused to the applicants,[574] it has sometimes been granted, *inter alia*, where no request for such a reparation had been filed by the applicant (e.g., *X v. Croatia*;[575] *Igor Ivanov v. Russia*[576]), or where there was insufficient documentation to support the claim (e.g., *Barberà, Messegué, and Jabardo v. Spain*[577]). Moreover, he also notes that, in some cases, monetary compensation was granted in the form of an amount superior to that which was requested in the application (e.g., *Stradovnik v. Slovenia*[578]), or in the form of a 'symbolic' amount, which clearly shows a willingness to punish the State (e.g., *Engel and others v. Netherlands*[579]). Perhaps Pinto de Albuquerque's most interesting claim concerns reparations grounded in the 'general interest' and their exemplary effects (e.g., *Xenides-Arestis v. Turkey (Just Satisfaction)*; *Ananyev and others v. Russia*[580]). Regrettably, he does not elaborate any further on the reasons for this claim, and the reading of the relevant Decisions does not clearly support his position.

What is clear, however, is that the ECtHR decides to grant monetary compensation on certain occasions even when the applicants have not requested any compensation at all; or if compensation has been requested, decides to grant monetary compensation of a value superior to the amount requested by the applicants. The Rules of the ECtHR provide that applicants wishing to receive compensation must submit a specific request. However, the same rules give the ECtHR the ultimate choice to decide upon whether or not to grant such compensation.[581] Thus, while a decision to grant compensation in such cases is the prerogative of the Court, it is not difficult to view such decisions as guided by an aim which goes beyond that of a compensatory purpose.

[574] Rules of the ECtHR, Rule 60.
[575] ECtHR, *X v. Croatia*.
[576] ECtHR, *Igor Ivanov v. Russia*.
[577] ECtHR, *Barberà, Messegué, and Jabardo v. Spain* (Just Satisfaction).
[578] ECtHR, *Stradovnik v. Slovenia*.
[579] ECtHR, *Engel and others v. The Netherlands*.
[580] ECtHR, *Xenides-Arestis v. Turkey* (Just Satisfaction); *Ananyev and others v. Russia*.
[581] Rules of the ECtHR, Rule 60(3).

The clearest example of the use of punitive reparations presented by Pinto de Albuquerque is the *Cyprus v. Turkey* Case.[582] There, monetary compensation was ordered by the ECtHR in favour of the Applicant State for non-pecuniary damages suffered by the relatives of the victims. Pinto de Albuquerque considers that such an order deliberately included a punitive element since those relatives had not been identified by the Applicant State nor determined during Court proceedings.[583] Moreover, when ordering monetary compensation, the ECtHR had not foreseen any contingency provisions in case said relatives could never be found, which, in his view, confirms that the order's primary purpose was to punish the State, and not to provide redress for the victims.[584] Nevertheless, those claims are not entirely convincing. The ECtHR was aware of the challenges related to the identification of beneficiaries (the victims' relatives) as it clearly stated that even though the group had not been identified yet, it was certainly identifiable.[585] Hence, the granting of the monetary award was not directed towards benefiting the Applicant State per se. Rather, Cyprus was called to play the role of intermediary. The ECtHR cited provisions of international instruments and international jurisprudence in order to demonstrate that such a practice already existed in other jurisdictions.[586]

In spite of the discussed disagreement with Pinto de Albuquerque's claims, it should be noted that he has correctly pointed out certain discrepancies existing between the reparative selection in *Cyprus v. Turkey* and the supposedly purely compensatory aim declared by the ECtHR. Here, a more nuanced explanation might be possible. First of all, it must be appreciated that the ECtHR decided on the request of just satisfaction thirteen years after the issuance of the Judgment on the Merits of the Case. Secondly, this Case dealt with continuing human rights violations involving, *inter alia*, the forced

[582] ECtHR, *Cyprus v. Turkey* (Just Satisfaction).
[583] Ibid, (Dissenting opinion by Judge Karakaș, 55).
[584] Ibid, (Judge Pinto de Albuquerque concurring, Para 13).
[585] ECtHR, *Cyprus v. Turkey (Just Satisfaction),* Para 47.
[586] Ibid, Para 46 quoting art. 19 of the Draft Articles on Diplomatic Protection in Rep. of the Int'l Law Comm'n, 58th sess., May 1–June 9 and July 3–Aug. 11, 2006, U.N. Doc. A/61/10; GAOR, 61st Sess., Supp. No. 10 (2006), and ICJ, *Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo)*, Compensation, 324.

disappearance of 1,485 Greek Cypriots during the Turkish military invasion and occupation of Cyprus in 1974—a military occupation that still persists in Northern Cyprus. Thirdly, notwithstanding the significant attention dedicated to the forced disappearances, the Turkish government has not shown an uncontested commitment either to the investigation of those crimes or the exhumation and identification of victims, which has translated into a protracted status quo of impunity.[587] Indeed, although they were made after the issuance of the judgment on just satisfaction, the declarations made by the Turkish Minister of Foreign Affairs to the effect of rejecting the ECtHR's Decision as not-binding and having no value, are a clear signal that the Turkish State was not interested in redressing the discussed violations.[588] Hence, it is plausible to consider that, in view of all those elements, the ECtHR resorted to the granting of monetary awards, with the purpose of not only compensating victims (and their next-of-kin), but also securing—or at least encouraging—the cessation and non-repetition of violations, as well as the revelation of the truth.[589] This purpose is confirmed by the ECtHR's declaration—provided in the Judgment of *Varnava and others v. Turkey* and repeated in *Cyprus v. Turkey*—, stating that when applicants have suffered *inter alia* prolonged uncertainty, distress, and anxiety, the public vindication of the wrong in a judgment is sometimes not enough in terms of redress and, hence, 'something further' is required.[590] Obviously, the ECtHR was referring to the granting of monetary awards in addition to the declaration of the violation, but the special element in this statement is the revelation of the ECtHR's consideration of purposes beyond that of compensation. Since feelings of uncertainty, distress or anxiety cannot be calculated in monetary terms, monetary awards addressing these feelings go beyond a mere compensatory aim and seek to fulfil other purposes, such as the ceasing of violations, or deterrence.

[587] Solomou (2015).
[588] Katselli (2014), blogpost.
[589] Ibid.
[590] ECtHR, *Cyprus v. Turkey (Just Satisfaction)*, Para 56 citing ECtHR, *Varnava and Others v. Turkey*, Paras 224–225.

While Pinto de Albuquerque has only focused on the use of monetary compensation as a punitive reparation, other types of reparations may be observed to be used for this purpose. Non-pecuniary reparations are being increasingly—although tentatively—used by the ECtHR. With the introduction of pilot and quasi pilot-judgments, specific measures have begun to be part of the reparative measures of the ECtHR, such as the amendment of legislation,[591] the release of prisoners,[592] and the reopening of faulty legal procedures.[593] In spite of the ensuing varied reactions from scholars and practitioners, some even accusing the ECtHR of taking an 'activist' stance,[594] the Court has only given scarce signals on what standards it follows for the determination of particular reparative measures.[595]

The ECtHR has sometimes argued that it specifically identified certain reparative measures on account of being the only appropriate ones due to their 'very nature,'[596] leaving no other choice for the State.[597] This is the case, for instance, for orders to release prisoners that have been illegally incarcerated.[598] In these cases, the ECtHR does not consider it sufficient to grant a monetary award, which would only serve a compensatory aim, but rather goes beyond this traditional reparative approach and orders States to take a specific action with the aim of terminating an unlawful situation. This existing purpose has been reinforced by the Practice Direction on Just Satisfaction issued by the ECtHR, which states that '[o]nly in extremely rare cases can the Court consider a consequential order aimed at putting an end or remedying the violation in question'.[599]

In other cases, the ECtHR seems to have selected a reparation after appreciating that a State had not complied with previous decisions of the Court, which could be read as

[591] ECtHR, *Greens and M.T. v. UK*, Para 6.
[592] ECtHR, *Del Rio Prada v. Spain*, op Para 3.
[593] ECtHR, *Öcalan v. Turkey*.
[594] Hertig Randall and Ruedin (2010), 421.
[595] See discussion about the reception of non-pecuniary measures in Chapter I.
[596] E.g. ECtHR, *Assanidze v. Georgia*, Para 202; ECtHR, *Moreira Ferreira v. Portugal (No. 2)*, Para 51.
[597] This selection standard has also been noted by Mowbray (2017).
[598] See, e.g., ECtHR, *Aleksanyan v. Russia*, Para 239; ECtHR, *Fatullayev v. Azerbaijan*, Para 174.
[599] See Practice Direction on Just Satisfaction, Para 23.

constituting a measure of cessation, but also as a kind of sanction. An illustration of the mentioned double aim is found in the *Greens M.T.* Pilot-Judgment, where the Court, for the first time, ordered the enactment of legislation compatible with the ECHR which would allow prisoners to vote.[600] Firstly, it should be noted that *Greens M.T.* originated in *Hirst*, a Case in which a violation of the right to free elections was found but where no specific reparative measures were ordered.[601] Secondly, at the time of issuance of the *Greens M.T.* Decision, the *Hirst J*udgment had been pending execution for over five years, and similar cases were continuously being brought before the Court.[602] Thirdly, the reason for the delay in compliance seemed to be the UK government's unwillingness to reform its legislation. These considerations might have influenced the ECtHR, even if still recognising the States' primary responsibility in the selection of means of redress, to order legislative reform in the judgment's operative paragraphs instead of suggesting them in the *obiter dictum*. Consequently, the issuance of the *Greens M.T.* Decision in the format of a pilot-judgment, meant to guide States in effectively dealing with systemic failures and repetitive violations, shows that the ECtHR looks beyond the particular characteristics of the concrete case. Conversely, the ECtHR assigns important weight to the aims of cessation and non-repetition due to the consideration of external—although relevant—factors. The argument for ordering a reparation which is the only appropriate reparation for redress, as is the case for a prisoner's release for example, does not hold in this instance. Here, the ECtHR does not order a specific action (e.g., providing detailed guidance for the enactment of legislation that is considered to comply with the ECHR), but gives a very broad indication to the State (i.e., requiring compatibility with the ECHR) which is precisely one of the reasons for the resulting non-compliance. Thus, the ECtHR's practice in this case reveals that legislative reform was ordered not because it was the

[600] ECtHR, *Greens M.T. v. UK.*
[601] See Protocol to the ECHR, Art 3; and ECtHR, *Hirst v. UK (No. 2)*.
[602] See CM/Del/Dec (2015)1236/25 (24 September 2015).

only choice, but because the Court considered it to be a means for cessation and non-repetition in view of the background of the case.

Undoubtedly, the selection of reparations is closely related to the context in which violations take place.[603] In *Varnava and others*, the ECtHR elaborated on the purpose of non-pecuniary reparations, arguing that certain injuries are of such a serious nature that, in invoking the principle of equity, redress should not only consider the damages suffered by the applicants but also the context in which the violation occurred.[604] This statement clearly departs from the traditional conceptualisation of reparations, and considers that the context in which violations take place is also an important issue to address.

In this light, the role of State agents in the performance of the wrongdoing, as argued by Pinto de Albuquerque, is of primary importance and several levels of responsibility might be identified.[605] It should be noted that this view is closely related to the warning that jurist Lauterpacht uttered regarding the perturbing consequences of a limited understanding of State responsibility due to a traditional State sovereignty approach. Such consequences would include the exemption of the State from being punished for its actions.[606] There are also clear linkages between Pinto de Albuquerque's view and Cançado Trindade's conceptualisation of State crime, which he considers to be a 'particularly grave violation of international law' that 'directly [affects] the fundamental values of the international community as a whole.'[607] The context in which violations occur qualifies their gravity by this rationale. In light of this discussion, the question should unavoidably be raised whether the inclusion of the different purposes for which reparations are awarded by the ECtHR allows some space for the consideration of punitive reparations, especially in cases where it can be

[603] See Ichim (2014) at 205 (arguing that ECtHR judges deny the Court's attention to pragmatic reasons in order to defend its prestige).
[604] ECtHR, *Varnava and others v. Turkey*, Para 224.
[605] ECtHR, *Cyprus v. Turkey* (Just Satisfaction) (Pinto de Albuquerque dissenting).
[606] Lauterpacht (1937), 349.
[607] IACtHR, *Myrna Mack Chang v. Guatemala* (Judge Cançado Trindade's Concurring Opinion, Para 28).

verified that States agents directly participated in the commission of human rights violations.

B. Expansion of the Purposes of Reparations by the IACtHR

Notwithstanding the wide recognition of the IACtHR as a major contributor to the development of reparative practice in the human rights field, this Court has also undergone significant transformation. In its first cases, decisions on the merits only established that there was a duty to provide fair compensation, and declared that the amount and form of the compensation would be set after consulting the State, the IA Commission, and the victims' next-of-kin.[608] Thus, the selection of reparations was influenced by the requests of the three mentioned actors. For instance, in *Velásquez Rodríguez v. Honduras,* the victims' next-of-kin were responsible for having requested—although not always successfully—the granting of non-pecuniary reparations and punitive damages in addition to compensation for pecuniary damages, loss of earnings, and emotional damages.[609] The IACtHR decided to grant only monetary compensation, mentioning that indemnification had a compensatory nature, not a punitive one.[610] However, the Court took the opportunity to define *restitutio in integrum*, including in this concept the aims of restoring the prior situation, repairing the consequences of the violation, and compensating for pecuniary and non-pecuniary damage, including emotional harm.[611]

Yet, not long after that, the IACtHR changed its practice and began ordering non-pecuniary reparations. The *Aloeboetoe* Case dealt with the killing of seven persons by members of Suriname's armed forces.[612] Even though the IA Commission asked the

[608] IACtHR, *Velásquez Rodríguez v. Honduras* (Reparations and Costs); IACtHR, *Godinez Cruz v. Honduras*, (Reparations and Costs).
[609] Some of the remedies requested were: a complete and truthful public report on what happened to the disappeared persons; the trial and punishment of those responsible for this practice; a public act to honour and dignify the memory of the disappeared; the naming of a street, park, elementary school, high school, or hospital after the victims of disappearances; etcetera.
[610] IACtHR, *Velásquez Rodríguez v. Honduras* (Reparations and Costs), Paras 38-9.
[611] Ibid, Para 26.
[612] IACtHR, *Aloeboetoe et al. v. Suriname* (Reparations).

IACtHR to order reparations similar to those which had been requested in the previous two cases —and rejected—, this time the Court ordered the reopening and staffing of the village's school and medical dispensary, in addition to monetary compensation for pecuniary and non-pecuniary damages.[613] According to the Court, these measures were justified by the need of adequate infrastructures for the development of victims' children.[614] In spite of the limited explanation offered by the IACtHR in respect to the selection of these measure (only two short paragraphs account for it), it is not difficult to see that the context of discrimination against impoverished tribal communities played an important role in the selection of reparations.[615] Thus, with the expansion of its reparative array, the IACtHR has given signals that reparative selection has a purpose beyond restrictive compensation, since it pays attention to conditions that are not strictly linked to the facts of the Case, but nevertheless affect the victims – to some degree.

In subsequent case-law, the IACtHR has continued denying its competence to grant exemplary or punitive damages. Similar to the ECtHR, the IACtHR has declared that reparations are not granted to enrich or impoverish victims or their next-of-kin, and that it should not function as a criminal court.[616] However, the IACtHR has changed its view regarding the pursuit of a deterrent purpose. Faced with the impossibility of granting full restitution, the Court declared that there are two possible methods of compensation:

> [B]y the payment of a sum of money or the assignment of goods or services that can be assessed monetarily … [or] by the execution of acts

[613] Ibid, op Para 5. Other measures requested by the next-of-kin, but not granted, included that the President of Suriname publicly apologise for the killings, that the chiefs of the Saramaka tribe be invited to come before the Congress of Suriname to receive an apology, and that the Government publish the operative part of this judgment. The next-of-kin also requested that the Government exhume the bodies of the six victims and return them to their respective families, name a park, square, or street in a prominent section of Paramaribo after the Saramaka tribe, and investigate the murders committed and punish the guilty parties.
[614] IACtHR, *Aloeboetoe et al. v. Suriname* (Reparations and Costs), Para 96.
[615] This judgment, however, has also raised concerns about the discrepancy of beneficiaries and the declared victims of the case, see Shelton (2005), 286.
[616] See IACtHR, *Castillo Páez v. Peru* (Reparations and Costs), Para 53; IACtHR, *Garrido and Baigorria v. Argentina* (Reparations and Costs), Para 43.

> or works of a public nature or repercussion which have effects such as recovering the memory of the victims, re-establishing their reputation, consoling their next of kin or transmitting a message of official condemnation of the human rights violations in question and commitment to the efforts to ensure that they *do not happen again*.[617]

This statement, then, reflects the evolution experienced by the IACtHR, which now conceptualises reparative measures as including diverse aims, not all of them exclusively linked to a compensatory purpose. Moreover, the reference to the 'message of official condemnation' might be interpreted as a tentative identification of a punitive element. Indeed, this incipient argument could be complemented by Judge Cançado Trindade's separate opinion, in which he declared that reparations for non-pecuniary damages are not about reparation per se (based on *restitutio in integrum*), but on 'alleviation,' considering some situations are just irreparable.[618] In spite of the novelty and provocativeness of the latter argument, the identification of a punitive aim is not yet convincing since there exist several reparative measures—for example, declaration of the finding of a violation—which are traditionally regarded as having a non-intrusive, solely compensatory purpose, while also containing an element of reproach.

In its innovative practice, the IACtHR has developed a very diverse catalogue of non-pecuniary reparations, which is constantly expanding. It has not gone unnoticed, however, that some of these reparations are not only directed towards the compensation of the damages or the rehabilitation of the victims—or their next-of-kin—but that they also have a more societal purpose, which stretches the approach to reparations in IHRL beyond traditional limits. In the *Myrna Mack Chang* case, for instance, the Court ordered the establishment of a yearly scholarship for anthropology students in the victim's name.[619] The IACtHR ordered this measure on having considered that the victim had been murdered by Guatemalan State agents in reprisal

[617] IACtHR, *"Street Children" v. Guatemala* (Reparations and Costs), Para 84 (emphasis added).
[618] Ibid, Para 42 (separate opinion by Judge Cançado Trindade).
[619] IACtHR, *Myrna Mack Chang v. Guatemala* (Reparations and Costs), Para 258.

for her investigations into State institutional policies with respect to internally displaced populations. The goal of the scholarship was to preserve the victim's memory and acknowledge her work. However, it is noticeable that said scholarship was not the only measure directed towards that end, but that it was one of several measures, including public acts of recognition of responsibility and the placing of a plaque with her name. In view of these facts, it is reasonable to question the purpose of the order to grant the scholarship. In other words, it is necessary to ask at which point the granting of a particular measure, ordered among several others with the same end, stops being compensatory and begins to feature a punitive aim.

Sometimes, the IACtHR even rejected ordering individual reparations for the victims or their next-of-kin, instead preferring measures for the benefit of a whole community. In the *Plan de Sánchez Massacre*, more than 300 members of a rural community were killed, including women and children, and survivors were forced to migrate.[620] Partially based on the request of the victims' representatives, the IACtHR decided to order the supply of teachers trained in intercultural and bilingual teaching in several affected communities. No scholarships were granted in spite of the existing precedent.[621] Regardless, it could be accepted that the IACtHR acted on the belief that the provision of a better educational infrastructure would secure rehabilitation for surviving victims and for the victims' next-of-kin. It is, however, noticeable that such a measure also benefited other members of the community with no direct connection to the Case, thus rendering the purpose of the award susceptible to questions challenging its solely compensatory or deterrent aim.

The understanding of *restitutio in integrum* has also evolved in the IACtHR's practice. After only subtly mentioning the purpose of non-repetition when conceptualising *restitutio in integrum*,[622] and suggesting that 'measures intended to prevent a recurrence'

[620] IACtHR, *Plan de Sanchez Massacre v. Guatemala* (Reparations).
[621] See, IACtHR, *Cantoral Benavides v. Peru* (Reparations).
[622] IACtHR, '*Street Children' v. Guatemala* (Reparations and Costs), Para 84.

may also be considered as reparations,[623] the IACtHR declared that the principle of *restitutio in integrum* not only consisted of restoring a previously-existing situation or, if not possible, granting measures to compensate damages, but that there is also a 'State's obligation to adopt affirmative measures to guarantee that no [similar] injurious occurrences . . . will take place in the future.'[624] Thus, the IACtHR clearly asserted an obligation to secure non-repetition and, in this way, legitimised the granting of reparations with an extended community reach. Additionally, the IACtHR has clarified that, while *restitutio in integrum* favours the re-establishment of the situation as if the violation had never occurred, on certain occasions, the Court is forced to introduce reparations to actually change the situation existing at the time of the violation since it was tainted by discrimination and violence.[625] Thus, the Court goes beyond restitution and sees itself as authorised to perform the role of a policy-maker, in order to achieve non-repetition through societal change.

The evolving approach to reparations including a gender perspective exemplifies the IACtHR's adoption of non-traditionally recognised purposes. When dealing with cases of sexual violence against women, the IACtHR has taken a progressive path aiming to provide redress for victims (in many cases their memories) and their next-of-kin, and ultimately to change a societal structure based on patriarchy, inequality, violence and discrimination against women. When the first references to occurrences of sexual violence against women and the States' failure to counter and remedy them arrived to the Court with the *Miguel Castro Castro v. Peru* Case, reparations failed to address these specific violations.[626] There, the IACtHR recognised that women had been targeted due to their gender in specific way at the hands of State agents – being subjected to physical and psychological torture, and sexual violence including rape.

[623] IACtHR, *Garrido and Baigorria v. Argentina* (Reparations and Costs), Para 41.
[624] IACtHR, *La Cantuta v. Peru*, Para 201.
[625] IACtHR, *'Cotton Field' v. Mexico*, Para 450.
[626] IACtHR, *Miguel Castro Castro Prison v. Peru*.

Yet, the Court did not order specific measures to address these facts, focusing only on reparations with a traditional compensatory purpose in respect to gender issues.[627]

Few years later, in the widely acknowledged *Cotton Field* Judgment, the Court decided to issue various orders with the purpose of ending repetitive cases of sexual violence and forced disappearances.[628] Particularly noticing that State's failure to promptly and effectively respond to these crimes (through investigation, prosecution and punishment of perpetrators) was partially caused by a widespread stereotyped view on gender within the police force and general population,[629] the IACtHR ordered the implementation of an educational programme for the local population in the region.[630] The following year, in a case brought against the same State, which featured intersections of sexual violence against women by members of the military, and discrimination against indigenous peoples, the Court ordered *inter alia* the training of armed forces in human rights with a gender-based perspective, and to continue running existing campaigns for countering discrimination and violence against indigenous women.[631]

Similarly, the Court knew of a case involving multiple gender-based homicides against women and children in 2014. The case revealed a generalised situation of discrimination against women within police and investigative institutions, which prevented carrying out effective investigations and caused an overall situation of impunity.[632] Likewise, it was known that criminal investigations were also hindered due to a misconception of the role of women in society, stereotyping their behaviour and ideas.[633] Nevertheless, the Court rejected the Inter-American Commission's

[627] Ibid, Paras 223, 303-313. See also Rubio Marin and Sandoval (2011), 1077.
[628] E.g. to conduct criminal proceedings including investigations with a gender perspective; to investigate responsible public institutions and officials; to hold a public act of acknowledgment; to erect a monument; legislative reform; medical and psychological treatment.
[629] IACtHR, *"Cotton Field" v. Mexico*, Paras 401-2.
[630] Ibid, op Para 22. See also Rubio Marin and Sandoval (2011), 1088-9 (arguing that the IACtHR should have demanded that the State implement special measures to optimise relevant criminal investigations).
[631] IACtHR, *Rosendo Cantú and other v. Mexico*, op Paras 17 and 23.
[632] IACtHR, *Veliz Franco et al. v. Guatemala*, Paras 81-83.
[633] Ibid, Para 118.

request for ordering the introduction of gender-sensitive education in the curricula of schools at national level– directed to promote the respect for human rights, including non-violence against women and non-discrimination –, rather ordering training in human rights and provision of technical support for particular institutions.[634]

However, the IACtHR took a further step in its purposive use of reparations in 2018. In *López Soto et al v. Venezuela*, dealing also with gendered violence against women, the Court issued an order to permanently include human rights education in the national curricula.[635] Although said measure only complements an existing national law which establishes the implementation of educational programmes promoting tolerance and gender equality,[636] its existence opens the door to a broader reparative approach to gendered violence and discrimination, reinforcing the purpose of non-repetition. In this light, reparative measures ordered by the IACtHR do not only provide redress to victims, but also aspire to non-repetition throught the transformation of society into a more human rights compliant community.

Similarly, when dealing with a case involving the rights of women and children, the African Court has put emphasis on the re-education of society. In 2018, the Court found that Mali had violated the rights of women and children by enacting laws which did not protect them from child marriage, lack of consent to marriage, discriminatory inheritance against children born out of wedlock, and discrimination and harmful social and cultural practices in general.[637] In addition to ordering Mali to amend such laws, the African Court requested the Respondent State "to comply with its obligations […] with respect to information, teaching, education and sensitisation of the

[634] Ibid, Para 277. See also Sosa (2017), 95 and 99 (also arguing that in this case the IACtHR missed the opportunity of substantially addressing the intersections of gender, age, ethnicity and social status, all of which affected case victims in a particular way), and Acosta López (2012), 46 (arguing that the adoption of a feminist approach by the IACtHR in this case hindered the considerations of other factors putting victims in a vulnerable situation).
[635] IACtHR, *López Soto et al. v. Venezuela*, op Para 22 and Para 345.
[636] Ibid, Para 344.
[637] ACtHPR, *Association pour le progres et la défense des droits des femmes maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v. Republic of Mali*.

populations".[638] Although said request was not explicitly formulated as a reparative order, a clear parallel might be drawn between this line of reasoning and the one observed at the IACtHR. Moreover, the fact that the African Court chose to include this request in the operative paragraphs of the sentence, which had not done in previous judgments ordering legislative reform, signals the importance which this court attaches to education for achieving social transformation in matters of gender discrimination.

In light of the case-law revised in this chapter, it is argued that the IACtHR uses the granting of non-pecuniary reparations as a way of directing respondent States towards the implementation of what the Court considers to be critical public policies. In many of the above-mentioned cases, several non-pecuniary reparations were ordered in addition to monetary compensation. Most of the ordered measures directly benefited victims or their next-of-kin. However, some measures benefited third persons or a community as a whole. The IACtHR has already clarified that several reparations can be ordered to redress a specific violation.[639] Hence, it should not be assumed that the granting of multiple reparative measures automatically constitutes double reparation or punitive damages.

IV. Conclusion

In this chapter an account is given of the significant transformation in the purpose of reparations. The ECtHR and IACtHR started their reparative practice attaching a strong compensatory purpose to reparations. Thus, reparative measures were ordered to redress specific, proven damages occurred to victims due to declared violations. The African Court seems to be following the same rationale. Yet, both the ECtHR and the IACtHR have departed from this traditional approach and have begun to use reparations to attain diverse aims.

[638] Ibid, op Paras x and xii. This obligation is enshrined in Art 25 of the African Charter on Human and Peoples' Rights.
[639] IACtHR, '*Cotton Field' v. Mexico*, Para 450.

The change experienced by the ECtHR is linked to its need to deal with an impressive, almost suffocating backlog. Thus, ordered non-pecuniary reparations such as legislative reforms have a compensatory or remedial purpose in the sense that provide victims with the tools to realise their rights domestically. Additionally, these measures also carry a restorative purpose since breaches are openly addressed by publicly reforming incompatible legislation. It might be also argued that these measures also contain elements of condemnation as States might be shamed by the fact that their legislative process could not secure human rights compliant legislation. Lastly, these measures secure non-repetition and cessation of ongoing violations, which gives a needed relief to the ECtHR. It must be also recognised that not all non-pecuniary measures are ordered due to the Court's worrying number of applications. In some cases, ordered measures (e.g. release of prisoners) do not affect or benefit other individuals than applicants. That is, these orders do not improve the ECtHR's capacity to deal with its backlog. However, other elements such as deterrence, restorative justice and condemnation are still present.

The rapid transformation of the reparative practice of the IACtHR has been praised as progressive and has received much attention in academia. Nevertheless, there is no explanation about the theoretical underpinning leading the departure from a traditional purposive approach to a more intrusive one. The reparative practice of this court reveals an ongoing reassessment of the purposes of reparations. It shows that the IACtHR carefully, albeit constantly, takes steps towards a purposive understanding of reparations as vehicles of social transformation oriented to non-repetition.

The changes experienced in both courts are not only significant at a theoretical level, but they greatly influence the way in which regional human rights courts place themselves among other legal entities. The purposes these courts ascribe to reparations influence their exercise of judicial discretion. A purposive approach to reparations allows the inclusion of extra-legal factors to the legal process of reparative determination. To understand the role of reparations' purposes becomes more

important when considering that the African Court has already shown that it follows, at least partially, the reparative tradition of the IACtHR and the ECtHR. To leave this issue unsolved would only result in a detrimental transplant of adjudicative practices, resting legitimacy to the Court. Ultimately, the understanding of reparations' purposes may affect the way societies evolve and face potential human rights challenges.

Having clarified the influence of the norms constituting *lex specialis* and *lex generalis*, customary law, the principles of equity and *restitutio in integrum,* and the purpose of reparations, the following Chapter will delve into the reparative practice of regional human rights courts. There, this dissertation will observe the actual process of determination of reparations in order to identify what courts are actually taken into account when selecting non-pecuniary reparative measures. This observation will help elucidating whether regional courts are neglecting the consideration of relevant sources.

CHAPTER V: THE PRACTICE OF REGIONAL HUMAN RIGHTS COURTS IN THE DETERMINATION OF REPARATIONS

I. Introduction

It is a well-known fact that each of the three regional human rights courts has developed a particular practice in regard to the granting of reparations. Existing comparative studies indicate a series of determinant factors for understanding the way in which these courts behave: the number of years they have been active, the political context within which they began operating, the specific wording of the provisions authorising the granting of reparations, and etcetera.[640] These factors are indeed germane to be taken into account when pursuing any comparative study in this area. Nevertheless, the vastness of the IACtHR's reparative catalogue and, conversely, the limited experience of both the ECtHR and the African Court make it difficult to draw acceptable, specific conclusions on this particular area of research.

As part of the original contribution of this dissertation, three specific reparative measures common to the three human rights courts are identified: orders to carry out legislative reform, orders to release prisoners, and orders to restitute property. In spite of the variation in preference these reparations enjoy in each regional court, their presence in all reparative 'catalogues' signals the *prima facie* existence of a similar rationale in respect to the determination of reparations. This detected common reparative practice permits the conduction of a comprehensive comparative study. It does not only shed light on the determination process within each regional human rights courts, but also allows drawing comparative lines between them. In this Chapter, the comparative exercise will integrate the findings reached in previous Chapters to allow a critical and informed overview of the case-law.

[640] See e.g. Engstrom (2019), Introduction; Viljoen (2012), Chapter 10: The African Court on Human and Peoples' Rights; Çali (2018).

As a first step, an analysis will be performed on whether regional human rights courts have incorporated, deliberately or otherwise, GIL guidelines (ILC Articles, Basic Principles and Guidelines on the Right to a Remedy, and UN Principles to Combat Impunity) in their rationale for reparations. To this end, the way courts categorise each measure will be explored and whether such a categorisation coincides with the guidance provided by GIL. An examination will follow of their emergence and their link with rights' violation, the forms they adopt, the level of specificity they bear, and their conditionality, timing, and purpose. Furthermore, it will be addressed whether and to what extent they have faced contestation, since courts are arguably able to react to such concerns.

Finally, a previous chapter already having established that the guidance provided by GIL is limited, an examination of when and how these courts exert discretion will be included, and whether the use of this faculty might be directed towards the *instrumentalisation* of reparations.

II. Orders to Carry Out Legislative Reform

Orders to reform domestic legislation are the most controversial reparative measures in the human rights field. Even when it seems natural that such orders are necessary to redress human rights violations, discussions on their legality and adequacy are constantly initiated by affected States. In Europe, the ECtHR's command to the UK to propose and enact legislation allowing prisoners to vote caused public outrage and provoked heated discussions about the UK's exit from the regional system.[641] Discussions mostly focused on the order's legality and legitimacy, and the possible conflicts with the principle of sovereignty and subsidiarity.[642] However, the debate has not been approached from a more global perspective, which, the author considers

[641] ECtHR, *Greens M.T. v. UK*, op Para 6. See references to the discussion in Çali, Koch and Bruch (2013), 956-7.
[642] A discussion on the response of the UK government to the *Hirst v. UK (No. 2)* case, prior to *Greens v. UK*, is presented in Foster (2009). For a discussion on the deliberative role of the ECtHR in the prisoners' vote case, see Fredman (2013). For a more general discussion on the legitimacy of the ECtHR, see: Çali, Koch, and Bruch (2013); Jean-Paul Costa (2011).

necessary for understanding the nature and dynamics of reparations. Indeed, although the prisoners' saga has been at the heart of the discussions concerning ECtHR's reparative powers, it is important to recall that this is not a unique phenomenon in human rights law: legislative reform is also ordered by the IACtHR and the African Court.[643] Moreover, this type of reparation is immersed in GIL and therefore subject to, and influenced by a plethora of rules and principles. Thus, it is necessary to understand the position of this measure in the forest of international law, especially considering its inclusion in prominent projects for international adjudication. [644]

The debate surrounding *Greens M.T. v. UK* reveals that, in spite of the actual —and potential— effects that legislative reform orders can bring to the advancement of human rights, very little is known about the factors triggering their issuance, degree of specificity, and purposes.[645] Moreover, the ECtHR has neglected —at least prima facie— to build on the experience of the more seasoned IACtHR.[646] The following section provides this much-needed analysis.

A. Legal Basis

1. The Treatment of Orders to Reform Legislation in *Lex Specialis*

The IACtHR was the first regional human rights court to issue orders to reform legislation —as is the case for all non-pecuniary reparations—, and it is the most experienced to date. The ECtHR and African Court have also included these orders in their judgments, even if much later and with significantly less frequency than their American counterpart. None of the regional human rights conventions expressly authorise regional courts to order legislative reform. As mentioned in Chapter I, the granting of reparative orders is the result of an *evolutive* interpretation of the reparative

[643] The ECtHR ordered this measure for the first time in *Hutten-Czapska v. Poland* in 2006. The IACtHR has more than 20 years of experience in ordering legislative reform.
[644] E.g. Kozma, Nowak and Scheinin (2010), 47 (proposing the inclusion of legislative reform as a form of reparations in the Human Rights World Court).
[645] A general concern about the lack of a clear legal framework for general measures has been voiced, for instance, by Italy in ECtHR, *Sejdovic v. Italia,* Paras 115-8.
[646] E.g. note that the *Greens M.T. v. UK* judgment does not mention the IACtHR.

provisions in the respective conventions. Proof of that is the absence of legislative reform orders in the IACtHR's first cases, despite great similarities with later cases in which the Court did order reform, and their transformation over time. Additionally, the ECtHR started to develop a 'hybrid approach' in 2006, including prescriptive orders to reform legislation in its judgments.[647] Although the ECtHR's experience with explicitly ordering legislative reform is limited to around a dozen cases, other judgments include suggestions or recommendations for reform in *obiter dicta*.[648] Both orders and recommendations are discussed under the title of Article 46 ECHR,[649] many of them framed as pilot-judgment procedures. However, as already explained, reparative orders are in fact always issued under the authority of Article 41 ECHR. Although the experience of the African Court is still limited to a handful of judgments, most of them declarations of inadmissibility due to the lack of ratifications and reservations on the part of States, orders to reform legislation have been included in judgments as frequently as in the ECtHR.[650]

Besides reparative provisions, regional human rights courts ground their authority for ordering legislative reform in other conventional provisions. The IACtHR uses Article 2 of the American Convention, which declares that States parties are obliged to 'adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.'[651] The IACtHR does not require that a breach of Article 2 is declared in the judgment; the obligation is borne from the moment of the ratification of the Convention.[652] The Court has also invoked *customary law* as a source for this States'

[647] Keller and Marti (2015), 835-6.
[648] See Table C.
[649] Noticeable exceptions are the case of ECtHR, *L. v. Lithuania*, Op Para 5 (where the judgment does not discuss Article 46 at all) and ECtHR, *Intersplav v. Ukraine*, Para 48 (where the ECtHR indicated that, under the title of Article 41 ECHR, the most appropriate means of redress was to eliminate certain administrative practice).
[650] See Table D.
[651] IACtHR, *Loayza-Tamayo v. Peru* (Reparations and Costs), Para 164. See also Pasqualucci (2013), 214.
[652] See IACtHR, *'White Van' v. Guatemala* (Reparations and Costs), Para 203; IACtHR, *'Street Children' v. Guatemala* (Reparation and Costs), Op Para 5.

obligation.[653] The reasoning is that a State is not only obliged to accommodate its legislation to the American Convention standards in general, but also that a declaration of incompatibility of a specific norm with the Convention will trigger the respondent State's obligation to reform it.

Although the European Convention does not make specific reference to the duty to adjust domestic legislation to its standards, it establishes an obligation for the States to secure the enjoyment of all rights protected in that instrument.[654] The ECtHR has repeatedly declared that such an obligation influences the reading of Article 46 of the European Convention, therefore imposing on respondent States 'a legal obligation to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures' to secure redress for the applicant.[655] Hence, although the ECtHR traditionally declared that '[i]t is for the respondent State, and the respondent State alone, to take the measures it considers appropriate to ensure that its domestic law is coherent and consistent,'[656] supporting conservative positions regarding the 'limits of its own functions'[657], and lack of 'jurisdiction'[658] or 'power to order [a State] to alter its legislation',[659] the ECtHR's new interpretation of Article 46 in the light of Article 1 may broaden the understanding of its reparative powers.

In spite of the apparent normality with which the African Court orders legislative reform, in none of those cases, there is evidence of discussions about the basis for such orders or reference to Article 1 of the African Charter which, similarly to Article 2 of

[653] IACtHR, *Olmedo Bustos et al. v. Chile* (Merits, Reparations, and Costs), Para 87. See also *Trujillo Oroza v. Bolivia* (Reparations and Costs), Para 96; *Cantos v. Argentina* (Merits, Reparations and Costs), Para 59; *Osorio Rivera and Family v. Peru* (Preliminary Objections, Merits, Reparations and Costs), Para 204.
[654] ECHR, Art 1.
[655] This interpretation is common in pilot-judgment procedures, e.g. ECtHR, *Greens M.T. v. UK*, Judgment (Fourth Section), Para 106; ECtHR, *Olaru and others v. Moldova*, Para 49; ECtHR, *Burdov v. Russia* (No. 2), Para 125.
[656] ECtHR, *Marckx v. Belgium*, Para 42.
[657] ECtHR, *X. v. UK* (Art 50), Para 15.
[658] ECtHR, *F. v. Switzerland*, Para 43.
[659] ECtHR, *Belilos v. Switzerland*, Para 78. See also ECtHR, *Lundevall v. Sweden*. For a discussion on the ECtHR's restricted view on non-monetary remedial orders, see e.g. Ichim (2015), 203-204; and Colandrea (2007), 396-411.

the American Convention, sets up a States' duty to adapt domestic legislation to the Charter standards.

2. The Treatment of Orders to Reform Legislation in L*ex Generalis*

a) The Articles on Responsibility of States for Internationally Wrongful Acts

The measure of legislative reform is recognised as a form of *assurances or guarantee of non-repetition* by the ILC Articles, thereby clearly differentiated from the reparative measures recognised in this instrument.[660] Although Article 30 of the ILC Articles does not explicitly mention the possibility of ordering reform of legislation, the Commentary includes 'the repeal of the legislation which allowed the breach to occur' as a clear example of the means available to satisfy the obligation to repair.[661] It should be noted, however, that this reference seems to be assuming a causal connection between the domestic law and the breach of a right of a convention. In other words, the ILC Articles require that the violation has been caused by a particular piece of legislation. This observation begs the question on whether other modes of legislative reform might also be included under the consideration of the ILC Articles, such as the enactment of lacking legislation. Moreover, it is also unclear whether it is actually possible accurately to ascertain a causality connection between breach and legislation, and if so, what the threshold for determining such a link would be.

The ILC Articles also present legislative reform as a means of *satisfaction*.[662] More specifically, the Commentary to the ILC Articles clarifies that '[a]ssurances or guarantees of non-repetition may be sought by way of satisfaction […] and there is thus some overlap between the two in practice.'[663] Notwithstanding this duality, the Commentary highlights the preference for identifying the measure as an assurance or guarantee of non-repetition rather than *satisfaction*, since the former categorisation

[660] ILC Articles, Art 30 (also dealing with the obligation to cease the wrongful conduct).
[661] Ibid, Art 30, Commentary (11).
[662] Recall that the ILC Articles divide reparations in three specific categories: restitution, compensation and satisfaction, see ILC Articles 34 to 37.
[663] ILC Articles, Art 30, Commentary (11).

brings strength to the measure as a means to repair the 'legal relationship' affected by the breach.[664] Understood in the context of an international dispute between two States, the term 'legal relationship' refers to an inter-State relationship in need to be fixed in to protect, for instance, diplomatic and commercial ties between two equal parties. Applied to the human rights field, 'legal relationship' concerns the duty borne by States to protect individuals. Hence, legislative reform as an assurance or guarantee of non-repetition is directed at restoring the trust individuals should have in their States as bearers of the protection duty. Here, it is important to notice that legislative reform does not only affect the parties to the conflict, but it also directly affects third parties.

The preceding discussion begs the question whether legislative reform could also be categorised as a means of cessation. The Commentary clearly explains that cessation is 'concerned with securing an end to continuing wrongful conduct'.[665] If the existence of incompatible domestic legislation is considered to be a human rights violation, it follows that the wrongful act is continuous as long as the incompatible law is into force. Therefore, an order to reform the law is an order to cease the violation. If accepted, this conclusion carries important consequences for the determination of reparations in the sense that measures of cessation are not subject to the proportionality requirement.[666] The practical application of this thesis is discussed later in this chapter.

b) 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

Legislative reform is first explicitly considered in the Basic Principles and Guidelines on the Right to a Remedy as a means for guaranteeing non-repetition,[667] which is regarded, in contrast to the classification made by the ILC Articles, as a type of

[664] Ibid.
[665] ILC Articles, Art 30, Commentary (1).
[666] Ibid, Art 30, Commentary (7).
[667] Basic Principles and Guidelines on the Right to a Remedy, Principle 23(h).

reparation.[668] Secondly, Principle 2 of the Basic Principles and Guidelines on the Right to a Remedy considers that legislative reform serves as a means for States to comply with their obligation to secure that their domestic law is consistent with their international obligations (established in Principle 1).[669] The content of this provision coincides with the obligations set by Article 2 in both the American Convention and the African Charter, and may constitute an extra basis for the introduction of legislative reform orders. Compatibility between domestic laws and international legal obligations can be achieved by incorporation, implementation or adoption of legislative and administrative procedures, and is intrinsically linked to the right to access to justice.[670] Lastly, orders to reform legislation are also characterised as a means to prevent violations.[671]

3. Assessment

The previous analysis allowed us to observe that orders to reform legislation have a clear legal basis in their respective regional conventions. Although they are not expressly included in the text of the reparative articles, these courts have incorporated them in their reparative catalogue through *evolutive* interpretation.

Apart from the particular articles authorising the granting of reparations, the IACtHR and the ECtHR have found legal support in other provisions. While only Article 2 of the American Convention specifically establishes a State's duty to adequate domestic legislation, the ECtHR has taken Article 1 of the European Convention as a basis for this obligation. However, the latter has insisted on declaring that the obligation is for the responsible State to adopt, but not for the Court to order legislative reform —at least not necessarily. The Principles and Guidelines on the Right to a Remedy also establish an obligation for States to respect, ensure respect for and implement

[668] Ibid, Principle 18. In total five forms of reparation exist: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.
[669] Ibid, Principle 2(b). This also includes the implementation of administrative procedures.
[670] Ibid, Principle 2(a) and (b).
[671] Ibid, Principle 3(a).

international human rights law and international humanitarian law. Interestingly, legislative reform is mentioned as a means for complying with this obligation.[672] In the case of the African Court, notwithstanding the fact that the African Charter features a similar provision to Article 2 of the American Convention, no reference has been ever made to its authority.

A last observation concerns the function assigned to legislative reform. Although this issue will be examined in greater detail later in this chapter, it should be recalled that regional human rights courts identify legislative reform as a measure of reparation. However, both the ILC Articles and the Principles and Guidelines on the Right to a Remedy assign different (and combined) functions to this measure. The ILC Articles primarily consider it as a means of assurance or guaranties for non-repetition, yet they also clarify that legislative reform can be used (keeping their primary quality) as a means of satisfaction, which is a reparative measure according to this instrument. Conversely, the Principles and Guidelines on the Right to a Remedy assign legislative reform a reparative function: it is expressly included as a guarantee of non-repetition, which is considered to be a form of reparation. Additionally, legislative reform is given two extra functions: it serves as a means to comply with the State obligation to adapt domestic law, and as a means of prevention. Certainly, the approach taken by the Principles and Guidelines on the Right to a Remedy —similar to that of the ILC Articles— integrates these three functions adequately, since a singular order to reform legislation could be recognised to have those three different qualities without conflict. However, it is also important to acknowledge that the primary function of legislative reform will define the factors to be considered when issuing such orders.

B. Emergence

Orders to reform legislation have become a solid element of the IACtHR's reparative catalogue through an intensive process involving several actors. Although the first

[672] Ibid, Principle 2(b).

judgment to incorporate legislative reform orders was *Loayza Tamayo v. Peru*,[673] the IACtHR had previously dealt with such measures in varying ways. In *Benavides Cevallos v. Ecuador*, the IACtHR approved a reparation agreement which included the obligation to ratify a regional convention and to incorporate this instrument into the domestic legal order.[674] Despite the novelty of this measure, no comments were offered and no substantial supervision was performed.[675] Later, the IACtHR slowly accepted the possibility of ordering legislative reform. First, it rejected a request for the criminalisation of forced disappearance, but only on the basis of the existence of an ongoing legislative discussion on the same matter.[676] In another case, while it also rejected the request to reform domestic legislation, for which no precedent of this kind existed at that time, it did not deny its authority to do so.[677] Instead, the IACtHR argued that the request concerned a law which had never been used in the case under analysis and rejected the request. In the next judgment, *Loayza Tamayo v. Peru*, when the victim requested the amendment of legislation in the reparations stage, the IACtHR swiftly granted the petition.[678] Since then, several judgment have included this order.

The ECtHR added legislative reform orders to its reparative catalogue much later, despite multiple victims' requests. The Court typically argued that the European Convention did not *empower* it to perform such an action.[679] Only after 2006, the ECtHR took a first step in ordering this kind of measure in the framework of a pilot-judgment,

[673] IACtHR, *Loayza-Tamayo v. Peru* (Reparations and Costs), op Para 5.
[674] IACtHR, *Benavides Cevallos v. Ecuador***,** Paras 51-2. Operative Paragraph 3 only refers to the approved agreement: 'In the matter of reparations, approves the agreement between the State of Ecuador and the victim's next-of-kin regarding the nature and amount of said reparations'.
[675] The Inter-American Convention on the Forced Disappearance of Persons was ratified by Ecuador on 07 July 2006, eight years after the approval of the agreement. See also IACtHR, *Benavides Cevallos v. Ecuador* (Monitoring of Compliance) Order 27 November 2003.
[676] IACtHR, *Garrido and Baigorria v. Argentina* (Reparations and Costs), Para 66.
[677] IACtHR, *El Amparo v. Venezuela* **(**Merits), Para 4. It must be noted that the Inter-American Commission requested this measure not as a remedy, but independently from the reparation request. **I**ACtHR, *El Amparo v. Venezuela* (Reparations**),** Para 51. More cases exist in which requests for orders to reform legislation have not been discussed despite the petition of victims and the Inter-American Commission, e.g. IACtHR, *Serrano Cruz Sisters v. El Salvador*, Para 162 (c) and 163 (e) (ii).
[678] IACtHR, *Loayza-Tamayo v. Peru* (Reparations), op Para 5.
[679] See e.g. ECtHR, *X. v. UK* (Art 50), Para 14; ECtHR, *F. v. Switzerland*, Paras 42-3; ECtHR, *Belilos v. Switzerland*, Para 77; ECtHR, *Lundevall v. Sweden*, Para 42; ECtHR, *Demicoli v. Malta*, Para 45.

addressing structural challenges in the domestic legal order.[680] On some occasions, the ECtHR has indicated that legislative reform is an appropriate measure to remedy a wrongdoing without including an order in the operative paragraphs.[681] This choice may relate to the fact that applicants have not explicitly requested legislative reform, but the ECtHR decides *motu proprio* to issue suggestions and recommendations for State's compliance and CoM's supervisory task. However, it is unfortunate that the ECtHR has failed to provide a satisfactory explanation for these differences.[682]

When the African Court, after several years of declaring its lack of jurisdiction over the cases brought before it, finally issued its first judgment on merits, it included orders to reform legislation.[683] Such orders have been repeated on four occasions to date. Unfortunately, those decisions give little information about the considerations taken into account by the African Court in order to determine reparations. Nevertheless, it is noticeable that applicants' requests have sometimes prompted the inclusion of these orders in the operative paragraphs, as is the case at the IACtHR.[684]

C. Causal Connection

When regional human rights courts order legislative reform, they do so because they find certain domestic legislation incompatible with the respective regional human rights convention. Said incompatibility, the courts seem to agree, must be ascertained in a concrete case; that is, there has to be a link between the application of the incompatible law and the violation declared in the judgment.

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[680] ECtHR, *Hutten Czapska v. Poland*, op Para 4.
[681] See e.g. ECtHR, *Hasan and Eylem Zengin v. Turkey*, Para 84; ECtHR, *Intersplav v. Ukraine*, Para 48; ECtHR, *Viaşu v. Romania*, Para 83.
[682] In this respect, an argument is made that the ECtHR should differentiate between mandatory orders and recommendations in order to eliminate ambiguity, see Keller and Marti (2015), 840-2.
[683] ACtHPR, *Tanganyika Law Society and the Legal and Human Rights Centre, and Reverend Christopher R. Mtikila v. The United Republic of Tanzania*, op Para 3.
[684] Applicants actively requested orders to reform legislation in the cases of *Tanganyika Law Society and The Legal and Human Rights Centre, and Reverend Christopher R. Mtikila v. The United Republic of Tanzania; Anudo Ochieng Anudo v. United Republic of Tanzania; Association pour le progres et la défense des droits des femmes maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v. Republic of Mali.*

For example the IACtHR refused to issue reform orders for laws that had been requested to be amended if it observed that said law had not really been applied to the situation which constituted the breach,[685] that is, there was no direct link between the challenged law and the violation. However, this was not a unanimous decision. Judge Cançado Trindade's dissenting opinion reveals his concern about States' duty to prevent violations and the possibility to assess rules 'in the abstract'. According to him, 'the very existence of a legal provision may *per se* create a situation which directly affects the rights protected by the American Convention', and such a situation should be redressed.[686] Cançado Trindade's argument was adopted by the IACtHR in a few subsequent cases declaring that a law can violate '*per se* Article 2 of the Convention, whether or not it was enforced in the instant case'.[687] Ultimately, the IACtHR reverted to its original position on this matter, declaring that it will not review legislation in the abstract, [688] with the consequence of not ordering amendment of that particular legislation.[689]

Nevertheless, recent case-law shows that the IACtHR does not demand a clear link between the challenged law and the declared violation. In *Osorio Rivera and Family v. Peru*, the IACtHR ordered the amendment of a law without successfully establishing a connection between its application and the violations found in the judgment.[690] Said law had been declared incompatible in a prior case,[691] but it had not been demonstrated that its application in the recent case constituted a breach of the convention. When questioned by the State, the Court explained that it ordered the amendment on account

[685] IACtHR, *El Amparo v. Venezuela* (Reparations), op Para 5.
[686] IACtHR, *El Amparo v. Venezuela* (Reparations), Dissenting Opinion by Judge Cançado Trindade, Para 2. Note that Cançado Trindade supported his arguments by means of the ECtHR and the HRC, which denotes the establishment of a dialogue between human rights courts and other fora.
[687] IACtHR, *Suarez Rosero v. Ecuador* (Merits), Para 98. See also IACtHR, *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Paras 114-6.
[688] IACtHR, *Usón Ramirez v. Venezuela*, Para 154; IACtHR, *Manuel Cepeda Vargas* v. Colombia, Para 51; IACtHR, *Velez Loor v. Panama*, Para 285.
[689] Pasqualucci (2013), 217.
[690] IACtHR, *Osorio Rivera and Family v. Peru*, op Para 10.
[691] IACtHR, *Gómez Palomino v. Peru*.

of the need to guarantee non-repetition.[692] Again failing to establish a causal connection between the order and the declared violations (let alone damages), the IACtHR only referred to the fact that the law had been already declared incompatible with the American Convention and that its continuous application constituted an impunity source in future cases.

When the ECtHR agreed to order legislative reform for the first time, it clearly stated that the violation found, protection of property, had 'originated in a systemic problem connected with the malfunctioning of domestic legislation' affecting the rights of the applicant and, potentially, nearly eighty thousand other people.[693] The Court thus found a clear causal connection between the challenged law and the declared violation. Moreover, contrary to the practice of the IACtHR, the causal connection in these cases seems to be influenced by the existence of multiple cases, affected by the same legislation, piling on in the ECtHR's backlog.[694] Hence, most decisions featuring legislative reform orders have been framed as pilot-judgments. The ECtHR has only seldom ordered legislative reform in a different context. An example can be found in *L. v. Lithuania*, in which the Court ordered to enact legislation that only affected a few individuals, not representing a systemic problem in this sense.[695]

Legislative reform orders issued by the African Court feature a straightforward link between the challenged law and the declared violations. In every single case in which the African Court ordered legislation to be amended —with different degrees of specificity—, it had previously identified and declared it incompatible with *inter alia* the African Charter.[696]

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[692] IACtHR, *Osorio Rivera and Family v. Peru* (Interpretation), Paras 25-6.
[693] IACtHR, *Broniowski v. Poland* (Merits), op Para 3 and Para 193.
[694] E.g. ECtHR, *Hutten Czapska v. Poland*, op Paras 3 and 4.
[695] ECtHR, *L. v. Lithuania*, Para 74.
[696] E.g. ACtHPR, *Tanganyika Law Society and the Legal and Human Rights Centre, and Reverend Christopher R. Mtikila v. The United Republic of Tanzania* (Merits), op Para 3; ACtHPR, *Lohé Issa Konaté v. Burkina Faso* (Merits), op Para 8 and Para 164. ACtHPR, *Association pour le progres et la défense des droits des femmes maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v. Republic of Mali*, op Para x.

The lack of a clear causal connection between challenged laws and declared violations influences the specificity with which orders to reform legislation are formulated. Whereas some orders expressly identify which laws and regulations are to be subject to reform,[697] the great majority are issued in a rather more generic manner, solely making reference to a general obligation to adapt domestic legislation to relevant human rights standards.[698] Low levels of specificity may result problematic, hindering compliance.[699] Should courts be able to identify incompatible legislation causing a breach, a higher level of specificity may be reached in the operative paragraphs, sometimes even including detailed orders on the way legislative reform should be implemented.[700]

The different shapes that legislative reform may take (e.g. enactment of legislation, ratification of treaties, and creation of an administrative procedure) call into question whether a link between legislation and breach should necessarily be asserted. In some cases, the breach of the convention does not originate in the application of an existing piece of legislation but rather in the lack of a legal remedy. For instance, on observing that respondent States had not ratified international treaties, which set minimum standards for the protection of certain human rights linked to the violations declared in the judgments, the IACtHR included orders to ratify those instruments in the operative paragraphs.[701] Although such inclusions were previously agreed in a

[697] IACtHR, *Loayza-Tamayo v. Peru* (Reparations and Costs), op Para 5; IACtHR, *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, op Para 8; IACtHR, *Caesar v. Trinidad and Tobago*, op Para 4; *Fermín Ramírez v. Guatemala*, op Para 8; IACtHR, *Raxcacó Reyes v. Guatemala*, op Para 5; IACtHR, *Goiburú et al. v. Paraguay*, op Para 12; IACtHR, *Rosendo-Cantú v. Mexico*, op Paras 12-3; IACtHR, *Cabrera García and Montiel Flores v. Mexico*, op Para 15; *Hacienda Brasil Verde workers v. Brazil*, op Para 11; ECtHR, L. v. Lithuania, op Para 5; ACtHPR, *Actions pour la protection des droits de l'homme (APDH) v. The Republic of Côte d'Ivoire*, op Para 7.
[698] IACtHR, *Castillo Petruzzi et al. v. Peru*, op Para 14; IACtHR, *Gómez Palomino v. Peru*; IACtHR, *Blanco Romero et al v. Venezuela*; IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay*; ECtHR, *Rezmiveș and Others v. Romania*, op Para 4; ECtHR, *Rumpf v. Germany*, op Para 5; ECtHR, *Sekerovic and Pasalic v. Bosnia*, op Para 6; ACtHPR*, Tanganyika Law Society and The Legal and Human Rights Centre; and Reverend Christopher R. Mtikila v. Tanzania*, op Para 3; ACtHPR, *Association pour le progres et la défense des droits des femmes maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v. Republic of Mali*, op Para x.
[699] See e.g. IACtHR, *Castillo Petruzzi et al. v. Peru* (where it was necessary to review the whole judgment to identify incompatible legislation).
[700] IACtHR, *Raxcacó Reyes v. Guatemala*, op Para 5. See also IACtHR, *Goiburú et al. v. Paraguay*, op Para 12.
[701] IACtHR, *Benavides Cevallos v. Ecuador*, Paras 51-2, and IACtHR, *Barrios Altos v. Peru*, Para 44 (c) and op Para 5 (c).

reparation agreement signed by the parties to the conflict, the binding nature of the measure might have required the establishment of a stronger causal link. The same challenge is present when regional courts order the criminalisation of certain conducts.[702]

D. Purpose

Although orders to reform legislation by regional human rights courts are formally granted as reparative measures, with a clear compensatory aim and pursuing remedial justice, examination of the relevant case-law shows that they have additional purposes — be it explicitly or implicitly.

Two main purposes, namely, cessation of the violation and guarantee of non-repetition, are identifiable in the practice of the IACtHR when ordering legislative reform. Whereas the Court avoided discussing the subject for years,[703] in 2001, it admitted that it was prompted to order legislative reform by the respondent State's continuing failure to comply with the obligation enshrined in Article 2 of the American Convention.[704] Thus, the Court's argument directly called for the cessation of the violation. A couple of months after, the IACtHR affirmed that legislative amendment served to avoid repetition of similar violations.[705]

The IACtHR's lack of structure when ordering legislative reform used to make it difficult to appreciate the exact nature of such orders. However, in 2006, the IACtHR started developing a new judgment structure in which discussions on reparations in *obiter dicta* were organised in different categories, including 'measures of satisfaction

[702] See, e.g. IACtHR, *Rochac Hernández et al. v. El Salvador*, Para 92; IACtHR, *Fornerón and daughter v. Argentina*, op Para 4.
[703] For instance, in 1998, in *Loayza-Tamayo v. Peru* (Reparations and Costs), the Inter-American Commission expressly required legislative reform to 'avoid a repetition of violations of the kind', but the IACtHR did not discuss these arguments, see op Para 5 and Para 160.
[704] IACtHR, *Olmedo Bustos et al. v. Chile*, Para 98.
[705] IACtHR, *'White Van' v. Guatemala* (Reparations and Costs), Para 203.

and guarantees of non-repetition'.[706] Currently, the IACtHR has a 'guarantees of non-repetition' sub-section in which legislative reform orders are included.[707] Thus, the IACtHR reiterates its understanding of legislative reform orders as measures preventing repetition.

One of the most concrete examples of the purposive use of legislative reform to cease violations is when the IACtHR orders the repeal of legislation.[708] Pasqualucci has rightly argued that this faculty secures the effective functioning of the Inter-American protection system since victims are not forced to resort to the Court time and again once a norm has been declared incompatible with the American Convention.[709] On some occasions, the IACtHR has taken a further step and directly abrogated the law. For instance, it has declared domestic legislation to be without legal effects from the moment the judgment was issued.[710] The direct repeal of legislation by a regional court is mostly discussed in regard to the rejection of amnesty laws. Here, the practice of the IACtHR is relevant.

The Court has developed a much discussed case-law declaring that amnesty laws, designed to grant impunity to perpetrators of serious human rights violations, were incompatible with the American Convention and, hence, had no legal effects in the domestic orders.[711] The Court later clarified that this declaration was not only applicable to the case examined but, due to its nature, had generic effects.[712] In subsequent cases, the IACtHR declared amnesty laws to lack legal effects but orders to repeal legislation were not issued.[713] Pasqualucci rightly argues that such decisions

[706] The new structure began with IACtHR, *Baldeón Garcia*. The first cases in which the IACtHR included sections discussing measures for guaranteeing non-repetition are IACtHR, '*Detention Center of Catia' v. Venezuela*, Paras 143-4; and IACtHR, *Zambrano Vélez et al. v. Ecuador*, Paras 147 et seq.
[707] E.g. IACtHR, *López Soto et al. v. Venezuela*, Para 315 et seq.
[708] IACtHR, *Caesar v. Trinidad and Tobago*, op Para 3; IACtHR, *Garibaldi v. Brazil*, Para 173.
[709] Pasqualucci (2013), 217.
[710] See e.g. IACtHR, *Raxcacó Reyes v. Guatemala*, op Para 6; IACtHR, *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Paras 86, 212, op Para 8; and IACtHR, *Fermín Ramírez v. Guatemala*, op Para 8.
[711] IACtHR, *Barrios Altos v. Peru* (Merits), Para 41 and op Para 4.
[712] IACtHR, *Barrios Altos v. Peru* (Interpretation of the Judgment of the Merits), op Para 2.
[713] See IACtHR, *La Cantuta v. Peru*, op Para 7; IACtHR, *Almonacid et al. v. Chile*, op Para 3; IACtHR, *Gelman v. Uruguay*, op Paras 6 and 11.

conveniently avert the difficult issue of requiring a State to reform specific legislation in a particular way.[714] This is especially true when considering some States' declarations (e.g. Peru and Chile) expressing concerns about the challenges these orders pose to the division of powers required in a democratic order.[715]

Although the ECtHR has declared, in *obiter dicta*, that there is a growing tendency to view amnesties as unacceptable when applied to grave violations of fundamental human rights, it has not expressly admitted that it could directly abrogate such laws ifself.[716] In fact, both the ECtHR and the African Court have always demanded that States take care of the amendment process when ordering legislative reform.

The purposes of deterrence and cessation are also present in the practice of the ECtHR. As previously mentioned in this chapter, orders to reform legislation at the ECtHR are mostly issued in the framework of pilot-judgments. This mechanism was created to address existing domestic structural problems which eventually reach the ECtHR, creating an almost crippling backlog.[717] The purpose of pilot-judgments is to avoid the occurrence of repetitive violations.[718] Prior reform requests, invoking the deterrence purpose, did not succeed.[719]

Nevertheless, orders to reform legislation have also been granted when there was no fear of repetition, that is, when only few individuals were negatively affected by the

[714] Pasqualucci (2013), 217.
[715] See, declarations made by States' representatives in IACtHR, *Castillo Petruzzi et al. v. Peru* (Monitoring of Compliance) Order of 17 November 1999, Para 3(d); and IACtHR, *Olmedo Bustos et al. v. Chile* (Monitoring of Compliance) Order of 28 November 2003, Para 8.
[716] See ECtHR, *Marguš v. Croatia*, Para 139; ECtHR, *Ould Dah v. France*.
[717] Haider (2013). See number of repetitive applications calculated in ECtHR, *Broniowski v. Poland*, Para 193: 'The failure to implement in a manner compatible with Article 1 of Protocol No. 1 the chosen mechanism for settling the Bug River claims has affected nearly 80,000 people […] There are moreover already 167 applications pending before the Court brought forward by Bug River claimants'; and ECtHR, *Hutten Czapska v. Poland*, Para 235: 'the operation of the rent-control scheme might potentially affect an even larger number of individuals – some 100,000 landlords and from 600,000 to 900,000 tenants (see paragraph 191 of the Chamber judgment).'
[718] See Partly Dissenting Opinion of Judge Fura-Sandström in ECtHR, *L. v. Lithuania.*
[719] ECtHR, *Lundevall v. Sweden*, Para 42.

incompatible legislation.[720] The main concern was rather that the incompatible law —still into force— constituted a violation *per se*. Hence, the purpose was to cease the breach. This reasoning has been repeated occasionally.[721]

Despite being less vocal regarding the purposes of its reparative orders, the African Court has also linked legislative reform orders to the aims of non-repetition[722] and cessation.[723]

In conclusion, it is possible to observe that the understanding of orders to reform legislation has evolved in the practice of both the ECtHR and IACtHR. Whereas these orders were initially thought to be an alternative to compensation, they have rapidly acquired a dual purpose of measures of cessation and non-repetition.

E. Conditionality

Orders to reform legislation are not provided with alternative measures in the practice of any regional human rights courts. The ECtHR's Case of *L. v. Lithuania* constitutes an exception. There, the ECtHR set the alternative measure of monetary compensation in case the State would not be able to pass required legislation within the period of three months.[724] This deviation is grounded in the urgency of medical treatment to be received by the victim —which deprivation was declared to constitute a violation of the individual's right to respect for private and family life—, and the Court's awareness of the likely difficulty for the State to reform legislation within an appropriate time.[725]

[720] ECtHR, *L. v. Lithuania* (Experts calculated that there were only 50 transsexuals living in Lithuania at that time, which is not a significant number when compared to the amount of repetitive applications that underlie pilot-judgments).
[721] ECtHR, *Hasan and Eylem Zengin v. Turkey*, Para 84.
[722] ACtHPR, *Anudo Ochieng Anudo v. United Republic of Tanzania*, Para 122.
[723] ACtHPR, *Association pour le progres et la défense des droits des femmes maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v. Republic of Mali*, op Para x.
[724] See ECtHR, *L. v. Lithuania*, op Para 6.
[725] See Ibid, Para 74.

F. Contestation

Negative responses and harsh criticism to legislative reform orders are not uncommon in the context of human rights adjudication. Whereas orders to reform legislation are an ideal means to redress violations which originate in the existence, application or unavailability of certain domestic laws,[726] they might also provoke strong rejection when States perceive them as too intrusive. Hence, it is important to be aware of the fragile balance courts strike, and the factors they consider, when ordering these measures.

Contestation at the IACtHR arose hand-in-hand with the first order to reform legislation. When the IACtHR ordered to reform certain domestic laws in the *Loayza Tamayo v. Peru* Judgment, the State argued that the Court had fallen into 'radical incompetence'.[727] In a later case, State agents considered that such orders breached the principle of sovereignty of States, since they 'require[d] the legislators to vote in a certain manner'.[728] Rejection was also clear when the Plenary Court of the Supreme Council of Military Justice declared the judgment as not executable.[729] Opposition to the IACtHR rulings became so strong that the State finally —unsuccessfully— attempted to withdraw from the jurisdiction of the Court.[730] Although this fact is mainly related to the unwillingness of the then-undemocratic Peruvian government to remain under international scrutiny, it should be appreciated that adverse reactions from the general population fuelled the Government´s decision. Many of the legislative reforms ordered by the Court were only introduced after Peru returned to democracy.

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[726] Antkowiak (2011), 301–2 (arguing that IACtHR orders to reform legislation have the potential to bring about much-needed changes in Latin-American societies).
[727] IACtHR, *Loayza-Tamayo v. Peru* (Monitoring of Compliance) Order 17 November 1999, Para 12(d).
[728] IACtHR, *Castillo Petruzzi et al. v. Peru* (Monitoring of Compliance) Order of 17 November 1999, Para 3(d).
[729] Ibid, Para 2.
[730] Legislative Resolution No 27,152 (8 July 1999) declared Peru´s decision to withdraw from the contentious jurisdiction of the IACtHR. This request was declared inadmissible by the IACtHR, see *Ivcher Bronstein v. Peru* (Competence), op Para 1(b). After Peru´s transition to democracy, approximately six months later, Peru informed the Organization of American States that the withdrawal request was cancelled.

The Peruvian reaction is not the only case of serious contestation in the system. After the issuance of an adverse Decision regarding the death penalty, where Trinidad and Tobago was ordered to amend its Constitution, this State denounced the American Convention and withdrew from the IACtHR jurisdiction.[731] Notwithstanding the fact that the IACtHR had competence to supervise compliance with the *Caesar* Judgment,[732] it was evident that Trinidad and Tobago did not wish to be held accountable by the IACtHR. [733] This unwillingness is notorious considering that, despite repetitive IACtHR requests, this State has not even fulfilled its obligation to provide information about the state of compliance with the ordered measures, thereby preventing effective monitoring.[734] Moreover, the IACtHR has been informed that Trinidad and Tobago continues with the practice of corporal punishment in spite of the IACtHR´s findings.[735]

Less debated, but equally serious, are the reactions to orders to reform legislation in the Case *Girls Yean and Bosico v. Dominican Republic*.[736] The Case dealt with the State's refusal to provide birth certificates for children of undocumented Haitian immigrants born in Dominican territory, through the establishment of obscure administrative procedures —a situation considered by the IACtHR as violating several rights protected by the American Convention.[737] Noticing that while the case was being examined by the Inter-American system, the State had implemented legislative

[731] IACtHR, *Caesar v. Trinidad and Tobago*, op Para 4. Denouncement notified to the Secretary General of the Organization of American States on 26 May 1998. For more details about the factors building up towards Trinidad and Tobago's withdrawal from the IACtHR jurisdiction see Soley and Steininger (2018), 243 et seq.
[732] See ACHR, Art 78(2): 'Such a denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any act that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation.'
[733] The official reason for Trinidad and Tobago denouncement of the ACHR was the 'inability of the Commission to deal with applications in respect of capital cases expeditiously to frustrate the implementation of the lawful penalty for the crime of murder in Trinidad and Tobago'. See text of the communication at: www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm#Trinidad and Tobago
[734] See IACtHR**,** *Hilaire, Constantine and Benjamin et al.* and *Caesar v. Trinidad and Tobago* (Monitoring Compliance with Judgment) Order 20 November 2015.
[735] See Ibid, Considering 10.
[736] IACtHR, *Girls Yean and Bosico v. Dominican Republic*, op Para 8.
[737] Right to nationality (Art 20); Right to equal protection (Art 24); Right to a name (Art 3); and Right to juridical personality (Art 18) of the American Convention on Human Rights to the detriment of the girls Yean and Bosico; and the right to humane treatment (Art 5) of the American Convention to the detriment of their next-of-kin.

changes making the obtainment of citizenship allegedly even harder,[738] the Court ordered 'to regulate the procedure and requirements for acquiring Dominican nationality based on late declaration of birth', providing a series of guidelines for the implementation of this order.[739] Hence, concerns about counter-productive reactions already existed prior to the issuance of the Judgment. Later, backlash appeared. In 2007, the civil registry authority, ordered all registers to stop issuing birth certificates to children of undocumented immigrants, using the better systematisation of the register as justification.[740] In 2010, the State amended its Constitution, denying children of undocumented immigrants their birthright citizenship.[741] In 2013, the Constitutional Tribunal of the State declared that children of undocumented immigrants were not eligible for citizenship since their parents' illegal situation could not generate rights.[742] In conclusion, the situation of children of undocumented immigrants in the Dominican Republic has worsened over time.[743]

Another subject of much contestation in the Inter-American system is the annulment of amnesty laws. In Uruguay, the IACtHR's declaration of amnesty laws having no legal effects has been confronted by the popular support for the law.[744] Voices of concern were heard all over the region about the troubling effects of these decisions in a democratic setting. For instance, Gargarella argued that the IACtHR should have distinguished between different types of amnesty, paying attention to the democratic legitimacy which these norms enjoy.[745] According to him, differences between the

[738] The Sentence mentions the ongoing reforms as one of the reasons for specifically ordering legislative reform, but fails to provide details about the particular reforms or the way they make the obtainment of citizenship harder. See IACtHR, *Girls Yean and Bosico v. Dominican Republic*, Para 238.
[739] IACtHR, *Girls Yean and Bosico v. Dominican Republic*, op Para 8.
[740] Central Electoral Board of the Dominican Republic, Resolution 12-2007.
[741] Dominican Republic Constitution, Chapter V, Section I, Art 18, published by Gaceta Oficial No. 10561, 26 January 2010. See an analysis of this reform in Culliton-Gonzalez (2012).
[742] Constitutional Tribunal of the Dominican Republic*, TC/0168/13*, issued on 23 September 2013.
[743] The IACtHR has heard a new Case dealing with similar issues in the Dominican Republic, see *Expelled Dominicans and Haitians v. Dominican Republic*. The *Girls Yean and Bosico* Judgment is still under supervision by the IACtHR.
[744] IACtHR, *Gelman v. Uruguay*, Op Paras 6 and 11. The Uruguayan amnesty law (Law No. 15,848 '*Ley de Caducidad de la Pretensión Punitiva del Estado*', also called 'Expiry Law') was passed by a democratic government and backed by two popular consultations (i.e. Referendum of 1989 and Plebiscite of 2009).
[745] Gargarella (2015a), 6.

Peruvian self-amnesty and the Uruguayan expiry law justified upholding the latter or, at least, a need for a greater effort to explain the IACtHR´s choice. Moreover, he accused the IACtHR of not considering democratic community's capacities to decide on the principles with which it would govern its institutions.[746] In respect to these claims, the author agrees with Gargarella in that the IACtHR should include explicit explanation of the value it attaches to domestic democratic processes such as consultations. However, in line with the argument presented by Føllesdal, it is difficult to accept that the judicial review exerted by the IACtHR is detrimental to democratic political debate at the domestic level.[747] Conversely, international judicial review secures that democratic decisions taken domestically also respect fundamental human rights.

An additional concern brought by the IACtHR jurisprudence on amnesties is related to the challenges it might impose on reaching a peace agreement in the context of internal armed conflicts. In *Massacre of El Mozote v. El Salvador*, the IACtHR declared that amnesties in favour of perpetrators of grave human rights violations *during* armed conflict also lacked legal effects.[748] Indeed, this precedent played a role during the negotiations of the Colombian peace agreement with the guerrilla group FARC in 2016,[749] and arguably helped to shape the ensuing Colombian Amnesty Law.[750] There, it was established that neither amnesties nor presidential pardons would be applied to a series of grave human rights violations.[751] Since IACtHR decisions are binding to all States under its jurisdiction through the doctrine of *conventionality control*, all State

[746] Gargarella (2015a), 10.
[747] Føllesdal (2009), 603.
[748] IACtHR, *Massacres of El Mozote and Nearby Places v. El Salvador.*
[749] Revolutionary Armed Forces of Colombia (FARC) has been in a protracted military conflict with the Colombian government since 1964. For a historical overview and possible perspectives of the FARC, see Grisham (2014), 75 et seq.
[750] Ley No 1820 del 30 de diciembre 2016 por medio de la cual se dictan disposiciones sobre Amnistía, Indulto y Tratamientos Penales Especiales y otras disposiciones (Law 1820 on Amnesty, Presidential Pardon and Special Criminal Procedures and other provisions, passed on 30 December 2016).
[751] Art 23 of the Law 1820. This provision also includes crimes not directly related to the armed conflict. For more analysis on the legislative reforms related to the peace process in Colombia, see Rettberg and Quiroga Ángel (2016).

actors are obliged to observe the application of the American Convention and the IACtHR jurisprudence which makes it possible that prosecutions against guerrilla fighters could succeed in spite of amnesty laws.

The ECtHR is not exempted from contestation. Regardless of the little attention drawn by the novel interpretation of Article 46 ECHR, which supposedly allows the Court to point out the particular reparations necessary that are to be implemented by States, the *Greens M.T. v. UK* pilot-judgment has prompted adverse reactions at the domestic level.[752] However, discussions are not limited to the legal ambit. In fact, there is little discussion about the legality of orders to reform legislation, as the debate has primarily focused on the democratic challenges of those orders for well-functioning democracies.[753] As discussed in Chapter III, claims about a democratic deficit of the ECtHR are broad and sparse, and seem to depend on popular reception at the domestic level. Moreover, proposals for considering adequate levels of review based on the democratic quality of States should be taken with caution. It could be accepted that, in general, the rights of citizens of well-functioning democracies might be better protected than the rights of less stable democracies. Yet, this assumption cannot disregard the fact that minorities and disadvantaged groups might be subject to human rights violations under democratic governments. Even worse, serious breaches might be enforced by democratically sanctioned rules. Hence, the qualification of "well-functioning democracy" should not justify a more relaxed judicial review.

Thus, even though contestation seems to be strong when orders to reform legislation are issued, it is noticeable that reactions are connected to the specific violations dealt with in the judgment on merits, instead of the specific orders. In other words, it seems that the rejection of the ordered reforms goes beyond the terms in which new legislation will be implemented, and is directly provoked by disagreement with the

[752] See references to the discussion in Çali, Koch, Bruch (2013), 956-957.
[753] A discussion on the response of the UK government to the *Hirst v. UK (No. 2)* case, prior to *Greens v. UK*, is presented in Foster (2009). For a discussion on the deliberative role of the ECtHR in the prisoners' vote case, see Fredman (2013).

finding of violations. This is confirmed by the fact that debates on the issue are focused on the substantive aspects of decisions, rather than the legality of the orders.

G. Assessment

Orders to reform legislation have been anchored in the practice of regional courts to invoke the *evolutive* interpretation of their respective reparative provisions as a legal basis. Thus, they have an undeniable reparative character. This approach is in line with the one taken by the Basic Principles and Guidelines on the Right to a Remedy. Conversely, it differs from —but does not oppose— the view taken by the ILC Articles which categorise legislative reform orders primarily as a guarantee of non-repetition, and only secondarily as a reparative measure of satisfaction.

The emergence of this type of measures in the practice of the IACtHR and the ECtHR did not occur sporadically. Only after hearing repetitive requests to grant legislative reform orders, the courts agreed to accept them. It certainly took longer for the ECtHR to be convinced than for the IACtHR. In the case of the African Court, the inclusion of legislative reform orders came with the first judgments on the merits, thus reflecting the already well-developed practice of the other regional courts.

The manner in and time at which these orders emerged in the practice of each court interestingly signal a discretionary exercise. While the acceptance of legislative reform orders by the IACtHR developed organically, the case of the ECtHR seems to be clearly linked to the purpose assigned to those measures. That is, while the IACtHR gradually accepted to order legislative reform, encouraged by victims' requests but also States' agreement, the ECtHR started granting those measures when they served to deal with existing domestic structural challenges.

Regional courts also exercise discretion when the causal connection between rights' violations and legislative reform orders cannot be clearly established. In many cases, orders to reform legislation are issued after clearly identifying certain domestic rules as incompatible. The mere existence of the law, applied to the case, breaches the rights

enshrined in the respective convention, generally causing damages for victims. This rationale has also been followed by the Commentary to the ILC Articles which calls for the repeal of legislation which has allowed a breach to occur. Nevertheless, in other cases, the connection between orders to reform legislation and the declared violations is not so clear. When that happens, courts may decide to order legislative reform anyway, but they do so in a less overt manner. Sometimes, courts only resort to indications in *obiter dicta*, calling for States to comply with their obligations to adapt the domestic legislation and to respect the rights provided in the conventions. Other times, courts venture to include vague orders to reform legislation in the operative paragraphs. Seldom, courts order the reform of specific legislation even when its causal link with the rights breach has not been established.

A court's decision to use a higher or lower degree of discretion cannot be understood without considering the purpose assigned to legislative reform orders at the same time. When no causal link is clearly established, but courts decide to include open, or even specific, orders in the operative paragraphs, they ascribe to them a preventive character. The purpose is then not reparation but deterrence. Those orders aim at eliminating all potential breaches of the law. Hence, courts resort to discretion to secure non-repetition. It is important to notice that the Basic Principles and Guidelines on the Right to a Remedy do not limit the granting of guarantees of non-repetition to a strict correspondence with the facts of the case or the concrete damages occurred, but rather they look beyond these elements, allegedly to the conditions favouring the occurrence of human rights violations.[754] Guarantees of non-repetition offer to expand the realisation of the rights protected by the regional conventions to benefit all individuals. This is important when considering, for instance, that the number of victims of grave and/or repetitive human rights violations reaching judicial redress is just a small fraction of the actual total amount. This is especially true in the Inter-American system where access to the IACtHR is filtered by the Inter-American

[754] Basic Principles and Guidelines on the Right to a Remedy, Principle 23.

Commission,[755] but it is also evident when comparing victim numbers between non-judicial reparation programs (e.g. Truth and reconciliation commissions) and judicial proceedings.[756] An expanded reach might also be necessary in cases where there is an impossibility of restoration of the affected right. There, orders to reform legislation will not be fully connected to the aim of *restitutio in integrum*, but will have the effect of preventing repetition.[757]

The practice of the regional courts shows that cessation is also an intrinsic purpose when ordering legislative reform orders. While none of the regional conventions explicitly considers orders to reform legislation as a means to cease an international wrongdoing, the State obligation to cease the occurrence of a wrongdoing is recognised in GIL and IHRL. When a regional court orders to reform incompatible legislation, it is only re-affirming this obligation. States remain in charge of implementing such orders in accordance with the principle of subsidiarity. More intrusive orders (e.g. to repeal legislation) are also justified by this obligation. However, the direct repeal of a domestic law (i.e. declaring it without legal effects) is problematic to defend, as courts themselves are assuming a legislative role. This decision might be seen as a discretionary act outside of its permissible framework. For instance, when ordering legislative reform, the IACtHR has recognised that it does so prompted by the States' unwillingness or inability to conduct those reforms. Thus, the IACtHR takes into account factors such as the conduct of States in relation to other cases, something that cannot be justified as pursuing *restitutio in integrum* or equity.

The Commentary to the ILC Articles recognises that 'the question of cessation often arises in close connection with that of reparation', and that results might coincide in some cases.[758] However, the difference lies in the fact that 'cessation is not subject to

[755] Similarly to the European System prior to Protocol 11.
[756] For more discussion on the dynamic of redress by reparations programs, see Falk (2006), 495.
[757] Consider for instance orders to criminalise forced disappearance. In that case, victims are presumed to be deceased and only *potential* victims benefit from the reform.
[758] ILC Articles, Art 30, Commentary (7).

limitations relating to proportionality'.[759] That is, when considering reparative orders, a proportionality test must ordinarily be performed to secure that reparative measures do not represent an excessive burden to the responsible State compared to the benefit the aggrieved State or victims of the breach should receive.[760] In the case of cessation measures, this precaution is not necessary since the obligation to cease the wrongdoing is independent from the reparative rules. Thus, complex breaches originating in a multiplicity of factors, including deficient or missing legislation, might still cause orders of cessation, such as Constitutional reform, even if said reform insufficiently redresses victims. In fact, cessation orders might bring about that not only victims in the specific case benefit from the order —if at all—, but also the universe of persons who are at that time and potentially affected by the said legislation. Such a measure may even only benefit persons who are not involved in the case, that is, who have not been given 'victim' status. This reality resonates well with the IACtHR's understanding that its obligation to guarantee the American Convention´s rights and freedoms is 'autonomous and differs from the obligation to repair' in the sense that victims or their next-of-kin might choose to waive their right to claim reparation while the State obligatorily maintains its duty to guarantee an effectively enjoyment of all rights.[761]

Another situation in which regional courts make use of a discretionary power is when they react to contestation of their orders to reform legislation. For instance, faced with the criticism regarding the annulment of amnesty laws, the IACtHR seems to be subtly changing its approach, holding a more nuanced view of the functioning of amnesty laws in a democratic society. Although this re-evaluation is certainly guided by the principle of *restitutio in integrum*, as it aims at redressing violations without being prejudicial to reconciliation processes, it is also noticeable that the IACtHR considers extra-legal elements such as its legitimacy perception and ultimate survival. At the

[759] ILC Articles, Art 30, Commentary (7).
[760] ILC Articles, Art 35, Commentary (11).
[761] IACtHR, *'White Van' v. Guatemala* (Reparations and Costs), Para 199.

ECtHR, the reaction to the orders given in *Greens and M. T. v. UK* has not prevented the Court from continue giving this type of orders. Nevertheless, the role of the CoM, which serves as an intermediary in the relation between States and the ECtHR, has been even more crucial when resistance arose. Due to its discretionary power, the CoM might ease the obligations set by the ECtHR's orders to change legislation, thus saving the Court from a bold retreat from its practice.[762]

III. Orders to Release Prisoners

The release of prisoners has gained an important position in the reparative catalogue of measures of the three regional human rights courts, and it is also well-established in the practice of the UN Human Rights Committee (HRC). Notwithstanding the infrequency with which this measure is used, the power of a release order is a unique feature in international human rights adjudication. Indeed, its consideration by an international judicial or quasi-judicial body alone calls into question important and sensitive issues related to the adequate role of international courts and the division of responsibilities between States, adjudicative and quasi-adjudicative international bodies, and other relevant actors.

The strength of a prisoner release order resides in its exceptional, immediate capacity to right a wrong. Such a request seeks to restore the enjoyment of an individual's right to liberty, which can only be achieved by a single action: to free the prisoner. The fact that —at least formally— subjects besides the State might have the power to decide on (in the case of regional courts) or strongly influence (in the case of human rights treaty bodies) the fate of an individual in such a direct way makes this measure of immense importance. Until very recently, if a regional human rights court declared that an individual had been unlawfully detained or imprisoned, it was solely for the State to

[762] Von Staden argues that the wide discretion enjoyed by the CoM to evaluate and declared whether States have complied with the obligations set by the ECtHR, could encourage them to follow a 'minimalist compliance strategy' in order to free themselves from annoying supervision, see von Staden (2018a).

repair such a situation. Willing States would resort to a series of mechanisms to release individuals, for instance presidential pardons, extraordinary revision of cases, unconditional release, and etcetera.[763] Conversely, unwilling States did not receive an express order to be followed and could act as they chose. The inclusion of orders (or indications) to release prisoners is therefore a great instrument of redress. Despite its significance, there is no uniform practice followed by the regional courts and the HRC when issuing these kinds of measures.

A. Legal Basis

1. The Treatment of Orders to Release Prisoners in *Lex Specialis*

As in the case of orders to reform legislation, orders to release prisoners have arisen from the *evolutive* interpretation by each regional court of its corresponding convention. The case of the HRC is rather special due to the absence of a provision specifically directed towards granting redress after the finding of a violation. The HRC has resorted to an extensive interpretation of Article 2(3) of the ICCPR to make up for the lack of specific regulation. The HRC has declared that the duty to provide effective reparations includes the obligation of states to end an ongoing violation of rights or to investigate the allegations of such violations. Additionally, in the Committee's interpretation, 'the Covenant generally entails appropriate compensation' and other modes of reparation can include *restitution, rehabilitation* and *measures of satisfaction*.[764]

In the Case of *Loayza Tamayo v. Peru,* the only case in which prisoner release has been ordered by the IACtHR, it is clear that the decision was based on the provision of the convention authorising the granting of reparations (Article 63 American

[763] Lambert-Abdelgawad (2008), 25 (commenting on the release of prisoners).
[764] HRC, General Comment 31, 29 March 2004 (UN doc. HRI/GEN/1/Rev, 8 233-238), Para 15 and 16. For more on the legal nature of the HRC's decisions on remedies see Scheinin (2004).

Convention).[765] However, the IACtHR failed to discuss the order further, only stating that it was a consequence of the declared violations.

Likewise, the few ECtHR judgments including orders to release prisoners are also authorised by the reparative provision of the convention (Article 41 European Convention). This is certainly something that the ECtHR does not explicitly recognise but it can be inferred from a close analysis of the relevant decisions.[766] While it is true that Article 46 of the European Convention imposes an obligation on States to abide by the Court's judgments, the ECtHR has never declared that release orders draw their authority therefrom.

Only recently the African Court has ordered the release of a prisoner for the first time.[767] Such an order has been discussed and framed within the section 'on reparations' which clearly shows the Court's acceptance of its reparative character. Moreover, this rationale has been present in prior cases, where the African Court discussed requests to grant release orders as reparative measures even if ultimately rejecting them.[768] The African Court's recognition of its ability to order the release of prisoners as a reparative measure might also be observed in discussions about provisional measures and certain dissenting opinion.[769]

When the ECtHR ordered the release of prisoners for the first time, besides anchoring this order in the corresponding reparative provision, it also invoked the State's primary obligation to secure the rights and freedoms guaranteed by the European Convention (Article 1).[770] Yet, the ECtHR has only inconsistently used such a

[765] IACtHR, *Loayza-Tamayo v. Peru* (Merits), op Para 5 and Para 84. The establishment of the legal basis of the release order was reinforced by the decision on Interpretation of the Judgment on Merits, see IACtHR*, Loayza-Tamayo* (Interpretation), Para 13 (c).
[766] See Chapter I in this dissertation.
[767] ACtHPR, *Mgosi Mwita Makungu v. United Republic of Tanzania*, op Para vii.
[768] See e.g. ACtHPR, *Alex Thomas v. Tanzania* (Merits), Para 155 et seq.; ACtHPR, Mohamed Abubakari v. Tanzania, Paras 231-3.
[769] ACtHPR, *Lohé Issa Konaté v. Burkina Faso* (Order for Provisional Measures), Paras 19-20, see also Joint Dissenting Opinion of Justices Ramadhani, Tambala and Thompson, Para 3; ACtHPR, *Lohé Issa Konaté v. Burkina Faso* (Merits), Para 16.
[770] See e.g. ECtHR, *Assanidze v. Georgia*, Para 202. Note that such a formulation is similar to the justification used by the ECtHR when ordering legislative reform.

justification in subsequent judgments, and it has never really explained the specific connection between Article 1 obligations and the particular measure.[771] Instead, the ECtHR has consistently argued that release orders are triggered by the *very nature* of the violation, even when the established violations refer to different rights (e.g. Right to liberty and security; Fair trial; Prohibition of torture; Freedom of expression; etcetera). Therefore, the notion of the *very nature* of a violation seems, therefore, determinant for the selection of cases in which release orders are granted. Yet, assessment of the *very nature* of a violation remains unclear and subject to limited discussion. Meanings assigned to *nature* refer to the 'essence of something' or 'a fundamental quality that distinguishes one thing from another'.[772] Hence, a plausible reading of the ECtHR's intention when referring to the *very nature* of a violation might be that it identifies cases featuring rather unique characteristics that render them deserving of release orders.

The process of identification of those exceptional characteristics is nevertheless contested. Grover finds, for instance, particular characteristics in cases 'where there are known or suspected perpetrators of a Convention violation —*especially where the infringement rises to the level of an international crime such as, but not limited to a practice of torture, or other crimes against humanity*'.[773] She argues therefore that when the ECtHR identifies certain individuals as responsible for violations amounting to international crimes, the Court has a mandate to order the investigation (criminal or other) of those perpetrators. In those cases, the nature of the violation requires the ECtHR to order such measures. Although Grover discusses *Assanidze v. Georgia* to illustrate her arguments, she only refers to the lack of an order to investigate, not to the actually ordered release of the applicant. Thus, Grover's approach to 'special characteristics' connected to perpetrators does not provide guidance in the case of orders to release

[771] Note that in the *Ilaşcu and others* Judgment, released shortly after the *Assanidze* Judgment, the Court did not mention the obligations of Art 1 at all. Only in the *Fatullayev* Case has the ECtHR referred again to Art 1 but did not elaborate on its relevance.
[772] Garner (2014).
[773] Grover (2010), 60.

prisoners. She does however provide a second criterion for 'special characteristics': when violations amount to international crimes equivalent to torture or other crimes against humanity. However, the ECtHR practice reveals that release orders are not solely granted in cases where violations equivalent to *inter alia* torture have been declared. Indeed, release orders have also been granted expressly to put an end to the violation of rights (e.g. breach of the right to freedom of expression) that can hardly compete with the level of seriousness of the former.[774]

A different take on the *nature of a violation* has been proposed by former ECtHR Judge Popović, specifically discussing restitution cases. He understands this concept to be linked to whether the act constituting a human rights violation is continuous or incidental.[775] Depending on this characteristic, Popović argues, States might be obliged to provide certain kind of reparations. While this approach seems to be compatible with the practice of the ECtHR since all decisions containing release orders in effect expressly recognise their purpose of ceasing existing breaches,[776] it does not satisfactorily explain the selection of specific cases deserving release orders by the ECtHR. In other words, this approach explains why courts order the ceasing of continuing violations, but it does not explain why release of prisoners is considered the adequate measure to stop continuing violations of the variety of rights affected in the cases where that measure has been ordered.

Another plausible meaning of the term *very nature* of the violation may refer to the unequivocal identification of the necessary reparative measure to be implemented. The ECtHR has sometimes indicated that release orders are granted on account of the *nature* of the violation not leaving any other 'real choice' for providing redress.[777]

[774] E.*g.* ECtHR, *Fatullayev v. Azerbaijan*, Paras 175-7.
[775] Popović (2015).
[776] ECtHR, *Assanidze v. Georgia*, Para 203; ECtHR, *Ilaşcu and others v. Moldovia and Russia*, Para 490; ECtHR, *Aleksanyan v. Russia*, Para 240; ECtHR, *Fatullayev v. Azerbaijan*, Para 177; ECtHR, *Del Rio Prada v. Spain*, Para 139.
[777] However, the ECtHR has not always referred to the 'real choice' term. See *e.g.* ECtHR, *Ilaşcu and others v. Moldovia and Russia*.

Nevertheless, the ECtHR has occasionally shown how it reached this conclusion.[778] When doing so, it has firstly highlighted that the *nature* of the violation might be such that only certain measures could be adequate to remedy it, but that the ECtHR may indicate only one of these measures while others may be identified by the State itself, under the supervision of the CoM.[779] This means that orders to release prisoners might not be sufficient but are nevertheless necessary to achieve redress. Secondly, the ECtHR might look at particular conditions of detention and establish that imprisonment is not adequate. For instance, in *Aleksanyan v. Russia,* the ECtHR concluded that detention was unacceptable after examining prison conditions since the prisoner's serious illnesses could not be treated on location and his detention on remand did not 'serve any meaningful purpose' since proceedings against him had been suspended and were not likely to be re-opened.[780] Similarly, in *Fatullayev v. Azerbaijan*, the ECtHR ordered the release of a prisoner after asserting that his detention was unacceptable because his prison sentence was unjustified.[781] In a more recent decision, however, the ECtHR neglected to discuss expressly the adequacy or inadequacy of the victim's imprisonment in order to grant her release. In spite of the declaration of the victim's imprisonment as not 'lawful',[782] in the section discussing reparations, the ECtHR only repeated general arguments regarding the obligations of respondent States under Article 46.[783]

Instead of using the ECtHR's term *very nature*, the African Court uses the standard of *exceptional and compelling circumstances* for ordering the release of prisoners. This standard is considered to be satisfied when, for instance, an applicant sufficiently demonstrates or the Court establishes that arrest or conviction is 'based entirely on arbitrary considerations and his continued imprisonment would occasion a

[778] See e.g. ECtHR, *Aleksanyan v. Russia*, Para 239; ECtHR, *Fatullayev v. Azerbaijan*, Para 174; Compare with ECtHR, *Assanidze v. Georgia*, Para 202, in which the ECtHR avoided to establish a link.
[779] See *e.g.* ECtHR, *Aleksanyan v. Russia*, Para 239; ECtHR, *Fatullayev v. Azerbaijan*, Para 174.
[780] ECtHR, *Aleksanyan v. Russia*, Para 240.
[781] ECtHR, *Fatullayev v. Azerbaijan*, op Para 6.
[782] ECtHR, *Del Rio Prada v. Spain*, Para 132.
[783] Ibid, Paras 137-9.

miscarriage of justice.'[784] To illustrate, the Court has accepted that the imprisonment of a person for twenty years, which constituted more than two thirds of his total prison term, without being able to access to appeal mechanisms, reached the threshold.[785] Prior to that case, the African Court had used the *exceptional and compelling* standard to reject victims' requests for immediate release.[786] Although the African Court sometimes ventured to suggest States order the release of prisoners, it was seriously criticised for not directly ordering release.[787]

In spite of being the first court to include orders to release prisoners in its operative paragraphs, the IACtHR has not developed substantial criteria for their selection. The same is the case at the HRC: even though it included those measures in their recommendations for nearly 40 years, it does not set clear standards up for their allocation.

2. The Treatment of Orders to Release Prisoners in *Lex Generalis*

a) The Articles on Responsibility of States for International Wrongful Acts

The text of the ILC Articles does not make explicit reference to the release of prisoners, yet their Commentary includes examples which can be *mutatis mutandis* comparable with such a measure: freeing of hostages, release of detained individuals, handing over of individuals arrested, and release of persons wrongly detained.[788] These measures

[784] ACtHPR, *Mgosi Mwita v. United Republic of Tanzania*, Para 84 (citing *Alex Thomas v. Tanzania* (Merits), Para 157; ACtHPR, *Diocles William v. United Republic of Tanzania*, Para 101; and ACtHPR, *Minani Evarist v. United Republic of Tanzania*, op Para 82).
[785] ACtHPR, *Mgosi Mwita v. United Republic of Tanzania*, Paras 84-6.
[786] Note that the African Court – wrongly – argued that the standard of 'specific and/or compelling circumstances' had been developed in the IACtHR *Loayza-Tamayo* Judgment on the Merits. It may be true that said Judgment contains an order to release a prisoner, but the IACtHR did not elaborate on the reasons why this measure was deemed necessary in the specific Case. Therefore, the African Court's attribution of the criterion of 'specific and/or compelling circumstances' to the IACtHR is unsubstantiated.
[787] See ACtHPR, *Alex Thomas v. Tanzania* (Merits), Dissenting Opinion of Judges Elsie N. Thompson and Judge Rafâa Ben Achour, Para 9 (arguing that the identification of appropriate measures to redress the declared violation had been left to the 'imagination' of the respondent State). See also ACtHPR, *Mohamed Abubakari v. Tanzania*, Dissenting Opinion of Judge Elsie N. Thompson, Paras 11-9 (accusing the Court of wrongly confiding in the discretion of the State even when previous experience had shown – referring to *Alex Thomas v. Tanzania* – that the State may never follow indications).
[788] ILC Articles, Art 30, Commentary (7) and Art 35, Commentary (1) and (5).

are dealt with in the provisions corresponding to *cessation* and *restitution*.[789] As a measure of *cessation*, the release of prisoners aims at stopping the occurrence of an ongoing violation; as a measure of *restitution*, the release of prisoners seeks to re-establish the situation which existed prior to the commission of the violation as much as possible, erasing the latter's effects.[790]

Importantly, the Commentary on the ILC Articles notes that the use of certain measures as either *cessation* or *restitution* might sometimes be 'indistinguishable'.[791] Nevertheless, an important reason for establishing a distinction is the fact that an order to release prisoners, understood as a measure of *restitution*, should be balanced against the actual 'costs' of implementing such a measure. If the burden of *restitution* is out of all proportion with the benefits of another measure (*e.g. compensation*), the latter must be preferred.[792] Although this proportionality test might be effective for asserting the appropriateness of certain measures constituting *restitution* (e.g. restitution of property), viewed within a context of illegal imprisonment, a weighing of the right to liberty seems troublesome.

b) 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 Basic Principles and Guidelines on the Right to a Remedy, restoration of liberty is a measure of *restitution* which aims to bring victims back to their original situation before the wrongful act occurred.[793] This document does not assign another function to the restoration of liberty. However, if the incarceration of an individual is deemed to be a continuous violation of his or her right to liberty, it follows that an

[789] ILC Articles, Art 30 and 35.
[790] Ibid, Art 35, Commentary (1).
[791] Ibid, Art 30, Commentary (7).
[792] Ibid, Art 35, Commentary (11).
[793] Basic Principles and Guidelines on the Right to a Remedy, Principle 19. Other examples of measures of *restitution* include the enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment, and return of property.

order to release the prisoner aims to halt such a violation. The Basic Principles and Guidelines on the Right to a Remedy consider the *cessation* of continuing violations to be a measure of *satisfaction*.[794] This understanding differs from the one proposed in the ILC Articles, which considers *cessation* of a violation a legal obligation completely separate from reparative measures.

3. Assessment

Orders to release prisoners are seldom issued by regional human rights courts and the HRC. While their inclusion in the reparative catalogue has been accomplished through *evolutive* interpretation of the reparative provisions of its convention (and Article 2 of the ICCPR in the case of the HRC), the release of prisoners is explicitly considered in the Basic Principles and Guidelines on the Right to a Remedy and the Commentary to the ILC Articles.

In addition to resorting to their reparative provisions, the ECtHR and the African Court have referred to some sort of criteria to justify the selection of release orders.[795] Under the denomination of either 'very nature' or 'specific and/or compelling circumstances', these regional courts have tried to identify special characteristics distinguishing those cases from all others and therefore making them worthy of the said measure. Regrettably, those courts have not succeeded in showing a consistent reasoning for such selection.

In general, the judicial and quasi-judicial bodies examined have kept congruence when invoking their authoritative provisions for granting (or considering) release orders. The only exception is the ECtHR, which practice reveals that despite relaying on the authority of the reparative provision (i.e. Article 41 ECHR), it also makes an efforts — although unsuccessfully— to base those orders on Article 46 of the ECHR.

[794] Basic Principles and Guidelines on the Right to a Remedy, Principle 22(a).
[795] The IACtHR has not done so in the only case in which it ordered such a measure.

It is also interesting to observe evidence of certain dialogue between regional courts. The relatively young African Court is clearly looking at the practice of the other regional courts, searching for guidance on how to determine reparations. Although this dialogue is accompanied by some challenges, its existence is undeniably relevant, particularly when considering that the provisions of the convention establishing reparations are utterly vague.

B. Emergence

The HRC is the pioneer in considering release of prisoners as a necessary measure to accomplish effective reparation.[796] This inclusion results from its evolving case-law. The context of the HRC's first cases, especially as regards communications concerning Uruguay, was of serious human rights violations in which victims had been illegally detained, tortured, subjected to unfair trials and/or disappeared. Indeed, in 1979, the first Views adopted by the HRC dealt with the rights of three persons who had been sentenced to imprisonment as a result of criminal proceedings non-compliant with fair trial guarantees.[797] Despite finding multiple violations of their ICCPR rights, including lack of effective remedies to challenge their arrest and detention, and their continued imprisonment at the time of the adoption of the Views, the HRC only indicated the obligation to 'take immediate steps to ensure strict observance of the provisions of the Covenant and to provide effective remedies to the victims'.[798] Yet, one year later, the HRC heard a similar case featuring the same fair trial violations and decided to explicitly include the release of the victim among its recommendations to the State.[799] To date, the HRC has sporadically continued including release of prisoners among its recommendations without offering explanations about its selection criteria.[800]

[796] HRC, *Luciano Weinberger Weisz v. Uruguay*.
[797] HRC, *Moriana Hernandez Valentini de Bazzano v. Uruguay*.
[798] Ibid, Para 10.
[799] HRC, *Luciano Weinberger Weisz v. Uruguay*, Para 17. Violations found include Art 7 and 10 (1); Art 9 (3); Art 9 (4); Art 14 (1); Art 14 (3); Art 15 (1); Art 19 (2); and Art 25.
[800] E.g. HRC, *Zogo v. Cameroon*, Para 9.

At the IACtHR, the release of prisoners has only been included in *Loayza Tamayo v. Peru*, issued in 1997.[801] On that occasion, the IACtHR indicated that the release order was a consequence of all violations found in the judgment, but 'particularly' the prohibition of double jeopardy.[802] Unfortunately, lack of further elaboration about the used criteria prevents the reader from appreciating the weight other declared violations (e.g. right to personal liberty; right to humane treatment) had in the Court's decision to order the prisoner's release. Notwithstanding the fact that the IACtHR has subsequently dealt with more cases in which the victims of the declared human rights violations were detained or imprisoned, it has not repeated release orders.

In 2004, the ECtHR started to order the release of prisoners. The Court heard a person arbitrarily imprisoned despite having been acquitted by the domestic courts, and found the respondent State responsible for violations to the rights to liberty and security and fair trial due to its failure to comply with the acquittal Judgment.[803] In the same Judgment, the ECtHR ordered to 'secure the applicant's release at the earliest possible date'.[804] Thus far, the ECtHR has only ordered this measure on few occasions, sometimes drawing criticism for doing it insufficiently. [805]

C. Causal Connection

Whereas the release of prisoners is seldom included in courts and treaty bodies' decisions, it can be observed that such an inclusion is related to the violation of certain rights. In the case of the HRC, there is a correlation between release orders and two particular rights: fair trial and liberty and security (i.e. ICCPR, Articles 14 and 9

[801] IACtHR, *Loayza-Tamayo v. Peru* (Merits), op Para 5.
[802] Ibid, Para 84. Besides the prohibition of double jeopardy (Art 8(4)), the IACtHR also found violations of the following ACHR rights: Right to personal liberty (Art 7 in relation to Art 25 and 1(1)); Judicial guarantees (Arts 8(1) and (2) in relation to Arts 25 and 1(1)); Right to judicial protection (Art 25); the Obligation to respect rights established in the ACHR (Art 1); and Right to humane treatment (Art 5 in relation to Art 1(1)).
[803] ECtHR, *Assanidze v. Georgia*, op Paras 5 and 8.
[804] Ibid, op Para 14(a).
[805] See e.g. Koroteev (2010), 278 (arguing that the ECtHR provides less effective redress in cases of *inter alia* enforced disappearance if compared with the IACtHR). See also the cases of ECtHR, *Fatullayev v. Azerbaijan*; ECtHR, *Del Rio Prada v. Spain*.

respectively).[806] Indeed, the right to a fair trial is a common thread in the HRC's early cases up to 2004; the right to liberty and security enjoys a solid presence in later case-law. Cases in which both rights have been breached are not exceptional. Conversely, release measures are not considered when neither the right to fair trial nor the right to liberty and security have been violated. Although the HRC is not keen on pointing out the specific links between rights and reparations, it has done so occasionally. For instance, in *Victor Francis v. Jamaica*, the HRC established that the violation of the right to fair trial, caused by the State's failure to provide a right to appeal,[807] led to the inclusion of a release measure as an effective reparation.[808] Conversely, the HRC only stated that the other declared violations should be remedied.[809] In *Lopez Burgos v. Uruguay*, the HRC recommended the immediate release of the petitioner, after noticing that he had remained imprisoned without any justification after completing the whole length of his sentence.[810] In that Case, however, the HRC did not find a breach of the right to liberty and security for the particular unlawful imprisonment, so the connection remains implicit.[811] In a different Case, this treaty body connected the violation of the right to fair trial with a release measure by stating that incarceration was a result of a 'trial that failed to provide the basic guarantees of a fair trial', and therefore suggested to conduct a retrial or to release the victim if the former measure was not possible.[812]

There are three particular types of cases in which the measure of release of prisoners is preferred. The first group includes cases in which individuals have been imprisoned by the State due to the commission of —or the accusation of having committed— a crime. Among them are cases connected to the Uruguayan dictatorship,[813] prisoners

[806] See Table E and F.
[807] ICCPR, Art 14 (5).
[808] HRC, *Victor Francis v. Jamaica*, Para 14.
[809] Ibid.
[810] See HRC, *Lopez Burgos v. Uruguay*, Para 11.7.
[811] However, there were several findings of a breach of the right to liberty and security connected to other facts.
[812] HRC, *Polay Campos v. Peru*, Para 10.
[813] E.g. HRC, *Luciano Weinberger Weisz v. Uruguay*; HRC, *Lopez Burgos v. Uruguay*.

sentenced to capital punishment,[814] and prisoners suffering deplorable prison conditions.[815] The second group is made up of cases in which individuals have been detained by a State due to their migratory status, namely, asylum seekers whose application has been denied.[816] The third group contains cases of enforced disappearance.[817] Since the development of HRC's case-law is driven by the individual applications it receives, it is possible to see that certain type of cases are more frequent than others within specific time periods.[818] Regrettably, discrepancies in the selection of release measures are abundant even with regard to cases belonging to those three groups. For instance, even though the HRC seemed to have accepted at some point that release measures were necessary redress in enforced disappearance cases,[819] later case-law shows that the HRC still chooses not to include them whenever it deems their inclusion inconvenient.[820]

To analyse the correlation between rights and release orders in the IACtHR case-law seems *prima facie* counterintuitive given that only one Judgment includes such orders. Yet, the examination of that particular Case added to its comparison with similar ones not including release orders will help to explore the said correlation. The *Loayza Tamayo* Judgment linked the release order with all violations found in the judgment,

[814] E.g. HRC, *Leroy Simmonds v. Jamaica*; HRC, *Victor Francis v. Jamaica*. But cf. HRC, *Lubuto v. Zambia*, in which similar violations were found but release of the prisoner was not considered.
[815] HRC, *Bee and Obiang v. Equatorial Guinea*; HRC, *Eugène Diomi Ndongala Nzo Mambu v. Democratic Republic of Congo*; HRC, *Miller et al. v. New Zealand*.
[816] HRC, *Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari and their five children v. Australia*; HRC, *Danyal Shafiq v. Australia*.
[817] HRC, *Sharmila Tripathi v. Nepal*; HRC, *Tahar Ammari and Toufik Ammari* v. Algeria; HRC, *Kamela Allioua and Fatima Zohra Kerouane and Adel, Tarek and Mohamed Kerouane v. Algeria*; HRC, *Boughera Kroumi v. Algeria*; HRC, *Aïcha Dehimi and Noura Ayache v. Algeria*.
[818] This is the case for, for instance, the first individual applications entertained by the HRC, which refer to the human rights violations against individuals detained during the Uruguayan dictatorship.
[819] See adoption of views issued during the HRC 112 Session (07 October 2014 – 31 October 2014), where cases of forced disappearance 'automatically' included a release measure.
[820] Later cases dealing with enforced disappearance in which release of prisoner has not been considered include e.g. HRC, *Mevlida Ičić v. Bosnia and Herzegovina*; HRC, *Nura Hamulić and Halima Hodžić v. Bosnia and Herzegovina*; HRC, *Chhedulal Tharu and others v. Nepal*; HRC, *Dovadzija and Sakiba Dovdzija v. Bosnia and Herzegovina*. In all these cases, there were reasons to believe that victims might have been killed on a date closed to their detention, although the victims' bodies were never recovered or properly identified. In some cases, (contested) death certificates had been issued by the States, see HRC, *Kamela Allioua and Fatima Zohra Kerouane and Adel, Tarek and Mohamed Kerouane v. Algeria*.

but gave special weight to the violation of the prohibition of double jeopardy.[821] Which other violations could have provoked a release order? It is a proven fact that Loayza Tamayo was detained by police officers in 1996. The Inter-American Commission claimed that the detention was conducted without an arrest warrant issued by a competent judicial authority, and that domestic legislation prevented the victim from resorting to remedies for challenging the lawfulness of said detention.[822] The State denied those allegations, arguing that the victim had been detained in compliance with domestic legislation.[823] While the IACtHR noticed this contradiction, it only focused on the lack of opportunity to resort to remedies for challenging the lawfulness of the detention, laying aside the absence of a detention warrant itself.[824] Since the American Convention recognises the right to personal liberty and provides that an unlawful arrest or detention should be remedied with a release order,[825] it would have been interesting to see whether a declaration of Loayza Tamayo's detention as unlawful could also have prompted a release order.

In later case-law, the IACtHR has partially replied to the posed question. In *Suarez Rosero v. Ecuador*, the Court recognised in *obiter dicta* that, had the victim still been imprisoned, it could order his release, based on the violation of his right to personal liberty (Article 7 ACHR).[826] However, in *Castillo Petruzzi v. Peru,* the IACtHR considered that violations of the right to personal liberty (i.e. Article 7 (5) and (6) ACHR) were not sufficient to grant an order to release prisoners, and ordered a new trial instead, declaring that provisional release orders fell under the competence of domestic courts.[827] The IACtHR's refusal to order the release of prisoners, even in cases

[821] IACtHR, *Loayza-Tamayo v. Peru* (Merits), Para 84. The prohibition of double jeopardy is laid down in ACHR, Art 8(4).
[822] IACtHR, *Loayza-Tamayo v. Peru* (Merits), Para 3(a) and (c).
[823] Ibid, Para 38(e).
[824] Ibid, Paras 49 to 55.
[825] ACHR, Art 7(6).
[826] IACtHR, *Suarez Rosero v. Ecuador* (Merits), Para 108.
[827] IACtHR, *Castillo Petruzzi el al. v. Peru*, Paras 215 and 221. Declared violations were: Right to Personal Liberty – be brought promptly before a judge (Art 7(5)); Freedom from ex-post fact rules (Art 9); Guarantees of fair trial (Art 8(1) (2) (b) (c) (d) (f)); Right to appeal a judgment to a higher court (Art 8(2)(h)); Publicity of criminal

where detention was clearly arbitrary, has caused Judge Medina Quiroga to issue a dissenting opinion calling for the adequate use of this measure.[828] The IACtHR has even refused to discuss the possibility of release when asked by victims.[829] Recently, faced with the prolonged detention of an individual awaiting an extradition decision, in breach of the rights to fair trial and liberty, the IACtHR avoided ordering release by asking the State to reassess detention.[830]

To summarise, it seems that the IACtHR only orders release of prisoners when an individual is serving a prison sentence as the result of criminal proceedings in violation of the prohibition of double jeopardy. However, later cases have brought new challenges to maintaining this criterion since, as observed by Judge Medina Quiroga, the fact that a person remains imprisoned after his or her detention has been declared illegal denies them the protection guaranteed by the American Convention.

The issuance of release orders by the ECtHR seems to be linked to the rights of liberty and security and fair trial. Yet, the Court has given contradictory statements, sometimes giving preference to one over the other. Indeed, in four out of the five cases featuring release orders, the ECtHR found violations of the right to liberty and security (i.e. Article 5 (1) and (3)).[831] In three of those cases, the ECtHR expressly linked the violation of this right with the release orders. To illustrate, in *Ilaşcu and others,* the Court declared the breach of the right to liberty and security since certain convictions were not '"lawful detention[s]" ordered in accordance with a procedure described by law'.[832] Despite having found additional violations,[833] the ECtHR only linked the release order to the specific right to liberty and security. Indeed, when justifying the

proceedings (Art 8(5)); Right to judicial protection(Art 25), Right to recourse to a competent court (Art 7(6)); Right to Human Treatment (Art 5) ACHR.

[828] IACtHR, *Garcia-Asto and Ramirez-Rojas v. Peru*, Dissenting opinion of Judge Medina Quiroga, 7.

[829] IACtHR, *Garcia-Asto and Ramirez-Rojas v. Peru*.

[830] IACtHR, *Wong Ho Wing v. Peru*, op Para 13 and Para 305 (The victim had spent several years detained and only granted house arrest after the case was referred to the IACtHR).

[831] ECtHR, *Assanidze v. Georgia*; ECtHR, *Ilaşcu and others v. Moldovia and Russia*; ECtHR, *Aleksanyan v. Russia*; ECtHR, *Del Rio Prada v. Spain*.

[832] ECtHR, *Ilaşcu and others v. Moldovia and Russia*, Para 462, and op Paras 14-5.

[833] I.e. Prohibition of torture (ECHR, Art 3) and Right to individual application (ECHR, Art 34).

release order, the ECtHR declared that a continuation of the 'unlawful and arbitrary detention' of the applicants would entail a serious prolongation of the violation of Article 5 and a breach of the obligations set by Article 46(1).[834]

However, the relation to the right to liberty and security does not prevent connections with other rights. In *Assanidze v. Georgia*, the Court ordered the release of the applicant based on both the right to liberty and security and the right to fair trial.[835] In *Aleksanyan v. Russia*, in addition to Article 5, the ECtHR connected the release order to the need of treatment of the applicant's illness, which could not be done while imprisoned.[836] In *Fatullayev v. Azerbaijan*, the Court specifically associated the release order with the violation of the right to freedom of expression, explaining that the European Convention only allows the imposition of a prison sentence for press offences in exceptional circumstances (e.g. hate speech; incitement to violence). [837]

Even when the ECtHR did not link release orders with the violation of any particular right in *Del Rio Prada v. Spain*, a dissenting opinion shows that judges may assume a correlation between rights and the measures they order. For instance, in disagreement with the majority, Judge Mahoney considered that there had been no violation of the right to no punishment without law (Article 7 ECHR,) and, consequently, the release order should not be upheld. Moreover, he argued there was no merit to a release order based on the finding of a violation of the right to liberty and security (Article 5(1) ECHR) 'on the ground of the defective quality of the Spanish law'.[838] However, he recognised that the breach of the right to liberty and security could incite a release order when, as happened in previous case-law, detention constituted a 'flagrant denial of justice, wholly arbitrary and offensive to the rule of law' or was 'unacceptable', 'not

[834] ECtHR, *Ilaşcu and others v. Moldovia and Russia*, Para 490.
[835] ECtHR, *Assanidze v. Georgia*, Para 203. Some commentators, however, link the release order in this case only to the violation of Art 5 (1), see *e.g.* Colandrea (2007), 401.
[836] ECtHR, *Aleksanyan v. Russia*, Para 240.
[837] ECtHR, *Fatullayev v. Azerbaijan*, Para 103.
[838] ECtHR, *Del Rio Prada v. Spain,* Partly dissenting opinion of Judge Mahoney, 65.

serv[ing] any meaningful purpose under Article 5', or the 'consequence of a criminal conviction with "no justification for imposing a criminal sentence"'.[839]

In spite of finding structural problems related to the violation of the prohibition of inhumane or degrading treatment in the context of detention, in this type of cases, the ECtHR focuses on the establishment of preventive and compensatory measures instead of directly ordering the release of detainees.[840] A plausible explanation for this preference is that the breaches found in those cases, even if they constitute violations to the prohibition of inhumane or degrading treatment, are not of a very grave nature, as they involve complaints about *inter alia* overcrowding, restrictions to access to sanitary facilities and outdoor activities. Yet, this reasoning is difficult to follow when the ECtHR, having determined that lack of access to adequate medical attention during detention amounted to a breach to the prohibition of torture, did not order the release or transfer of the prisoner to an adequate medical facility.[841] Rather, the ECtHR indicated in *obiter dicta* that the State should take urgent measures, necessary in order to keep to the spirit of the protection system set up by the European Convention.[842]

Dissenting opinions by the African Court's judges also signal correlation between rights' violations and orders to release prisoners. In *Mohamed Abubakari v. Tanzania*, the Court found violations of the right to fair trial protected by both the African Charter and the ICCPR; yet, it did not grant the applicant's request to be released from prison.[843] Judge Thompson dissented, arguing that the violation of these rights in fact merited a release order, and called for a comparative analysis of the case-law of other regional human rights courts where the violation of due process has provoked said measures.[844] Interestingly, when the African Court decided to grant a release order, it

[839] Ibid.
[840] E.g. ECtHR, *Ananyev and others v. Russia*; ECtHR, *Torreggiani and Others v. Italy*; ECtHR, *Neshkov and Others v. Bulgaria*; ECtHR, *Varga and Others v. Hungary*.
[841] ECtHR, *Dybeku v. Albania*.
[842] Ibid, Para 64.
[843] ACtHPR, *Mohamed Abubakari v. Tanzania*.
[844] Ibid, Dissenting Opinion of Judge Elsie N. Thompson, Paras 11-9.

did so precisely following the declaration of a violation of the right to fair trial. The circumstances of the latter case were, however, more serious, as the applicant had remained imprisoned for 20 years without being given the opportunity to exercise the right to appeal.[845]

To summarise, although neither the regional courts nor the HRC have established a clear correlation between the violation of certain rights and orders to release prisoners, the rights to liberty and security and to fair trial play a pivotal role. Indeed, the majority of cases in which release of prisoners has been included feature the breach of, at least, one of the two mentioned rights. However, this does not guarantee the granting of release orders as it has been demonstrated that cases containing similar characteristics only occasionally produce this result. While regional human right courts and treaty bodies generally avoid discussing the selection of release orders, individual opinions show that discussions take place within each jurisdiction concerning this issue, and that some look at the practice of the others in search for selection criteria.

D. Purpose

There is no uniform practice pointing to a specific purpose to orders to release prisoners, with only few commentators discussing, and failing to reach consensus on this issue.[846] Shelton, for instance, affirms that release of prisoners as a restitution measure is coextensive with its use as cessation of a breach, and no significant challenges are caused by this combination.[847] This argument is not shared by Arangio-Ruiz who argues against the classification of release orders as a reparative measure, maintaining that the obligation to put an end to a breach exists independently from any declaration of a violation.[848] Merging these two ideas, Buyse contends that the duty

[845] ACtHPR, *Mgosi Mwita Makungu v. United Republic of Tanzania*, Paras 84-5.
[846] See Shelton (2015), 305; Nifosi-Sutton (2010); Tomuschat (2003), 207.
[847] Shelton (2015), 307.
[848] See *e.g.* Preliminary report on State Responsibility by Special Rapporteur Arangio-Ruiz, Para 22.

to end a violation may exist independently from reparation, but may be part of it at the same time.[849]

Well-established ECtHR jurisprudence has indicated the European Convention establishes a legal obligation to put an end to human rights violations as well as to make reparations for its consequences.[850] Following this precedent, the ECtHR declared in *Assanidze v. Georgia* that orders to release prisoners were both a measure of reparation and a means of securing *cessation* of the breach.[851] However, subsequent case-law reveals that orders to release prisoners are primarily directed towards halting the occurrence of violations. For instance, in the *Ilașcu* Case, the ECtHR justified a release order by declaring that a continuation of the 'unlawful and arbitrary detention' of the applicants would entail a serious prolongation of the violation to the right to liberty and security and a breach of the obligations set by Article 46(1).[852] Although reasons for the release order were discussed in the reparative section of the Judgment (Article 41), the wording of the Decision shows that the ECtHR used the release order to stop the violation to start with, but furthermore to remedy it. The same conclusion could be drawn from *Aleksanyan v. Russia*, where the ECtHR ordered the victim's release by reasoning that his illnesses could not be treated in his prison (i.e. prolongation of the violation of Article 3).[853] Hence, the order is clearly a means to cease ongoing violations.[854] The same reasoning has been used in later ECtHR case-law as the Court continues issuing orders to release prisoners with a dual purpose, a reparative and cessation, but the prevalence of the aim of *cessation* is evident.[855]

[849] Buyse (2008), 114; Shelton (2005), 149. See also Colandrea (2007), 401.
[850] ECtHR, *Papamichalopoulos and Others v. Greece* (Art 50), Para 34. The ECtHR argued that both obligations emanated from former Arts 53 and 54 of the ECHR (currently merged in Art 46). This conclusion is incorrect, in the author's opinion, since Arts 53 and 54 did not provide for the establishment of reparations, as Art 50 (current Art 41) in fact did.
[851] ECtHR, *Assanidze v. Georgia*, Paras 198, 202-3. See also arguments for the identification of this order with cessation of violation by Colandrea (2007), 400-3.
[852] ECtHR, *Ilașcu and others v. Moldovia and Russia*, Para 490.
[853] ECtHR, *Aleksanyan v. Russia*, Para 240.
[854] The same conclusions have been reached by Starr (2010), 483.
[855] E.g. ECtHR, *Fatullayev v. Azerbaijan*, Paras 175-7; ECtHR, *Del Rio Prada v. Spain*, Paras 138-9.

Attention to the terminology used by the IACtHR helps to identify the purpose of release orders. When the Court ordered the release of Loayza Tamayo, it stated that this measure in fact constituted the result of the incurred violation, rather than a means to repair the consequences of the violation, which is the rationale of the reparative provision of the American Convention.[856] Therefore, it could be argued that the IACtHR recognised that, at least in that Case, the order to release the victim was independent from considerations about reparation. This reasoning is confirmed by the fact that release was ordered in the Judgment on the Merits, rather than the later one on reparations, thereby contravening the then common IACtHR's practice and signalising the uniqueness of the measure.[857]

By the same token, the HRC follows a rationale similar to the ECtHR's one. Based on the text of Article 2(3)(a) ICCPR, the HRC considers the release of prisoners to constitute 'effective reparation' when it includes those measures in its views. From the context in which those measures are considered, it evidently results that the *cessation* role is intrinsic to the rationale of the HRC. All cases in which release orders are given, feature the existence of an ongoing violation: forced disappeared persons suffer the breach of their right to liberty until they are released or their remains are returned to their next-of-kin; persons unlawfully imprisoned or suffering deplorable prison conditions are subjected to ongoing violations of their right to liberty or fair trial. In every case, release orders have the effect of ending the occurrence of an ongoing violation.

E. Conditionality

Different levels of conditionality are assigned to orders to release prisoners. The HRC, for instance, gives release orders as effective reparation in either a compulsory or a conditional capacity. That is, in some cases, the HRC has established that the State party's obligation to provide effective remedies includes the victim's 'immediate

[856] IACtHR, *Loayza-Tamayo v. Peru* (Merits), Para 84.
[857] Ibid, Para 85.

release'.[858] In others, however, the HRC has declared that release orders should be included as reparative measures if other measures fail to be implemented. For instance, in the Case of *Polay Campos v. Peru*, the HRC established that release should take place 'unless Peruvian law provides for the possibility of a fresh trial'.[859] That formula has since been repeated in several cases.[860] On occasion, the HRC gives States parties unconditional discretion to dictate release orders (or new trial), only suggesting States 'consider' those measures.[861] This practice has occasionally drawn criticism from its own members.[862] The HRC's choice to assign different levels of discretion to release orders without explaining the criteria used for selection is controversial.

Issuance of release orders by the ECtHR has been very strict, leaving no room for States to choose an alternative. The Court has used terms such as 'secure' or 'ensure' to highlight States parties' obligation to release a victim.[863] Indeed, a difference has been established between situations in which it assists States in the selection of adequate reparation indicating measures that 'might be taken', and situations in which the nature of the violations leaves 'no real [alternative] choice' —always identifying release orders with the second type.[864] More clarity in the formulation of these obligations may positively affect levels of State compliance: the 'more specific the wording of the judgment, the easier the Committee of Ministers' task of supervising

[858] *E.g.* HRC, *Luciano Weinberger Weisz v. Uruguay*, Para 17; HRC, *Lopez Burgos v. Uruguay*, Para 14.
[859] HRC, *Polay Campos v. Peru*, Para 10.
[860] HRC, *Geniuval M. Cagas, Wilson Butin and Julio Astillero v. The Philippines*, Para 9; HRC, *Khomidova v. Tajikistan*, Para 8; HRC, *Musaeva v. Uzbekistan*, Para 11.
[861] HRC, *Francis et al. v. Trinidad and Tobago*, Para 7; HRC, *Sandzhar Ismailov v. Uzbekistan*, Para 9; HRC, *Bondar v. Uzbekistan*, Para 9; HRC, *Akhadov v. Kyrgyzstan*, Para 9; HRC, *Miller et al. v. New Zealand*, Para 10.
[862] HRC, *Francis et al. v. Trinidad and Tobago*. See Individual opinion of Committee member Mr. Hipólito Solari Yrigoyen (dissenting in part), where he argued that said verb should be eliminated from the sentence on account of the wide discretion this word offered to the State party.
[863] *E.g.* ECtHR, *Assanidze v. Georgia*, Para 202; ECtHR, *Ilaşcu and others v. Moldovia and Russia*, Para 490; ECtHR, *Aleksanyan v. Russia*, Para 240; ECtHR, *Fatullayev v. Azerbaijan*, Para 177; ECtHR, *Del Rio Prada v. Spain*, op Para 3.
[864] See *e.g.* ECtHR, *Aleksanyan v. Russia*, Para 239; ECtHR, *Fatullayev v. Azerbaijan*, Para 174; ECtHR, *Del Rio Prada v. Spain*, Para 138.

the execution of measures imposed on the States becomes from the legal perspective.'[865]

The only cases in which release orders have been issued by the IACtHR and the African Court, likewise portray an unconditional order.[866]

F. Contestation

Orders to release prisoners have led to significant criticism. The first ones to question the suitability of this innovative measure have been the judges of regional human rights courts themselves. When the IACtHR ordered the freeing of Loayza Tamayo, Judge Montiel-Argüello called the release order an 'obscure formula equivalent to an order acquitting the defendant'.[867] Further criticism was voiced by the Peruvian State, calling the release order 'irregular and illegal'.[868]

More instances of contestation are found in the ECtHR case-law. In *Assanidze*, for instance, the ECtHR ordered the release of a person who was being kept incarcerated in the Autonomous Republic of Ajaria —a politically independent region of Georgia— in spite of an acquittal by the Georgian courts and several calls by Georgian authorities for his liberation. Judge Costa underlined the difficulties which might arise concerning the implementation of the release order by Georgia and wondered whether 'the Court should have waited for a more suitable opportunity to take this step forward in its case-law'.[869] In response to the *Ilașcu* Decision, in which the ECtHR ordered Russia and Moldova to secure the release of victims that were imprisoned in Moldovan territory, Judge Kovler similarly stated that the implementation of such a release order was an 'objective impossibility' for Russia. Indeed, Judge Kovler considered that actions taken by Russia in order to comply with the *Ilașcu* decision could be seen as a breach of the

[865] ECtHR, *Assanidze v. Georgia*, Partly concurring opinion by Judge Jean-Paul Costa, Para 7.
[866] IACtHR, *Loayza-Tamayo v. Peru* (Merits), Op Para 5 and Para 84; and ACtHPR, *Mgosi Mwita Makungu v. United Republic of Tanzania*, op Para vi.
[867] IACtHR, *Loayza-Tamayo v. Peru* (Merits), Dissenting opinion of Judge Montiel-Argüello, Para 11.
[868] IACtHR, *Loayza-Tamayo v. Peru* (Interpretation), Para 12(c). The IACtHR declared the request inadmissible and therefore no more analysis was submitted.
[869] ECtHR, *Assanidze v. Georgia*, Partly concurring opinion by Judge Jean-Paul Costa, Para 8.

sovereignty of Moldova, although the majority of the Court agreed that the region in which the prisoners were detained, Transdniestria, was a territory *de facto* under Russian control.[870]

Some States have also given an unequivocal negative response to these measures. Commentators have observed that, contrary to the *Assanidze* experience in which the prisoner was released immediately after the issuance of the Decision, the Russian authorities did not seem to be convinced by either the ECtHR's arguments or the CoM's calling for compliance with the *Ilaşcu and others* Judgment.[871] In fact, two of the prisoners were only liberated three years after the issuance of the release order. The complex issue of the level of effectiveness of Russia's overall control over the Moldavian Republic of Transdniestria —a self-proclaimed separatist regime acting in Moldavian territory—might have influenced Russia's compliance, even when the ECtHR had determined that such control existed. Some scholars suggest that due of the severity of the Judgment and the recognition of extra-territorial obligations, reservations with regard to European Convention obligations have increased in territories under foreign occupation.[872] For others, the fact that 'political pressure appears to have been more effective than legal reasoning' is a ground for assigning supervision of judgment execution to a political organ such as the CoM.[873]

States in the Inter-American system have also complained about release orders. In *Castillo Petruzzi*, for instance, when the Inter-American Commission requested the release of prisoners, the Peruvian State replied that the IACtHR was 'not a tribunal that [could] declare[] individuals innocent and [did] not have the right to order that criminals be released',[874] and that the release request 'infringe[d on] Peruvian

[870] ECtHR, *Ilaşcu and others v. Moldovia and Russia*, Dissenting opinion by Judge Kovler, 157. For an analytical summary of this case, describing the complex issue of *de facto* control over the territory in which the applicants were detained, see Wenzel (2007).
[871] Ichim (2015), 211.
[872] Karagiannis (2012), 321.
[873] Ichim (2015), 211.
[874] IACtHR, *Castillo Petruzzi el al. v. Peru*, Para 216 (f).

sovereignty'.[875] In the African Court, it remains to be seen whether Tanzania will comply with the recently issued release order, and whether this and/or other States Parties will present objections to the *Mgosi Mwita Makungu* Judgment, especially considering that Tanzania does not have a good record of compliance with other orders.[876]

Contestation of the views adopted by the HRC is *prima facie* weaker than the one experienced by regional human rights courts. Due to their lack of formal bindingness, HRC's views only sporadically face open confrontation by States.[877] Yet, the HRC faces the same implementation challenges when it comes to the reception and execution of its indications.[878] Criticism of indications to release detainees is delivered through official State responses to the HRC views for instance, where they declare their disagreement with the HRC findings.[879] Additionally, States might state that the release of detainees will depend on domestic evaluations, despite clear non-conditional indications given by the HRC.[880] As a matter of example, the Russian response to the HRC's Views in *Gridin v. Russian Federation* is well-known: it highlighted that the HRC is not a court (while recognising the Views as authoritative); and it stated that, having conducted a domestic second review of the case, 'the State party's conclusions in this matter remain the same.'[881] Likewise, the release of prisoners whose conviction has been confirmed by the Supreme Court has been

[875] IACtHR, *Castillo Petruzzi el al. v. Peru*, Answer to the application submitted by the Peruvian State, p. 000164 of the file.
[876] Daly and Wiebusch (2018), 306 et seq.
[877] The follow-up procedure established by the HRC to supervise compliance with its Views, for instance, has been the object of criticism by China and Russia, see Ulfstein (2018), 298.
[878] See Kosar and Petrov (2018); Seibert-Fohr (2018), 133 et seq.
[879] See e.g. the Australian response to the Views of the HRC regarding the cases of F.K.A.G. et al and M.M.M. et al both against Australia, https://remedy.org.au/correspondence/1412_Austn_response_to_FKAG&MMM.pdf
[880] E.g. HRC, *F.K.A.G. et al. v. Australia*, Para 11; HRC, *M.M.M. et al. v. Australia*, Para 12 (Information on current status of detainees available at https://remedy.org.au/cases/13/); HRC, *Bolanos v. Ecuador*, Para 10 (where the detainee was released after having been found not guilty to the criminal charges for which he had been unlawfully imprisoned).
[881] UN GA, 60th Session. Report of the Human Rights Committee, 3 October 2005, UN Doc. A/60/40, Vol.II, Supp. No 40, 521-2.

deemed contrary to the Constitution, and as interfering with the judicial independence of Sri Lanka.[882]

G. Assessment

The analysis here presented confirms allegations of discrepancy and lack of transparent reasoning in the selection of the measure of prisoner release between and within regional human rights courts and the HRC. Naturally, these bodies have developed particular practices regarding the consideration of release of prisoners, based on different legal frameworks which do not explicitly include the provision of such a measure. Nevertheless, it is remarkable that release of prisoners has found a place in the reparative catalogue of all regional human right courts and the HRC. The role of interpretation in achieving this transformation has been fundamental, as all regional courts invoked their respective reparative provisions when considering the release of prisoners. Likewise, the HRC's interpretation of Article 2(3) ICCPR has been essential.

The present analysis also reveals that, in practice, release orders have a dual purpose: primarily as a means of *cessation* and only secondarily as a means of *restitutio in integrum*. In other words, when regional human rights courts and the HRC decide to include release orders in their decisions, they do it with the purpose of stopping the occurrence of an ongoing human rights violation. The fact that the release of an individual also contributes to the restoration of a situation as if the breach had not happened (*restitutio in integrum*) is – although welcome and important – only accessory.

Some elements dealt with in this section reinforce the claim that release of prisoners should in fact be categorised as a means of *cessation*. Firstly, it has been noted the emergence of this measure occurred when the HRC dealt with applications from dictatorship-driven Uruguay (accused of widespread political repression and human

[882] See Van Alebeek and Nollkaemper (2012), 376 (commenting on the Sri Lankan Supreme Court's 2006 Decision regarding HRC, *Singarasa v. Sri Lanka*).

rights violations), accounting for the arbitrary incarceration of individuals who were subjected to torture and sentenced to prison following proceedings which had not complied with fair trial guarantees. The HRC's analysis and ensuing adoption of views were conducted while those individuals were still imprisoned. Thus, it is plausible that the HRC wished to prevent the continuation of a situation (i.e. victims' imprisonment) constituting a clear violation of the ICCPR. Later, when the IACtHR and the ECtHR also pondered the inclusion of this measure, they used a similar rationale.[883]

Secondly, the observed correlation between breached rights and orders to release prisoners also points to the identification of this measure as a means of *cessation*. Indeed, the practice of regional human rights courts and the HRC demonstrates that infringements of the rights of liberty and security and fair trial are closely linked to the measure of prisoner release. The breach of these rights, in the context of ongoing unlawful imprisonment, demands a cessation measure. Although the breach of one of these rights does not necessarily cause the granting of prisoner release, most cases in which this measure has been resorted to, involved the violation of at least one of them.

However, discrepancies are too significant to be ignored. The connection with the right to fair trial, for instance, is different in each jurisdiction. While relevant HRC case-law mostly involves the breach of this right, the ECtHR has not given the right to fair trial enough weight to establish a clear link with release orders. Moreover, it seems that the IACtHR only considers the protection against double jeopardy —one of the several protections recognised by the right to fair trial— as worthy of establishing said link. In essence, the fact that release orders are triggered by the breach of a variety of rights including, for instance, the right to freedom of expression demonstrates that these measures do not necessarily depend on the breached right *per se*.[884] Instead, regional

[883] This argument however fails to explain why regional international human rights courts and treaty bodies sometimes choose not to consider release of prisoners notwithstanding similar conditions.
[884] See e.g. ECtHR, *Fatullayev v. Azerbaijan*.

courts and the HRC might be using their discretion to ground release measures in the overall circumstances of imprisonment, rather than in the violation of particular rights.

Thirdly, the practice of regional human rights courts (although incipient in the case of the IACtHR and the African Court) shows that orders to release prisoners are given in a categorical manner, requiring States to cease the wrongdoing unconditionally. Contrary to the HRC's practice, which sometimes recommends the release of prisoners as an alternative means of redress, regional courts seem to agree about their mandatory character. This characteristic resonates well with the identification of release of prisoners as a cessation measure.

The identification of release of prisoners as a means of cessation in IHRL is clearly reconcilable with the notion of cessation in GIL. Cessation of a wrongful act is recognised to be a legal consequence of its occurrence and forms part of the content of State responsibility.[885] An order to cease arises when two conditions are met: the continuing character of the wrongful act, and the violated rule still being in force at the time at which the order is issued.[886] Hence, the release of prisoners in IHRL clearly fulfils the two conditions since they are applied to the ongoing unlawful imprisonment or detention of individuals (regardless of the simultaneous existence of lawful reasons for their imprisonment or detention) in contravention of ruling human rights instruments.

Moreover, particularly on the compatibility with the ILC Articles, it should be underlined that while the immediate function of cessation is to put an end to a violation, there is a second more general function directed towards 'safeguard[ing] the continuing validity and effectiveness of the underlying primary rule' and thereby protecting 'the interests of the international community as a whole in preservation of,

[885] ILC Articles, Art 30, Commentary (3)(f).

[886] These conditions were set in the arbitral award in the *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior affair*, UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 215 (1990), Para 114.

and reliance on, the rule of law.'[887] In this light, it could be argued that regional human rights courts and the HRC select the measure of release of prisoners for two reasons, considering not only its aim to stop the wrongful situation but also to re-establishing respect for human rights within their jurisdictions. Indeed, one must not forget that the preambles of both the European and American Convention recall the wish of consolidating the realisation of human rights within their communities as an instrument for greater unity of States parties based on democratic order and the RoL.

Regarding compatibility with the other relevant instrument of GIL, namely the Basic Principles and Guidelines on the Right to a Remedy, the identification of orders to release prisoners as a cessation measure does contravene its assigned character of a reparative one. For this instrument, both cessation and restitution (under which the measure of release of prisoners is formally classified) are reparative measures.

In conclusion, regional courts and the HRC consider the release of prisoners as both a reparative measure and a means of cessation. The fact that they insist on formally classifying this measure as solely a reparative one responds to the need to base their decisions on the provisions of their relevant instruments. However, the identity of this measure as a cessation means becomes manifest when it is applied in a discretionary manner, not necessarily following a specific causal connection.

IV. Orders to Restitute Property

The restitution of property forms part of the reparative catalogue of the IACtHR and ECtHR, and the HRC. Up to this moment, the African Court has not granted orders to restitute property. Like in the case of other reparative measures examined in this dissertation, each of these jurisdictions has developed a unique way of selecting and giving shape to restitution of property. Its regular inclusion in the reparative catalogues does not entail the development of clear and consistent standards for its use within each jurisdiction. On the contrary, this examination will show that,

[887] ILC Articles, Art 30, Commentary (5).

although regional courts and the HRC are constantly looking for an effective way to select this kind of measures, they have not been successful in this task.

In addition to the challenges common to all jurisdictions when considering restitution of property, the special characteristics of the cases dealt with by each court and treaty body also influence the process of its determination. To illustrate, common difficulties include a possible interference with the rights of third parties. Neuman, for instance, has warned that States might 'need to dispossess another private holder' when ordering restitution of property.[888] Indeed, this concern has sometimes constituted an obstacle for the adoption of international instruments.[889] However, this common challenge might be met differently by each judicial and quasi-judicial body due to the diverse contexts in which violations occur. For instance, while both the ECtHR and the IACtHR consider restitution orders in connection to the right to property, the HRC does it in relation to the prohibition of discrimination. It is necessary to appreciate these differences in order to understand the characteristics attached to restitution in each jurisdiction.

A fascinating but challenging task is the examination of the IACtHR's experience in developing the measure of restitution of property within a broader understanding of indigenous rights. Restitution of indigenous lands has been recognised as a source for the 'amplification of remedies in the global law'.[890] Notwithstanding this praise, scholars are aware of the lack of clear standards for granting restitution of property in such cases. For instance, Pentassuglia argues that, even when there is a strong presumption that dispossession of traditional lands should be remedied by restitution, the truth is that granting of this measure or relevant alternatives do not follow clear guidelines.[891]

[888] Neuman (2014), 331.
[889] See Statement by H.E. Ms. Rosemary Banks, Ambassador and Permanent Representative of New Zealand, on behalf of Australia, New Zealand, and the United States, at: www.un.org/press/en/2007/ga10612.doc.htm
[890] Antkowiak (2014), 11.
[891] Pentassuglia (2011), 168 and 199 (recognising however that the IACtHR has developed certain helpful criteria in this respect).

In the following, a systematic examination of factors determining or influencing the consideration of restitution measures is presented. Special attention is paid to the justifications used for the determination of restitution as well as to its emergence, connections with rights' violations, conditionality, and purpose. Lastly, the challenges faced by the IACtHR when developing a special approach to restitution measures as a way to attain *restitutio in integrum*, will be addressed.

A. Legal Basis

1. The Treatment of Orders to Restitute Property in *Lex Specialis*

As is the case for other restitution measures examined in this dissertation, the regional courts have grounded restitution of property orders in the reparative provisions of their respective conventions through *evolutive* interpretation. Similarly, the HRC consistently bases its authority to identify restitution of property as adequate redress on Article 2(3)(a) of the ICCPR which establishes States parties' obligation to ensure the provision of an effective remedy for individuals whose rights and freedoms have been breached. In the particular case of the ECtHR, although the granting of restitution orders is sometimes discussed in relation to Article 46 of the European Convention, they have mostly been given by invoking Article 41.[892]

Besides founding reparations on their reparative conventional provisions, regional courts and the HRC use additional justifications for their determination. The IACtHR uses two types of justifications. Firstly, in cases where it has ordered restitution of personal (movable) property confiscated by the State in connection to criminal proceedings, the Court might take into account the existence of domestic decisions already granting restitution, [893] or certain indications pointing to the illegal

[892] IACtHR, *Brumarescu v. Romania (Art 41)*; ECtHR, *Strain and others v. Romania*; ECtHR, *Hirschhorn v. Romania*; ECtHR, *Suciu Werle v. Romania*; ECtHR, *Prepelita v. Moldova*; ECtHR, *Olimpia Maria Teodorescu v. Romania*; ECtHR, *Borzhonov v. Russia*; ECtHR, *Dacia S.R.L. v. Moldova* (Just Satisfaction); ECtHR, *Marton v. Romania*; ECtHR, *Saghinadze v. Georgia*; ECtHR, *Andonoski v. The former Yugoslav Republic of Macedonia*; ECtHR, *Vasilevski v. The former Yugoslav Republic of Macedonia*.

[893] IACtHR, *Tibi v. Ecuador*, Paras 214-215 and op Para (resolutive) 14b (also notice that the order of restitution is given under the heading of compensation for pecuniary damages). Additionally, see IACtHR, *Salvador*

appropriation of the victim's belongings by State agents.[894] Yet, the IACtHR has also ordered restitution of property in cases where no favourable domestic decisions existed.[895]

The second justification used by the IACtHR to order restitution of property involves the rights of indigenous and tribal communities. In those cases, orders to return property are not linked to the prior existence of a domestic restitution order, but rather to its special conceptualisation of the right to property in relation to indigenous and tribal communities.[896] In the light of this particular understanding, the IACtHR justifies orders to restitute territory to meet the need properly to realise its special protection for indigenous and tribal communities. Aiming at *restitutio in integrum*, the IACtHR includes several reparative measures, including the restitution of property, under the common umbrella of restitution. The examination of the IACtHR's practice — presented later in this chapter— will give a more detailed account of the particular conceptualisation of property rights and its connection to restitution of property measures.

As in the case of the IACtHR, the ECtHR often justifies orders to restitute property by the existence of domestic decisions already favouring such a measure. Indeed, starting with *Papamichalopoulos and others v. Greece*, the ECtHR observed that the respondent State had failed to implement already existing domestic decisions ordering the redress of the complained of violations.[897] Whereas the ECtHR argued that similar

Chiriboga v. Ecuador, op Para 7 and Paras 114-124 (where the IACtHR ordered the return of a sum of money corresponding to the payment of taxes and fines unlawfully collected by the respondent State based on two administrative rulings ordering said return).

[894] IACtHR, *Cantoral Huamani and Garcia Santa Cruz v. Peru*, Para 187 (where State agents participating in the detention of the victims were under criminal investigation for the illegal seizure of money belonging to one of the victims. Note that the restitution order was not included in the Operative Paragraphs of the IACtHR judgment).

[895] See e.g. IACtHR, *Palamara Iribarne* v. Chile; IACtHR, *Peasant Community of Santa Barbara v. Peru*, Para 202 (where the IACtHR makes reference to domestic decisions recognising the commission of crimes against property but makes no reference to whether *restitution* was ordered in those decisions).

[896] ACHR, Art 21.

[897] ECtHR, *Papamichalopoulos and others v. Greece (Art 50)*, Paras 36-8. Realising the lack of precedent in its own jurisdiction, the ECtHR deemed it necessary to look at international case-law of other courts and tribunals. Inspired by the *Factory at Chorzów* Case, it decided that restitution in kind was the most appropriate option for

expropriation cases could be sufficiently addressed by granting compensation, the Case at hand was more serious because it encompassed the illegal expropriation of land and the respondent State's continuing inability and unwillingness to redress the situation.[898] The ECtHR appreciated these 'circumstances' as special and used them as a basis to justify orders of restitution.[899]

Yet, as in the case of the IACtHR, the existence of a final domestic decision ordering restitution has not always been a decisive factor for the ECtHR. For instance, in *Borzhonov v. Russia,* the ECtHR ordered the return of a bus, illegally retained by domestic authorities, regardless of the lack of a domestic final decision on the matter.[900] Similarly, in the Cases of *Andonoski* and *Vasilyski* against The Former Yugoslav Republic of Macedonia, the ECtHR decided to grant *restitution* of certain confiscated vehicles without considering that the applicants had not obtained favorable decisions from domestic courts.[901] Only once, the ECtHR has invoked a justification based on the 'circumstances of the case' without really specifying which circumstances it was referring to.[902]

Similarly to the practice of regional courts, the HRC has actively searched for reasoned justifications for the selection of restitution measures, and seems to have found one in the existence of prior domestic decisions favouring them. In the first views of this type, *Des Fours Walderode and Kammerlander*, the HRC considered that appropriate reparation entailed 'prompt restitution of the property in question or compensation

complying with the obligation to afford *restitutio in integrum.* In subsequent cases, however, the ECtHR has only referred to its own case-law. The same justification was used in ECtHR, *Dacia S.R.L. v. Moldova* (Just Satisfaction), Para 38.

[898] It should be noted that the ECtHR blamed the State's authorities for ignoring domestic decisions and their own promises of redress, see *Papamichalopoulos and others (Art 50) v. Greece*, Para 36.

[899] ECtHR, *Brumarescu v. Romania (Art 41)*, Para 22. See also ECtHR, *Dacia S.R.L. v. Moldova* (Just Satisfaction), Para 38; ECtHR, *Strain and others v. Romania*, Para 80; ECtHR, *Hirschhorn,* Para 114; ECtHR, *Driza*, Para 135; ECtHR, *Suciu Werle v. Romania,* Para 29; ECtHR, *Prepelita v. Moldova*, Para 34; ECtHR, *Olimpia-Maria Teodorescu v. Romania,* Para 34; ECtHR, *Marton v. Romania*, Para 23.

[900] ECtHR, *Borzhonov v. Russia*, op Para 9.

[901] ECtHR, *Andonoski v. The Former Yugoslav Republic of Macedonia*, Para 46; and ECtHR, *Vasilevski v. The Former Yugoslav Republic of Macedonia*, Para 67.

[902] ECtHR, *Maria Violeta Lazarescu v. Romania*, Para 33.

therefore'.[903] Although the inclusion of restitution, in such a direct way, broke new ground in the HRC case-law, especially considering that this body had previously declared that no right to restitution existed due the ICCPR's lack of inclusion of the right to property,[904] no explanation was offered for why this particular case merited this development.[905] No individual opinions demanding or providing substantiation for this change were issued either.

However, relevant clarification appeared some days later in the *Brok and Brokova* views. In an individual opinion, former HRC member Scheinin explained that restitution had been directly included as effective reparation in the *Des Fours Walderode and Kammerlander* Views because a domestic court had already recognised it as an appropriate reparation.[906] In fact, based on that favourable Decision, the authors of the communication had already re-taken possession of the property. However, the domestic Decision granting restitution was later voided due to an amendment of the law which application, according to the HRC, was discriminatory to the authors.

Scheinin pointed out that the same did not hold true in the Case of *Brok and Brokova.* Certainly, in the latter case, and administrative Decision had reinstated the author's parents as the rightful owners of the disputed property during the domestic proceedings by the author with the purpose of recovering his property. However, in the same year, a domestic court annulled that Decision and declared a nationalised enterprise as the rightful owner. After confirmation by the Supreme Court, the property was transferred to third parties. Thus, the administrative Decision was the only domestic recognition of the applicant's domain over the disputed property, and had been declared void before becoming final.

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[903] HRC, *Des fours Walderode v. The Czech Republic,* Para 9.2.
[904] HRC, Somers v. Hungary, Para 9.6.
[905] The *Des fours Walderode v. The Czech Republic* views might be compared with e.g. HRC, *Simunek et al. v. The Czech Republic*, Para 12.2; HRC, *Adam v. The Czech Republic*, 13.2; HRC, *Blazek et al. v. Czech Republic*, Para 7, which did not include a restitution recommendation.
[906] HRC, *Brok and Brokova v. Czech Republic*, Individual opinion by Committee member Martin Scheinin (partly concurring, partly dissenting).

In spite of this difference, on finding merits for declaring a breach of Article 26 of the ICCPR, the HRC established that the State had the obligation to provide effective reparation which '*should* include restitution of the property or compensation…'[907] Disagreeing with this conclusion, Scheinin argued that '[w]hether the author is entitled to the restitution of his parents' property is an issue of domestic law', meaning that the role of the HRC should only be to indicate that the author's wife should have a 'fresh possibility to have the restitution claim considered, without discrimination or arbitrariness and with all the guarantees of a fair trial…'[908] However, the corollary seems to be that while the HRC recognised the primary role of States in selecting such measures, it considered itself authorised to suggest restitution of property when domestic decisions had already recognised the authors' entitlement to restitution, even though the decisions had not become final and had been reversed at a later stage.[909]

As in other jurisdictions, the HRC has also recommended restitution of property when no favourable domestic decision existed, setting a new standard for the selection of this measure. Thus, the HRC has justified restitution when it considered that its denial at the domestic level was a direct result of the application of discriminatory legislation. Yet, when the HRC noted that other factors besides discriminatory legislation had contributed to a negative decision, it refrained to recommend restitution. To illustrate, in *Marik v. Czech Republic*, the author claimed restitution of two properties. The HRC noted that while the author's claim for restitution of the first property had been rejected at the domestic level solely because of his lack of Czech citizenship, the claim for restitution of the second property had been rejected —in the first instances— due

[907] HRC, *Brok and Brokova v. Czech Republic*, Para 9 (emphasis added). For a detailed account of this Case and its significance for addressing Nazi confiscation of property followed by communist nationalisation in the Czech Republic see Macklem (2005).
[908] HRC, *Brok and Brokova v. Czech Republic*, Individual opinion by Committee member Martin Scheinin (partly concurring, partly dissenting). This individual opinion gives a clear signal that HRC members discussed – at least to a certain level – about the appropriate role of the HRC in selecting measures which might constitute effective remedy.
[909] See also HRC, *Blaga and Blaga v. Romania*, Para 12 (where restitution of a property, confiscated by the Communist regime, was granted by a domestic court and later unlawfully reversed in spite of having become final).

to a combination of lack of Czech citizenship and the failure to meet another requirement set by the relevant domestic law. Consequently, the HRC established that appropriate reparation included restitution or compensation in regard to the first property, but only compensation for the second one.[910]

The HRC has tried to use the justification set in the *Marik* view in subsequent case-law.[911] In G*ratzinger* a thorough examination of that Decision suggests that such a justification was actually not applicable. In that case, the HRC noted that the State had recognised that the 'lack of fulfilment of the citizenship criterion was central in dismissing the authors' request for restitution'.[912] Assigning great weight to this declaration, the HRC followed the *Marik* precedent, concluding that effective reparation may include *restitution*.[913] Nevertheless, the HRC did not take into account that a domestic court had indicated the fact that 'authors had failed to demonstrate that the owners had acquired their property on the basis of an unlawful advantage'. This means that, at least in the first instance, the decision to deny restitution was grounded in something else than —or, at least, something additional to— the condition of citizenship (the discriminatory factor of the referrenced legislation).[914] Thus, it is doubtful that the HRC had solid evidence that domestic decisions mainly relied on the citizenship requirement and were not equally based on other requirements set by the domestic law. Therefore, the conclusion drawn by the HRC, and consequently the use of the standard set in the *Marik* view, seems unjustified.

In later case-law, the HRC has apparently given up using favourable —but not necessarily final— domestic decisions as justification for the selection of restitution measures as effective reparation. In the Cases of *Ondracka*,[915] *Preiss*[916] and *Persan*,[917] the

[910] HRC, *Marik v. Czech Republic*, Para 6.5.
[911] See HRC, *Kriz v. Czech Republic*, Para 9 (emphasis added) and Para 2.3.
[912] HRC, *Gratzinger v. Czech Republic*, Para 7.5
[913] Ibid, Para 9 (compensation was set as an alternative to restitution).
[914] Ibid, Para 2.5. The same was argued by the State party in its submission on admissibility and merits in Para 4.4.
[915] HRC, *Ondracka v. Czech Republic*.
[916] HRC, *Preiss v. Czech Republic*.
[917] HRC, *Persan v. Czech Republic*.

authors' attempts to secure a domestic decision supporting restitution of their properties were unsuccessful. Yet, the finding that States applied discriminatory legislation in breach of Article 26 of the ICCPR was in itself sufficient grounds for establishing that effective reparation indeed included restitution of property.

2. The Treatment of Orders to Restitute Property in *Lex Generalis*

a) Articles on the Responsibility of States for International Wrongful Acts

The Commentary to the ILC Articles recognises the return of property as a simple form of restitution, establishing a difference between restitution of territory and restitution of property.[918] The difference is not substantial as both types of restitution share the same characteristics: they are subjected to the conditions of feasibility and proportionality. With respect to the condition of feasibility, the Commentary clarifies that restitution turns 'materially impossible' when property is 'lost or destroyed, or has deteriorated to such an extent as to be valueless.'[919] Moreover, the Commentary also considers impossible the return of property which has 'fundamentally changed in character or the situation cannot be restored to the *status quo ante* for some reason'.[920] Yet, the mere existence of legal or practical difficulties does not render restitution impossible, as States may make efforts to accommodate the execution of this measure.[921] The Commentary also clarifies that complex situations in which the object of dispute has not been destroyed or changed in essence may nevertheless amount to impossible restitution.[922] Certainly, a combination of factors including, for instance,

[918] ILC Articles, Article 35. Restitution:
A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:
(*a*) is not materially impossible;
(*b*) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.
See also ILC Articles, Art 35, Commentary (1) and (5) where examples of 'property' include ships, documents, works of art, share certificates, and etcetera.
[919] ILC Articles, Art 35, Commentary (8).
[920] Ibid, Art 35, Commentary (4).
[921] Ibid, Art 35, Commentary (8).
[922] Ibid, Art 35, Commentary (9).

uncertainty about the real conditions of the object of dispute and obtainment of property rights by third parties may make restitution be deemed impossible.[923] With regard to third parties, the Commentary says that preclusion of restitution will depend on the specific circumstances of the case, including whether they obtained rights in good faith and without notice of the claim to restitution.[924]

In respect to the second condition for granting restitution (i.e. proportionality), the Commentary states that, in situations where the burden of awarding this measure greatly outweighs the alternative of payment of compensation, restitution might not be considered based on principles of equity and reasonableness.[925] Nevertheless, the Commentary adds, the injured State will get preferment in cases where 'the balancing process does not indicate a clear preference for compensation' or where 'the failure to provide restitution would jeopardize its political independence or economic stability'.[926]

Examples of the use of restitution orders are found in several judgments of the ICJ. The Commentary of the ILC Articles evokes the *Temple* Case, in which Thailand was ordered to return religious artefacts.[927] Additionally, the ICJ has made use of this reparative measure in the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* where it considered that the Israeli State should return land and other resources which were seized for the construction of the wall.[928]

Lastly, the Commentary to the ILC Articles clearly asserts that measures of restitution may be complemented with monetary compensation. The ILC takes this approach due

[923] Ibid. As a manner of example, the Commentary recalls the combination of difficulties encountered in the *Forest of Central Rhodopia* Case, where the characteristics of the object to be returned had fundamentally changed and 'detailed inquiries' would be necessary to establish its new status, in addition to the existence of third parties rights to the said object, see *Forest of Central Rhodopia* award.
[924] ILC Articles, Art 35, Commentary (10).
[925] Ibid, Art 35, Commentary (11).
[926] Ibid.
[927] ICJ, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand),* 37.
[928] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Para 153. This inclusion has been acknowledged by Falk (2006), 482-3.

to its conceptualisation of *restitution* (as understood in Article 35) in the 'narrow sense'. According to the ILC, restitution could be defined in two different ways. On the one hand, the 'narrow sense' sees restitution as an instrument to re-establish the *status quo ante*, that is, the situation existing before the occurrence of the wrongful act. On the other hand, a 'broad sense' of restitution aims to re-establishing a situation which 'would have existed if the wrongful act had not been committed', thus encompassing all means necessary to attain *restitutio in integrum.*[929] Since the ILC Articles have adopted the 'narrow sense', which does not include a consideration of the losses suffered, an order of restitution may be combined with an order to compensate. Falk observes that this overlap had already been recognised in the ICJ case-law.[930]

b) Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

The Basic Principles and Guidelines on the Right to a Remedy explicitly identifies return of property as a restitution measure, one of the five forms of reparations recognised therein.[931] This measure is applicable to cases of, for instance, return of confiscated property.[932] Similarly to the approach taken in the ILC Articles, the Basic Principles and Guidelines on the Right to a Remedy consider that restitution aims at restoring the victim 'to the original situation before the [breaches] occurred.'[933] This means that return of property could be accompanied, if appropriate, with other recognised forms of redress, such as monetary compensation for the loss of earnings.[934]

[929] ILC Articles, Art 35, Commentary (2).
[930] Falk referred to the ICJ's opinion that Israel had to restitute certain property in addition to paying pecuniary compensation. See Falk (2006), 482-3, citing ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.
[931] UN Guidelines and Principles, Principle 19. According to Principle 18, reparation may take the form of: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.
[932] Antkowiak (2014), 8.
[933] UN Guidelines and Principles, Principle 19. See also Antkowiak (2014), 8.
[934] UN Guidelines and Principles, Principle 20 (c) and 18.

3. Assessment

The practice of the IACtHR, the ECtHR and the HRC shows that there is a common thread in the use of restitution measures. All these bodies have justified the identification of restitution of property as a reparation based on prior domestic decisions granting or recognising the victims' right to restitution. However, the use of this standard is not regular in any of the jurisdictions hereby examined, and has seemingly been abandoned after some years of practice. This move may well be qualified as a discretionary exercise. The fact that the HRC had not demanded the existence of a prior favourable domestic decision recognising the authors' right to restitution, in its recent relevant case-law, departing from its earlier practice, has not been reasonably explained by the HRC. Moreover, the HRC's proceedings and resources only allow limited possibilities for the establishment of facts. Hence, to categorically assign property rights (by way of restitution) to the communications' authors within these proceedings, seems unreasonable. As for other reparative measures, the ECtHR has sometimes invoked existing 'special circumstances' to justify restitution orders; yet, it has failed to explain the content of such a standard.

The ECtHR has kept a relative uniformity in the use of the standard of existence of a prior favourable domestic decision. Although with some exceptions, the ECtHR's practice shows that it prefers to order restitution of property when a domestic judicial (or administrative) tribunal has already granted restitution of the goods in dispute, but the decision has not been complied with for some reason. The use of favourable domestic decisions as justification for the inclusion of restitution of property is arguably based on the advantage those decisions pose in terms of the establishment of facts. At the ECtHR and the HRC, restitution of property has been usually claimed in cases dealing with expropriations carried out during the Second World War or post-war communist regimes. In those cases property has passed through the hands of several owners, due to expropriation, nationalisation or common private trade, and rights have been certainly acquired by third persons. Hence, the establishment of facts

is resource intensive and would result difficult to be performed by the regional courts or treaty bodies due to their institutional constraints. The existence of domestic decisions establishing proven facts is therefore of great relevance even when the former have been reversed later. However, the use of those favourable decisions is still complicated. As the HRC practice shows, their revocation is sometimes based not only on discriminatory legislation, but on lawful reasons. Thus, at least in some cases, ordering restitution may be premature; a fresh consideration of the case at the domestic level might be a better choice. In the light of this discussion, it is also necessary to question whether both the HRC and the ECtHR are moved by ulterior reasons, not willingly expressed in their decisions.

In the case of the IACtHR, a different justification is used in cases involving the lands of indigenous and tribal communities. There, the IACtHR grounds restitution measures in its special understanding of the right to property within the context of indigenous and tribal rights, and the aim of providing *restitutio in integrum*. It is important to bear this rationale in mind when assessing whether the IACtHR might be using a discretionary power to order restitution.

The ILC Articles and the Basic Principles and Guidelines on the Right to a Remedy include the measure of restitution of property (understood in a 'narrow sense') as an important element of providing *restitutio in integrum*. Likewise, these two instruments allow measures of restitution to be complemented with other reparative measures (e.g. compensation) in order to achieve effective full restitution. This flexibility goes hand in hand with the approach taken by all jurisdictions here examined, as they, each in their own way, combine measures of restitution with, mostly, monetary compensation, but also with other innovative measures such as legislative reforms (e.g. IACtHR).

B. Emergence

The ECtHR was the first regional human rights court to introduce orders to restitute property in its operative paragraphs. In 1995, in the *Papamichalopoulos and others v.*

Greece Judgment, the ECtHR explained that, reparation could not be limited to compensation alone since they were dealing with the illegal occupation of the applicants' land by the Greek Navy rather than with a lawful expropriation.[935] According to the ECtHR, the unlawfulness of the dispossession affected the criteria for selecting reparations. Therefore, it was necessary to look at the international case-law in search for *inter alia* the relevant principles governing reparations. Resorting to the principle of full restitution, recognised in the *Factory at Chorzów* Judgment, the ECtHR considered that the return of land would place the applicants in a situation (as much as possible) equivalent to the one in which they would have been if there had not been a violation.[936]

While most of the early ECtHR decisions including restitution orders were connected to cases of expropriation or nationalisation carried out by States during communists or socialists regimes after the end of the Second World War, since 2009, the ECtHR has also included restitution orders in different cases. For instance, the ECtHR has ordered the restitution of a bus seized in connection to a criminal prosecution.[937] Likewise, the Court has ordered restitution when applicants have been denied effective access to justice,[938] or where they had been deprived of their right to possession, in spite of not having a property title.[939]

In the IACtHR, orders to restitute property have developed cautiously and differently. In the case of personal property (i.e. movable goods), the Court has transited from very malleable orders securing the possibility of restitution,[940] to directly ordering

[935] ECtHR, *Papamichalopoulos and others v. Greece* (Art 50), Para 36.
[936] Ibid, Paras 36-8; PCIJ, *Case Concerning the Factory at Chorzów* (Merits), 47.
[937] ECtHR, *Borzhonov v. Russia*. See also ECtHR, *Andonoski v. The Former Yugoslav Republic of Macedonia*; and ECtHR, *Vasikevski v. The Former Yugoslav Republic of Macedonia.*
[938] ECtHR, *Dacia S.R.L. v. Moldova* (Just satisfaction); ECtHR, *Marton v. Romania*.
[939] ECtHR, *Saghinadze v. Georgia*.
[940] IACtHR, *Ivcher Bronstein v. Peru*, Para 121 and op Para 8 (where the IACtHR did not order the return of movable goods but, rather, to 'facilitate the conditions to enable [him] to take the necessary steps to recover the use and enjoyment of his rights […] under the terms of domestic legislation'. Additionally, the Court decided that loss of earning should be determined by the domestic tribunals).

restitution of goods.[941] Exceptionally, the IACtHR has ordered the restitution of money in *obiter dicta* and without declaring the violation of the right to property.[942]

To date, the IACtHR has dealt with a case of land expropriation only once, which is, conversely, a common issue in the ECtHR practice. The IACtHR did not order restitution of the property, but decided on the amount of compensation itself.[943] Importantly, the IACtHR distinguished between the concepts of 'just compensation' established by Article 21(2) of the American Convention which applies to situations of expropriation, and the compensation ordered for damages resulting from a violation. Compensation was thus granted for both concepts.[944] Additionally, under the guise of restitution, the IACtHR ordered the return of money which had been wrongfully collected by the State in the form of taxes and fines.[945]

In respect to restitution of indigenous and tribal lands, the IACtHR also carefully developed its special approach. In the first case of this kind, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, it found the State responsible for not securing the right to property of communal lands, including their peaceful enjoyment (due to logging activities approved by the State without the community's prior consultation).[946] The IACtHR ordered to adopt the necessary measures to 'create an effective mechanism for delimitation, demarcation and titling' of that territory.[947] The Court also demanded that the State must not interfere with the 'existence, value, use or enjoyment of the property'.[948] These measures have become standard in the relevant jurisprudence of the IACtHR, as they are consistently included in cases where indigenous or tribal

[941] IACtHR, *Tibi v. Ecuador*, op Para 14(b). Restitution was ordered under 'consequential damage' and was not labelled as a special non-pecuniary measure.
[942] IACtHR, *Cantoral Huamaní and García Santa Cruz v. Peru*. The IACtHR reaffirmed the authority of this order in a decision of interpretation of this judgment, see IACtHR, *Cantoral Huamaní and García Santa Cruz v. Peru* (Interpretation).
[943] IACtHR, *Salvador Chiriboga v. Ecuador* (Reparations and Costs), op Para 2.
[944] Ibid, Paras 84 and 101.
[945] Ibid, op Para 7 and Paras 114 and 124.
[946] Antkowiak (2014), 30.
[947] IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Para 164.
[948] Ibid.

communities have been prevented from the full enjoyment of their territories.[949] Recourse to restitution orders is not limited to the physical expulsion of community members from their territories, rather, it is considered appropriate when those individuals or the community as a whole have been deprived of any aspect of the full enjoyment of their property.[950]

Restitution orders issued by the IACtHR may take different forms. For instance, in 2015, the Court ordered to clear any obstacle to the restitution of those lands to the rightful owner.[951] This included the resettlement of individuals who had occupied the community's traditional land, guarantees of no increase of interference already existing in the use and enjoyment of property rights, and evaluation of the viability of purchase or expropriation of the occupied lands for reasons of public utility or social interest.[952] In this case, the IACtHR also ordered to halting of any activity concerning a specific exploration project which the community had not been previously consulted on.[953] Finally, the Court could also order the rehabilitation of territories.[954]

In other cases, the IACtHR has seemingly preferred not to investigate much on the destruction of (real or personal) property and has decided to afford compensation based on equity.[955] For instance, the IACtHR ordered compensation for the destruction

[949] See e.g. *Moiwana Community v. Suriname*; *Yakye Axa Indigenous Community v. Paraguay*; *Sawhoyamaxa Indigenous Community v. Paraguay*; *Saramaka People v. Suriname*; *Xákmok Kásek Indigenous Community. v. Paraguay*; *Afro-descendant communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia; Garífuna Punta Piedra Community and its Members v. Honduras; Community Garifuna Triunfo de la Cruz and its members v. Honduras; Kaliña and Lokono Peoples v. Suriname*.

[950] A more in-depth analysis of the implications of the development made by the IACtHR with respect to the right to property will be presented in the next sections. In the *Yakye Axa* Case, for instance, it was recognised – influenced by the provisions of the ILO Convention No. 169 – that the right to property included States' obligation to secure due process guarantees in procedures involving land claims, see IACtHR, *Yakye Axa Indigenous Community v. Paraguay,* Paras 95-6.

[951] IACtHR, *Garifuna Punta Piedra Community and its members v. Honduras*, op Para 10 (the Spanish term used in the Judgment is 'saneamiento'. There is no official English translation of this judgment).

[952] Ibid, Paras 323-4.

[953] Ibid, op Para 11. Among other measures, the amendment of mining legislation was ordered to avoid conflict with the right to be consulted, and the creation of adequate mechanisms to regulate the system of the property registry; see ibid, op Paras 15-6.

[954] See e.g. *Kichwa Indigenous People of Sarayaku v. Ecuador*, op Para (resolutive) 2; and *Kaliña and Lokono Peoples v. Suriname*, op Para 10.

[955] Reference to *equity* has been made by the IACtHR since its first decision on reparations (i.e. IACtHR, *Velásquez Rodríguez v. Honduras* (Reparations and Costs), Para 27), although mostly in connection to non-

of personal and real property and the killing of livestock.[956] On some other occasions, invoking the principle of *complementarity*, it has referred to the domestic jurisdiction for the determination of reparations, despite requests for rehabilitation of property.[957] Also on the basis of the principle of *complementarity*, the IACtHR has refused to grant compensation for the destruction of individual and collective property, and only ordered to grant victims priority access to already existing domestic reparation programs.[958] Thusly, the IACtHR moved away from the established precedent, in which, even though no certain number of displaced victims had been established, the respondent State was ordered to secure adequate conditions for their return and to establish development programs, including education, health and infrastructure projects.[959] Finally, the IACtHR has also concluded that restitution could be achieved by ordering the State to revoke a domestic decision which implementation would constituted a disproportional impairment to the right to property.[960]

In the case of the HRC, the inclusion of restitution of property orders have developed progressively. Early HRC views declaring the violation of Article 26 ICCPR due to the States' refusal to provide restitution of property or alternative compensation, only weakly identified the provision of restitution as possible redress.[961] In fact, the language used by the HRC —i.e. the use of the modal verb 'might'— reveals the lack

pecuniary damages. The notion of *equity*, however, remains obscure in the IACtHR's context and seems to allow a wide use of discretion by this Court's judges. A very informative discussion on the definition and use of *equity* by the ECtHR is available in Ichim (2015), 43-56.

[956] See IACtHR, *Barrios Family v. Venezuela*, Paras 150 and 364 and op Para (resolutive) 9; IACtHR, *Massacres of El Mozote and Nearby Places v. El Salvador*, op Para (resolutive) 13 and Paras 383-4. Fixed amounts were however different depending on whether the victims had been killed in the massacre, were survivors or were the killed victims' next-of-kin.

[957] *Santo Domingo Massacre v. Colombia*, op Para 4, op Para (resolutive) 5, Paras 321, 323, 336-7. The IACtHR outlined that some victims had already collected compensation and even conciliated with the State and it was therefore not appropriate to order compensations anew. In regard to the domestic proceedings to be carried out, the IACtHR required them to be based on objective, reasonable and effective criteria.

[958] IACtHR, *Afro-descendant communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, op Paras 6 and 18, Paras 474-5. Other measures addressed the harm to the individual and collective property of the community, see, ibid, op Paras 16-7.

[959] E.g. IACtHR, *Massacres of El Mozote and Nearby Places v. El Salvador*; IACtHR *Santo Domingo Massacre*, Para 266-7 (where the IACtHR admitted that the number and situation of displaced victims were unknown).

[960] IACtHR, *Memoli v. Argentina*, op Paras 4 and 8. The unjustified prolongation of the civil proceedings caused the declaration of the violation of the right to fair trial (ACHR, Art 8).

[961] See e.g. HRC, *Simunek et al. v. The Czech Republic*, Para 12.2; HRC, *Adam v. The Czech Republic*, 13.2.

of force in the identification of such measures as constituting an important —if not necessary— part of full restitution. Next, the HRC declared that effective reparation would include giving authors the opportunity to file new claims for restitution of property or compensation, thus signalling more consideration to these measures.[962] Not much later, the HRC clearly identified the provision of restitution or compensation as necessary measures for the fulfilment of the State party's obligation to provide effective reparation.[963]

Despite existing precedent, the HRC occasionally —and sometimes unjustifiably— refrains from the direct identification of restitution or compensation as constituting effective redress. In the *Fábryová* and *Pezoldova* Views, the HRC only indicated the State's obligation to provide an opportunity to file a new claim for restitution or compensation.[964] The reason for not directly identifying measures of restitution or compensation as effective redress may be connected to the HRC's unwillingness to decide on the applicability of several domestic laws, which would entail its acting as a fourth instance.[965] Since 2006, relevant case-law includes the direct recognition of restitution or compensation as necessary measures for the successful provision of adequate redress.[966]

So far, the African Court has not granted orders to restitute property. However, in 2017, the African Court issued a landmark judgment in the case *African Commission on Human and Peoples' Rights v. Republic of Kenya*, where it recognised *inter alia* that indigenous peoples have property rights over their traditional lands.[967] The Court reserved its ruling on reparations which shall be issued after the case parties

[962] HRC, *Blazek et al. v. Czech Republic*, Para 7.
[963] HRC, *Des fours Walderode v. The Czech Republic,* Para 9.2.
[964] HRC, *Fábryová v. The Czech Republic*, Paras 9.2, 9.3 and 11: and HRC, *Pezoldova v. Czech Republic*, Para 11.6 (Also note that HRC member Justice Bhagwati argued, in a partly concurring opinion, that the HRC should have clearly identified restitution as an appropriate remedy instead of 'just the opportunity of resubmitting a claim').
[965] Yet, in his partly concurring individual opinion in the *Pezoldova v. Czech Republic* Views, HRC member Ando argued that the HRC had indeed acted as a fourth instance tribunal.
[966] See e.g. HRC, *Blaga and Blaga v. Romania*; HRC, *Gratzinger v. Czech Republic*; HRC, *Ondracka v. Czech Republic*; HRC, *Preiss v. Czech Republic*; HRC, *Persan v. Czech Republic*.
[967] ACtHPR, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, op Para (on the merits) i and Para 131. For a critical analysis of this decision see Tramontana (2018).

communicate their submissions and comments. Since the applicants have specifically requested the restitution of the traditional lands (through delimitation, demarcation and titling) among other reparative measures, it will be interesting to see whether the African Court will grant this request, expanding its reparative catalogue.[968]

Nevertheless, it should be noted that, despite its 'inconsistent prescription of remedies', [969] restitution of traditional lands has been considered by the African Commission on Human Rights on several occasions. For instance, the African Commission has recommended the restitution of property rights to persons negatively affected by a discriminatory law on land ownership. [970] This body has also recommended the restitution of property in the ground-breaking Decision *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, where the State, in order to create a game reserve, had evicted an indigenous community from their traditional territory. [971] There, the African Commission not only recommended the recognition of property rights and the consequential return of the land, but also the payment of royalties to the Endorois people for the economic activities developed in their territories and the provision of employment opportunities.

In fact, the African Commission had already begun developing some elements of a holistic redress to deprivation of traditional lands in 2001.[972] It declared the violation of *inter alia* the rights to free disposal of wealth and natural resources (Article 21), housing (Article 14), health (Article 16) and to a general satisfactory environment (Article 24) due to the inadequate oil exploitation by State-owned companies in traditional Ogoni land without consulting with the community's leaders and causing

[968] ACtHPR, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Paras 218 et seq.
[969] Viljoen and Louw (2007), 16.
[970] African Commission, *Mouvement Ivoirien de droits de l'Homme (MIDH) [Ivorian Human Rights Movement] v. Côte d'Ivoire.*
[971] African Commission, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya.*
[972] African Commission, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria.*

damaging consequences for the environment, health and survival of the population. The Commission recommended the adequate compensation of victims, 'including relief and resettlement assistance to victims of government sponsored raids' and the rehabilitation of lands and rivers damaged by oil operations.[973] In this case, even if the right to property of traditional lands was not really discussed by the Commission, it can be observed that this body already considered aspects such as the adequate condition of the land or the possibilities for continuing with traditional economic activities as important elements of the indigenous and peoples' rights over their territory.

C. Causal Connection

The practice of regional courts and the HRC demonstrates a correlation between orders to restitute property and the violation of certain rights. All orders for the restitution of property issued by the ECtHR are clearly linked to the violation of the right to the protection of property.[974] Additionally, many judgments include a violation of the right to fair trial (Article 6 ECHR) and occasionally of the right to effective remedies (Article 13 ECHR). In most cases, the finding of a violation to the right to the protection of property seems to be sufficient to order restitution (see Table G). Moreover, such orders have not only been granted in favour of applicants who are considered to be rightful owners of the property under dispute, but also in favour of applicants who had a right to enjoy the possession of such property.[975] The ECtHR has also explained that adjudication in these cases is strongly related to the protection of the *principle of legal certainty*, as the violation of the right to property in most decisions consisted of an unlawful deprivation of property by the State.[976]

[973] Ibid.
[974] ECHR, Protocol I, Art 1.
[975] ECtHR, *Saghinadze v. Georgia*, Para 112.
[976] ECtHR, *Dacia S.R.L. v. Moldova* (Just satisfaction), Para 38.

In the IACtHR, restitution orders are always connected to the right to property.[977] Sometimes, correspondence between those orders and the breach of the right to property is clear as measures aim at the return of illegally seized objects.[978] Occasionally, the connection is not straightforward as the IACtHR fails to link specific facts to the violation of the right to property.[979] In those cases, it is necessary to revise the whole judgment in search of such links.[980] Conversely, when there is no declaration of the violation of the right to property, the IACtHR does not order restitution, even when it has been proven that victims have been forcibly displaced as a consequence of a massacre.[981] However, a declaration of a violation of the right to property is not a sufficient factor to issue a restitution order. The IACtHR has, for instance, left the violation of Article 21 (in regard to reparation) unaddressed in spite of ordering pecuniary and non-pecuniary measures to redress damages produced by the violations of other rights.[982]

As previously mentioned, orders to provide restitution of traditional lands belonging to indigenous and tribal communities are closely connected to the special conceptualisation of the right to property. Former IACtHR Judge Ventura Robles summarised the IACtHR's understanding of this right in the following manner: '[it] cannot be viewed from a civil-law perspective, because these communities have a different concept of property based on a worldview that is totally different from

[977] ACHR, Art 21. Exceptionally, the IACtHR has ordered the return of money – seized from a victims at the moment of his execution – without including it in the operative paragraphs or declaring a violation of the right to property, see IACtHR, *Cantoral Huamaní and García Santa Cruz v. Peru,* Para 187. The authority of this order was confirmed by the decision on its interpretation, see IACtHR, *Cantoral Huamaní and García Santa Cruz v. Peru* (Interpretation).

[978] E.g. IACtHR, *Tibi v. Ecuador*, Para 215; IACtHR, *Palamara Iribarne* v. Chile.

[979] IACtHR, *Plan de Sanchez Massacre v. Guatemala* (Merits), op Para 3.

[980] In *Plan de Sanchez Massacre v. Guatemala* (Merits), it is possible to deduce, from the list of proven facts, that the violation of property was linked to the plundering and destruction of dwellings, stealing of belongings, food, animals and personal effects in addition to setting fire to the houses and others buildings in the community, see Paras 42(20), 42(22), 42(24). Since the massacre had caused the destruction of houses and other infrastructure, and forced displacement of the community's population, the IACtHR ordered the State to provide adequate housing to the surviving victims who were still living in that village, see *Plan de Sanchez Massacre v. Guatemala (Reparations),* Para 105.

[981] IACtHR, *'Mapiripán Massacre' v. Colombia*, Paras 96.63, 274, 279 and 280.

[982] IACtHR, *Furlan and Family v. Argentina*, Para 312, 316 and 321. The IACtHR referred, for instance, to the violations of ACHR, Arts 5, 8 and 25.

ours'. [983] Indeed, since its first case discussing property rights of indigenous communities, the IACtHR recognises that terms of an international human rights treaty have an 'autonomous meaning' which does not necessarily coincide with the one assigned by domestic courts.[984] The 'evolution of the times' and 'current living conditions' are elements taken into account when interpreting the American Convention. Hence, the right to property of indigenous and tribal territories not only implies the communities' ownership of their traditional lands, [985] but also the communities' cultural legacy, spiritual life, integrity, economic survival and use of natural resources, in accordance with indigenous customary law.[986] The IACtHR's take on this right has been upheld throughout its relevant jurisprudence.

Hence, the assessment of the right to property in these cases does not question whether indigenous communities have a right to their traditional lands —taken as a given—, but rather whether this right has been effectively realised.[987] Taking a holistic approach, the IACtHR analyses for instance the circumstances in which indigenous people were dispossessed of their territories.[988]

The IACtHR's special protection of the right to property in relation to traditional lands is most noticeable when it discusses, in one judgment, the specific 'right to restitution of traditional lands'.[989] The IACtHR has designed a viability test to analyse whether

[983] Manuel Ventura Robles (2015).
[984] IACtHR, *Mayagna (Sumo) Awas Tingni*, Para 146.
[985] Ibid, Para 151.
[986] IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, Para 137; IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay*, Paras 118-121; IACtHR, *Mayagna (Sumo) Awas Tingni*, Paras 149-151. See Beristain (2008), 591 (arguing that displacement from their traditional lands has caused indigenous communities significant economic loss due to the impossibility of continuing with traditional economic activities). Observe that UN HRC General Comment 23 has clarified that the right to culture for indigenous peoples is connected to territory and use of natural resources, see UN HRC, *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, 8 April 1994, CCPR/C/21/Rev.1/Add.5
[987] IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, Para 140; *Sawhoyamaxa Indigenous Community v. Paraguay,* Para 124.
[988] It is recognised that many of the cases dealing with dispossession of indigenous communities from their traditional land originated between the late 1800s and early 1900s provoked by colonisation of traditional indigenous land, formalisation of property deeds and their exploitation by farmers and stock-breeders, the church and the State, see Beristain (2008), 587.
[989] IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay*, Paras 131 et seq. The IACtHR has not repeated this term in subsequent case-law.

restitution of traditional lands may be enforceable or could have expired. The test is based on two criteria: a) the existence of a relationship between indigenous identity and their traditional lands; b) the possibility for this relationship to be realised.[990] The first criterion refers to the intrinsic relationship between the spiritual and material basis for indigenous identity, and the traditional land. This relationship can be expressed through different means, such as traditional ceremonies, cultivation, or mere traditional presence. The second criterion refers to the actual possibility of using the disputed traditional lands in accordance with the indigenous community's traditional customs. If these two criteria are fulfilled, the IACtHR considers that the right to restitution of traditional land is claimable.

In connection to the second criterion, the IACtHR has clarified that third-party rights do not automatically preclude restitution of traditional lands. Conflicts involving the rights of third-parties over disputed territory should be resolved in accordance with the relevant rules on permissible restrictions to the right to property.[991] Moreover, the Court has rejected the argument that exploitation by third parties should be preferred over the one performed by members of the indigenous community on account of —arguably— higher efficiency. Rather, it considers that such a calculation does not correctly appreciate the nature of land utilisation by indigenous peoples.[992] Finally, the Court has denied that transfer of traditional lands to third parties within the framework of (international) bilateral agreements prevent restitution, and conversely demands those agreements to be made and enforced respecting the American Convention.[993]

The IACtHR's special conceptualisation of the right to property carries additional effects. For instance, the Court considers that not only individual community members

[990] Ibid, Paras 131-2. This test was upheld in *Xakmok Kasek Indigenous Community v. Paraguay*, Para 113.
[991] IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay*, Para 138. This criteria had been confirmed in the IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, Para 144 and 217.
[992] IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay*, Para 139. The IACtHR repeated this argument in *Xakmok Kasek Indigenous Community v. Paraguay*, Para 149.
[993] IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay*, Para 140.

are entitled to the right to property, but also the people as a collective subject. Therefore, 'legal considerations expressed or indicated in [its] judgment[s] should be understood from that collective perspective'.[994] As will be explained later in this chapter, the IACtHR has included several measures in its reparative catalogue which are also connected —sometimes even more obviously— to the violation of other rights.[995] Antkowiak argues that this development responds to the actual IACtHR's approach to reparations in the context of indigenous rights, which is arguably based on the concept of 'dignified life' as a broader understanding of the right to life, instead of on the broader concept of property rights.[996]

Although the right to property is not protected as such by the ICCPR, the HRC has entertained an important number of communications regarding confiscation and nationalisation of property, and has considered ensuing restitution orders. In such cases, the HRC examines whether domestic legislation set discriminatory conditions for the restitution of property in contravention of the rights to equality and equal protection of the law as laid down in Article 26 of the ICCPR.[997] It is within this framework that the HRC has occasionally established that restitution of property constitutes a necessary —if not sufficient— condition for providing effective reparation. Most of the HRC case-law considering restitution of property as effective reparation correlates to the violation of Article 26 ICCPR. In some cases, the HRC has declared that violation of Article 26 is to be read in conjunction with Article 2 of the ICCPR, which establishes the States parties' general obligation to respect and ensure all ICCPR rights without distinction of any kind. However, this addition seems to be irrelevant for the consideration of restitution measures.

As in the case of the regional courts, the finding of a violation of Article 26 does not necessarily prompt the consideration of restitution orders. Sometimes, despite finding

[994] *Kichwa Indigenous People of Sarayaku v. Ecuador*, Para 231.
[995] See below section on Purposes.
[996] Antkowiak (2013), 181-2.
[997] See Tomuschat (2004), 235.

such a violation, the HRC has only pointed out to the State's obligation to provide an opportunity to file a new claim for restitution or compensation.[998] On one of these occasions, a HRC member argued that restitution should have been identified as reparation, although it is not clear whether he linked the measure to Article 26 and Article 2 of the ICCPR, or the violation of Article 14 which he also proposed.[999]

Additionally, the HRC considers restitution of personal property in connection to the violation of Article 19, which enshrines the right to freedom of expression.[1000] In those cases, in which authors had been subjected to disciplinary measures including arrest, prosecution, conviction and/or the imposition of fines, the HRC considered that effective reparation should include the return of fines and administrative or judicial fees paid by the victims —when relevant— in addition to the overturning of the conviction.

D. Purpose

The ECtHR uses restitution of property orders as a means to attain *restitutio in integrum* which is predominantly defined by this Court as putting applicants 'as far as possible in a situation equivalent to the one in which they would have been if there had not been a breach'. [1001] It should be noted that the ECtHR has sometimes expressly recognised that restitution orders are given to achieve 'full and final settlement of the property dispute' in cases where States had continuously failed to take appropriate measures to comply with earlier ECtHR judgments.[1002] In other words, the ECtHR chose to grant restitution not on the basis of the case at hand, but rather for the possibility of stopping ongoing violations already declared in prior judgments.[1003]

[998] E.g. HRC, *Fábryová v. The Czech Republic*, Paras 9.2, 9.3 and 11; HRC, *Pezoldova v. Czech Republic*, Para 11.6.
[999] HRC, Pezoldova v. Czech Republic, See Partly concurring individual opinion by HRC member Justice Prafullachandra Natwarlal Bhagwati.
[1000] HRC, *Coleman v. Australia*, Para 9; HRC, *Tulzhenkova v. Belarus*, Para 11; HRC, *Bodrozic v. Serbia and Montenegro,* Para 9; HRC, *Shin v. Korea*, Para 9; HRC, *Claudia Andrea Marchant Reyes et al. v. Chile*, Para 9.
[1001] See Table A.
[1002] ECtHR, *Driza v. Albania*, Para 134.
[1003] Cf. ECtHR, *Maria Atanasiu and Others v. Romania,* Op Para 6 (where despite taking note of abundant similar prior judgments against the same State, the ECtHR framed the decision as a pilot-judgment ordering to take measures ensuring the effective protection of certain rights, but neglecting the return of property).

Furthermore, it has been argued that the ECtHR uses restitution orders in cases dealing with 'traumatic historical events' in particular, thereby categorising those cases as exceptional. [1004] Nifosi-Sutton warns that this approach should be strongly discouraged, as it takes 'non-monetary relief as an ad hoc form of reparation' and not as an integral component of reparative strategy.[1005]

The early case-law of the IACtHR used restitution of property orders as a direct reparative measure, aiming at the re-establishment of the goods which victims had been deprived from. [1006] Although these measures were accompanied by orders granting pecuniary compensation for monetary and non-monetary damages, restitution had the purpose of immediate and direct redress. However, the IACtHR rapidly progressed to a more comprehensive understanding of the role of restitution of property orders, no longer limiting them to simple monetary compensation for pecuniary and non-pecuniary damages. To illustrate, in a massacre case, the IACtHR clearly stated that although compensation was necessary to redress wrongdoings, this measure was not sufficient when said wrongdoings had 'public repercussions'.[1007] In this type of cases, due attention needed to be given to the 'extreme gravity of the facts and the collective nature of the damage produced', and therefore, additional measures (e.g. orders to provide housing for the victims) were necessary for the fulfilment of *restitutio in integrum*.[1008]

The most revealing example of the IACtHR's take on the purpose of restitution of property orders is found in cases dealing with indigenous and tribal communities. At first, restitution orders focused on the identification, delimitation, demarcation, and

[1004] Nifosi-Sutton (2010), 69.
[1005] Ibid.
[1006] IACtHR, *Tibi v. Ecuador*, Para 224. The restitution order was framed under the title of 'consequential damage' rather than 'restitution', see Para 237(e). See also, IACtHR, *Palamara Iribarne v. Chile*, Paras 63.20 and 234.
[1007] IACtHR, *Plan de Sanchez* Massacre v. Guatemala (Reparations), Para 93.
[1008] Ibid.

titling of traditional lands.[1009] They had a clear restorative nature as they did not assign new rights, but rather recognised an existing right to communal property (including possession). Later, the introduction of new measures beside restitution of property showed the IACtHR's holistic approach to *restitutio in integrum*, which perceives each ordered measure as a component of the overall goal. For instance, in addition to demarcation and titling of the traditional lands, the IACtHR has ordered the establishment of a Community Development Fund (CDF) which provides several activities aiming at the improvement of *inter alia* education, agriculture, housing and health for the members of affected indigenous and tribal communities.[1010] Demarcation and titling alone were not considered sufficient redress given the precarious conditions in which these communities were placed, after decades of destitution and negligence by private and state actors. Moreover, the special connection between communities and their traditional lands, and the pressing need to preserve their existence and culture, prompted the consideration of innovative measures. Hence, an order to implement a CDF complements the identification and delimitation of territory since it provides important guarantees for the existence of a sustainable environment for the community's members.

Further advancing the comprehensive approach to *restitutio in integrum*, the IACtHR has ordered *inter alia* to legally recognise the communities' collective juridical capacity; to remove or amend legal provisions which impedes community members from holding a collective title of said territory, including lands and natural resources, and managing, distributing and effectively controlling said territory as they see fit in accordance to their uses; to adopt legislative and other measures to secure consultation, respecting their right to give or withhold their free, informed and prior consent, in regard to development or investment projects that may affect their territory and to reasonably share the benefits of said projects; to secure that environmental and

[1009] IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*; IACtHR, *Moiwana Community v. Suriname*; IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, op Para 6.
[1010] IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, op Para 9.

social impact assessments are conducted by independent and technically competent entities prior to the awarding of concessions for development and investment projects in the mentioned territories, and to minimise the damage such activities could cause to their social, economic and cultural survival; and to implement legislative or any other reform to ensure adequate and effective recourse against breaches to the right to use and enjoy property.[1011]

According to the IACtHR, restitution of land also involves orders to rehabilitate territories;[1012] consultation on any plan for activities or projects for the extraction of natural resources, investment or development which could affect their territory, and thereby their right to property;[1013] and to carry out the necessary reforms —including legislative amendments— to secure that the right to prior consultation is effectively implemented.[1014] Recently, in *Kaliña y Lokono Peoples v. Suriname*, the IACtHR went a step further, stating from the outset that the purpose of reparations in these cases (i.e. dealing with indigenous and tribal communities) is to 'guarantee' the communities' control over their own institutions, culture, traditions and territories; to 'contribute' to their development according to their own needs; and to 'provide' effective mechanisms for identifying their own priorities in regard to their development and evolution as peoples.[1015]

In addition to measures addressing the particular violations against the Kaliña and Lokono peoples, the IACtHR declared that perpetration of human right violations is repetitively targeting indigenous and tribal communities in this case, and guarantees of non-repetition are therefore of utmost importance. Ordered measures are thus directed at not only the reparation of the damages caused by the violations addressed in the particular case, but the structural dimension of those violations, aiming at non-

[1011] IACtHR, *Saramaka People v. Suriname*, op Paras 5-10. See also, e.g. IACtHR, *Xákmok Kásek Indigenous Community v. Paraguay*, op Para 25.
[1012] IACtHR, *Kichwa Indigenous People of Sarayaku v. Ecuador*, op Para 2 and Paras 146 and 294.
[1013] IACtHR, *Saramaka People v. Suriname*, Paras 93 and 130.
[1014] IACtHR, *Kichwa Indigenous People of Sarayaku v. Ecuador*, op Paras 3-4.
[1015] IACtHR, *Kaliña and Lokono Peoples v. Suriname*, Para 272.

repetition through prevention.[1016] Thus, the IACtHR ordered two sets of similar measures: one set specifically directed toward the benefit of the Kaliña and Lokono Community, and the other one to benefit of all indigenous and tribal peoples.[1017]

The IACtHR's special take on *restitution in integrum* is not limited to cases regarding indigenous and tribal populations but permeates the whole IACtHR case-law. For instance in *Ituango Massacres v. Colombia*, the IACtHR ordered the implementation of a housing program for victims, and guarantees for the safe return of victims forcibly displaced.[1018] These measures show that the understanding of restitution is not limited to the material dimension of property, namely the physical return of the good which was lost. Indeed, full restitution also requires that adequate conditions exist for the effective enjoyment of the right to property. Whereas the IACtHR many times has failed to show a relevant connection between the objectives of the CDF (and other similar measures aforementioned) and the pecuniary and non-pecuniary damages suffered by victims, the adoption of a holistic approach to *restitution in integrum* shows that orders to restitute property have several purposes. They are used to restore the enjoyment of property rights, but also to halt continuing violations and to secure non-repetition.

Although the HRC has not provided much elaboration on their perception of the purpose of orders to restitute property, it is clear that it mainly identifies those measures as reparative means. Moreover, when the HRC orders to restitute fines, it seeks to eliminate the consequences of unlawful proceedings carried out against victims, thus asserting wrongfulness and reproach for the unlawful conduct.[1019] Despite the lack of concrete references to the purposes of non-repetition and cessation by the HRC, restitution orders implicitly contain those purposes as well.

[1016] Ibid, Para 300.
[1017] Compare the orders in IACtHR, *Kaliña y Lokono Peoples v. Suriname*, op Para 5, 6 and 8 with op Paras 13, 14 and 16.
[1018] IACtHR, *Ituango Massacres v. Colombia*, op Paras 19, 17 and Para 404.
[1019] See, HRC, *Bodrozic v. Serbia and Montenegro*; HRC, *Coleman v. Australia*; HRC, *Tulzhenkova v. Belarus.*

E. Conditionality

In the context of the ECtHR, restitution orders are usually drafted, followed by an alternative measure consisting in monetary compensation.[1020] This formulation indicates that, while the ECtHR prefers the implementation of measures of restitution over compensation, in this way signalling a priority order among reparative measures, it gives respondent States the possibility of freely choosing between those two measures.[1021] Two plausible explanations exist for this practice. The first one is related to the observance of the *subsidiarity* principle. The second one concerns the actual possibility of executing restitution.

Regarding the first explanation, it is well-known that the principle of *subsidiarity* plays an important, explicit role in the ECtHR's adjudication process. Indeed, in the section discussing reparations, ECtHR judgments contain a paragraph almost verbatim recognising that the finding of a violation 'imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.'[1022] Thus, it is clear that, although an obligation to cease and repair is imposed on respondent States, they are still free to choose the particular means to comply with those obligations, as the ECtHR is only authorised to perform a *subsidiary* role.[1023] Even

[1020] A typical formulation for introducing the alternative monetary compensation is 'failing such restitution…' See e.g. ECtHR, *Papamichalopoulos and Others v. Greece (Art 50)*, op Para 3; *Brumarescu v. Romania (Just Satisfaction),* op Para 2. See also Koroteev (2010), 286.

[1021] Although the CoM is the organ in charge of the supervision of ECtHR judgment, its decisions give no account of any evaluation made on the States' election between restitution and compensation. See, e.g., the Résolution CM/ResDH(2007)90 'Exécution des arrêts de la Cour européenne des Droits de l'Homme, Affaire Brumărescu (arrêt de Grande chambre du 28 octobre 1999) et 30 autres affaires contre la Roumanie devenus définitifs entre le 9 juillet 2002 et le 3 mai 2005', where the CoM closed the monitoring process of *inter alia* the Brumarescu Case, only observing than the State had complied with the order to pay compensation, but neglecting to discuss the alternate order of restitution. See also *Çali and Koch (2014), 311* (noting that the fact that these resolutions are adopted behind 'closed doors' raises concern among scholars and practitioners).

[1022] ECtHR, *Papamichalopoulos and Others v. Greece (Art 50)*, Para 34. Even though the formulation of this reasoning has been reduced in subsequent case-law, the substance of the obligation remains, see e.g. ECtHR, *Strain and Others v. Romania*, Para 77.

[1023] There, the role of the CoM is to supervise that the means utilised by respondent States effectively address the overall obligation.

when the ECtHR considers that restitution is the most suitable means to effectively fulfil the obligation to cease and repair the found violations, it remains within a *subsidiary* role and, consequently, gives to respondent States the opportunity to choose compensation.[1024]

The second explanation is more practical. It assumes that the ECtHR, aware of its disadvantageous position to appreciate domestic conditions for the implementation of certain measures (i.e. lack of expertise), prudently provides an alternative consisting of compensation for cases in which restitution is not possible. Since the ECtHR has not provided standards for the evaluation of the possibility of effecting restitution, the inclusion of an alternative orders circumvents the task of assessing such a possibility.[1025] Some commentators criticise this solution, arguing that they 'look good exclusively on paper'.[1026] In a similar vein, former ECtHR Judge Loucaides warns that this practice 'undermines the remedy of restitution' and creates incentives for States to continue breaching the ECHR at an affordable cost.[1027] Proposing a standard for the assessment of such a possibility, and building on the Commentary to the ILC Articles, he argues that impossibility of restitution 'may only exist if the effects produced by the illegal act are irreversible or when the act has caused permanent damage'.[1028] Thus, he does not perceive an inherent conflict between the ECHR and the ECtHR's identification of specific measures designed to achieve *restitutio in integrum.*[1029]

Although most ECtHR decisions including restitution orders resonate with the latter explanation, the ECtHR has occasionally engaged in the evaluation of possibilities of

[1024] The ECtHR usually refers to compensation even in cases where it ultimately orders restitution, e.g. ECtHR, *Strain and Others v. Romania*, Para 77.
[1025] Likewise, there is no clear evidence that States explain why they prefer *compensation* over *restitution* when they are supervised by the CoM.
[1026] Ichim (2015), 210.
[1027] Loucaides (2008), 187.
[1028] Ibid, 185-6.
[1029] Cf. Ichim (2015), 207 (arguing that when the ECtHR commands restitution of property accompanied by an alternative compensation without adequately providing clear requisites for choosing the latter measure, the ECtHR is actually ordering measures to assist States in the execution of judgments and not really satisfying the *restitutio in integrum* principle).

restitution, yet sometimes contradicting itself. For instance, while the State's unawareness of the location of a bus (i.e. movable property in dispute) has not impeded ordering its restitution,[1030] the possibility that an aircraft (i.e. movable property in dispute) had either been 'seriously damaged, [] sold to third parties, or [] gone missing' prevented the ECtHR from ordering the same measure.[1031] The fact that disputed property has been transformed *inter alia* by the construction of apartments, significant improvement of the premises, or demolition might also be used as a reason for considering restitution impossible.[1032] Lastly, the ECtHR has invoked factors such as the 'ineffective nature of the current system of restitution', 'the age of the applicants', the property's occupancy by *bona fide* third parties,[1033] and the unjustified length of administrative and judicial proceedings, for arguing that applicants should be afforded compensation —instead of restitution— with the aim of securing a 'final and exhaustive settlement' of that case.[1034] Conversely, in cases where access to property has been impaired due to an ongoing armed conflict, the ECtHR has granted compensation, while highlighting that owners retain their property rights.[1035]

The seeming randomness with which the ECtHR sometimes grants restitution has also been labelled as politically affected by some commentators.[1036] Referring specifically to the *Loizidou v. Turkey* Case, Ichim argued that, despite finding a violation of the right to protection of property, the ECtHR did not order the restitution of the applicant's possession of her property —located in the occupied northern Cyprus—, since it worried that such an order could destabilise the fragile conditions of the presence of

[1030] ECtHR, *Borzhonov v. Russia*, op Para 7(a) and Para 15.
[1031] ECtHR, *East West Alliance v. Ukrania*, Para 256.
[1032] ECtHR, *Saghinadze v. Georgia (Just Satisfaction)*, Para 14 (however, the ECtHR ordered the restitution of alternative property offered by the respondent State, see Para 9); ECtHR, *Driza v. Albania*, op Para 7, Paras 32 and 135 (where the ECtHR ordered compensation instead of restitution of a plot on which an apartment building had been built on and the apartments had been sold to and occupied by third parties. Conversely, it ordered restitution – and alternate compensation – for another plot on which there had not been substantial reforms).
[1033] ECtHR, *Vrioni and Others v. Albania*, Para 83.
[1034] ECtHR, *Maria Atanasiu and Others v. Romania*, Para 253.
[1035] ECtHR, *Sargsyan v. Azerbaijan (Just Satisfaction)*, Paras 42-3.
[1036] Ichim, 207-8.

the Turkish army in that territory.[1037] Although Ichim's claims seem to be legitimate in the sense that the Court had already set precedent ordering the restitution of property in an earlier case,[1038] it is important to notice that the applicant had only required compensation for the 'loss of use of land and the consequent lost opportunity to develop or lease it',[1039] not the restitution of her land's possession.[1040]

Only on a few occasions, the ECtHR has ordered restitution without providing the possibility of an alternative measure.[1041] While neither of those judgments offers explicit reasons for this deviation, the facts in *Saghinadze and others v. Georgia* suggest a possible explication. Indeed, in the merits judgment, the ECtHR implied that return of the property in dispute —consisting of a cottage which had been in possession of the authors for many years before having been unlawfully ceased by the State— was preferred to the alternative of providing 'other proper accommodation' or reasonable compensation.[1042] At the reparation stage, the ECtHR observed that, while the applicants requested the return of the cottage or, alternatively, corresponding monetary compensation, the State had informed that the cottage had been transformed into a police station, a fact that rendered restitution impossible. Nevertheless, the respondent State offered restitution in kind consisting of a building with equivalent characteristics and value to the disputed property.[1043] In view of all these elements, the ECtHR ordered the transfer of full ownership of the offered building, declaring that restitution in kind was the 'most appropriate reparation for the actual pecuniary loss

[1037] Ibid; ECtHR, *Loizidou v. Turkey* (Art 50).
[1038] ECtHR, *Papamichalopoulos and others v. Greece* (Art 50).
[1039] ECtHR, *Loizidou v. Turkey* (Art 50), Para 27.
[1040] A related issue – yet not frequently discussed – is the propensity of regional human rights courts to strategically choose remedial measures taking into account their possibility of being complied with.
[1041] E.g. ECtHR, *Borzhonov v. Russia*, op Para 7; ECtHR, *Gladysheva v. Russia*, op Para 4; ECtHR, *Pelipenko v. Russia (Just Satisfaction)*, op Para 1; ECtHR, *Saghinadze v. Georgia (Just Satisfaction)*, op Para 1.
[1042] ECtHR, *Saghinadze and others v. Georgia*, op Para 8.
[1043] ECtHR, *Saghinadze and Others v. Georgia (Just Satisfaction)*, Para 7, 9 and 14.

suffered'.[1044] The Court did not include alternative compensation since it was clear that the respondent State had already agreed to grant restitution in kind.

In *Pelipenko v. Russia*, restitution in kind was also granted unconditionally but indirectly. Following the Decision on Merits, the domestic courts granted an alternative property to the applicants because of the destruction of the original property, but the State did not execute said Decision.[1045] Thus, at the reparation stage, the ECtHR ordered the State to comply with the domestic judgment, without providing any alternative. Finally, in *Gladysheva v. Russia*, the ECtHR ordered the restitution of the property deed of a flat, which was still occupied by the applicant.[1046]

The aforementioned cases suggest that the ECtHR orders the unconditional restitution of property, either its possession or deed, when the respondent States have signalled their agreement with this reparation, or when restitution may not impose on the rights of third parties.

A last consideration is necessary in regard to the difference between restitution of real state and personal property. Depreciation of an item belonging to the latter category might be a reasonable justification for preferring compensation over restitution, since the passage of time may have reduced the value of the items which had been taken away.[1047] The ECtHR failed to appreciate this effect when, for instance, it ordered the restitution of a bus, which had been seized by the respondent State ten years prior to the issuance of the judgment, without granting an appropriate compensation for loss of earnings and non-pecuniary damage.[1048] The Court did not even direct the respondent State to return the bus in the same conditions it was seized.

[1044] Ibid, op Para 1(a), and Para 10 (while the applicants were only rightful possessors of the cottage, the respondent State offered to transfer the ownership of the apartment given as restitution in kind).
[1045] ECtHR, *Pelipenko v. Russia (Just Satisfaction)*, Paras 6 et seq.
[1046] ECtHR, *Gladysheva v. Russia*, op Para 4.
[1047] Exceptions may be, for instance, luxury, collectible goods.
[1048] ECtHR, *Borzhonov v. Russia*, Paras 65, 69 and op Para 7(a) (observing that the applicant had not substantiated the request for loss of earnings, the ECtHR only granted the restitution of the bus and a modest amount for non-pecuniary damage).

The conditionality of restitution orders in the jurisprudence of the IACtHR seems to be determined by the characteristics of the property to be restituted. When dealing with personal property, the IACtHR generally grants the alternative measure of compensation to restitution orders should the execution of the latter results impossible.[1049] However, the Court has failed to explain how to assess such an impossibility. Occasionally, the IACtHR has ordered restitution of personal property without providing an alternative measure.[1050] In that case, the Court justified its decision through the uniqueness of the good, which would be lost if not returned to the victim.[1051] However, this standard has not been followed in succeeding similar cases.[1052]

With respect to cases involving indigenous and tribal lands, the IACtHR ordered restitution without providing – at least specifically – any alternative measure when first considering reparations.[1053] Restitution consisted of the creation and implementation of a domestic mechanism for delimitation, demarcation and titling of property belonging to indigenous communities, and an order not to impede the use and enjoyment of those territories until the delimitation, demarcation and titling had been executed.

The IACtHR did not foresee any conflict between the implementation of the mentioned orders and third parties' rights. In later cases, however, the IACtHR started to pay particular attention to the rights of third parties, and restitution orders are currently issued accompanied by an alternative measure.[1054] For instance, when the IACtHR

[1049] IACtHR, *Tibi v. Ecuador*, op Para 14(b).
[1050] IACtHR, *Palamara Iribarne v. Chile*.
[1051] Ibid, Paras 105, 107 and 251 (case dealing with the seizing of all copies of a book (including its electronic support), which content allegedly included issues of national security, and was therefore banned from being published).
[1052] IACtHR, *Peasant Community of Santa Barbara v. Peru*, op Para 12 (where the IACtHR ordered to deliver some alpaca stallions, so victims would be able to recommence their traditional activities, but also providing alternative compensation without appreciating the uniqueness of such an activity for the livelihood of the community).
[1053] IACtHR, *Mayagna (Sumo) Awas Tingni v. Nicaragua*, op Paras 3 and 4, and Para 153.
[1054] See Antkowiak (2014), 52 (arguing however that the IACtHR discourages States from selecting alternate lands or compensation).

ordered the identification and granting of traditional territories to the members of the *Yakye Axa Indigenous Community*, it recognised that, since sections of said territory were in the possession of or had been acquired by third parties, the respondent State needed to assess the viability of expropriation of those lands in accordance with the conditions set for permissible restrictions to the enjoyment of human rights.[1055] Only should said assessment resulted positive, expropriation of the disputed territories should be carried out. Should expropriation not be feasible, the IACtHR considered that the State might allocate alternate land instead.[1056] Inspired by the provisions of the International Labor Organization (ILO) Convention No 169, the IACtHR warned that such an allocation was however not at the mere discretion of the State, but it had to be determined via consensus with the people involved, also following their own mechanisms of consultation, values, customs and customary law.[1057] In this way, the IACtHR set criteria for determining whether restitution (through expropriation) was possible. Interestingly, the Court did not consider the alternative of granting monetary compensation rather than the delivery of alternative land, notwithstanding that such possibility was mentioned in the judgment as one of the possibilities laid down in ILO Convention No 169.[1058]

The criteria developed in *Yakye Axa Indigenous Community* have been reaffirmed in subsequent case-law. The Court has stated that the existence of third party rights does not automatically precludes the possibility of restitute traditional lands.[1059] Alternate

[1055] IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, op Para 6 and Paras 144 and 217. The Court enumerate the said conditions as a) they must be established by law; b) they must be necessary; c) they must be proportional, and d) their purpose must be to attain a legitimate goal in a democratic society. The assessment should also take into account the meaning of the territorial lands to the specific indigenous group, in a case by case basis, paying attention to their 'values, practices, customs and customary law'.
[1056] IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, Para 217. The provision of alternative lands has also been contemplated in IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay,* Para 135.
[1057] IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, Paras 150-1 referring to ILO Convention No. 169, Art 16(4). It is worth noticing that ILO has declared that the ILO Convention No. 169 might be used by adjudicatory organs as a 'tool for interpretation' or as a 'basis for decision', see ILO (2009), 6. Likewise the IACtHR has stated that ILO Convention No. 169 sheds light on the content and scope of the right to property, see IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, Paras 127 and 130.
[1058] See IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, Paras 149-151.
[1059] IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay*, Paras 214.

land should comply with certain conditions, including the possession of certain 'agro-ecological suitability' and it is to be subjected to a 'study to determine [its] potential for being developed by the Community'.[1060] Nevertheless, the IACtHR continuously neglects to set a standard for the assessment of impossibility of restitution, only demanding a 'reasoned' decision by the State.[1061] Recognising that displaced victims may not wish to return to their traditional lands, the IACtHR has also granted the alternative order to facilitate resettlement in similar conditions to the ones existing before displacement.[1062]

In only several cases, the election between the measures of restitution and compensation has not depended on an assessment of the possibility of restitution but purely on the implementation of the restitution order within a specific period of time.[1063]

When the HRC recommends the restitution of property, it generally provides an alternative measure consisting of monetary compensation. This is certainly the case for cases dealing with real estate seized by governments during or after the Second World War.[1064] This practice has arisen despite the HRC's identification of restitution of property as a fundamental part of effective redress, leaving the question whether restitution shall be implemented to the States' discretion. Only in occasional cases, dealing with the illegal seizure of personal property and collection of fines, the HRC recommends restitution without providing any alternative.[1065] The HRC has not set any standard to evaluate the possibility of restitution. Thus, even though the

[1060] IACtHR, *Xakmok Kasek Indigenous Community v. Paraguay*, Paras 118 and 286.
[1061] IACtHR, *Community Garifuna Triunfo de la Cruz and its members v. Honduras*, Para 262.
[1062] E.g. IACtHR, *Massacres of El Mozote and surrounding areas v. El Salvador*, op Para (resolutive) 8 and Para 345; IACtHR, *Afro-descendant communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia,* op Para 17 and Para 460-1.
[1063] IACtHR, *Peasant Community of Santa Barbara v. Peru*, op Para 12 (orders to restitute personal and real property were accompanied by alternative compensation orders).
[1064] E.g. HRC, *Des Fours Walderode and Kammerlander v. Czech Republic*; HRC, *Brok and Brokova v. Czech Republic*; HRC, *Marik v. Czech Republic*; HRC, *Blaga and Blaga v. Romania*; HRC, *Klain and Klain v. Czech Republic*.
[1065] E.g. HRC, *Shin v. Korea*; HRC, *Bodrozic v. Serbia and Montenegro*; HRC, *Coleman v. Australia*; HRC, *Claudia Andrea Marchant Reyes et al. v. Chile*.

formulation of the paragraphs dealing with reparations after the finding of a violation might indicate a certain preference for restitution (i.e. a common formula is to declare that compensation is necessary in case restitution is not possible), the truth is that State parties enjoy complete discretion when choosing between those two measures.

Although the ECtHR, the IACtHR, and the HRC have failed to design a standard for assessing the impossibility of restitution, the Commentary to the ILC Articles offers helpful guidance in this respect. Firstly, as previously mentioned, the ILC Articles have clarified that material impossibility not only refers to the cases in which the object claimed for restitution has been destroyed, but also when it has changed in character or circumstances for restitution are utterly adverse. Thus, impossibility of restitution could be considered in cases where property has been fully destroyed (e.g. demolition of a building), changed in character (e.g. substantial reform) or when circumstances are adverse (e.g. no certainty of the location of the object to be returned). Moreover, in the case of indigenous and tribal traditional lands which have been altered by the activities of extractive industries, it might be necessary to assess whether the current conditions of the lands allows the performance of indigenous and tribal traditional activities. In some cases, restitution might still be possible after conducting, for instance, rehabilitation activities.

It must be noted that the ILC adds a caveat regarding the scope of existing difficulties for restitution. The ILC warns that, at least, some difficulties involve 'questions of property rights within the legal system of the responsible State', and that those difficulties might not be sufficient for declaring the impossibility of restitution if 'rights and obligations in issue arise directly on the international plane', given that in this context restitution plays a 'particularly important role'.[1066] This reasoning begs the question of whether third party rights could not be a reason at all to declare restitution impossible when human rights run the risk of being restricted. In this respect, the Commentary to the ILC Articles argues that the weight to be given to third party rights

[1066] ILC Articles, Art 35, Commentary (9).

depends on, for instance, the good faith of right-holders.[1067] This means that restitution should be possible in cases where third parties acquired property rights knowing that those rights were being disputed. By the same token, impossibility could not be declared in the case of traditional lands when third parties acquired property rights over territories which they knew belonged to indigenous and tribal communities.

However, a more difficult situation to be assessed involves the rights of third parties acquired in good faith. Following the Commentary to the ILC Articles, it could be argued that restitution, understood as the realisation of the right to be redressed, is a right directly arising on the international plane given its recognition in IHRL. Thus, in some specific contexts, restitution could have such an importance that it would trump third-party rights, notwithstanding that they have been acquired in good faith. This might be the case for restitution of indigenous and tribal traditional lands, necessary to the subsistence of those communities. The IACtHR has partially adopted this view in the sense that it recognises that third-party rights do not immediately preclude restitution. Nevertheless, this Court subjects actual restitution of traditional lands to a viability assessment of, for instance, expropriations, which means that rights of third parties are given preference over the rights of indigenous and tribal communities anyway.

F. Contestation

Orders to restitute property have not encountered significant contestation, especially in the case of personal property. Since the IACtHR, ECtHR and HRC generally consider restitution of goods and monies in cases where they have been shown to be illegally seized (as a criminal act or under a judicial or administrative process later declared in violation of the respective conventions), these orders have been received as a natural consequence of the finding of a violation.

[1067] Ibid, Art 35, Commentary (10).

In the case of restitution of real property, contestation has not been particularly loud either, yet States' disagreement with those measures might be shown through lack of compliance. Indeed, execution of IACtHR's orders to delimit and title indigenous or tribal traditional territories are monitored for many years and only few have attained full compliance.[1068] Reasons accounting for this failure are *inter alia* the legal and geographical difficulties to determine the exact borders of the territory, the lack of agreement between community's representatives and State authorities, and the unwillingness of States to renounce absolute control over the natural resources available within those territories.[1069] At the ECtHR, difficulties also exist in the return of property confiscated by the State during Nazi occupation or Soviet control. Lack of compliance even extends to orders issued in the pilot-judgment procedure. As in the IACtHR's case, the governments' political preferences to prioritise the redress of certain wrongdoings over others count among the several reasons which might explain this failure to comply.[1070]

Notwithstanding the obvious challenges caused by non-compliance, it should be noted that restitution orders are not really contested. There is no meaningful criticism on the authority of regional courts and the HRC to identify cases in which restitution of property constitutes necessary redress. In this respect, Buyse argues that invocation of the principle of *restitutio in integrum* as a 'general norm under international law' helps the acceptance of these orders.[1071]

G. Assessment

Measures of restitution of property have been regularly used by both the ECtHR and IACtHR, as well as the HRC. The limited case-law of the African Court has not yet

[1068] See e.g. IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Monitoring Compliance with Judgment) Order 3 April 2009 (full compliance declared), and compare to IACtHR, *Moiwana Community v. Suriname* (Monitoring Compliance with Judgment) Order 21 November 2018; and IACtHR, *Yakye Axa, Sawhoyamaxa*, and *Xákmok Kásek v. Paraguay* (Monitoring Compliance with Judgment) Order 30 August 2017 (where orders to restitute territory have not been executed).
[1069] Fuentes (2017), 231.
[1070] Macklem (2005).
[1071] Buyse (2008), 129.

provided an opportunity for the Court to consider this measure. However, such an opportunity might arise soon. Whereas regional courts make use of evolutive interpretation of conventional reparative provisions to order restitution, the HRC grounds its authority to recommend restitution measures in the States' obligation to repair violations of ICCPR rights. Regarding their connection with protected rights, regional courts unequivocally link restitution orders with the right to property (protection of property in the case of the European Convention). Conversely, considering that no such protection exists in the ICCPR, the HRC mostly —but not necessarily— associates restitution with the right to equal treatment (Article 26 ICCPR).

Compared to orders to release prisoners or to reform legislation, restitution of property is prescribed in a less imperative fashion by regional courts. The provision of an alternative measure, generally consisting of compensation, is pervasive in the courts' practice, and the choice between alternatives is left to the respondent States. Although courts often refer to the impossibility of restitution when setting alternative measures, they have failed to provide clear criteria for the determination of such an impossibility. This oversight becomes negligence in sensitive cases like the ones dealing with traditional indigenous and tribal territories, where land and the subsistence of the community are profoundly intertwined. Although the IACtHR makes an efforts to empower indigenous and tribal communities in the decision-making process regarding the restitution of territory, other considerations, such as the rights of third parties, are used to justify the allocation of alternative lands.

Restitution measures have a clear reparative character in the sense that they are used to attain *restitutio in integrum*. Despite occasional deviations, regional courts and the HRC make use of restitution to re-establish the victim as if the violation had not taken place. This means that restitution of property (personal or real) is recognised to have a compensatory and restorative effect, yet other complementary measures are considered equally important to attain full restitution (e.g. compensation;

rehabilitation). Moreover, the courts' use of restitution measures to address structural problems has added a new layer to the restitution picture. Indeed, restitution of property is not only used to provide compensation and restitution to the victims of the case at hand, but also to halt ongoing violations.

V. Conclusions

The review of the specific case-law done in this Chapter first and foremost confirms allegations that the determination of reparations in IHRL is inconsistent. The many variations with which regional human rights courts select and design non-pecuniary reparations makes the drawing of overall conclusions a daunting task. A *prima facie* impression is that existing divergences are of such magnitude that they hinder any possible comparison between regional courts. Yet, the considerations which follow show that this is not the case.

Although the significance of inconsistent reparative practice should not be set aside, it is worth noticing that this study has also found many similarities. It is contended here that these are not anecdotal evidence, but rather signal the construction of a common understanding and systematization of reparations. For instance, regional human rights courts and the HRC share the common practice of granting reparations based on the evolutive interpretation of their conventional reparative provisions (and Art. 2(3) of the ICCPR, in case of the HRC). This practice shows that secondary norms are also subject to the 'living instrument' doctrine, thus accepting a charitable reading of reparative provisions in the light of current developments. Another example is the common practice of assigning the same level of conditionality to particular non-pecuniary reparations. That is, for instance, categorically ordering the release of prisoners, but conditionally ordering the restitution of property.

An important observation from this comparative exercise is that the use of discretion might explain many of the differences which are currently regarded as disrupting and uncoordinated. For instance, it has been shown that regional human rights courts are

ordering non-pecuniary measures containing mixed purposes. Often, the lack of a clear causal connection between damages and declared violations does not prevent the selection of non-pecuniary reparations, which attributes to the latter a character of something else beyond purely compensatory. This development clearly shows that courts are using its discretionary power to orient reparations towards new ends.

Another instance of the use of discretion concerns the nature assigned to non-pecuniary reparations in some cases. This comparative study shows that certain orders are better identified as cessation acts rather than reparative orders, in the sense that the principle aim of the measures is to stop the violation. Regional courts seem to implicitly recognise these differences when ordering those measures with different levels of conditionality, for instance using its discretion to always order the release of prisoners in a categorical manner.

The emergence of certain types of non-pecuniary reparations also signals the use of discretionary power. In this Chapter, it is shown that particular reparations were repeatedly requested before being ordered by courts. Yet, only when courts considered them appropriate (arguably using its discretion), they were included in judgments. Moreover, non-pecuniary reparations have been included not only as proper orders (i.e. in the operative paragraphs) but also in the *obiter dicta* as suggestions and recommendations. These variations could indeed be regarded as an exercise of discretion indicating a certain reasoning and not simply be categorised as capricious.

These observations convey the impression that there is, in fact, a use of discretion by regional human rights courts when determining reparations. However, discretion seems to be variable and sometimes arbitral. Without an appropriate permissible framework, the use of discretion might be contributing to chaos than to the upholding of the RoL. In the next Chapter, the innovative practice of the IACtHR with regard to non-pecuniary reparations is examined. The focus is on the determination of two particular non-pecuniary reparations which illustrate how this Court has found a way to exercise its discretion.

CHAPTER VI: AN INNOVATIVE APPROACH TO REPARATIONS: THE IACtHR'S ORDERS TO PROVIDE EDUCATIONAL SCHOLARSHIPS AND TO ESTABLISH A COMMUNAL DEVELOPMENT FUND

I. Introduction

In the preceding chapter, regional human rights courts, and sometimes the HRC, have been shown to share many similarities in regard to the consideration of reparations in their practice. Through the examination of the commonly ordered measures of legislative reform, release of prisoners, and restitution of property, the picture emerges that, in addition to their reparative character, reparations are also directed towards the cessation of violations and non-repetition. Moreover, this examination also shows that while the determination of reparations is strongly influenced by their connection with the corresponding breached rights, together with the principles of *restitutio in integrum* and the limited guidance offered by *lex generalis*, courts and treaty bodies occasionally use their discretion for such a determination.

How is the use of discretion effected? And, what factors are considered when using discretion? To answer these questions, in this chapter, two special reparative measures commonly ordered by the IACtHR are examined due to their special characteristics. This analysis will show that the IACtHR uses great discretionary powers in the design of these measures. Thus, the Court does not only look at the facts constituting conventional breaches but also at the context in which those breaches took place. In this light, the Court gives weight to factors which fall outside the scope of the traditional reparative determination. While these measures share the same purposes of more traditional ones (i.e. compensatory; restorative; deterrent), the IACtHR arguably uses its discretionary power to further the principle of *restitutio in integrum*. Reparative measures then are 'instrumentalised' in pursuit of a broader understanding of redress. However, this innovative approach brings particular challenges with it.

As a caveat, it should be noted that much of the criticism raised against the so-called transformative reparations might be thought to apply *mutatis mutandis* to the design and implementation of the two innovative types of reparations under examination in this chapter. The concept of transformative reparations boils down to Uprimny's contention that a restrictive legal consideration of reparations —focusing on compensating damages— does not really benefit victims.[1072] According to him, redress of human rights violations can only be effective if reparations are directed to change societal patterns through collective, transformative measures.[1073] In Chapter IV of this dissertation it has been explained that while the concept of 'transformative reparations' seems to imply transformation as a goal, the present author sustains that transformation is more akin to a means or a consequence. Transformation is not an end in itself, but rather it conduces to the purpose of non-repetition.

Having clarified this confusion, it should be admitted that the idea of transformative reparations and the non-pecuniary reparations examined in this Chapter might be equality criticised for being vulnerable to political manipulation. It might be the case that highlighting of the 'transformative role' of reparations responds to the advancement of a political agenda (national or regional). For instance, von Bogdandy and others have given an account of the different views taken by various States or groups of States equally calling for an international constitutional order in Latin America.[1074] Such callings are however influenced by different perspectives on the relationship between State and supra national organs, and RoL and democratic order. Thus, there is a risk of giving transformative reparations and reparations in general a populist tone, and using them to justify a move towards unaccountability. This is one of the reasons why the granting of non-pecuniary reparations needs to be grounded in a solid understanding of its legal base.

[1072] Uprimny (2009).
[1073] For an account of the emergence and conceptualisation of transformative reparations, see Fraser and McGonigle (2019), and Chapter IV of this dissertation.
[1074] von Bogdandy et al (2017), 15 et seq.

II. Orders to Provide Scholarships

Within the IACtHR's reparative practice, orders to grant *scholarships* are not unusual. This measure has been ordered in approximately 25 cases, making it one of the most prevailing in the IACtHR's case-law. A scholarship (also called study grant or fellowship) is a non-pecuniary reparation ordered by a competent judge or tribunal as a means to redress a human rights violation. This measure covers the costs of school fees and materials, and may also include school uniforms and expenses linked to commuting, housing, and sustenance. As it is the case for all other reparative measures, the IACtHR grounds this order in Article 63 of the American Convention. Scholarships are ordered under the title of *satisfaction*.

Few international instruments provide guidance regarding scholarships as reparation. The Basic Principles and Guidelines on the Right to a Remedy mentions that *compensation* should be provided for pecuniary loss also due '[l]ost opportunities, including employment, education and social benefits.'[1075] Since this document solely deals with reparations to *victims*, it might be understood that only they are entitled to obtain this kind of redress. However, there is no provision in this instrument suggesting that a reparation of scholarship exists or should not be ordered.

A. Causal Connection

Scholarship orders are linked to the infringement of certain rights. Taking this context into account, it is possible to see that the IACtHR not only uses this measure to redress particular grievances (e.g. to compensate damages) but also uses education as an instrument to strengthen development possibilities for individuals and communities not directly connected to the cases at hand. Judgments featuring orders to provide scholarship can be categorised in three groups.[1076] The first group contains cases dealing with the violation of the right to life, namely cases of enforced disappearances

[1075] Basic Principles and Guidelines on the Right to a Remedy, Principle 20(b).

[1076] Cases are grouped according to the weight given to some particular rights, but only for the sake of a practical classification.

and extra-judicial executions.[1077] In these cases, the Court orders the provision of a study grant to surviving victims, reasoning that the occurrence of the violation prevented these individuals from continuing with their normal course of life, which would have naturally included education. The IACtHR also orders study grants for favour of the deceased victims' next-of-kin (particularly children), directed towards compensating for the deprivation of parental care.

The second group includes cases finding a violation of the right to personal liberty and fair trial.[1078] They deal with the imprisonment of persons subjected to criminal proceedings which did not satisfy the legal guarantees of fair trial. In some cases, victims were illegally detained without a warrant having been issued by a competent authority, and subjected to torture[1079] or cruel, inhumane and degrading treatment because of the poor conditions of the prison facilities and lack of necessary medical treatment.[1080] The Court's special attention to redress in the cases belonging to the first two groups resonates well with the fact that the IACtHR seems to favour 'more extensive' reparations in cases involving a *jus cogens* violation.[1081] The IACtHR's reasoning in cases belonging to the second group puts great emphasis on the consequences of unfair imprisonment for the lives of victims and their families. Many victims spent several years serving unjust prison sentences.[1082] The IACtHR granted scholarship so that victims could complete truncated education and receive further professional training.

[1077] ACHR, Art 4. See e.g. IACtHR, *Barrios Altos v. Peru* (Reparations and Costs); IACtHR, *Myrna Mack Chang v. Guatemala*; IACtHR, *Gómez Paquiyauri Brothers v. Peru*; IACtHR, *Escué Zapata v. Colombia*; IACtHR, *Valle Jaramillo et al. v. Colombia*; IACtHR, *Barrios Family v. Venezuela;* IACtHR*, Garcia and Family v. Guatemala*; IACtHR, *Osorio Rivera and Family v. Peru*.

[1078] ACHR, Art 7-8.

[1079] IACtHR, *Cantoral Benavides v. Peru*; IACtHR, *Mendoza et al. v. Argentina*.

[1080] E.g. ACtHR, *Garcia-Asto and Ramirez-Rojas v. Peru*; IACtHR, *García Cruz and Sánchez Silvestre v. Mexico*.

[1081] Neuman (2008), 117. Note that the right to life is not *jus cogens*, whereas the prohibition of torture – which many victims of forced disappearance suffered – is.

[1082] E.g. IACtHR, *Norín Catrimán et al. v. Chile* (victims spent up to seven years imprisoned); IACtHR, *Garcia-Asto and Ramirez-Rojas v. Peru* (one of the victims was still serving prison time – and had been for more than fifteen years– when the IACtHR declared that the convictions were made in violation of fair trial guarantees).

The IACtHR summarised its purpose for granting scholarships in a case dealing with youngsters convicted to life sentences for crimes committed when they were underage. There, the Court ordered to '[e]nsure, as soon as possible, that [the victims] receive the formal educational or training opportunities that they want, including university studies, through the prison system or, if they have been released, through its public institutions.'[1083] It grounded its decision in the fact that these persons had lost the opportunity to construct a 'life project', and therefore the most appropriate way to 'ensure a decent life' was to provide training which would help them to develop their skills and abilities.[1084] Thus, the notion of 'life project' is crucial to understand the purpose of reparations in such contexts. It concerns the 'full self-actualization of the person', meaning that a victim's personality would only be realised if he or she would receive and complete the education which he or she had been pursuing before the violation took place.[1085]

Lastly, cases in the third group deal with the violation of the rights to humane treatment and to privacy, focusing especially on the protection of personal integrity and dignity.[1086] These cases address occurrences of sexual violence and discrimination against women —who may or may not belong to an indigenous group— in the context of internal armed conflict.[1087] The granting of educational scholarships in these cases aims to repair the *dignity* of victims, particularly considering that sexual assault does not only abuse women's bodies but creates severe damage to their reputation in particular circumstances.[1088] Because the State failed to properly investigate those violations in these cases, victims and their families dedicated many resources to seeking justice throughout years of impunity, which inevitably caused great

[1083] IACtHR, *Mendoza et al. v. Argentina*, Para 317.
[1084] Ibid, Para 316.
[1085] IACtHR, *Loayza Tamayo v. Peru* (Reparations and Costs), Para 147. This concept was introduced by Judge Cançado Trindade in a Separate Opinion in IACtHR, *Cantoral Benavides v. Peru* (Reparations).
[1086] ACHR, Art 5 and 11.
[1087] E.g. IACtHR, *Fernández Ortega et al. v. Mexico*; IACtHR, *Rosendo-Cantú and other v. Mexico*; IACtHR, *Women Victims of Sexual Torture in Atenco v. Mexico*; IACtHR, *López Soto et al. v. Venezuela*.
[1088] IACtHR, *Fernández Ortega et al. v. Mexico*, Para 94.

disturbance in their family life and was detrimental to their mental health. The Court's intention in ordering scholarships is also to make up for the resources used to attain justice.

B. Purpose

To understand the purpose and function of the measure of scholarship, as issued by the IACtHR, the way in which relevant case-law developed has to be examined. Whereas scholarship was formally ordered for the first time in 2001,[1089] its rationale can be traced back to the IACtHR's earliest jurisprudence. In *Velásquez Rodríguez v. Honduras*, the IACtHR ordered the creation of a trust fund to administer the pecuniary compensation awarded to the victim's children, only allowing them to collect a monthly interest of the total sum awarded until they reached the age of 25.[1090] Although the Court did not explain the reason for this choice, it was arguably looking after the children's interest by securing their studies up to the level of university education.[1091] This may explain why the IACtHR decided to distribute compensation over time instead of delivering it at once. The practice of ordering the creation of trust funds for minors was replaced by the opening of bank accounts after some years.[1092]

The IACtHR's great interest in the promotion of education became more evident in later case-law. In *Aloeboetoe et al. v. Suriname*, in addition to monetary compensation for material and moral damages, the Court ordered the reopening and staffing of the affected village's school.[1093] After noticing that many villages in Suriname did not have schools, the IACtHR argued that while monetary compensation was necessary to secure education for victims' children, it was 'essential that [they] be offered a school

[1089] IACtHR, *Barrios Altos v. Peru* (Reparations).
[1090] IACtHR, *Velásquez Rodríguez v. Honduras* (Reparations), Para 58.
[1091] Ibid, Paras 7.10 and 8.2.b (note that the Inter-American Commission and the children's mother requested that the Court grant compensation to cover inter-alia the children's studies).
[1092] IACtHR, *Neira Alegria et al. v. Peru* (Merits); IACtHR, *El Amparo v. Venezuela* (Reparations and Costs). In these cases, access to the total amount of compensation depended on a number of alternative conditions, one of which was the minor's marriage. Realising that this model encouraged early marriage, the Court abandoned this practice in subsequent case-law.
[1093] IACtHR, *Aloeboetoe et al. v. Suriname* (Reparations and Costs).

where [] can receive adequate education.'[1094] Although the Court avoided a discussion on the negligence experienced by indigenous and other minorities in Suriname, there are reasons to believe that this decision targeted that injustice. In any case, the lack of a direct link between the declared violations and the ordered reparation in this case is impossible to disregard. In this respect, Shelton noted that the school was closed due to reasons unrelated to the killing of the victims, thus rendering the non-pecuniary reparation as 'just satisfaction' for the entire community, rather than the victims of the case alone.[1095] Despite these concerns, the Court has continued showing great interest in education through the granting of reparations.

The Court has declared that the optimal way to reintegrate youngsters who had been imprisoned for many years is to provide education which improves their chances of a 'decent life'.[1096] In another case, the IACtHR agreed to grant scholarships after hearing that 'the only way [beneficiaries] can help improve their life is to continue with their studies'.[1097] Likewise, Judge Cançado Trindade has declared that the emphasis given to the victim's education by the IACtHR rendered a scholarship an appropriate means to protect the 'integrality of the personality of the victim'. At a time when most of the governments in the region were advancing public policies which neglected education, the IACtHR 'affirm[ed] the superior value of the *guarantee of education* as a form of reparation for the damage of the project of life of a victim of violation'.[1098]

C. Beneficiaries

When ordering study grants, the IACtHR usually identifies beneficiaries within three groups: victims, their next-of-kin and persons with no connection to the case. Before describing these groups, it is important to underline the IACtHR's particular approach to the concept of *victim*. For instance, in cases involving violation to the right to life,

[1094] Ibid, Para 96.
[1095] Shelton (2005), 286.
[1096] IACtHR, *Mendoza et al. v. Argentina*.
[1097] IACtHR, *Rosendo-Cantú et al. v. Mexico*, Para 256.
[1098] IACtHR, *Cantoral Benavides v. Peru* (Reparations and Costs), Separate Opinion by Judge Cançado Trindade, Paras 10 and 13.

the IACtHR considers the individuals immediately affected by the breach 'victims', but also their parents, siblings, spouses and children, based on the natural suffering experienced by any human in the same situation. Other family members might also be considered victims, on the submission of evidence proving their close connection to the main victim.[1099]

The first group contains direct victims of violations but also victims' children who have been declared victims in their own right.[1100] In the case of direct victims, the IACtHR usually grants scholarships when they have suffered unjustified imprisonment, thereby missing opportunities to get occupational or professional training.[1101] In the case of victims' children benefitting from scholarships, the IACtHR has frequently declared that the lack of financial support experienced by them due to the involuntary absence of their parents is the main reason for issuing this measure.[1102] The Court's arguments in both cases coincide with the compensatory purpose of reparations, since scholarships seek to redress victims' missed opportunities as a consequence of the breach of their rights.

The second group (i.e. next-of-kin) concerns cases in which the relatives of direct victims have been afforded scholarships, without having been declared victims themselves. Although the reasoning for ordering this measure is likely similar to the one used for the first group, the IACtHR has not provided any explanation for its choice in some cases.[1103] The same has happened in instances when the Court refused to grant this measure.[1104]

On rare occasions, the IACtHR has ordered the provision of scholarships to the benefit of a third group, namely, persons not linked to the case. For instance, the Court

[1099] For more on the evolution of the victim status in the IACtHR see Sandoval-Villalba (2009), 243.
[1100] E.g. IACtHR, *Escué Zapata v. Colombia*; IACtHR, *Rosendo Cantú et al. v. Mexico*; IACtHR, *Osorio Rivera and Family v. Peru.*
[1101] E.g. IACtHR, *Cantoral Benavides v. Peru* (Reparations).
[1102] See IACtHR, *García Cruz and Sánchez Silvestre v. Mexico*, Para 83.
[1103] E.g. IACtHR, *Barrios Altos v. Peru*; IACtHR, *Gómez Paquiyauri Brothers v. Peru.*
[1104] E.g. IACtHR, *Maritza Urrutia v. Guatemala*.

ordered the establishment of a scholarship for anthropology students to honour a victim's memory and her commitment to human rights.[1105] An additional reason for this choice might be that the victim's daughter —receiving compensation for pecuniary and non-pecuniary damages– had already completed a university studies and a scholarship may not have been appropriate for her. In another Case, where an individual had been forcibly disappeared and there was evidence of his extra-judicial execution, the respondent State agreed to grant ten scholarships in favour of children or grandchildren of people who had also been forcibly disappeared in the same period (but who had not been declared victims in this case).[1106] Regrettably, this Judgment did not specify the identity of the disappeared as no official record was available at the time. There is neither a record of a monitoring process providing more information. Moreover, similar to the previous Case, the Judgment was pronounced 28 years after the victim's disappearance, probably making a scholarship in favour of the victim's daughter no longer an appropriate redress.

The particular Judgment of the *Fernández Ortega et al. v. Mexico* Case, also belonging to the third group, clearly portrays the IACtHR's innovative approach to reparations, combining its appreciation of the connection with the rights' breach, the purpose for ordering scholarship, and the beneficiaries' characteristics. This case dealt with the rape of Mrs. Fernández Ortega by members of the Guatemalan military and the subsequent denial of justice by the State. Among several reparative measures, Mrs. Fernandez Ortega's children (also declared victims in this case) were granted scholarships until the completion of higher education.[1107] The victim and her daughters were all impoverished indigenous women who lived in an indigenous community. The IACtHR reasoned that because of the infringement of their mother's rights, the daughters' lives and relations with their community had been disrupted, affecting their personal development. Moreover, the lack of a middle school in Mrs. Fernandez

[1105] IACtHR, *Myrna Mack Chang v. Guatemala*, Para 258.
[1106] IACtHR, *Garcia and Family v. Guatemala*.
[1107] IACtHR, *Fernández Ortega et al. v. Mexico*, op Para 21.

Ortega's town and the fact that her two oldest children were forced to move to a middle-class town where they worked in 'semi-slavery' conditions in exchange for the opportunity to attend middle school —a common situation for young female members of indigenous communities— may have also influenced the Court's decision to order scholarships.

However, the IACtHR was not satisfied with this measure alone and extended the reach of scholarships to all girls belonging to the victim's community who were continuing their studies in the same city where the two victim's daughters had resettled.[1108] This Decision followed an expert's testimony provided during the case's trial, who argued that the situation of the victim's daughters working in semi-slavery conditions was not unique, since as much as thirty girl members of their same community were also engaged in similar activities in order to cover their education in the city.[1109] Thus, scholarships included the provision of housing and a proper diet so that the girls could carry on with their secondary education. This Case then shows how the IACtHR uses the measure of scholarship to combat a situation of structural discrimination and violence against indigenous women. Extending the reach of reparations beyond victims and their next-of-kin, the IACtHR aims at redressing not only the damages resulting from the declared rights violations, but also deeply anchored structural challenges to the realisation of human rights in the region.

D. The IACtHR's Discretionary Use of Scholarships

The appreciation of education as a development tool and the desire to attain *restitutio in integrum* have caused the IACtHR to grant educational scholarships in a discretionary manner. This innovative practice has sometimes triggered disagreement about the overall role of the Court, and its level of autonomy when ordering reparations. In some cases, it seems that the IACtHR assumes a paternalistic role, even

[1108] IACtHR, *Fernández Ortega et al. v. Mexico*, op Para 23. Despite the ambitious aim of this remedy, monitoring shows that compliance with this remedy has not been prioritized, see Monitoring Compliance with Judgment, Orders of the Court of 17 April, 2015; 21 November 2014; and 25 November 2010.
[1109] IACtHR, *Fernández Ortega et al. v. Mexico*, Paras 268-70.

against the wishes of victims. For instance, it has ordered the provision of scholarships in favour of persons who have not declared their desire to pursue university studies or occupational training.[1110] As a result, scholarships have sometimes remained unused, since victims could not benefit from them anymore (e.g. due to their age or geographical location).[1111]

Using its discretionary power, the IACtHR has on occasion decided not to consider scholarships as adequate reparation, despite existing precedent, preferring related measures also targeting education instead, such as the supply and training of teaching personnel for the communities' schools.[1112] Sometimes these choices follow —at least partially— the requests of victims or the Inter-American Commission, but the Court also acts *motu proprio*. The IACtHR has also ignored precedent and decided to grant victims' children of school-age monetary compensation in addition to other non-pecuniary measures.[1113] In these cases, the Court's refusal to provide reasons for the determination of reparations undeniably diminishes its authority.

The granting of scholarships as reparation, subjected to the discretion of the IACtHR, has also raised questions concerning the possible confusion over the roles of the Court and States. De Greiff, for instance, maintains that the inclusion of educational packages in reparation programs has both advantages and disadvantages.[1114] On the one hand, they satisfy real needs and are cost-effective if already existing institutions are used. On the other hand, the overlap with the provision of regular public services offered by the State, may have the effect that many people, including victims, do not recognise

[1110] E.g. IACtHR, *Gómez Paquiyauri Brothers v. Peru* (where one of the victims' daughter was offered a scholarship without her consent or declaration of interest about pursuing university studies).
[1111] IACtHR, *Valle Jaramillo et al. v. Colombia* (Interpretation) (beneficiaries unsuccessfully tried to transfer the scholarships to their children, or to use the scholarships at educational institutions abroad). Eventually, at the monitoring of compliance stage, the IACtHR accepted that the beneficiaries' children could use the scholarships. See discussion in Pasqualucci (2013), 329.
[1112] IACtHR, *Plan de Sanchez Massacre v. Guatemala*.
[1113] IACtHR, *La Cantuta v. Peru*.
[1114] de Greiff (2006).

them as reparation at all. Moreover, it may encourage States, purposely or not, to neglect the provision of educational services for other parts of the population.

Finally, it must be recalled that scholarship is one of the many measures (pecuniary and non-pecuniary) ordered by the Court with the goal to attain *restitutio in integrum*. Thus, all ordered measures are complementary, and the IACtHR uses its discretion to strike a balance among them. Without adequate explanation of its reasoning, measures can easily be taken as punitive since they imply a costs (although seldom significant) for the State. This is especially true when the IACtHR orders this measure in cases where rights' breaches occur in a context of structural discrimination against disadvantaged groups.

III. Orders to Establish a Community Development Fund

Within the innovative catalogue of non-pecuniary reparative orders developed by the IACtHR, the establishment of a Community Development Fund (CDF) is a useful example of the way in which this judicial body discretionarily tailors reparations according to the special characteristics of the case at hand. By ordering this unique measure, which combines orders for the provision of various basic goods and services with many others, the IACtHR seeks to provide full restitution to victims.[1115] Yet, through CDFs, the Court orders the implementation of activities for the advancement of certain rights and social policies, which are traditionally seen as part of the sovereign domain of States.

Although CDFs have been ordered in a significant number of cases, the IACtHR has not explained the criteria used for their selection. Yet, the significant transformation of

[1115] The IACtHR is the only regional human rights tribunal or treaty body that has directly ordered this kind of collective measure, although similar proposals have been made in different fora. For instance, in HRC, *Ominayak (Lubicon Lake Band) v. Canada*, the State proposed to remedy found violations by providing a package of benefits and programs and the granting of land destined to host a reserve, see Follow-Up of the Human Rights Committee on Individual Communications under the Optional Protocol to the International Covenant on Civil and Political Rights (2006), 701. This proposal was rejected as it was considered disadvantageous to the rights of the indigenous community; see Martin-Hill (2008), 21-5. In 2016, the HRC expressed concern about the still existing disputes on traditional land and resources to be resolved in the Canadian State, see HRC, Concluding observations on the sixth periodic report of Canada, Para 16.

this measure's design over years of experience signals that the IACtHR assesses and tries different formulas, arguably taken into consideration several factors such as context or the attained level of compliance in previous cases. However, the role that those factors actually play in the selection of CDFs remains unclear.

Moreover, the identification of CDFs as 'collective' and not 'individual' reparations calls into question whether a special causal connection applies in these cases. The examination of relevant judgments suggests that the IACtHR considers *inter alia* the restorative impact on the community and process management when selecting the implementation of CDFs. However, these factors are not considered when ordering traditional reparations such as, for instance, monetary compensation. Hence, an examination of the several elements influencing in the design of CDFs will provide valuable information on the criteria used by the IACtHR.

A. Causal Connection

The examination of the IACtHR's case-law shows a clear correlation between judgments ordering the establishment of CDFs or similar programs, and the violation of the rights to property and judicial protection (See Table H).[1116] Additionally, there is a strong correlation with the right to fair trial.[1117] As previously noted in the review of orders to restitute property, the IACtHR considers that all members of an indigenous or tribal community are directly and negatively affected by the denial of property rights over their traditional lands, in the sense that the transmission of their values and traditions are put at risk.[1118] The special meaning of the traditional lands is an important consideration in the assessment of damages.[1119] This link between indigenous peoples and their lands seems to be the basis for ordering the establishment of a CDF, as this measure aims to repair the disruption of such a

[1116] ACHR, Arts 21 and 25.
[1117] ACHR, Art 8.
[1118] IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay*, Paras 220-2; IACtHR, *Saramaka People v. Suriname*; IACtHR, *Xákmok Kásek Indigenous Community v. Paraguay*, Paras 320-1.
[1119] See *Community Garifuna Triunfo de la Cruz & its members v. Honduras*, Para 294.

connection. However, in cases where the IACtHR has chosen not to consider CDFs, it also invoked the deep interconnection between the indigenous and tribal communities and their territories.[1120] This discrepancy calls into question whether orders to establish a CDF are really related to the infringed rights or only to the determination of damages. If the latter were to be true, what would be the criteria followed by the Court when choosing between the establishment of a CDF and the direct payment of compensation?

Even if only in a few decisions, the IACtHR has allowed itself briefly to elaborate on the relationship between the breach of particular rights and the establishment of a CDF. For instance, the Court has recognised a direct connection between the establishment of a CDF and the violation of the rights to property, fair trial and judicial protection, and the obligation to give domestic legal effect to the provisions of the American Convention.[1121] However, this declaration has been followed by a discussion that gives much weight to the damages experienced due to the violations, and not the violations themselves. For instance, addressing damages affecting traditional territories' productive capacity and environment conservation, the IACtHR designed a CDF aiming at the implementation of projects *inter alia* to improve productive capacity and reforest affected areas.[1122]

While a CDF administers the funds set up in connection to non-pecuniary damages in most cases, in recent cases, it addresses both pecuniary and non-pecuniary damages by ordering the payment of a lump sum (Table I).[1123] In some cases, however, it is difficult to assert what kind of damage is being addressed by the measures ordered by the IACtHR. For instance, in an early Case, the Court stated that the ordered provision of public works and services addressed neither pecuniary nor non-pecuniary

[1120] IACtHR, *Kichwa Indigenous People of Sarayaku v. Ecuador*, Para 322; and IACtHR, *Kuna de Madungandí and Emberá of Bayano and its members v. Panama*, Para 246.
[1121] IACtHR, *Community Garifuna Triunfo de la Cruz and its members v. Honduras,* Para 295.
[1122] Ibid*,* Para 296. See also ACtHR, *Garífuna Punta Piedra Community and its Members v. Honduras*, Para 332.
[1123] IACtHR, *Community Garifuna Triunfo de la Cruz and its members v. Honduras*, Para 298; IACtHR, *Garifuna Punta Piedra Community & its members v. Honduras*, Para 335; and IACtHR, *Kaliña and Lokono Peoples v. Suriname*, Para 295.

damages.[1124] In other cases, the Court has ordered, in addition to compensation for pecuniary and non-pecuniary damages, several reparative measures under the guise of 'other forms of reparations' without really explaining their connection to damages, and despite having declared that reparations depend on the 'harm caused at both the material and moral levels'.[1125]

B. Purpose

The purpose attached to the establishment of CDFs seem to have changed throughout the IACtHR's practice. The Court was first inspired by existing domestic reparation programs in Latin America and the rest of the world.[1126] Often, transitional reparation programs included development measures.

In the first judgments featuring these orders (establishing a CDF or similar measures), the IACtHR declared that their purpose was to secure a *proper* use of amounts granted in compensation to the members of indigenous and tribal communities.[1127] The IACtHR's arguments displayed in *obiter dicta* suggest that this is based on the belief that the beneficiaries themselves were not able to make optimal use of the compensatory sums. In a specific case, the Court's representation of indigenous victims as 'practically illiterate' and living 'in the jungle', might have influenced this viewpoint, prompting the IACtHR to decide that money received in compensation should be invested in small capital for business or covering study fees.[1128]

Through this measure, the IACtHR also aims at securing non-repetition and asserting reproach. Since its early case-law, the Court has stated that 'public acts and works [] seek,

[1124] IACtHR, *Plan de Sánchez Massacre v. Guatemala* (Reparations), Para 93.
[1125] IACtHR, *Moiwana Community v. Suriname*, Para 171.
[1126] Correa (2013), 11-2. Also take note of programs in Uganda (Peace Recovery and Development Program, and the Northern Uganda Social Action Fund); in Canada (see James (2008), 140, 145-6 [for redressing the deportation of Japanese Canadians during the Second World War]); in Cambodia; addressing the Israeli-Palestinian conflict (see Samy (2010), 30-1 [observing that the Geneva Initiative —an unofficial negotiation for the ending of the Israeli-Palestinian conflict— suggested such a reparation in 2003, which did not include the payment of individual compensation]).
[1127] E.g. IACtHR, *Aloeboetoe v. Suriname*; IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*.
[1128] IACtHR, *Aloeboetoe et al. v. Suriname* (Reparations and Costs), Paras 72, 98 and 106.

inter alia, to commemorate and identify victims, as well as to avoid repetition of human rights violations'.[1129] The IACtHR has recognised that when ordering the establishment of CDFs, or similar measures, it takes into account the circumstances of the case and the 'alterations to the conditions of existence of the victims'.[1130] This appreciation strongly influences the purpose attached to CDFs, as the IACtHR has also recognised that it might order measures consisting of 'acts or projects with public recognition or repercussion'.[1131] Thus, the IACtHR's purpose when ordering the delivery of public goods and implementation of public services may be to provoke public repercussions, an effect which the Court still considers necessary when violations are of extreme gravity and damages are of a collective nature.[1132]

Additionally, later cases show that the IACtHR aims at protecting the existence of indigenous and tribal communities through this measure. The Court has specifically argued that reparations must be reconciled with the need to strengthen indigenous and tribal peoples' identity.[1133] Likewise, it has recognised that indigenous and tribal communities might not be homogenous in their perceptions of life and development. Therefore, reparations must provide effective ways to redress violations from the ethnic perspective of the particular communities.[1134]

The IACtHR's wish to protect indigenous and tribal communities through the implementation of CDFs or similar measures has also brought about a certain paternalistic control. To illustrate, for many years, the IACtHR instructed the creation of an implementation committee in charge of CDFs' management (Table J). This committee, in charge of deciding over funds and activities, was first made up of

[1129] IACtHR, *Moiwana Community v. Suriname*, Para 191.
[1130] IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, Para 200; IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay*, Paras 220-2.
[1131] IACtHR, *Plan de Sánchez Massacre v. Guatemala* (Reparations), Para 80. See also IACtHR, *Moiwana Community v. Suriname*, Para 191; IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, Para 199.
[1132] IACtHR, *Plan de Sánchez Massacre v. Guatemala* (Reparations), Paras 80 and 93. See also IACtHR, *Moiwana Community v. Suriname*, Para 201.
[1133] IACtHR, *Garífuna Punta Piedra Community and its Members v. Honduras,* Para 316.
[1134] Ibid.

individuals directly appointed by the IACtHR.[1135] Later, different formulas were tested: State administration supervised by the Inter-American Commission;[1136] a three-member committee composed of a State's representative, a victims' representative and a person chosen by agreement between the victims and the State.[1137] These choices followed the IACtHR's desire to secure participation of the indigenous or tribal community in the decision-making process directly affecting them. Yet, some commentators rightly criticised this practice for being 'paternalistic' as it assigned decision-making power to an external body rather than to the community itself.[1138]

After some years in which the IACtHR stopped ordering the establishment of CDFs,[1139] the Court resumed this practice, with the exception of eliminating the implementation committee. The IACtHR assigned decision-making power to the representatives of the Community instead, while also establishing that a State's representative would be in charge of the administration of the fund.[1140] IACtHR Judge Sierra Porto explained that the State's infrastructure, knowledge and means made it the ideal administrator.[1141] In the latest case dealing with indigenous and tribal peoples, the IACtHR has remained silent about this issue.[1142]

The IACtHR's instructions with respect to the allocation of CDFs investments and activities have also been perceived as paternalistic. When ordering the implementation of services or programs, the IACtHR has frequently tried to influence —to a greater or lesser extent— the substance of those activities. Although the Court has sometimes

[1135] IACtHR, *Aloeboetoe et al. v. Suriname* (Reparations and Costs), Paras 101-2.
[1136] IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, op Para 6.
[1137] See e.g. IACtHR, *Moiwana Community v. Suriname*, Para 214; IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, Para 206; IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay,* Paras 224-5; IACtHR, *Xákmok Kásek v. Paraguay*, Para 323.
[1138] Nash (2009), 55.
[1139] IACtHR, *Kichwa Indigenous People of Sarayaku v. Ecuador*, op para (reparations) 8; and IACtHR, *Indigenous Communities Kuna of Madungandí and Emberá of Bayano and its members v. Panama*, op Para 14 (where monetary compensation for pecuniary and non-pecuniary damages was ordered to be delivered to the communities' representatives).
[1140] IACtHR, *Garifuna Triunfo de la Cruz Community and its members v. Honduras*, Para 297.
[1141] Ibid (Concurring Opinion of Judge Sierra Porto, Paras 58-62).
[1142] IACtHR, *Pueblo Indígena Xucuru y sus miembros v. Brasil*.

chosen to give only general directions,[1143] it has generally given specific details about the activities to be carried out.[1144] Activities targeted by the CDF are usually connected to the provision of housing, health services and educational programs, but also involve agricultural, water, and sanitation services. In later case-law, the IACtHR allowed more flexibility, while still suggesting activities in *obiter dicta.*[1145] In its latest Case, the Court has given no particular direction.[1146]

The noticeable preference for implementing certain activities (e.g. supply of water, funding of education, and provision of health care) may provoke confusion about regular public works implemented by the State. Although the IACtHR has repetitively cautioned against mixing reparative activities with activities carried out as regular State duties, confusion easily prevails. To illustrate, Beristain has documented a compelling series of interviews in which he shows that beneficiaries of these measures are sometimes confused as to whether some activities constitute reparations or not.[1147] Showing awareness of this confusion, Judge Sierra Porto has provided some clarifications on the distinction between collective reparations and general State obligations.[1148] According to him, collective reparations aim to redress a specific damage caused by the breach of the American Convention by a State to the detriment

[1143] E.g. IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, op Para 6 and Para 167 (where it ordered to invest funds in 'works and services of collective interest for the benefit of the … [c]ommunity').
[1144] See IACtHR, *Plan de Sánchez Massacre v. Guatemala* (Reparations), op Para 9 and Paras 109-11. Programs included 'a) study and dissemination of the Maya-Achí culture in the affected communities through the Guatemalan Academy of Mayan Languages or a similar organisation; b) maintenance and improvement of the road systems between the said communities and the municipal capital of Rabinal; c) sewage system and potable water supply; d) supply of teaching personnel trained in intercultural and bilingual teaching for primary, secondary and comprehensive schooling in these communities, and e) the establishment of a health center in the village of Plan de Sánchez with adequate personnel and conditions, as well as training for the personnel of the Rabinal Municipal Health Center so that they can provide medical and psychological care to those who have been affected and who require this kind of treatment'.
[1145] See e.g. IACtHR, *Garifuna Triunfo de la Cruz Community and its members v. Honduras*, Paras 296-7; IACtHR, *Garifuna Punta Piedra Community & its members v. Honduras*, Para 333; IACtHR, *Kaliña and Lokono Peoples v. Suriname*, Para 296.
[1146] IACtHR, *Pueblo Indígena Xucuru y sus miembros v. Brasil*.
[1147] Beristain (2008), 508-511. See also Carranza (2009), 4 (referring to cash payments for children schooling in Peru, which some victims of the recent armed conflict thought to be a recognition of the wrongdoings committed against them).
[1148] IACtHR, *Garifuna Triunfo de la Cruz Community and its members v. Honduras*. Concurring Opinion of Judge Sierra Porto, Paras 22 et seq.

of a community and its members. He also clarified that, while both categories might target the same individuals —either as citizens or reparations' beneficiaries— it is important that the State keeps a clear account of the differences as confusion might lead to victims actually not being compensated or States neglecting their obligations. In the words of Roht-Arriaza and Olovsky, reparation programs should *complement* instead of *duplicate* regular development activities.[1149]

The desire to protect communities has also made the IACtHR order the establishment of CDFs in opposition of victims' wishes. Sometimes, the IACtHR has ignored the requests for ordinary compensation made by the Inter-American Commission and victims' representatives.[1150] The IACtHR has also disregarded the requests made by victims' representatives to allow the community to administer the CDF.[1151] With this conduct, the Court is arguably showing that it assumes that it has a better understanding of the community's needs than its own members.

Another issue which demonstrates the IACtHR's exercise of discretion is the recognition of pecuniary and non-pecuniary damages and their occasional management by CDFs. The IACtHR often changes its approach to this topic, either attaching only non-pecuniary damages, both, or none of them to CDFs, without providing explanation. In most cases, the money assigned to the CDFs is the only pecuniary compensation received by the affected community or its members.[1152] Compensation for non-pecuniary damages besides the CDF have only been awarded under special circumstances, such as for victims who died due to lack of medical treatment while they lived outside their traditional territories.[1153] While the IACtHR may justify the failure to grant compensation for pecuniary damages by the fact that

[1149] Roht-Arriaza and Orlovsky (2009), 4.
[1150] IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Para 158.
[1151] IACtHR, *Kaliña and Lokono Peoples v. Suriname*, Paras 292 and 297.
[1152] E.g. IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, op Para 6 (compensation was ordered for neither pecuniary nor non-pecuniary damages).
[1153] IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay,* Para 226. See also, IACtHR, *Xákmok Kásek Indigenous Community v. Paraguay,* op Para 27.

victims' representatives did not expressly request it in accordance with the rules of the Court, it often declares the existence of non-pecuniary damages based on 'equity' and assigns an amount to be administered through the CDF, without providing further explanation.[1154]

The lack of clear standards for the recognition of pecuniary and non-pecuniary damages renders the IACtHR's decisions unpredictable. The fact that the IACtHR sometimes recognises the existence of pecuniary damages based on its *motu proprio* appreciation of loss of earnings,[1155] while in other cases it denies them,[1156] puts indigenous communities in a fragile position, depending on the good will of the IACtHR. Moreover, the fact that the IACtHR does not identify separate amounts corresponding to pecuniary and non-pecuniary damages, but rather orders a total sum for both to be administered by the CDF, also overlooks the need to recognise the particular suffering and economic loss of individuals as members of indigenous and tribal communities.[1157]

The practice of the IACtHR also shows that orders to establish a CDF are not indispensable in cases dealing with indigenous and tribal peoples. In two relevant cases, the IACtHR bypassed this measure, addressing pecuniary damages by granting monetary compensation, and non-pecuniary damages through measures of satisfaction (e.g. publication and dissemination of the Judgment; public act recognising the State's international responsibility) and non-repetition (e.g. delimitation and titling of traditional territories) in addition to monetary compensation.[1158] The Court only suggested some development goals —e.g. to redress effects on education and health—

[1154] IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Paras 165 and 167.
[1155] IACtHR, *Community Garifuna Triunfo de la Cruz and its members v. Honduras*, Para 292.
[1156] IACtHR, *Pueblo Indígena Xucuru y sus miembros v. Brasil*, Para 210.
[1157] IACtHR, *Community Garifuna Triunfo de la Cruz and its members v. Honduras*, Para 298; IACtHR, *Garifuna Punta Piedra Community & its members v. Honduras*, Para 335; and IACtHR, *Kaliña and Lokono Peoples v. Suriname*, Para 295.
[1158] IACtHR, *Kichwa Indigenous People of Sarayaku v. Ecuador*, op Paras 2-7, and *Indigenous Communities Kuna of Madungandí and Emberá of Bayano and its members v. Panama*, op Paras 10-4.

when granting monetary compensation.[1159] Moreover, although the IACtHR acknowledged the precarious conditions in the indigenous communities, it refrained from ordering measures to redress the situation.[1160] In this case, however, the temporal competence of the IACtHR only allow it to deal with some violations. This may also have affected the Court's approach to reparations, in the sense that it was difficult to assert the degree to which damages were caused by certain violations and not others (outside of the Court's competence).

In comparison, when dealing with similar cases involving indigenous communities, the HRC has only declared the breach of the right to enjoy one's culture (ICCPR, Article 27) due to the State's failure to protect indigenous communities' enjoyment of their lands and resources, without proposing clear reparative measures.[1161]

C. Beneficiaries

The identity of beneficiaries as members of an indigenous or tribal community is determinant for the IACtHR's consideration of CDFs. Even in early cases where the IACtHR did not order the establishment of a CDF, but rather incipient measures such as trust funds or targeted investments, beneficiaries could be identified as belonging to indigenous or tribal groups (TABLE G).[1162] This practice raises questions about whether the IACtHR's design of reparations is guided by the same criteria in all cases, or whether it is mostly influenced by the identity of victims rather than, for instance, their connection with declared violations or damages. While dealing with similar cases,

[1159] IACtHR, *Kichwa Indigenous People of Sarayaku v. Ecuador*, Para 320.
[1160] In their arguments regarding the determination of pecuniary compensation, the victims' representatives argued that the construction of a dam in their ancestral territories had caused, *inter alia*, increase of illnesses; damage to the ecosystem; malnutrition; lack of water and electricity; deforestation. Likewise, the IACtHR noted, while evaluating immaterial damage, that the living conditions of the members of the community had been negatively affected by the disruptions in the enjoyment of their property rights. See, *Indigenous Communities Kuna of Madungandí and Emberá of Bayano and its members v. Panama*, Paras 235 and 246.
[1161] HRC, *Ominayak (Lubicon Lake Band) v. Canada*.
[1162] E.g. IACtHR, *Aloeboetoe et al. v. Suriname* (Reparations and Costs); IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*; IACtHR, *Plan de Sánchez Massacre v. Guatemala* (Reparations).

other jurisdictions have not addressed violations of the rights of indigenous people by providing public goods and services.[1163]

The recognition of indigenous people as beneficiaries of CDFs also extents to the community itself, thus forming the concept of collective reparation. The Court has declared that reparations need to be implemented in the communities where victims come from and be granted as 'a whole'.[1164] The IACtHR's appreciation of the collective reparative character of CDFs has been explained by IACtHR Judge Sierra Porto. He maintains that when the rights of indigenous and tribal communities are breached, causing collective damages, reparation as a general rule must also be afforded in a collective way, rather than in the form of compensation for individuals or members of the community.[1165] The CDF was therefore, in his opinion, an appropriate collective reparation.

Moreover, Sierra Porto explained three elements of significance to this measure: i) the collectively exercise, especially the right to collective property, of indigenous peoples' rights; ii) the holders of those rights and therefore the beneficiaries of reparative measures when those rights are breached; iii) the specific damage occurred due to the breach.[1166] Referring to the relevant IACtHR case-law, he recognised that the Court had often regarded the individual members of the indigenous and tribal communities as the right holders of the collective right to property.[1167] However, the recent Court's recognition of the indigenous peoples' juridical personality, allowing them to exercise certain rights such as the collective right to property, brings as a consequence that

[1163] HRC*, Poma Poma v. Peru*, Para 9 (After finding that Poma Poma's rights to enjoy her own culture and to obtain an effective remedy had been breached, the HRC suggested the provision of effective remedies and reparations proportional to the harm caused). Unfortunately, follow-up reports show that the State has not implemented satisfactory remedial measures, see HRC, 'Follow-up progress report on individual Communications: Draft proposed by the Special Rapporteur on follow-up to Views', 25.
[1164] IACtHR, *Plan de Sánchez Massacre v. Guatemala* (Reparations), Paras 86 and 110; IACtHR, *Moiwana Community v. Suriname*, Para 194.
[1165] *Garifuna Triunfo de la Cruz Community and its members v. Honduras*. Concurring Opinion of Judge Sierra Porto, Para 36.
[1166] Ibid, Para 38.
[1167] Ibid, Paras 40-3.

indigenous communities themselves can be recognised as victims of related violations.[1168]

Indeed, in 2010, the IACtHR had begun declaring that the violation of the right to property, the right to fair trial and judicial protection in these cases occurred to the detriment of the community as a whole and not just some or all of its members.[1169] According to Sierra Porto, identifying the establishment of CDFs as a collective measure secured congruence between the right to collective property and the holders of those rights, namely the community and its members.[1170] Lastly, he argued that collective compensation may be the only way to repair the damage suffered by these communities, as it differentiates between damages suffered by the communities and their members.[1171] However, this is an aspirational argument since, in practice, the recognition of collective reparations has not been accompanied by the recognition of individual reparations for pecuniary or non-pecuniary damages.

The latest developments in the IACtHR case-law have not expressly adopted Sierra Porto's arguments. The Court continues repeating the formula of prior judgments, only adding that there is a need to respect the decisions taken by the members of indigenous and tribal communities in regard to the understanding of their development and their evolution, thus neglecting to provide a sound basis for the selection of the CDF.[1172]

D. The IACtHR's Discretionary Use of Orders to Establish a Community Development Fund

When determining compensation for non-pecuniary damages, the IACtHR has admitted that its decisions are taken based on the 'reasonable exercise of judicial

[1168] Ibid, Para 48.
[1169] IACtHR, *Xákmok Kásek Indigenous Community v. Paraguay*, op Para 2.
[1170] *Garifuna Triunfo de la Cruz Community and its members v. Honduras*. Concurring Opinion of Judge Sierra Porto, Para 53.
[1171] Ibid, Para 54.
[1172] IACtHR, *Kaliña and Lokono v. Suriname,* Para 272; IACtHR, *Pueblo Indígena Xucuru y sus miembros v. Brasil*, Para 211.

discretion and in terms of fairness'.[1173] Likewise, since the IACtHR usually channels compensation of non-pecuniary damages through CDFs, discretionary and fairness considerations affect the selection of those measures.[1174]

Undoubtedly, the discretionary use of CDFs by the IACtHR has been inspired by the Court's great desire to protect indigenous and tribal communities. This protection covers both community members and the communities as a whole. By using CDFs (complemented by other measures), the IACtHR aims at securing *restitutio in integrum*, offering beneficiaries a means of survival and development. Moreover, the implementation of CDFs also acts as a cessation measures and arms communities with strengthening tools facilitating non-repetition.

Despite the IACtHR's good intentions, the lack of consistency displayed in the determination process of CDFs is problematic. Although the Court seems to establish certain standards for the determination of this measure for some periods, the IACtHR keeps changing its practice again and again.

The IACtHR's volatility in the determination of CDFs as reparation even creates doubt as to whether this measure is at all necessary to address violations against indigenous and tribal communities. The IACtHR has shown that it is able to order the provision of public goods and services without them being provided and administrated by CDFs.[1175] The existence of these cases disputes the necessity of CDFs in the first place, especially considering the difficulties encountered in regard to the constitution of management committees.[1176]

[1173] IACtHR, *Plan de Sánchez Massacre v. Guatemala* (Reparations), Para 80.
[1174] IACtHR, *Yakye Axa Indigenous Community*, Para 205.
[1175] E.g. IACtHR, *Xákmok Kásek Indigenous Community v. Paraguay*, Paras 300-6, 323 (where the Court ordered provision of public goods and services as an urgent measure instead of through the establishment of a CDF).
[1176] See IACtHR, *Kaliña and Lokono Peoples v. Suriname*, Para 292 (where the victims' representative asked the IACtHR not to order the establishment of a management committee since the experience in other cases showed that this was not 'functioning satisfactorily' and that, in this case, the indigenous community was sufficiently experienced to manage the fund).

Additionally, the continuing changes in the IACtHR's approach to the coverage of pecuniary and non-pecuniary damages by CDFs also debilitate the Court's claim of discretionary power. The choice of not differentiating between amounts granted for pecuniary and non-pecuniary damages, subsuming these concepts under a single amount assigned to the CDF, has not been well-received by some commentators. Even if referring to reparation programs implemented at the domestic level, de Greiff warns against presenting this measure as providing 'adequate' or 'proportional' compensation, due to the many difficulties involving its implementation in view of the large number of persons affected by widespread human rights violations.[1177] He argues that, in contrast to isolated cases with a small number of victims, reparation programs are best designed to respond to widespread or structural violations because they have the advantage of, *inter alia*, simplifying administrative tasks and costs.[1178] However, if a reparation program is regarded as the sole provider of sufficient compensation, de Greiff fears that *pernicious effects* might appear, for instance, when individuals who have suffered similar violations are granted very dissimilar reparative measures, depending on the forum (international, regional or domestic) providing redress.[1179] This might bring about repercussions like social fracture of the community's tissue and prolongation of already existing inequalities.

These concerns are easily transposed to the context in which the creation of CDFs is ordered by the IACtHR. Since recent practice suggests that compensatory claims are to be addressed by CDFs and other non-pecuniary measures, in the sense that community members are not being granted additional monetary compensations, one might question whether the IACtHR is correctly redressing all pecuniary and non-pecuniary damages of all victims. In other words, since the IACtHR uses CDFs to compensate indigenous or tribal communities in general, it is not clear whether

[1177] De Greiff (2006), 456 and 465-6.
[1178] Ibid, 459. Other advantages are saving victims from time-consuming judicial involvement, avoiding re-victimisation and suffering linked to giving testimony, etcetera.
[1179] De Greiff (2006), 456-7.

community members are being effectively compensated for the particular damages suffered as individuals.

The complexity of CDFs, clustering several measures —each with their own purposes, beneficiaries and implementation requirements—, might result in confusion or even contradiction when received by States and victims. For instance, their restorative or rehabilitative impact might be challenging when applied to communities which have experienced significant transformation since the occurrence of violations. A discretionary assignment of reparations such as the implementation of CDFs would demand that the Court attains special expertise before issuing those orders.

IV. Conclusions

In this chapter, the IACtHR's innovative approach to reparations was analysed through the examination of two particular measures: Scholarships, and the establishment of a Community Development Fund. When ordering these measures, the Court aims to further traditional reparation purposes in order to restore the well-being of victims of declared violations. The Court also uses reparations, as recognised by GIL, to halt ongoing violations and to secure non-repetition. These functions are recognised to be compatible.

However, the IACtHR's innovative approach to reparations consists in using reparations as tools for furthering socio-economic goals, in the understanding that these measures will help to satisfy the principle of *restitutio in integrum.* Hence, the IACtHR uses its discretionary powers to select measures which not only address the elements of a particular violation in a particular case, but also address the general situation leading to the occurrence of a violation. Through these reparative measures, the Court intends to correct situations of *inter alia* poverty and discrimination.

Yet, discretionary power as exercised by the IACtHR brings with it certain challenges. Added to the problematic lack of clear standards in the allocation of traditional reparations, uncertainty caused by the IACtHR's use of discretion creates uneasiness

in the system. Parties to the conflicts have trouble pursuing judicial strategies as the links between reparations and violations, damages and victims are unclear. Moreover, the IACtHR's desire to protect vulnerable populations (e.g. indigenous peoples) might make it assume a paternalistic position in some cases, disregarding victims' wishes and capabilities. Additionally, the intrusion of the IACtHR ordering the provision of public goods and services into a field which has been traditionally regarded as belonging to the sovereign domain of States, has led to unwanted consequences. On the one hand, the function and meaning of reparations have been diluted as victims and beneficiaries encounter difficulties in differentiating between reparations and regular State activities. On the other hand, States may neglect their regular duties in respect to the provision of public goods and services, if they are already carrying out similar activities in compliance with a court's order.

CHAPTER VII: GENERAL CONCLUSIONS

Traditionally, the determination of reparations by regional human rights courts has been regarded as being within the exclusive ambit of each particular court. That is, the determination of reparative measures seemed to be an isolated —sometimes even accessory— process, in which only the parties to the particular case had an interest. While it is true that the IACtHR started to develop an extensive reparative practice going beyond traditional monetary compensation many years ago, the disorganised and generally unsubstantiated granting of non-pecuniary reparations has limited the interest of academia to the examination of specific case studies. In Europe, the slow development of the ECtHR's reparative catalogue, mostly focusing on monetary compensation, has not encouraged systematic studies of this Court's reparative practice. In Africa, the inclusion of non-pecuniary reparations in the case-law has just started; hence, scholarly approaches to this topic have been only perfunctory.[1180]

The irregular reparative practice of the three regional courts conveys a sense of unreliability in the system. The lack of clear guidelines for the granting of reparations prevents both victims and States from forming concrete expectations about the way judgments may impact them. Moreover, from a judicial perspective, it difficult to design a strategy towards the granting of particular non-pecuniary reparations, as no determination criteria has been specifically recognised by the regional courts. Given the asymmetry of the relationship between State and human rights victims, the latter are particularly affected by not having clear reparative expectations. The lack of attention to and general theorisation of the remedial practice of regional human rights courts is, therefore, negligent. Relevant, systematic studies have only recently begun to emerge, in view of a new consolidating yet evolving practice in those jurisdictions.[1181]

[1180] Viljoen (2018), 98; Ssenyonjo (2018), 31 et seq.
[1181] Novak (2018), Huneeus (2015); Mowbray (2017).

This dissertation joins the current interest in the law on reparations in IHRL, focusing specifically on the determination of non-pecuniary reparations. In the course of the preceding chapters, two main questions have been asked: What are the factors regional human rights courts take into consideration when determining non-pecuniary reparations? And, what legal sources could be used to strengthen the determination process? To answer those questions, this dissertation takes an integrated approach to reparations, considering all sources of international law, hence, looking for guidance not only in the particular regional conventions authorising the granting of reparations but also in GIL as a whole. Moreover, this analysis takes the general standards of the RoL as a normative framework, thus focusing on how to strengthen the values of *inter alia* clarity, certainty and predictability in the adjudicative process.

The study of non-pecuniary reparations proposed in this dissertation has followed a logical trajectory. It began by analysing the conventional reparative provisions, traditionally considered as *lex specialis*, and finished with the examination of the innovative practice of the IACtHR in regard to two particular non-pecuniary reparation, from which a permissible framework for the use of discretion might be deduced. The overall findings of this dissertation are described in the following lines.

I. Lex Specialis: Compatibility of Conventional Provisions on Reparations with GIL.

The lack of scholarly attention over the determination of reparations in part reflects an erroneous understanding of the special nature of human rights. Said understanding considers regional human rights conventions —especially their secondary norms— and the general functioning of regional human rights courts separated from the system of GIL. Because of this limited view, the reparative practice of regional human rights courts has been regarded as governed by its respective conventional provisions alone. In this light, conventional provisions on reparations have been qualified as *legi speciali*, in the sense that regional conventional rules exclusively apply to the determination of reparations in their jurisdictions. Thus, *lex specialis* has been understood as not

allowing the influence of general norms, leaving regional human rights courts only equipped with the guidance provided by vague conventional rules on reparations and court's proceedings.

This dissertation takes issue with the restricted approach to the concept of *lex specialis*, particularly in respect to the provision of reparations in the field of IHRL, showing that it is not correct. Reparations are a pivotal element of human rights adjudication —perhaps the most important element for victims of human rights violations. As such, their treatment is not only an essential part of IHRL but also of GIL. Whereas conventional reparative provisions clearly are *lex specialis*, Chapter I demonstrates that those provisions do not necessarily contradict GIL norms and both systems can be reconciled.

Indeed, the examination of the IACtHR's and ECtHR's practice shows that these courts actually interpret their respective reparative provisions in an equivalent fashion. This finding is relevant for current discussions on the ECtHR's powers to order reparations. Certainly, the granting of non-pecuniary reparations by the ECtHR has been referred to as 'recommendations', 'guidance' and 'indications' by relevant stake-holders and commentators,[1182] who often avoid to categorise them as 'orders'. In fact, the ECtHR tends to ground these orders in the States obligation to abide by its rulings (Article 46) instead of invoking the European Convention's provision authorising the granting of reparations (Article 41). Nevertheless, the analysis presented in this dissertation shows that non-pecuniary reparations are being ordered under the authority of Article 41, *in the light* of Article 46. That is, the reparative power of the ECtHR unequivocally lies in Article 41, and Article 46 gives context to particular non-pecuniary orders.

Consequently, the actual notions of *just satisfaction* and *reparation*, as laid down in the European and American conventions respectively, are similar and include various types of reparative measures also recognised in GIL (e.g. the ILC Articles). This fact

[1182] CoM, Supervision of the Execution of Judgments and Decisions of the ECtHR 2011, 19; CoM, Supervision of the Execution of Judgments and Decisions of the ECtHR 2012, 28; Mowbray (2017).

allows the maxim of *lex specialis derogat legi generali* to work as a tool for legal interpretation and not as a conflict resolution technique, where only *lex specialis* remains valid.[1183] This means that the process of determination of reparations is not only ruled by *lex specialis* but is also subject to the influence of *lex generalis* rules when permitted.

Appreciating the consequences of this influence is a pressing endeavour. Non-pecuniary reparative measures cause great impact on all individuals in the system, even if those measures do not ultimately acquire full compliance. The lack of consistency due to multiple variations in the determination of non-pecuniary measures however weaken their potential for redress. Hence, the influence of *lex generalis*, which complements the specific regional reparative legal frameworks, needs urgent clarification.

II. Offered Guidance by *Lex Generalis*

In addition to the proper identification of *lex specialis*, this dissertation has engaged in the clarification of the content of *lex generalis* in the law on reparations. Three particular instruments are relevant in this context: The ILC Articles on State Responsibility, The Basic Principles and Guidelines on the Right to a Remedy, and the UN Principles to Combat Impunity. A caveat must be made at this point: this is not an exhaustive list. The inclusion of these three instruments should not be regarded as an argument for attributing them priority over others. In fact, several declarations and other instruments address particular reparative challenges in specific contexts, and rules contained therein might be equally relevant or even considered *lex specialis* themselves.[1184] It is however hereby contended that the three instruments analysed in this dissertation provide useful general guidance over the topic of reparations for human rights violations.

[1183] ILC Report on Fragmentation, Paras 56-7.
[1184] E.g Guidance note of the UN Secretary-General 'Reparations for conflict-related sexual violence' published in 2014; Istanbul Protocol.

It is noticeable that, classification of reparative measures in *lex generalis* in many ways follows the one traditionally held by regional human rights courts: restitution, compensation and satisfaction. Additionally, guarantees of non-repetition and rehabilitation are considered independently and differently by these instruments. Such dissimilarities might be explained by considering the objectives of each instrument. While the ILC Articles were drafted having inter-state relations in mind, the Basic Principles and Guidelines on the Right to a Remedy and the UN Principles to Combat Impunity are directed to the redress of wrongdoings committed to the detriment of individuals. Thus, it is important to carefully assess the guidance offered by those instruments, placing them in their corresponding context.

Whereas these instruments organise reparative measures in different ways, sometimes contradicting each other, they do offer a common approach to reparations which may guide regional human rights courts. A first element of guidance is the causality connection established between reparative measures and the breached primary obligation.[1185] That is, the determination of a reparative measure must be anchored in the finding of a human rights violation. This demand, however, is not complemented in the ILC Articles by a further explanation of the relationship between reparative measures and damages caused by declared violations. The Basic Principles and Guidelines on the Right to a Remedy correct this omission by linking the determination of reparations to the gravity of the violation (primary obligation), and the harm suffered.[1186]

A second element of guidance concerns limitations to the selection of reparations. The ILC Articles set limitations with respect to restitution and satisfaction, yet ignoring compensation. The Basic Principles and Guidelines on the Right to a Remedy also set limitations, however, not distinguishing between types of reparations.[1187] In both cases,

[1185] ILC Articles, Art 35, Commentary (6).
[1186] Basic Principles and Guidelines on the Right to a Remedy, Principles 15 and 17.
[1187] Ibid, Principle 15.

limitations refer to the use of a proportionality standard.[1188] In the case of restitution, the ILC Articles provide that such orders are appropriate unless alternative compensation offers a higher benefit for the injured State. This otherwise obscure provision is duly clarified in the Commentary, and might provide guidance for the determination of reparations in IHRL.

For instance, the Commentary explains that the burden borne by responsible States when offering restitution is to be compared to the benefit gained by injured States or 'any victims of the breach'. [1189] Importantly, this reference recognises the right of individuals as victims. Moreover, it eliminates the possibility of restricting the proportionality assessment to a mere pecuniary exercise, as the concept of 'benefit' is complex and involves notions of honour and consolation for individuals. The Commentary also explains that resort to alternative compensation might be justified in cases of great disproportionality, and that injured States have preference to choose between restitution and compensation when there is no clear imbalance.

Lastly, it is also explained that restitution is preferable when failure to attain it jeopardises the political independence or economic stability of injured States. This last comment is of particular importance when considering human rights violations committed to the detriment of indigenous and tribal peoples. Due to the close connection between traditional lands and the culture and livelihood of indigenous and tribal populations, any illegal appropriation or damage to their lands directly endangers their survival, including their economic stability.[1190] Bearing this in mind, the guidance offered by Article 35 of the ILC Articles might be interpreted, *mutatis mutandis*, as giving preference to the restitution of indigenous and tribal traditional lands over compensation.

[1188] ILC Articles, Art 35 (a) and (b), and Commentary (7), and Art 37, Commentary (3) and (8).
[1189] Ibid, Art 35, Commentary (11). Art 37 also contains a reference to proportionality which provides that a measure of satisfaction should not exceed the injury.
[1190] This conception is in line with United Nations Declaration on the Rights of Indigenous Peoples, Art 25, and has also been recognised by the IACtHR and is considered to be one of its more important contributions, see e.g. Parra Vera (2008).

A third element of guidance concerns hierarchy between types of reparations. Again, the ILC Articles provide a useful approach to this subject. Whereas the ILC Articles state that restitution is preferred to compensation, and satisfaction is a measures of last resort faced with the impossibility of providing restitution or compensation, injured States have the possibility of changing this order of preference. Such a choice is certainly subject to the limitations regularly provided in the ILC Articles. Moreover, the Commentary advises that injured States cannot disregard the hierarchy of reparations ignoring sensitive situations which might involve human rights violations (e.g. right to liberty; right to self-determination). That is, injured States cannot choose a reparation which does not satisfactorily address injuries suffered by individuals under their jurisdiction. In such cases, and considering the aforementioned first guiding element, the rights of victims of human rights violations need to be taken into account. Yet, it is not clear whether States need to get the victims' consent or they are expected to merely consider victims' interests. The answer to this query seems to be found in the political ambit rather than the legal one.

Lastly, the fourth element of guidance concerns reparative classification. The examination of the three instruments considered *lex generalis* shows that they hold a common rationale regarding the classification of particular reparative measures. Indeed, the primary identification of certain measures as a particular category does not preclude their secondary identification as another. Each of the three instruments offers examples of how several measures might be subject to multiple categorisation. Likewise, those measures also combine multiple purposes. Hence, reparative measures are thought to complement each other in order to attain full restitution.

III. The Influence of the Principles of Equity and *Restitutio in Integrum* and the Role of Discretion

Whereas it is clear that *lex generalis* offers useful elements of guidance, especially considering the openness of conventional reparative provisions, it is also germane to appreciate that such a guidance does not sufficiently address the many gaps left by *lex*

specialis. This dissertation therefore resorted to the third source of international law, namely the general principles of law. Two particular general principles are repeatedly invoked in regional reparative practice: *restitutio in integrum* and equity.

According to the well-established principle of *restitutio in integrum*, embraced as customary international law,[1191] States have the obligation to redress a wrongdoing by erasing its consequences as if the act had never occurred.[1192] *Restitutio in integrum* might be attained by measures of restitution, compensation and satisfaction. In fact, in the *Factory at Chorzów J*udgment, the PCIJ clearly established a hierarchy among those measures, assigning priority to restitution over measures of compensation and satisfaction.[1193] Restitution was not to be pursued in case of impossibility, however, the Court did not further elaborate on this issue.

Although differently adopted, the principle of *restitutio in integrum* is commonly appreciated by the ECtHR and the IACtHR as an aspiration to wipe out all damages stemming from a human rights violation. Nevertheless, the practice of those courts shows that whereas the IACtHR generally assumes this task immediately after the declaration of a violation, the ECtHR generally gives States the opportunity to comply with this obligation under the supervision of the CoM. In fact, it could be said that, in some cases, the CoM takes the role of identifying measures which would satisfy the *restitutio in integrum* principle.[1194] The difference found in the courts' practice lies in a distinct application of the principle of *subsidiarity.* In the one hand, it seems that although the IACtHR considers that the *subsidiarity* principle also operates at the supranational level, the fact that States are found responsible for human rights violations diminishes their ability to effectively identify adequate reparations. This

[1191] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), Para 152; ICJ, *Case Concerning Pulp Mills on the River Uruguay*, Para 273; IACtHR*, Aloeboetoe et al. v. Suriname* (Reparations), Para 43.
[1192] PCIJ, *Case Concerning The Factory at Chorzów* (Merits), 47.
[1193] Ibid.
[1194] See e.g. the supervision of the judgment's execution in *Ilgar Mammadov v. Azerbaijan*, where the CoM identified the release of a prisoner as an adequate measure to comply with the judgment, CoM Interim Resolution CM/ResDH(2017)429.

rationale is related to the existence of impunity, corruption and an overall lack of respect for the RoL, which often constitutes the background of cases in the Inter-American region.[1195] On the other hand, it seems that the ECtHR begins applying the principle of *subsidiarity de novo* after the finding of a violation. That is, a State found responsible for a human rights breach is given a new opportunity to provide reparations after failing to do so at the domestic level.

In this dissertation it has been demonstrated that differences in the application of the principle of *restitutio in integrum* have become blurrier in recent reparative practice. Through the granting of non-pecuniary reparations, the ECtHR has favoured a less strict understanding of *subsidiarity* (more in line with the IACtHR's one), assuming a more decisive role in the practical definition and satisfaction of *restitutio in integrum*. Moreover, it has been shown that the current definition of *restitutio in integrum* has departed from the one set by the PCIJ in the *Chorzów at Factory* judgment. That is, rather than demanding a re-establishment of a situation which should have existed had the breach not occurred, regional courts focus on a realistic redress of damages in the present.

This approach to the principle of *restitutio in integrum* fits well in IHRL. In this light, this principle allows redress of human rights violations through various measures, targeting non-repetition as much as strict restitution and compensation. Moreover, this view addresses the complex reality of damaging social structures which bring about human rights violations and prevent their effective redress.

The principle of equity is also broadly invoked in the reparative practice of regional human rights courts. Equity, however, relates more to the granting of compensation rather than non-pecuniary measures. Although the concept of equity remains obscure, it is noticeable that the practice of the world court and regional human rights courts

[1195] See e.g. Çali (2018), 229 (considering some of these factors as the case-history explanation for intrusive measures).

relate it to notions of justice, as it serves to prevent 'extreme injustice'[1196] but cannot be equated to unrestricted discretion based on any ground. Yet, the lack of clarity regarding the application of this principle has been criticised, as it seems that equity is used as an excuse to further judges' personal and cultural convictions. Although regional courts have made efforts to counter these objections (e.g. by systematising criteria for the calculation of compensation), the truth is that the appreciation of this principle does not offer much guidance for the determination of non-pecuniary reparations.

In view of the limited guidance offered by both principles, this dissertation proposes resort to the use of discretion as a complementary tool which brings external but relevant considerations for the application of both principles within the determination of reparations. Resort to discretion hence allows judges to integrate external, non-legal factors into the understanding of the principles of *restitutio in integrum* and equity. Factors which traditionally were considered non-relevant to the determination of reparations (e.g. victims' socio-economic status, ethnicity, disability, etc.) might, in this view, influence the selection of particular non-pecuniary reparations over others.

The use of discretion must not exceed its permissible scope. Inspired by the arguments posed in favour of deference to the reasoning of States (e.g. MoA), three elements are identified as establishing the limits of the use of discretion: expertise, democratic legitimacy and the common practice of States. The two first elements are particularly relevant for this study. In regard to expertise, it is noted that a common argument supporting deference to States is that they are in a privileged position to understand the particularities of a human rights violation, thus holding expert knowledge to identify most effective redress. Yet, this argument ignores the evolving practice of regional courts, particularly the IACtHR, which have an increasing inquisitorial role within the adjudicatory process, thus acquiring the necessary expertise. Moreover,

[1196] Hudson (1943), 617.

victims of human rights violations and other individuals such as witnesses might distrust state authorities (including members of the domestic judiciary). In such cases, it is plausible to conclude that the information acquired by the regional courts through *inter alia* public hearings or *in situ* visits, is more reliable than the one acquired at the domestic level or from official sources. These considerations call into question the actual expertise borne by States, and help to understand that the expertise justification does not hold true in all cases.

The element of democratic legitimacy refers to the accountability of policy choices, which at the domestic level finds its basis on political representation through a democratic process and is subject to review. Since regional human rights courts' final decisions are not subject to appeal,[1197] it is believed that reparative orders do not hold democratic legitimacy. This dissertation takes issue with this argument, noticing that contestation against courts' orders is mainly connected to the granting of non-pecuniary reparations, not the authority to order reparations in general. Thus, existing resistance is actually a reaction towards unwanted measures, rather than illegitimate ones.

Having clarified that the arguments which are usually raised to give deference to States do not necessarily apply to the use of discretion by regional human rights courts, this dissertation focused on defining discretion's permissible scope. Three elements were analysed for this purpose: rationality, appropriate selection of factors to be considered, and justifiable accountability. The first element demands that decisions granting reparations are the result of a rational process which must secure congruence between arguments, evidence and the final reparative selection. The second element requires a case-by-case examination, as it refers to the selection of factors influencing the determination of reparations. While it is true that influencing factors might include

[1197] Significant differences exists between the IACtHR and the ECtHR in regard to the revision of judgments. ECHR, Art 43 allows that a judgment issued by a Chamber might be referred to the Grand Chamber. Nevertheless, both the European and the American Conventions provide that final judgments cannot be reviewed by another organ.

extra-legal ones, some are straightforward unsuitable (e.g. political views, career motivation). However, it is admitted that differentiating between suitable and unsuitable factors is a difficult task as courts might need to act strategically in order to attain 'legitimising' compliance and ultimately secure their survival. The third element, justifiable accountability, calls for spelling out the reasons for the selection of considered factors and the process leading to the selection of reparative measures. Although these elements are deeply interlinked, each one has a unique purpose, and considering them all together validates regional courts' use of discretion.

IV. New Purpose of Reparations

Apart from the formal sources of international law, it is important to acknowledge that the determination of reparations is also influenced by the way regional human rights courts conceive reparations. It is necessary to examine the true purposes of non-pecuniary reparations, and to clarify whether regional courts hold coinciding views. When commentators compare the IACtHR and ECtHR, they usually make reference to the origins of the former, recalling that it was born when the region faced strong democratic challenges, characterised by a predominance of dictatorships and political violence.[1198] A necessary task for the Inter-American system —including the IACtHR— was to substitute some States' functions when they were unable or unwilling to effectively deal with issues regarding the protection of human rights. It was precisely this need which prompted the IACtHR to rapidly develop a new purposive understanding of reparations, going beyond the traditional compensatory purpose. Hence, only few years into the start of its activities, the IACtHR began ordering non-pecuniary, far-reaching reparative measures in addition to monetary compensation and restitution measures.

With the passage of time, non-pecuniary reparative measures ordered in response to the inaction of States have not been just limited to the investigation, prosecution and

[1198] Çali (2018), 229 (notice the case-history explanation as a partial justification for intrusive remedial measures); Pasqualucci (2013); Burgorgue-Larsen and Úbeda de Torres (2011), 148.

punishment of human rights violations. The IACtHR has carefully but progressively ordered reparative measures which aim at the advancement of public policies connected to the respect and development of human rights. However, this shift only occurred, as noticed by Barretto Maia and others, after the region entered a more democratic stage, in which widespread human rights violations no longer exclusively occupied the IACtHR's agenda.[1199] Thus, reparative measures ordered by the IACtHR generally have various purposes, including the traditionally recognised compensatory one, but also purposes of deterrence, justice restoration and condemnation. Moreover, some IACtHR's reparative orders are clearly directed to halt ongoing human rights violations and to secure non-repetition of those conducts. More recently, the IACtHR has signalled that it uses reparative orders to change overall situations of discrimination, poverty and sexual violence, thus influencing —or even attempting to establish— public policy. Hence, the IACtHR has entered to a terrain traditionally regarded as exclusively belonging to democratic States.[1200]

The purpose of ECtHR's reparative measures has also experienced a significant transformation. The reparative practice of this Court has gone from only granting monetary compensation to ordering various non-pecuniary reparations in some cases. This change reflects the purposive use of non-pecuniary measures as a means to halt existing violations and avoid repetitive ones. Whereas many of these measures are ordered within the framework of pilot-judgment procedures (invoking the obligations laid down in Article 46 ECHR),[1201] the granting of these types of measures is not strictly limited to this context. As explained in Chapter I, non-pecuniary reparations have been ordered by the ECtHR since 1995, long before the introduction of pilot-judgment procedures and the current concerns regarding the Court's backlog. Therefore, it

[1199] Barretto Maia et al. (2015), 202.

[1200] Note the analysis of cases presented in Chapter IV, where the IACtHR has begun to show its willingness to secure access to public goods such as education, with the end to promote equality and non-discrimination.

[1201] The ECtHR has designed new procedures to expedite adjudication: In 2010, Protocol 14 was introduced in response to the increasing number of pending applications, setting new judicial formation (i.e., single judge formation for simple cases), procedures (i.e., *pilot-judgments*), and more restrictive admissibility criteria (i.e., 'significant disadvantage').

cannot not be argued that these measures are ordered with the sole purpose of facilitating the effective functioning of the Court. In fact, ordered non-pecuniary reparations do not deal with situations common to numerous cases very often, but rather, those orders are granted in the context of special situations only affecting the particular applicants or few potential ones.[1202] The ECtHR, which has experienced distinctive developmental stages, is now focusing on the effectiveness of the ECHR in relation to domestic application.[1203] However, all these orders are issued due to the ECtHR's desire to repair injustices and, ultimately, to pave the way for the effective realisation of human rights.[1204]

Hence, the new purpose of reparations granted by the IACtHR and the ECtHR goes beyond the traditionally compensatory aim and serves to actively support the consolidation of substantive democracies. However, this purpose is limited in both regional regimes by the principle of *subsidiarity*. Although less discussed in the Inter-American context than in the European one, it has been argued that States are—at least at a theoretical level—better prepared for the prevention of, and response to, human rights violations than supranational organs.[1205] Therefore, States are the ones carrying the primary responsibility in the selection of reparations once regional courts declare a human rights violation.[1206] Conversely, some commentators argue that the principle of *subsidiarity* works in a dual manner as it limits the functions of the IACtHR and the ECtHR but also demands that States effectively work towards the realisation of human rights.[1207] However, it is important to ponder the constraints that the *subsidiarity* principle sets for the Courts' selection of reparative measures, which influence the purposes such measures should have.

[1202] See e.g. ECtHR, *L. v. Lithuania*.
[1203] Christoffersen and Madsen (2011) 'Introduction', 1.
[1204] Some commentators note that rulings providing social policies might be complicated and even beyond the jurisdiction of both national and international courts, see Ferstman (2017), 69.
[1205] Barretto Maia et al. (2015), 201.
[1206] Christoffersen (2009).
[1207] Melish (2009), 438–40.

Traditionally, the balance stricken between measures required to fulfil *restitutio in integrum* and limits imposed by the *subsidiarity* principle has caused that the ECtHR and the IACtHR issue reparative measures based on their compensatory capacity alone, although those measures might also carry some level of reproach (i.e., the declaration of a violation seen as sufficient redress). To grant reparative measures containing a purpose beyond that of a compensatory one, was considered as interfering with the sovereign role of States to determine, by themselves, the ways in which violations were to be redressed.[1208] However, the examination of the Courts' practice indicates that the balance has changed. The search for effective ways to meet certain challenges has lead both Courts to expand their reparative catalogue, thus granting reparative measures seeking non-repetition and, possibly, punishment. The latter is especially the case for intrusive non-pecuniary measures ordered in cases where it is clear that States have neglected their protective role or State agents have had an active role in the occurrence of human rights violations.

The recognition of regional human rights courts' intention when ordering reparations is important for understanding why courts prefer ordering certain measures over others. Moreover, awareness about reparative purposes contributes to the understanding of the factors which play an important role when selecting reparations. Therefore, efforts should be made to clarify them throughout the corresponding adjudicative process. Likewise, in view that other regional courts such as the African one – or potential ones such as the ASEAN Court of Human Rights[1209] or the World Court of Human Rights [1210] – do also consider the granting of non-pecuniary reparations among their faculties, an updated examination and recognition of reparative purposes is definitely imperative.

[1208] Interference with domestic affairs has also been the object of concern in the context of the PCIJ and the ICJ, where orders to 'review and reconsider' have criticized as limiting States' freedom to choose remedial measures, see Tully (2013), 459 et seq. See also ICJ, *LaGrand case (Germany v. US)*, Dissenting Opinion of Judge Oda, Para 37.
[1209] Phan (2012); Bui (2016).
[1210] Nowak (2016).

V. The Current Use of Discretion in Regional Human Rights Courts' Reparative Practice

In order to concretely examine how regional human rights courts determine reparations, this study has included a comparative analysis of the treatment of three reparative orders commonly issued across regions: legislative reform, release of prisoners and restitution of property. Given its relevant experience with some of those reparations, this analysis includes HRC's adoption of Views when suitable. As a first finding it is argued that although regional courts and the HRC have each developed their special manner for determining reparations, those practices are not completely isolated as they do not exist in a vacuum. Regional human rights courts are part of a system of human rights adjudication and they look at each other for inspiration. That is, the so-called 'judicial dialogue' also affects the determination of reparations.[1211]

This analysis shows that regional courts look at the performance of the other ones for inspiration regarding the determination of reparations. This does not mean that courts expressly recognise this exchange, either declaring it in the text of judgments or citing examples from other jurisdictions. In general, inspiration remains tacit as courts rarely refer to other courts' reparative experiences. It is also important to note that inspiration might sometimes be misguided as it is difficult to have a comprehensive appreciation of all elements influencing the selection of reparations by other courts in particular cases. Certainly, this is an instance which might greatly benefit from a renewed theorisation on reparations.

A second finding resulting from the comparative analysis of the courts' reparative practice is that each one, following its own path, has anyway found a common unwritten system for the determination of reparations. Regional human rights courts have developed a vast reparative catalogue invariably based on the *evolutive*

[1211] Most studies on judicial dialogue focus on the vertical exchange between a regional and domestic courts, or a horizontal exchange between States, see e.g. Müller (2017). Only few studies has been conducted looking at the horizontal exchange between regional courts, see e.g. Ferrer Mac-Gregor (2017); Føllesdal (2017).

interpretation of their respective reparative provisions. Their practice shows that, in the case of the three examined reparative measures, regional human rights courts have gone from not considering them as part of their functions to selecting them in especial cases, demonstrating that conventional secondary norms are also part of the *living instrument* doctrine.[1212]

As a third finding, the pursued comparative examination confirms that there is no real conflict between regional conventional provisions and the GIL framework on the issue of reparations, thus reinforcing the conclusions reached at the theoretical level in Chapter I. Certainly, it is argued that when regional courts order reparative measures, they consider them to perform multiple functions, thus combining various purposes in accordance to the characteristics of each particular case. Besides the traditionally recognised compensatory or restorative purpose, regional courts use reparative measures to deter the repetition of similar violations. Moreover, in most cases the first purpose of reparations is to cease the occurrence of an ongoing violation. Therefore, reparative measures might have one or several purposes, and might also complement each other in order to achieve a specific purpose, as recognised in the ILC Articles and other instruments serving as *lex generalis*.

A fourth finding concerns the purposely use of discretionary powers by regional human rights courts when determining reparations. Along with the *evolutive* interpretation of reparative provisions, courts started purposely using non-pecuniary measures in order to address certain circumstances (e.g. structural problems) or demands (e.g. repetitive victims' requests), even when such conditions were already present in prior cases. As already noticed, regional human rights courts and the HRC combine reparative measures' multiple purposes. The pursued analysis, however, demonstrates that when reparative orders have a greater cessation purpose, they are given in a more categorical manner (i.e. not allowing alternative measures).

[1212] Although mostly discussed in the ECtHR's context, the living instrument doctrine is also followed by the IACtHR, see Neuman (2008), 106.

Conversely, when measures are considered to have a greater restorative purpose, orders are less categorical, giving only broad directions and allowing States to find alternative solutions. Here the influence of GIL, particularly the ILC Articles, is clear and might be further used. Even when the ILC Articles do make a distinction between strict reparations (i.e. restitution, compensation and satisfaction) and measures of cessation and non-repetition, the way they characterise the issuance of a cessation order coincides with the practice of regional human rights courts, as the latter issue cessation orders without really performing a proportionality test. For instance, when regional courts order legislative reform, they do not balance this decision with the burden (whether economic or political) of defendant States to implement it. In the view of regional courts, the obligation to secure conventional rights is not subject to limitations linked to a proportionality assessment.

However, this view is not always held when regional courts and the HRC reflect on other reparative measures. For instance, in the case for orders to release prisoners, regional courts and the HRC do not have a uniform practice. In some cases, release orders are issued without any indication of a proportionality assessment. In others, courts do not order the release of prisoners, leaving such a decision to the will of States. A recognition of release orders as a primary measure of cessation would encourage their more frequent and appropriate use.

Another instance of GIL's influence over the reparative practice of regional courts concerns the assessment of impossibility when effecting restitution measures. When regional courts order the restitution of property, they usually provide the alternative of compensation. Even though the formulation of such orders indicates a preference for restitution, States are ultimately given the possibility to choose between the two alternative measures. The ILC Articles deal with the impossibility of restitution, providing that restitution is to be preferred except for cases in which the object of restitution has been destroyed, changed in character, or the circumstances for

restitution are utterly adverse.[1213] These standards might guide the otherwise discordant practice of human rights courts and treaty bodies, providing them with uniformity and certainty, and preventing States from 'paying their way out' of restitution.

The Commentary to the ILC Articles also discusses whether rights and obligations at the domestic level might influence the viability of restitution, concluding that their direct application on the international plane would hinder a declaration of impossibility.[1214] This means that, for instance, in cases where property rights recognised as human rights are involved, the mere existence of third party rights over property does not prevent restitution. According to the Commentary, much depends on the good faith borne by right-holders, yet even in those cases, certain property should be anyway the object of restitution. These standards may be of great utility in cases dealing with indigenous and tribal territories. Given the importance of traditional lands for the survival of indigenous and tribal communities, it might be argued that the rights of third-persons —even if acquired in good faith— should not hinder restitution.

Finally, the comparison of regional reparative practices overall shows that when issuing reparative orders, courts purposely choose and design them in a way that sometimes suggests a strategic approach. Indeed, the design of reparative measures is constantly being revised by regional courts, and is subject to adaptation after considering *inter alia* compliance success and contestation. This fact confirms the appreciation of extra-legal factors as relevant for the determination of reparations.

VI. A Discretionary Instrumentalisation of Reparations

When studying the reparative practice of regional human rights courts, it is impossible to ignore the IACtHR' innovative approach to this subject. This court has not only

[1213] ILC Articles, Art 35 and Commentary.
[1214] Ibid, Art 35, Commentary (9).

developed the most varied array of reparative measures, which has clearly inspired the other two regional courts, but additionally it has given reparations a new direction, looking beyond concrete damages, and utilising them to tackle unwanted societal structures. In this study, I selected two measures which best exemplify this approach: orders to provide scholarship and orders to establish a Community Development Fund. The examination of these special reparations informs us about the role assumed by the IACtHR within the reparative determination process. The way in which this Court reads the principle of *restitutio in integrum* through the use of discretion, is pivotal to understand its innovative approach.

Notably, when selecting these reparative orders, the IACtHR does not only look at the concrete case, but also considers external factors. Thus, the identity of victims (i.e. whether they belong to a minority), their state of vulnerability, the existence of a structural problem leading to repetitive violations, and the overall environment in which victims are situated (e.g. economic conditions of towns where victims live) become, among others, important factors able to prompt the issuance of certain reparations. Whereas the consideration of these factors is regarded as a special feature of the IACtHR's reparative practice, this is actually not foreign to the practice of other courts. To illustrate, pilot-judgments and quasi pilot-judgments show that the ECtHR also engages in the consideration of external factors when determining reparations. Measures ordered in such judgments address the general context in which those violations occur, in addition to the concrete breaches.

Through the issuance of innovative reparative orders, and making use of great discretion, regional human rights courts are assuming the role of a policy maker. These measures do not only have a restorative purpose, but they greatly aim at cessation and non-repetition. Moreover, these measures are directed to change damaging societal structures bringing about the proliferation of human rights violations. On some occasions, these measures might also carry a sort of punitive aim, as they can be used to shame respondent States.

The IACtHR's especial view of the *restitutio in integrum* principle promotes, for instance, the direction of innovative reparative measures towards persons not directly related to the cases at hand. That is, when the IACtHR orders reparative measures, the purpose is not only to heal the victims and their next-of-kin, but also society as a whole. The Court's reasoning is that since reparative orders empower their beneficiaries, measures which extend to a whole community will significantly reduce the likelihood of repetition of violations. Moreover, having identified a pervasiveness of detrimental culture and conducts in specific communities, the IACtHR uses non-pecuniary measures to re-educate the members of such communities, hoping to tackle human rights violations from the root. Although this new approach to reparations could be effective in regard to prevention and non-repetition, one must not ignore the fact that such an approach enjoys of an even weaker legal basis than the one containing regular reparative measures. As Shelton noticed, some innovative reparations lack a necessary causal connection with declared violations and damages.[1215] This lack of coherence is problematic and should not be oversighted.

Additionally, when the IACtHR's assumes the role of a policy maker, it occasionally takes decisions regarding the provision of public goods and services with unforeseen consequences. Although the Court actively investigates the occurrences of human rights violations through *inter alia* public audiences, *in situ* visits, and hearings of experts, its resources are scarce to keep the Court really informed about significant budgetary and policy repercussions at the domestic level. Thus, courts considering the issuance of these kinds of reparations should be wary of their own limitations, perhaps only ordering such measures when the scale of the provision of public goods and services is rather low and controllable.

Among the problematic issues stemming from the IACtHR's innovative approach to reparations, one might also count the possible negative repercussions of favouring

[1215] Shelton (2005), 286.

certain communities over others. Given that access to the IACtHR is filtered by the Inter-American Commission, only few victims can benefit from its far-reaching non-pecuniary reparative measures. Those victims are only a small sample of a myriad of individuals whose human rights have been infringed. By the same token, communities favoured by the provision of public goods and services ordered by courts usually represent a small fraction of all communities affected by the same kind of human rights violations (e.g. breach of the right to property). When only few communities are the object of favourable developing measures, leaving others without similar redress, the overall consequences might be counter-productive, as this difference in treatment might be used to normalise inequality and discrimination. Indeed, some commentators have warned about the danger of confusing reparative measures with the regular State's provision of public goods and services.[1216] Thus, in order to avoid this confusion, the clear establishment of a causal connection together with an explicitly explained rationale should be a priority for regional courts.

A last detected challenge is the possibility that courts develop well-meant yet paternalistic views connected to the identity of victims and beneficiaries when ordering reparations. As it has been observed in Chapter VI, in its efforts to address societal structural challenges of discrimination and poverty, the IACtHR has often directed innovative non-pecuniary reparative measures to benefit indigenous peoples and other vulnerable groups. However, not all ordered measures have been welcomed by the beneficiaries. Moreover, it has been shown that occasionally the Court has ordered certain measures even when the victims had declared that they did not wish them. Conflicts of this kind call for a review of regional human rights courts' process of determination of reparations. More specifically, when courts take into consideration the personal characteristics of victims or beneficiaries (e.g. ethnicity, socio-economic status), it is necessary that they expressly state which specific characteristics were taken into account and what is their relevance in connection to redress. This is an

[1216] Beristain (2008), 508-511.

important characteristic of the RoL. Likewise, in the light of relevant *lex generalis* provisions, courts should explain their reasons when they decide not to follow victims' requests regarding reparations.

VII. The Road Ahead

Bearing in mind these challenges, how could the ECtHR and the African Court use a similar innovative approach to reparations without increasing uncertainty and prompt rejection?

First and foremost, parties to the conflict need to be aware of the importance of their roles in the determination of reparations. While parties direct most of their resources to proving the occurrence of violations (in the stages of admissibility and merits), almost no resources are used to substantially request the granting of adequate reparations. The lack of awareness on this topic leads courts to continue avoiding this issue and denying victims' requests. At this point, it is important to recall that the IACtHR used to separate the merits stage from the one on reparations in its early practice. Unfortunately, a decision on reparation took an average of a year to be issued. This meant that human rights victims had to wait an additional year to be – at least theoretically – redressed.

Although the IACtHR's current practice (deciding merits and reparations simultaneously) gives earlier relief to victims, it must be acknowledged that the separated reparations stage gave parties to the conflict better possibilities for negotiation and substantiation of their claims. The role of the CoM, in the European context, despite also providing room for negotiation, is not comparable to the reparations' stage because it does not conduce to an ensuing binding judicial decision. The African Court is lately following the old IACtHR's model, separating merits from reparations. Although the limited reparative practice of this court does not allow to draw conclusions on this regard, it is frequently observed that decisions on reparations

are taking much time to be issued.[1217] Hence, it is hereby suggested that a plausible way for optimising regional courts' reparative practice is to have a specific place for the consideration of reparations within the regular course of court proceedings. This could imply, for instance, their consideration in a specific section of the judgments (following the IACtHR's example) and/or their inclusion among the issues dealt with in oral proceedings. Additional means for raising awareness among practitioners and applicants could be through training manuals and other information tools already being disseminated by the courts.

A second suggestion is that regional human rights courts should expressly recognise the purposes of cessation and non-repetition in their judgments. Although these purposes are not included in the conventional reparative provisions, regional courts have already developed a —accepted— reparative practice based on the *evolutive* interpretation of those provisions. Recognition of the compatible purposes of cessation and non-repetition, in addition to the restorative one, will demand —and facilitate— a better substantiation of parties' claims and courts' decisions. Thus, although courts can still exercise their discretionary power and opt for a variety of choices, their decisions will begin forming a cohesive doctrine.

Additionally, it is necessary to highlight that, this research has encountered two issues connected to the practice of regional human rights courts which are in need of further examination. The first one concerns the determination of reparative measures after decisions have become final. As a caveat, it must be noted that although supervision of compliance is carried out in both the American and European regional systems,[1218] it is differently structured. The European Convention has a specific provision which gives the supervisory task to the CoM (a political organ composed of State Parties'

[1217] E.g. ACtHPR, *Wilfred Onyango Nganyi & 9 others v. United Republic of Tanzania*; ACtHPR, *African Commission on Human and Peoples' Rights v. Republic of Kenya*.

[1218] In the African system supervision of compliance is in charge of the Executive Council of the African Union, see Protocol to the African Charter on the Establishment of an African Court, Art. 29(2) and 31. The present author has not heard of any judgment subject to actual supervision by the Executive Council.

Ministers for Foreign Affairs or an alternate).[1219] In the case of the IA System, the supervisory task has been assumed by the IACtHR itself and is currently carried out by the Unit of Supervision of Execution of Judgments.[1220] Since these two bodies are entrusted with monitoring compliance with orders issued by the respective regional courts, it is reasonable to conclude that such a supervisory performance is constricted by the wording of the judgments being supervised. That is, at the supervisory stage, neither the IACtHR nor the CoM are authorised to create or declare additional obligations to the ones which have been already accounted for in the judgments under supervision.

Nevertheless, the task of supervision is not as simple as crossing off items on a to-do list. Both the IACtHR's Unit of Supervision of Execution of Judgments and the CoM are constantly challenged by requests from victims and States to clarify the scope of reparative measures contained in final judgments. Even after nearly thirty years of experience monitoring compliance, the understanding of IACtHR's powers within this framework seems to be developing on a case-by-case basis.[1221] Since the supervisory process is a dynamic exercise where the views of States and victims (in addition to the Inter-American Commission) are equally considered, the determination of compliance often takes the form of an adversarial proceeding. Likewise, during supervision of compliance, the CoM receives respondent States' Action Plans containing information on the measures chosen to comply with specific ECtHR's reparative orders and also general obligations to avoid non-repetition. This process aspires to be collaborative rather than adversarial. However, since information on compliance is also provided by applicants and civil society representatives such as NGOs and national institutions,

[1219] ECHR, Art 46(2); Statute of the Council of Europe, Art 14. Note that the supervisory procedure is similar for the judgments of the African Court.

[1220] Although the American Convention does not include an explicit provision on this issue, the IACtHR has progressively established this practice through interpretation of ACHR, Art 68 and assumes the supervisory function as one of its inherent attributes, see e.g. *'Street Children' v. Guatemala* (Monitoring of Compliance) Order 27 November 2003, (considering) Para 1. See also Pasqualucci (2013), 303 et seq.

[1221] While research on compliance rates exists, very little has been discussed on the limits of the IACtHR's monitoring of compliance powers, see Schneider (2015), 205-218.

some issues can become controversial. Thus, the CoM's supervisory task is also a dynamic process and often implies choosing a position between two parties.

Furthermore, the supervisory task becomes even more challenging when regional human rights courts' orders are formulated in an open fashion. This requires that supervisory organs decide not only about concrete compliance but also that they give content to courts' reparative orders. In these situations, supervisory organs cannot really rely on the wording of courts' orders. For instance, in *Ilgar Mammadov v. Azerbaijan*, the CoM decided that the release of Mammadov was a necessary measure to declare compliance with the judgment, even though the ECtHR had not included said order in its final judgment.[1222] It is worth noticing that Azerbaijan had not included in any of their Action Plans the release of Mammadov, restricting itself only to inform the national courts about the existence of the ECtHR judgment.[1223] In the judgment of the ensuing 'infringement procedure'[1224] (the first one of this kind), the ECtHR's Grand Chamber declared that the CoM has broad faculties for interpreting the Court's judgments.[1225] This view is, however, contested as some judges declared, in a Separate Opinion, that the 'supervisory powers of the Committee of Ministers … are not unlimited' and the 'measures indicated by the Committee within the execution process must be compatible with the Court's findings'.[1226] Hence, as Dzehtsiarou has argued, the Grand Chamber's decision might have sacrificed legal reasoning in the name of fairness and humanity.[1227]

[1222] ECtHR, *Ilgar Mammadov v. Azerbaijan;* CoM Interim Resolution CM/ResDH(2017)429. See also Bates (2005), 70 (where he explains that the CoM has encountered difficulties in its supervisory tasks due to *inter alia* the lack of clarity of ECtHR judgments).
[1223] See Action Plans of 26 November 2014 and 14 February 2017. For an overview of the supervisory process of ECtHR judgments see Dothan (2017).
[1224] ECHR, Art. 46.
[1225] See, ECtHR, *Ilgar Mammadov v. Azwerbaijan* (Article 46§4 Proceedings), Para 186. See also Çali (2019), blogpost (arguing that this reasoning could serve as an instrument for better State accountability in the future).
[1226] ECtHR, *Ilgar Mammadov v. Azwerbaijan* (Article 46§4 Proceedings) (Joint Concurring Opinion of Judges Yudkivska, Pinto de Albuquerque, Wojtyczek, Dedov, Motoc, Polácková and Hüseynov, Para 21).
[1227] Dzehtsiarou (2019), blogpost.

Similarly, although the IACtHR has a separate stage for interpretation of its judgments upon request, the dynamic nature of the supervisory process and the existence of unforeseen developments at the domestic level, often demands a substantive assertion of States' obligations by the IACtHR at this stage.[1228] In conclusion, it must be recognised that the determination of reparations is definitely a complex issue which goes beyond courts' decisions on reparations; therefore, the hereby presented analysis should be complemented by that study.

The second identified issue in need of further research concerns the appropriate understanding of the principle of *subsidiarity* within the process of determination of reparations. Indeed, although *subsidiarity* is mostly discussed in connection to deference to State's interpretation of primary rules (also connected to the MoA methodology), in this dissertation it has been observed that the IACtHR and the ECtHR have different understandings of when the *subsidiarity* principle justifies deference to States' preferences about the selection of reparations. Do States have authority to claim priority in the selection of reparations when they have already been found responsible for human rights violations? McGoldrick argues that States featuring a record of serious human rights violations are discredited and not in position to avoid international review.[1229] By the same token, it could be argued that States responsible for repetitive human rights violations lose their privilege to invoke Courts' subsidiarity in the determination of reparations. Alternatively, it might be necessary to establish a record of non-compliance with regional human rights reparative orders to deny States such a privilege.

Moreover, observing that in some cases the occurrence of human rights violations is a direct consequence of the action of State agents, should these cases justify a different application of the subsidiarity principle? Should State conduct be penalised by

[1228] See e.g. Cornejo Chavez et al. (2019) (where the request of annulling the Presidential pardon of former Peruvian President Fujimori, within the IACtHR's framework of supervision of compliance, was analysed).
[1229] McGoldrick (2016), 36.

denying them priority in the selection of reparations? These questions are clearly connected to the consideration of subsidiarity as a 'rebuttable presumption'[1230] and the proposed existence of 'state crimes'[1231] and, as such, promise interesting discussions at both theoretical and practical level.

[1230] Føllesdal (2016); Arnardóttir (2017); Dzehtsiarou (2015).

[1231] Cançado Trindade's conceptualised 'State crime' as a 'particularly grave violation of international law' that 'directly [affects] the fundamental values of the international community as a whole, see IACtHR, *Myrna Mack Chang v. Guatemala* (Judge Cançado Trindade's Concurring Opinion, Para 28).

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ACRONYMS AND ABREVIATIONS

ACHR	American Convention on Human Rights
ACHRP	African Charter on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
CDF	Communal Development Fund
CoE	Council of Europe
CoM	Committee of Ministers
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
IA Commission	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IA system	Inter-American System of Human Rights
ILA	International Law Association
ILC Articles	Articles on Responsibility of States for International Wrongful Acts
ILO	International Labour Organisation
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia

IHL	International Humanitarian Law
IHRL	International Human Rights Law
MoA	Margin of Appreciation
PCIJ	Permanent Court of International Law
RoL	Rule of Law
SC	Security Council
UN	United Nations

ANNEX

TABLE A			
Restitutio in integrum conceptualisation in Orders to Restitute Property			
ECtHR Judgment	To restore as far as possible the situation existing before the breach (Narrow)	To put the applicant in a situation as if there had not been a breach (Broad)	No concept provided
Papamichalopoulos and others v. Greece (Art. 50)		x	
Brumarescu v. Romania (Just Satisfaction)		x	
Vasiliu v. Romania		x	
Popescu Nasta v. Romania		x	
Strain and others v. Romania		x	
Radu v. Romania		x	
Ruxanda Ionescu v. Romania		x	
Gabriel v. Romania		x	
Florescu v. Romania		x	
Hirschhorn v. Romania		x	
Driza v. Albania		x	
Ramadhi and others v. Albania	x		
Suciu Werle v. Romania		x	
Tudor v. Romania		x	
Prepelita v. Moldova			x
Olimpia-Maria Teodorescu v. Romania		x	
Katz v. Romania		x	
Borzhonov v. Russia			x
Dacia S.R.L. v. Moldova (Just Satisfaction)		x	
Marton v. Romania	x		
Maria Violeta Lazarescu v. Romania		x	
Saghinadze v. Georgia	x		
Gladysheva v. Russia	x		
Pelipenko v. Russia (Just Satisfaction)	x		
Andonoski v. "The Former Yugoslav Republic of Macedonia"		x	
Vasilevski v. "The Former Yugoslav Republic of Macedonia"		x	

TABLE B			
Restitutio in integrum conceptualisation in Orders to Restitute Property			
IACtHR Judgments	To restore as far as possible the situation existing before the breach (Narrow)	To put the applicant in a situation as if there had not been a breach (Broad)	No concept provided
Mayagna (Sumo) Awas Tingni Community v. Nicaragua			x
Cantos v. Argentina		x	
Tibi v. Ecuador	x		
Moiwana Community v. Suriname	x		
Yakye Axa Indigenous Community v. Paraguay	x		
Palamara Iribarne v. Chile	x		
Sawhoyamaxa Indigenous Community v. Paraguay	x		
Saramaka People v. Suriname			x
Xákmok Kásek Indigenous Community. v. Paraguay			x
Salvador-Chiriboga v. Ecuador			x
Mémoli v. Argentina	x		
Operation Genesis v. Colombia	x		
Indigenous Communities Kuna of Madungandí and Emberá of Bayano and its members v. Panama	x		
Granier et al. (Rario Caracas Televisión) v. Venezuela	x		
Peasant Community of Santa Barbara v. Peru			x
Garífuna Punta Piedra Community and its Members v. Honduras		x	
Community Garifuna Triunfo de la Cruz & its Members v. Honduras	x	x	
Kaliña and Lokono Peoples v. Suriname		x	
Andrade Salmón v. Bolivia			x
Pueblo Indígena Xucuru y sus miembros v. Brasil	x		

TABLE C		
ECtHR Legislative Reform Orders		
ECtHR Case	**Order in Operative Paragraphs**	**Indications in Obiter Dicta**
Broniowski v. Poland (Merits)	x	
Hutten-Czapska v. Poland	x	
L. v. Lithuania	x	
Hasan and Eylem Zengin v. Turkey		x
Viaşu v. Romania		x
Faimblat v. Romania		x
Burdov v. Russia (No. 2)	x	
Katz v. Romania		x
Olaru and others v. Moldova	x	
Yuriy Nikolayevich Ivanov v. Ukraine	x	
Ürper and others v. Turkey		x
Rumpf v. Germany	x	
Maria Atanasiu and others v. Romania	x	
Greens and M.T. v. UK	x	
Sekerovic and Pasalic v. Bosnia	x	
Dimitras and others v. Greece (no2)		x
Lindheim and others v. Norway		x
Manushaqe Puto and others v. Albania	x	
Torreggiani and others v. Italy	x	
Zorica Jovanovic v. Serbia	x	
Suso Musa v. Malta		x
Vlad and others v. Romania		x
Barta and Drajkó v. Hungary		x
Luli and others v. Albania		x
László Magyar v. Hungary		x
Harakchiev and Tolumov v. Bulgaria		x
Statileo v. Croatia		x
Ališić and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "The Former Yugoslav Republic of Macedonia"	x	
Centre for Legal Resources on Behalf of Valentin Câmpeanu v. Romania		x
Atiman v. Turkey		x
Neshkov and others v. Bulgaria	x	
Tagayeva and others v. Russia		x
Rezmiveș and others v. Romania	x	
Navalnyy v. Russia	x	

TABLE D (part 1)							
ACtHPR Judgments Ordering Reparations							
ACtHPR Case	**Amend legislation**	**Release order**	**Reopen criminal investig.**	**Terminate criminal proceed.**	**Quash conviction and sentence**	**Concl. trial**	**Open order to remedy**
Tanganyika Law Society; The Legal and Human Rights Centre; Reverend Christopher R. Mtikila v. Tanzania	X						
Journalist Lohé Issa Konaté v. Burkina Faso (Merits)	X						
Norbert Zongo and others v. Burkina Faso			X				
Mohamed Abubakari v. Tanzania		0					
Alex Thomas v. Tanzania		0					X
African Commission on Human and Peoples' Rights v. Libya		0		X			
Wilfred Onyango Nganyi and 9 others v. United Republic of Tanzania		0		X			
Actions pour la protection des droits de l'homme (APDH) v. The Republic of Côte d'Ivoire	X						
African Commission on Human and Peoples' Rights v. Republic of Kenya (Merits)							X
Kennedy Owino Onyachi and Charles John Mwanini Njoka v. United Republic of Tanzania							X
Christopher Jonas v. United Republic of Tanzania		0			X		
Ingabire Victoire Umuhoza v. Rwanda		0					X
Ernest Francis Mtingwi v The Republic of Malawi		0					
Kijiji Isiaga v. United Republic of Tanzania		0					X
Anudo Ochieng Anudo v. United Republic of Tanzania	X						
Thobias Mang'ara Mango and Shukurani Masegenya Mango v. United Republic of Tanzania		0					
Amiri Ramadhani v. United Republic of Tanzania		0			0		
					X: Order granted	**0: Request rejected**	

TABLE D (part 2)							
ACtHPR Judgments Ordering Reparations							
ACtHPR Case	**Amend legislation**	**Release order**	**Reopen criminal investig.**	**Terminate criminal proceed.**	**Quash conviction and sentence**	**Concl. trial**	**Open order to remedy**
Association pour le progres et la défense des droits des femmes maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v. Republic of Mali	X						
Anaglet Paulo v. United Republic of Tanzania		0					
Diocles William v. United Republic of Tanzania		0			0	X	
Minani Evarist v. United Republic of Tanzania		0			0		
Mgosi Mwita Makungu v. United Republic of Tanzania (Merits)		X					
Armand Guehi v. United Republic of Tanzania		0			0		
X: Order granted 0: Request rejected							

TABLE E (part 1)					
Correlation between prisoner release consideration and rights violations (Views including consideration of prisoner release)					
HRC Adoption of Views	**Art. 6 - Life**	**Art. 7 - Torture**	**Art. 9 - Liberty and Security**	**Art. 14 - Fair Trial**	**Other rights**
Luciano Weinberger Weisz v. Uruguay		X	X	X	X
Sergio Euben Lopez Burgos v. Uruguay		X	X	X	X
Bolanos v. Ecuador			X	X	X
Leroy Simmonds v. Jamaica	X			X	
Victor Francis v. Jamaica	X	X		X	X
M'Boissona v. Central African Republic		X	X	X	X
El-Megreisi v. Libya		X	x	X	X
Polay Campos v. Peru		X		X	X
Domukovsky et al. v. Georgia		X	X	X	X
Johnson (Clive) v. Jamaica		X		X	X
Gridin v. Russian Federation				X	
Arredondo v. Peru		X	X	X	X
Mansaraj et al. v. Sierra Leone	X			X	
Geniuval M. Cagas, Wilson Butin and Julio Astillero v. The Philippines			X	X	
Francis et al. Trinidad and Tobago			X	X	
Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari and their five children v. Australia			X		X
Abdumalik Nazarov v. Uzbekistan			X	X	
Singarasa v. Sri Lanka		X		X	
Khomidova v. Tajikistan	X	X	X	X	
Bee and Obiang v. Equatorial Guinea		X	X	X	X
Danyal Shafiq v. Australia			X		
Koreba v. Belarus		X		X	
Sandzhar Ismailov v. Uzbekistan			X	X	
Bondar v. Uzbekistan			X	X	
Akhadov v. Kyrgyzstan		X	X	X	
Toshev v. Tajikistan		X	X	X	
Berzig v. Algeria	X	X	X		X
Djebbar and Chihoub v. Algeria	X		X		X
Musaeva v. Uzbekistan		X	X	X	
Boudjemai v. Algeria	X	X	X		X
Dzhakishev Mukhtar v. Kazakhstan				X	X
M.M.M. et al. v. Australia		X	X		
F.K.A.G. et al. v. Australia		X	X		X
Khaoukha Marouf v. Algeria	X	X	X		X
Sharmila Tripathi v. Nepal	X	X	X		X
Sassene v. Algeria	X	X	X		X
Tahar Ammari and Toufik Ammari v. Algeria		X	X		X
Kamela Allioua and Fatima Zohra Kerouane and Adel, Tarek and Mohamed Kerouane v. Algeria	X	X	X		X
Boughera Kroumi v. Algeria	X	X	X		X

TABLE E (part 2)					
Correlation between prisoner release consideration and rights violations (Views including consideration of prisoner release)					
HRC Adoption of Views	**Art. 6 - Life**	**Art. 7 - Torture**	**Art. 9 - Liberty and Security**	**Art. 14 - Fair Trial**	**Other rights**
Aïcha Dehimi and Noura Ayache v. Algeria	X	X	X		X
Zhakhangir Bazarov v. Kyrgyzstan		X	X	X	X
Eugène Diomi Ndongala Nzo Mambu v. Democratic Republic of Congo			X	X	X
Malika El Boathi v. Algeria		X	X		
Allaberdiev v. Uzbekistan		X	X	X	
Khelifati et.al. v. Algeria	X	X	X		X
Ashirov v. Kyrgyzstan		X		X	
Abdelkader Boudjema v. Algeria	X	X	X		X
Zogo v. Cameroon			X	X	

TABLE F					
Correlation between prisoner release consideration and rights violations (Views refusing consideration of prisoner release)					
HRC Adoption of Views	**Art. 6 Life**	**Art. 7 Torture**	**Art. 9 Liberty and Security**	**Art. 14 Fair Trial**	**Other rights**
Moriana Hernandez Valentini de Bazzano v. Uruguay		X	X	X	X
Luis Touron v. Uruguay			X	X	
Raul Sendic Antonaccio v. Uruguay		X	X	X	X
Guillermo Ignacio Dermit Barbato et al. v. Uruguay			X	X	
Marais v. Madagascar		X		X	X
Elena Beatriz Vasilskis v. Uruguay		X		X	X
Batlle Oxandabarat Scarrone v. Uruguay				X	
Earl Pratt and Ivan Morgan v. Jamaica		X		X	
Shalto v. Trinidad & Tobago				X	
Lennon Stephens v. Jamaica		X	X		X
Lubuto v. Zambia	X			X	
Clive Smart v. Trinidad and Tobago			X	X	
Rameka et al v. New Zealand		X	X	X	X
Quispe Roque v. Peru			X	X	
Marlem Carranza Alegre v. Peru		X	X	X	X
Umarova v. Uzbekistan		X	X		X
Ebenezer Derek Mbongo Akwanga v. Cameroon		X		X	
Stefan Lars Nystrom v. Australia					X
Jaime Calderón Bruges v. Colombia				X	
Viktor Leven v. Kazakhstan					X
Bronson Blessington and Matthew Elliot v. Australia		X			X
Mevlida Ičić v. Bosnia and Herzegovina	X	X	X		
Nura Hamulić and Halima Hodžić v. Bosnia and Herzegovina	X	X	X		X
Chhedulal Tharu and others v. Nepal	X	X	X		X
Dovadzija and Sakiba Dovdzija v. Bosnia and Herzegovina	X	X	X		X
Ray Maya Nakarmi v. Nepal	X	X	X		X
Dmitry Tyan v. Kazakhstan		X	X	X	
Dhakal et.al. v. Nepal	X	X	X		X
Zhaslan Suleimenov v. Kazakhstan		X			X
Miller et al. v. New Zealand			X		X

TABLE G				
Correlation with ECHR Right's Violation				
ECtHR judgments including orders to restitute property	**Right to property Protocol 1, Art. 1**	**Right to a Fair Trial Art. 6**	**Right to an Effective Remedy Art. 13**	**Other rights**
Papamichalopoulos and others v. Greece	x			
Brumarescu v. Rumania	x	x		
Vasiliu v. Romania	x	x		
Popescu Nasta v. Romania	x	x		
Strain and others v. Romania	x	x		
Radu v. Romania	x			
Ruxanda Ionescu v. Romania	x			
Gabriel v. Romania	x			
Florescu v. Romania	x			
Hirschhorn v. Romania	x	x		
Driza v. Albania	x	x	x	
Ramadhi and others v. Albania	x	x	x	
Suciu Werle v. Romania	x			
Tudor v. Romania	x			
Prepelita v. Moldova	x	x		
Olimpia-Maria Teodorescu v. Romania	x			
Katz v. Romania	x			
Borzhonov v. Russia	x	x	x	
Dacia S.R.L. v. Moldova	x	x		
Marton v. Romania	x	x		
Maria Violeta Lazarescu v. Romania	x			
Saghinadze v. Georgia (Just Satisfaction)	x			x
Gladysheva v. Russia	x			x
Pelipenko v. Russia (Just Satisfaction)		x		x
Andonoski v. "The Former Yugoslav Republic of Macedonia"	x			
Vasilevski v. "The Former Yugoslav Republic of Macedonia"	x			

Table H								
Correlation between the finding of a right's violation and orders to establish a Community Development Fund*								
Case	**Art. 1**	**Art. 2**	**Art. 3**	**Art. 4**	**Art. 5**	**Art. 8**	**Art. 21**	**Art. 25**
Aloeboetoe et al. v. Suriname**, ***								
Mayagna (Sumo) Awas Tingni Community v. Nicaragua***							x	x
Plan de Sánchez Massacre v. Guatemala***	x				x	x	x	x
Moiwana Community v. Suriname					x	x	x	x
Yakye Axa Indigenous Community v. Paraguay				x		x	x	x
Sawhoyamaxa Indigenous Community v. Paraguay			x	x		x	x	x
Escué Zapata v. Colombia				x	x	x		x
Saramaka People v. Suriname			x				x	x
Xákmok Kásek Indigenous Community. v. Paraguay	x		x	x	x	x	x	x
Kichwa Indigenous People of Sarayaku v. Ecuador***				x	x	x	x	x
Indigenous Communities Kuna of Madungandí and Emberá of Bayano and its members v. Panama***		x				x	x	x
Garifuna Triunfo de la Cruz Community and its members v. Honduras		x				x	x	x
Garífuna Punta Piedra Community and its Members v. Honduras	x	x				x	x	x
Kaliña and Lokono Peoples v. Suriname		x	x				x	x
Pueblo Indígena Xucuru y sus miembros v. Brasil						x	x	x

* This is not an exhaustive list of the violations declared in each case. This table rather indicates common violations among the examined cases.

** Whereas the IACtHR acknowledged the State's admission of responsibility in this case, it did not declare specific violations

*** Cases not including an order to establish a CDF

TABLE I (part 1)							
COMMUNITY DEVELOPMENT FUND (CDF)							
Case	**Damage addressed by the CDF or equivalent**	**Was the measure requested by the parties?**	**Was a managing body appointed by the IACtHR?**	**Members of the Committee**	**Did the IACtHR specify which projects the funds should be assigned to?**	**Was compensation ordered besides a CDF?**	**Level of compliance**
Aloeboetoe et al. v. Suriname*	Material and immaterial damage	No	Yes	A group of persons specifically appointed	No, but signaled activities such as business investment or educational activities	No	No information available
Mayagna (Sumo) Awas Tingni Community v. Nicaragua*	Immaterial damage	No	No. Funds' administration in charge of the State in agreement with the Community and under supervision by the Inter-American Commission		Yes. In works and services of collective interest for the benefit of the Community	No	Compliance declared in 2008
Plan de Sánchez Massacre v. Guatemala*	Immaterial damage	Yes, by the Inter-American Commission	No		Yes, programs of language and cultural dissemination, road infrastructure, sewage infrastructure and potable water supply, teaching and training, and provision of health services	Yes, compensation for material and immaterial damages	Partial compliance declared in 2011

* Judgment including measures similar to the CDF

TABLE I (part 2)							
COMMUNITY DEVELOPMENT FUND (CDF)							
Case	**Damage addressed by the CDF or equivalent**	**Was the measure requested by the parties?**	**Was a managing body appointed by the IACtHR?**	**Members of the Committee**	**Did the IACtHR specify which projects the funds should be assigned to?**	**Was compensation ordered besides a CDF?**	**Level of compliance**
Moiwana Community v. Suriname	Unspecified	Yes, by the Inter-American Commission and victims' representatives	Yes	One chosen by the victims' representatives, one chosen by the State, and one chosen by an agreement between the victims' representatives and the State	Yes, programs of housing, health and education	Yes, compensation for material and immaterial damages	Partial compliance declared in 2010
Yakye Axa Indigenous Community v. Paraguay	Immaterial damage	Yes, by the Inter-American Commission	Yes	One chosen by the victims' representatives, one chosen by the State, and one chosen by an agreement between the victims' representatives and the State	Yes, programs of education, housing, agriculture and health	Yes, compensation for material damage	Several monitoring resolutions declaring non-compliance

TABLE I (part 3)							
COMMUNITY DEVELOPMENT FUND (CDF)							
Case	**Damage addressed by the CDF or equivalent**	**Was the measure requested by the parties?**	**Was a managing body appointed by the IACtHR?**	**Members of the Committee**	**Did the IACtHR specify which projects the funds should be assigned to?**	**Was compensation ordered besides a CDF?**	**Level of compliance**
Sawhoyamaxa Indigenous Community v. Paraguay	Immaterial damage	Yes, by the Inter-American Commission and victims' representatives	Yes	One chosen by the victims' representatives, one chosen by the State, and one chosen by an agreement between the victims' representatives and the State	Yes, programs of education, housing, agriculture and health, drinking water and sanitation infrastructure	Yes, compensation for material damage and compensation for immaterial damage to certain victims	Several monitoring resolutions declaring non-compliance
Escué Zapata v. Colombia*	Unspecified	No	No		Yes, works and services of collective interest for the benefit of the Community.	Yes, compensation for material and immaterial damages	Compliance declared in 2010

* Judgment including measures similar to the CDF

TABLE I (part 4)							
COMMUNITY DEVELOPMENT FUND (CDF)							
Case	**Damage addressed by the CDF or equivalent**	**Was the measure requested by the parties?**	**Was a managing body appointed by the IACtHR?**	**Members of the Committee**	**Did the IACtHR specify which projects the funds should be assigned to?**	**Was compensation ordered besides a CDF?**	**Level of compliance**
Saramaka People v. Suriname	Material and immaterial damage	Yes, by victims' representatives	Yes	One chosen by the victims' representatives, one chosen by the State, and one chosen by an agreement between the victims' representatives and the State	Yes, programs of education, housing, agriculture, health projects, electricity and drinking water	No	Partial compliance declared in 2011
Xákmok Kásek Indigenous Community. v. Paraguay	Immaterial damage	No	Yes	One chosen by the victims' representatives, one chosen by the State, and one chosen by an agreement between the victims' representatives and the State	Yes, programs of education, housing, nutritional and health projects, drinking water, and building of sanitation infrastructure	Yes, compensation for material damages and compensation for immaterial damages in connection to deceased victims	Several monitoring resolutions declaring non-compliance. Implementation Committee has not been constituted.

TABLE I (part 5)							
COMMUNITY DEVELOPMENT FUND (CDF)							
Case	**Damage addressed by the CDF or equivalent**	**Was the measure requested by the parties?**	**Was a managing body appointed by the IACtHR?**	**Members of the Committee**	**Did the IACtHR specify which projects the funds should be assigned to?**	**Was compensation ordered besides a CDF?**	**Level of compliance**
Garifuna Triunfo de la Cruz Community & its members v. Honduras	Material and immaterial damage	No	No. Funds' administration in charge of the State, and decision-making in charge of the Community's representatives		Yes, projects oriented to increase agricultural productivity or alike in the community; to improve the Community's infrastructure according to the communities present and future necessities; to restore deforested areas; etc.	No	No information
Garífuna Punta Piedra Community and its Members v. Honduras	Material and immaterial damage	No	No. Funds' administration in charge of the State, and decision-making in charge of the Community's representatives		Yes, projects oriented to increase agricultural productivity or alike in the community, to improve the Community's infrastructure according to the communities present and future necessities, to restore deforested areas, etc.	No	No information

TABLE I (part 6)							
COMMUNITY DEVELOPMENT FUND (CDF)							
Case	**Damage addressed by the CDF or equivalent**	**Was the measure requested by the parties?**	**Was a managing body appointed by the IACtHR?**	**Members of the Committee**	**Did the IACtHR specify which projects the funds should be assigned to?**	**Was compensation ordered besides a CDF?**	**Level of compliance**
Kaliña and Lokono Peoples v. Suriname	Material and immaterial damage	Yes, by the Inter-American Commission and victims' representatives	No. Funds' administration in charge of the State, and decision-making in charge of the Community's representatives		Yes, programs of health, education, food security, resource management, etc.	No	No information
Pueblo Indígena Xucuru y sus miembros v. Brasil	Immaterial damage	No	No. Establishment of the fund in charge of the State coordinating with the Community members.		No	No	No information

TABLE J			
Victims and Beneficiaries Identification in Judgments Ordering the Establishment of a CDF or Similar			
IACtHR Case	**Indigenous or Tribal People**	**Victims**	**Beneficiaries**
Aloeboetoe et al. v. Suriname	X	Particular individuals	Particular individuals (next of kin)
Mayagna (Sumo) Awas Tingni Community v. Nicaragua.	X	The members of the Mayagna (Sumo) Awas Tingni Community	The Mayagna (Sumo) Awas Tingni Community
Plan de Sánchez Massacre v. Guatemala.	X	Individuals mostly indigenous members of the community	Members of the communities affected
Moiwana Community v. Suriname.	X	Members of the Moiwana Community	Members of the community
Yakye Axa Indigenous Community v. Paraguay.	X	Members of the Yakye Axa, except violation right to life (only 16 members of the community)	Members of the community
Sawhoyamaxa Indigenous Community v. Paraguay.	X	Members of the Yakye Axa, except violation right to juridical personality (particular individuals)	Members of the community
Escué Zapata v. Colombia	X	A indigenous leader and their next of kin	The community
Saramaka People v. Suriname.	X	Members of the community	Members of the community
Xákmok Kásek Indigenous Community. v. Paraguay.	X	The community and its members	Members of the community
Kichwa Indigenous People of Sarayaku v. Ecuador*	X	The community and its members	The Association of the Sarayaku People (Tayjasaruta)
Indigenous Communities Kuna of Madungandí and Emberá of Bayano and its members v. Panama*	X	The community and its members	The community
Garifuna Triunfo de la Cruz Community & its members v. Honduras	X	The community and its members	Members of the community
Garífuna Punta Piedra Community and its Members v. Honduras	X	The community and its members	Members of the community
Kaliña and Lokono Peoples v. Suriname	X	The community and its members	Members of the community
Pueblo Indígena Xucuru y sus miembros v. Brasil	X	The community	The indigenous territory (community) and its members

* Judgments not including an order to establish a CDF