Structural Remedies: Human Rights Law

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A. Disclaimer

1 Parts of section E.1 in this entry are reproduced with permission from a previous article by the same author: V Fikfak, 'Non-pecuniary Damages before the European Court of Human Rights: Forget the Victim; It's All about the State' (2020) 33 LJIL 335–69.

B. Introduction

2 This entry seeks briefly to outline the concept of structural remedies in human rights law (→ *Human Rights* [MPEPIL]; → *Human Rights, Remedies* [MPEPIL]) ie remedies which aim to bring about change in relationships within a State. These remedies can be imposed by a court or agreed by the States to avoid future violations. Section C addresses what structural remedies are, section D discusses the aims pursued by such remedies, section E provides examples of structural remedies, section F identifies obstacles such remedies face, and section G concludes.

C. What Are Structural Remedies?

3 Article 31 International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) ('Articles on State Responsibility') provides that the State responsible for the breach is 'under an obligation to make full reparation for the injury caused by the internationally wrongful act' (→ *State Responsibility* [MPEPIL]). In this context, structural remedies are substantive types of relief or reparation aimed at addressing gross and systemic problems within domestic legal systems. When the term 'remedy' or 'relief' is used, it refers to the outcome of proceedings, and specifically to the relief afforded to the successful claimant. In contrast, when the term 'reparation' is used, it signifies the means by which a state seeks to repair the consequences of a breach of international law for which it is responsible (→ *Reparations* [MPEPIL]).

4 Structural remedies do not replace or substitute the individual victim's right to reparation. A victim is entitled to redress for the injury suffered. Whilst the victim's injury may be repaired by providing them with compensation or other non-monetary remedies specific to their situation (eg release from prison, order of non-extradition, etc), the general problem within the State which may have led to the systemic, repetitive violations often remains unaddressed. A structural remedy therefore looks beyond the particular situation of the individual victim and seeks to find a solution to the broader systemic problem. In this regard, structural remedies aim to bring about change in the structure of relationships and processes within a specific State and seek to modify that State's practice in order to prevent future similar violations. In practice, only very invasive remedies or a multitude of measures can lead to a change in the structural relationships within the State or a fundamental shift in the decision-making processes.

5 Note that the term 'structural remedy' is most frequently used in competition law to distinguish measures that regulate the structure of a company from behavioural remedies, which seek to merely change its behaviour within the market. Structural remedies in competition law are invasive and require a change in the structure of the company and its

existing relationships. Such remedies are often needed to change the companies' power structure and therefore opportunity for abuse. In a similar manner in international law structural remedies aim at a change in the structure of existing relationships and the abuse of power that results from this.

D. What is the Aim of Structural Remedies?

6 The Oxford English Dictionary defines reparation as an 'act of restoring' something to a 'good condition', including 'the action of making amends for a wrong or harm' (Oxford English Dictionary, Reparation). In principle, the primary purpose of remedies is therefore to restore the individual victim to the conditions they were in before the violation (*restitutio in integrum*), and to provide them compensation and other non-pecuniary remedies—eg right to an effective investigation, information about events, locating and handing over remains etc. But remedies can also be used to deter future violations and thus benefit other potential victims. Scholars, for example, speak of the need for structural remedies in cases of historic injustice and gross systemic violations of human rights where repetitive violations abound and where restructuring of past relationships is necessary to address the problem and prevent future repetitive violations arising. In these cases, the aim of remedies is not so much to redress the loss suffered by the victim but to hold the wrongdoer responsible for his conduct and to fix a structural problem by encouraging, cajoling, or even sanctioning 'insufficiently resourced or recalcitrant countries to deter human rights violations from occurring' in the future (Helfer, 2008, 155). In the Inter-American System of Human Rights, the goal of deterrence is recognized as a fundamental aim of remedies ordered by the → *Inter-American Court of Human Rights (IACtHR)* [MPEPIL] (Quiroga, 2015, 121). If the victim is the main focus of remedies intended to redress the injury incurred, in cases of structural remedies the focus turns to the State. This means that structural remedies will be different from remedies adopted to redress victims' suffering.

7 Beyond deterrence, structural remedies may also pursue aims of restorative justice. In countries where certain groups have been silenced by the previous regime, remedies may seek to give such victims a voice and recognition (de Greiff, 2006, 451 and 456–57). The → *African Commission on Human and Peoples' Rights (ACommHPR)* [MPEPIL] has, for example, adopted General Comment No 4, which stipulates that when violations of human rights are directed against or have an impact upon groups of people, this collective harm has to be redressed through appropriate remedies. In this context, the reparation for collective harm cannot substitute the individual's right to reparation. Instead, the collective harm has to be assessed and Parties have to ensure that there is full and informed participation of the collective in the reparation process (General Comment No 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), 2017, para 52 and 58). In addition, the Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence has underlined that States have an obligation to ensure that reparation programmes are commensurate with the gravity of violations. This may require sophisticated, well-designed reparation programmes which provide for both individual and collective forms of material

reparation along with symbolic measures, such as apologies and acknowledgements (Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, 2014). In other contexts, the creation of fora where perpetrators can be identified and brought to account—such as in international criminal law with for example the → *International Criminal Tribunal for Rwanda (ICTR)* [MPEPIL], the → *International Criminal Tribunal for the Former Yugoslavia (ICTY)* [MPEPIL], and the → *International Criminal Court (ICC)* [MPEPIL]—may also lead more generally to the 'process of national reconciliation', and the 'restoration and maintenance of peace' (United Nations ('UN') Security Council ('UNSC') Resolution ('Res') 955 (1994) and UNSC Res 827 (1993)). In this context, the IACtHR is increasingly requiring States to involve victims and → *civil society* [MPEPIL] organizations in the implementation of reparations. This recognizes that human rights violations often have wide-ranging implications and that the process of addressing them often requires more than merely the involvement of the perpetrator and the victim (→ *Victim Participation: Human Rights Bodies*; → *Victim Participation in International Criminal Proceedings*).

E. What Type of Remedies are Aimed at Structural Change?

8 Structural remedies are focused on violations caused by institutional and often historical problems. In this context, as Shelton put it, 'historical claims … generally cannot be based upon the remedial paradigm of individual perpetrator, individual victim and proven quantifiable losses' (Shelton, 2004, 260). Instead, the usual remedies have to be adapted to provide an incentive for the whole institution to change its behaviour, rather than the individual wrongdoer. This poses formidable obstacles to finding efficient and suitable 'reparations, especially when coupled with procedural barriers like statutes of limitations and the principle [of] non-retroactivity of law' (Shelton, 2004, 260). At the same time, the idea of providing 'full reparations' may be costly and too onerous for certain countries. A careful balance thus needs to be struck both in the choice of remedy and the time given to the country to put it into practice.

1. Monetary Remedies and the Question of Punitive Damages

9 → *Compensation* [MPEPIL] as a structural remedy is usually used in the form of a compensation scheme, which States adopt to redress the damage suffered by a large number of victims. This was the case, for example, in relation to prisoners kept in poor conditions (*Ananyev and ors v Russian Federation*, 2012; *Neshkov v Bulgaria*, 2015), excessive length of proceedings (*Lukenda v Slovenia*, 2005, 98), expropriation of property confiscated in previous regimes, blood contaminations (*MC v Italy*, 2013), non-enforcement of domestic decisions (*Burmych and ors v Ukraine*, 2017; *Burdov v Russian Federation*, 2009), and in other cases (*Kurić and ors v Slovenia*, 2014 in relation to the erasure of individuals from official records). On a wider scale, compensation schemes have also been adopted in response to the atrocities of the two world wars. For example, Germany concluded the Luxembourg Agreement, in which it agreed to pay 3 billion DEM to the State of Israel and 450 million DEM to the

Conference on Jewish Material Claims against Germany to address individual suffering, loss of life, health, and liberty inflicted by the Nazi regime (Compensation for National Socialist Injustice: Indemnification Provisions, 2019, 6–7). In addition, Germany also provided compensation for the Nazi regime's use of slave labour. Similar compensation schemes have been suggested as necessary to address past injustices and inequalities in the context of slavery and colonialism. For instance, the United Kingdom government settled a claim brought by the veterans of the Mau Mau movement, whose independence movement had been repressed by the British colonial government in the 1950s. Over 1.5 million Kenyans were held in detention camps and subjected to torture and abuse at the time. In 2011, the United Kingdom government apologized and agreed to pay 5,228 survivors £19.9 million in damages (*Mutua and ors v Foreign and Commonwealth Office*, 2011). More recently in Northern Ireland, a pension scheme is being put in place to redress victims injured through no fault of their own during the 'Troubles' (Moffett, 2016).

10 Some studies have shown that through these compensation schemes States are able to pay individual victims much less than they would generally receive at the international level, (Fikfak, 2020; Antkowiak, 2008, 351) but that the 'domestication' of the claims relieves the international courts of the workload and allows it to close the repetitive claims *en masse*. Yet the question arises whether such schemes motivate States to seek and adopt other more long-term solutions to structural problems. A case in point is Italy's problem of delays in domestic proceedings, an issue that has generated thousands of cases before the → *European Court of Human Rights (ECtHR)* [MPEPIL]. In a series of judgments, the ECtHR found that Italy had to pass legislation providing for a domestic remedy to address the excessive delays in domestic proceedings. The so-called *Pinto* law (Law no 89, 24 March 2001 (Italy)) was adopted, requiring Italian applicants to turn to domestic authorities rather than Strasbourg. However, within a few years the new legislation itself generated new cases, raising concerns about how the scheme functioned and whether the speed of procedures before domestic courts had actually been addressed or if the new remedy exacerbated the situation. Applicants even questioned whether the amounts awarded in compensation were fair, given that they were low in comparison to the compensation victims would receive in Strasbourg. Similar concerns about the effectiveness of compensation schemes were raised by the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, who argued that the 'adequacy of the benefits' these schemes offer 'depends on complicated judgments concerning the appropriateness of the whole complex of benefits, the process of distribution and the relationship between the reparation benefits and other redress measures' (Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, 2016, para 57) Although victims should be involved in these assessments, their individual position is often not sufficiently considered. As a consequence, they seek justice—again—at the international level. In case of *Pinto* legislation (→ *Repetitive Cases: European Court of Human Rights (ECtHR)*), thousands of claims are still pending before the ECtHR.

11 Compensation—even when it is provided as a scheme for numerous victims—is often inadequate to incentivize a State to redress a structural problem. Such defendants pay compensation from the State treasury and thus they often have unlimited or vast resources. As

experts have argued, if monetary remedies are to be efficient, they must be on a scale that acts as a deterrent to the State concerned and thus provide an incentive to change noncompliant behaviour (Eisenberg and Engel, 2014). Although certain judges advocate in favour of such exemplary or punitive damages precisely because of their potential deterrent effect (Pinto de Albuquerque and van Aaken, 2018; Fikfak, 2018), the → *International Law Commission (ILC)* [MPEPIL] has explicitly rejected them. Compensation is not intended 'to punish the responsible State, nor … have an expressive or exemplary character' (Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, 99). Even when a serious breach of an international obligation has occurred, 'the award of punitive damages is not recognized in international law' (Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 111; Fikfak, 2018). It is noteworthy that even after the ILC proposed that damages should reflect the gravity of the breach, the proposal received an overwhelmingly negative reaction, leading the Rapporteur to conclude that 'the idea of punitive damages under international law is currently unsustainable' (Crawford, 2013, 526). International human rights courts explicitly accept this approach and have until now rejected claims to accept damages with labels such as 'punitive', 'aggravated', or 'exemplary' (ECtHR Practice Direction: Just Satisfaction Claims, 2007, 9; *Akdivar and ors v Turkey*, 1998; *Selçuk and Asker v Turkey*, 1998). Especially in cases of mass violations, exorbitant damages could bring a State to its knees. In this context, scholars have argued against awards of crippling compensation in international law (Paparinskis, 2020).

12 Nevertheless, individual cases exist in which human rights bodies appear to have tacitly adopted a punitive approach. In his concurring opinion to *Cyprus v Turkey* which concerned numerous violations of the Convention by Turkey arising out of the Turkish military operations in northern Cyprus in July and August 1974, the continuing division of the territory of Cyprus, and the activities of the 'Turkish Republic of Northern Cyprus' (*Cyprus v Turkey*, 2014, 3), Judge Pinto de Albuquerque insists that the ECtHR acted punitively by awarding millions in non-pecuniary damages to Cyprus—although the exact number of individual victims of human rights violations was not established and the victims in the Karpas region were neither identified nor identifiable on the basis of the evidence in the file (*Cyprus v Turkey* (Concurring Opinion of Judge Pinto de Albuquerque), 12–13). De Albuquerque welcomes this approach, underlying that 'punitive damages [are] an appropriate and necessary instrument for fulfilling the Court's mission to uphold human rights in Europe and ensuring the observance of the engagements undertaken by the Contracting Parties in the Convention and the Protocols.' For Pinto de Albuquerque this:

> conclusion applies with even greater force in the case at hand, where the respondent State not only committed a multitude of gross human rights violations over a significant period of time in Northern Cyprus, and did not investigate the most significant of these violations adequately and in a timely manner, but also deliberately failed year after year to comply with the Grand Chamber's judgment (*Cyprus v Turkey* (Concurring Opinion of Judge Pinto de Albuquerque), 19).

13 The discussion of punitive damages is not limited to *Cyprus v Turkey.* In *Guiso-Gallisay v Italy*, the ECtHR explicitly stated that Article 41 awards must be 'a serious and effective means of dissuasion with regard to the repetition of unlawful conduct of the same type, without however assuming a punitive function' (*Guiso-Gallisay v Italy*, 2009, 85). The debate about the introduction of such 'exemplary' or 'aggravated' damages has also been present in the Committee of Ministers. The Committee has previously explicitly supported the use of punitive damages to ensure the effectiveness of ECtHR judgments, as has the Parliamentary Assembly of the Council of Europe, which considered the introduction of fines to be imposed on States that persistently fail to execute the judgments of the Court, with a view to introducing more effective measures in the face of non-compliance (Execution of Judgments of the European Court of Human Rights, 2000, 94; → *Execution of Judgment: European Court of Human Rights (ECtHR)*). The issue was debated in relation to the Brighton Declaration, in which the United Kingdom 'invite[d] the Committee of Ministers to consider the introduction of a financial penalty where a failure to implement a judgment leads to a significant number of repetitive applications to the Court' (Draft Brighton Declaration, 23 February 2012, para 36 (d)). However, these proposals were not included in the final draft.

14 In the Inter-American System of Human Rights, the position against punitive damages appears clearer. When the Commission requested punitive damages in *Velásquez Rodríguez v Honduras* (1988) and *Godínez Cruz v Honduras* (1989), the Court rejected these claims. In 2003, in *Myrna Mack Chang v Guatemala*—a serious case that revealed a pattern of extra-legal executions tolerated by the State and recidivism of human rights violations—the Court noted that 'full reparation' required not only compensation but also punishment. Yet the Court did not award punitive damages but required Guatemala effectively to investigate the facts in the case so as to identify, try, and punish all perpetrators and accessories. The imposition of punitive damages was rejected implicitly, and Judge Sergio Garcia Ramirez in his separate opinion noted that such monetary damages could impose an 'additional burden for the taxpayer and mean a reduction in the resources that should go towards social programs' (*Myrna Mack Chang v Guatemala*, 2003, 47). In the same vein, Judge Cançado Trindade underlined the need for exemplary or dissuasive reparations in order to ensure non-repetition but emphasized that such incentive had to come from non-monetary reparations rather than damages (*Myrna Mack Chang v Guatemala*, Separate Opinion of Judge Cançado Trindade, 2003, 15–16). In the IACtHR 'aggravated' violations can therefore trigger various non-pecuniary remedies, rather than punitive damages.

15 Recently, the International Court of Justice rendered its reparations decision in *DRC v Uganda,* in which it awarded a global sum of $325 million dollars as total compensation for damage caused by Uganda's violations of international human rights law, international humanitarian law, and international law, stemming from Uganda's military activities against the DRC on the latter's territory. The award was made for loss of life and damage to persons, for damage or destruction of assets, and for looting, plundering and exploitation of natural resources. Although the Court applied the standard of full reparation for the injury caused, it awarded only 3% of what the DRC asked for (due to lack of evidence) and refused DRC's

claim to establish a fund to promote reconciliation between warring ethnic groups. In addition, as far as the global sum was concerned, the Court provided little explanation as to how it came up with quantum, but it did explicitly clarify that the award should not be read as being of 'a punitive character' (102).

2. Non-Monetary Remedies

15 As Shelton argues, '[o]pinion is divided on the ability of international decision-makers to issue non-monetary remedial orders' (Shelton, 2015, 383). The ECtHR is extremely reluctant to issue such orders and prefers to give States free rein in proposing remedies that would be most suitable and appropriate—given the domestic capacity and circumstances—to address the systemic problem. The IACtHR, on the contrary, is very specific and very creative in the type of non-monetary remedies it orders States to undertake.

16 The difference between the two jurisdictions might be due to the textual basis for reparations. The → *European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)* [MPEPIL] ('European Convention') speaks only of 'just satisfaction' being awarded in cases where this is necessary, but this has been used by the Court exclusively to award monetary damages (→ *Just Satisfaction: European Court of Human Rights (ECtHR)*). In contrast, the → *American Convention on Human Rights (1969)* [MPEPIL] ('American Convention') speaks of the need for the breach to be 'remedied and for fair compensation to be paid' (Art 63). The Court's practice has led to an award of a spectrum of reparations, emphasizing the explicit need for non-pecuniary reparations and the necessity for remedies that seek to rehabilitate victims and their relatives.

17 Additionally, the difference might lie in the question of which body is involved in the follow up of international judgments, ie who decides on the issue of compliance. In the ECtHR, this issue is left to the Committee of Ministers, a political supervisory body, which is rarely specific about the type of measures it expects the State to undertake. If the Court remains silent about the non-monetary remedies, the Committee must wait to hear from States about the type of measures they themselves propose to adopt. On the other side, in the Inter-American System of Human Rights, it is the Court that imposes specific remedies on States and then supervises compliance with its judgments. In this regard, the issue of compliance is in the hands of the same judicial body and remains a question of law rather than politics (→ *Procedure for Monitoring Compliance with Judgments and Other Decisions: Inter-American Court of Human Rights (IACtHR)*).

18 It cannot be denied that the presence of certain judges on the IACtHR such as Judge Cançado Trindade made it their mission to develop the Court's practice in relation to reparations and significantly influenced the Court's approach in this area (Cançado Trindade, 2003, 1). In many respects, the IACtHR now serves as an example of the creativity and activism that international courts could adopt in relation to structural non-monetary remedies (→ *Judicial Activism*) (Sicilianos, 2014; Donald and Speck, 2019, 83–117; Cornejo Chavez, 2017, 372–93; Sandoval, 2018, 1192).

3. Restitution

19 → *Restitution* [MPEPIL] is often the preferred means of redressing systemic, structural problems as it seeks 'to restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred' (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, 2005, para 19). It is most often used in respect of property—land, art, etc—that has been expropriated or stolen by a previous government. This is the case in relation to assets taken during the Second World War, restoration of property nationalized by communist governments in Central and Eastern Europe, and the return of lands to → *indigenous peoples* [MPEPIL]. Often restitution takes place as a consequence of a change in regime, where new governments seek to institute restitution schemes as a way to distance themselves from those practices. This is most frequently done with a change of legislation or adoption of new laws. *Broniowski v Poland* (2004) serves as an example. In that case, the applicant and his family had been forced to abandon their property at the end of the Second World War due to the erection of a new border and loss of Polish territory. Although Poland committed itself to compensate persons who had lost property due to such delimitation, a number of administrative and legislative problems meant that the applicant and more than 80,000 other people never received any compensation despite their own and their ancestors' efforts. Finding that Poland had failed to redress the situation, the ECtHR ruled that the State had to adopt a series of non-monetary measures—including administrative and legislative measures—to remedy the widespread problem.

20 In principle, the ECtHR is reluctant to order a State to adopt legislative measures. As a rule, it will leave it to the State itself to propose the most appropriate remedies available for redress. However, in repetitive cases the Court has developed a pilot judgment procedure as a means of dealing with large groups of identical cases that derive from the same underlying problem (→ *Pilot-Judgment Procedure: European Court of Human Rights (ECtHR)*). In *Broniowski v Poland*, the Court used such a measure for the first time. Its aim was to identify the 'dysfunction' under national law that was at the root of the violation and to give the Government clear indications as to how this could be eliminated (*Broniowski v Poland*, 193). Finally, it also sought to bring about the creation of domestic remedy capable of dealing with similar cases, including a compensatory scheme to provide adequate compensation to victims whose assets could not be returned. Similar judgments for restitution of property confiscated during the communist regimes were also rendered in relation to Romania (*Atanasiu and ors v Romania,* 2010) and Albania (*Puto v Albania*, 2012).

21 Since *Broniowski v Poland*, the pilot judgment procedure and the requirement of restitution has also been used in a number of cases relating to the former Yugoslav republics. In *Suljagić v Bosnia and Herzegovina*, the Court uncovered systemic problems in the repayment scheme for foreign currency deposited before the dissolution of the Socialist Federal Republic of Yugoslavia ('SFRY'). The applicant, a Bosnian national, complained of the failure to issue State bonds which, as provided for by Bosnian law, would enable savings deposited by

individuals in Bosnian banks before the dissolution of the SFRY to be reimbursed. The Court observed that more than 1,350 similar cases were pending before it and insisted that the government issue government bonds and pay outstanding payments. The same problem arose in relation to Serbian and Slovenian banks, which had since the dissolution of the SFRY made it impossible for individuals to withdraw their 'old' foreign currency savings deposited with the banks. The Court required that the two countries adopt legislative measures to allow individuals to recover their savings and in subsequent cases assessed this implementing legislation as adequate (*Suljagić v Bosnia and Herzegovina*, 2009; later also *Ališić and ors v Bosnia and Herzegovina and ors*, 2014).

22 Beyond the European context, claims for restitution are most prominent in relation to lands that used to belong to indigenous peoples. In the United States ('US'), the issue of the confiscation of the land of Native American people has been largely allowed by the US Supreme Court. Only in the past few decades has Congress passed legislative enactments seeking to restore some lands to indigenous tribes—eg the return of Blue Lake to the Taos Pueblo of New Mexico because of its religious significance. In other cases, compensation was provided instead (Alaska Native Claims Settlement Act of 1971, which extinguished all aboriginal title in Alaska and provided a compensation scheme). In Australia, a landmark decision of the High Court of Australia in *Mabo and ors v Queensland* (1992) rejected the view that Australia was *terra nullius* and established aboriginal peoples' right to their land, which led to the adoption of the Native Title (Queensland) Act 1993. The subsequent amendment which limited the decisions protecting native title was criticized by the UN → *Committee on the Elimination of Racial Discrimination (CERD)* in 1999 and 2000 (Concluding Observations of the CERD (Australia), 2000, 8–9).

4. Satisfaction and Guarantees of Non-Repetition

23 As scholars have noted, the establishment of truth commissions (→ *Truth and Reconciliation Commissions* [MPEPIL]) is a 'common instrument for seeking reconciliation in Latin America' (Cornejo Chavez, 2017, 375). These were created following the end of authoritarian regimes or dictatorships that engaged in widespread violations of human rights and sought to investigate and establish the truth about events that happened, assign responsibility to perpetrators, identify the victims and restore their dignity, and allow for apologies to be made as well as the construction of monuments and community centres in honour of victims' memory. As scholars note, truth commissions have been especially important in places where due to a 'large number of perpetrators, it has been impossible to prosecute those responsible for the planning as well as carrying out the violations' (Cornejo Chavez, 2017, 376). The long-term benefit of establishing a clear narrative about past events for the community is clear, especially if the measures concern communities or minorities that have been consistently marginalized or discriminated against in the past. In Chile, the Commission for Truth and Reconciliation investigated the deaths and disappearance of approximately 3,000 people during Pinochet's rule. The Rettig report detailed the human rights abuses, identified the victims and their fate, and led to the prosecution of dozens of military personnel for human rights violations. The Commission also led to the recommendation of

reparations for families of the victims, and broader legal and administrative measures to prevent future violations, including training police and armed forces to respect human rights. Most crucially, the national holiday celebrating the 1973 coup was eliminated, the Chilean military was stripped of its political power, and a national institute of human rights was created. Similar truth commissions have been established in South Africa, East Timor, Nepal, Germany, and elsewhere. Reports on the status of indigenous peoples in Australia and Canada have also contributed to the national discussion about identity, history, and culture.

24 The IACtHR has also used other measures to ensure rehabilitation of victims. It has ordered States to provide educational, medical, or similar services or scholarships to survivors and affected family members. Its most interesting remedial order came in 2004 in the case of the massacre of the inhabitants of an indigenous village in Guatemala. The State was required to provide not only medical treatment including free medicines and a health clinic, but also education in Mayan culture, bilingual teachers, housing assistance, and infrastructure investment in roads, sewers, and drinking water (*Plan de Sánchez Massacre v Guatemala*, 2004, 125.7–9). This type of measure is often accompanied by training and educational programs for state officials in order to prevent repetition of violations. A similar remedial scheme was used in *Caracazo v Venezuela*, a 2002 case in which Venezuelan security troops had acted with disproportionate force to stop citywide protests. The Court ordered the training of police and military in human rights and humanitarian law, and more specifically on the appropriate limits of the use of force (*Caracazo v Venezuela*, 2002, 127). Similar programs have been ordered in relation to prison officials, judges, prosecutors, and health professionals associated with state institutions. The Court has actively encouraged that → *non-governmental organizations* [MPEPIL] with relevant experience participate in the design and implementation of such programs.

25 Beyond this, the Court has also imposed that certain symbolic measures be taken to recognize the severity of violations and thus serve as a lesson to deter further similar violations. Latin American States have been ordered to name a street, school, plaza, and memorial after a victim, or to introduce a national day of remembrance. In the prominent *'Street Children'* case against Guatemala, the Court ordered that Guatemala name a school after the five adolescents killed by state security forces. Guatemala was also obligated to install a plaque with the names of the victims on the school building (*'Street Children' (Villagrán Morales et al) v Guatemala*, 2001, para 123). In another case, *Myrna Mack Chang v Guatemala*, the State was ordered to establish an annual scholarship in honour of Myrna Mack Chang, a sociologist murdered by state agents after the Guatemalan government suspected her of 'subversion.' The Court also required that Guatemala name a street or square in Guatemala City after the victim, and 'place a prominent plaque in her memory at the place where she died or nearby, with a reference to the activities she carried out' (*Myrna Mack Chang v Guatemala*, 286). Monuments have been frequently erected as a result of the cases dealing with massacres of communities. In this context, the Court has insisted that survivors be consulted as to the design, content, and location of such monuments. Furthermore, the Court has required that public ceremonies be conducted in which victims publicly received compensation. and the State accepted responsibility and provided an apology. It has even gone so far as to require state officials to participate in these ceremonies (*Myrna Mack Chang v Guatemala*, 301.8; *Molina Theissen v Guatemala*, 2004,

106.5; *19 Tradesmen v Colombia*, 2004, 295.8; *Juvenile Reeducation Institute v Paraguay*, 2004, 340.11(a); *Tibi v Ecuador*, 2004, 280.12 (written declaration only); *Plan de Sánchez Massacre v Guatemala*, 125.2; *Carpio Nicolle et al v Guatemala*, 2004, 155.4; on apologies: Swart, 2008). Finally, in cases which concern disappearances and killings, the IACtHR has required that States locate the remains of victims and accord them proper burials. In relation to Guatemala, the scene of hundreds of massacres, it has also required the State to institute a national exhumation program (*Rio Negro Massacres v Guatemala*, 2012, 265 ff*).*

5. Structural Legal Reform as a Result of Repetitive Violations

26 Thus far, this article has focused on remedies which are imposed on States by international human rights courts. This section focuses on the type of major reform that States themselves undertake in order to comply with a string of repetitive adverse judgments highlighting a structural problem in the domestic legal system. In this regard, perhaps the most apparent changes to existing relationships within a State stem from remedies which require States to change or redesign their institutions, in particular the structural features of their judicial systems (Kosař, 2017, 112–23).

27 For example, in Europe ECtHR decisions have had the effect of changing the role of the Advocate General in a number of francophone countries. In *Borgers v Belgium,* the Court held that the opinion of the Advocate General at the Belgian Court of Cassation could not be regarded as neutral from the point of view of the parties to the cassation proceedings (1991, 26). It found that the Advocate General's participation in the Cassation Court's deliberations, coupled with the impossibility for the applicant to submit his observations on the Advocate General's arguments, were incompatible with the European Convention and specifically the provision relating to the impartiality of the adjudicating tribunal. Since then, the ECtHR has similarly ruled on a number of other decisions relating to the definition of an 'independent and impartial' tribunal, a move that has led to wide-ranging judicial reform in a number of countries. As a result of decisions against advocates general and other judicial officers, countries like Belgium, Portugal, the Netherlands, and France have abolished or substantially changed the role of the advocate general—an institution that for centuries represented an important part of the judicial system (Lasser, 2005, 1060–62; Sudre, 2006, 286; Krisch, 2008, 194–96; Bell, 2008, 134; Lemmens, 2009, 166–74; Latour, 2010).

28 In a similar manner, countries like Turkey have had to change or abolish their system of military courts (*Incal v Turkey*, 1998, 677–72; *Çiraklar v Turkey*, 1998, 39; *Şahiner v Turkey*, 2001, 33–47) whilst other jurisdictions have had to create judicial review of administrative decisions to satisfy the requirement of independence (*Benthem v Netherlands*, 1985, 32–44). Most notably in francophone countries, the dual role of the Councils of State had to be amended, as they operated both as decision-making and advisory executive bodies (*Procola v Luxembourg*, 1995, 43–45; *McGonnell v United Kingdom*, 2000, 55; *Stafford v United Kingdom*, 2002, 78; *Kleyn v Netherlands*, 2003, 198–200). In addition, constitutional reform in the United Kingdom led to the House of Lords Appellate Committee being replaced by the Supreme Court of the United Kingdom as the highest judicial forum. The United Kingdom

Supreme Court is now symbolically located in a separate building from Parliament and Government. This was triggered by Strasbourg's interpretation of the right to a fair trial (Sueur, 2004).

29 It is important to underline that the decisions that bring about these structural changes in the legal systems across Europe—and similarly in Latin America—are not in fact envisioned by the international court. There is no 'international' order telling States to amend their judicial systems; they are merely told to 'undertake all necessary measures' (*Ališić and ors v Bosnia and Herzegovina and ors*, 2012, para 99) to give effect to the rights of the Convention. Instead, reform comes after a number of decisions on the same issue flag up the problem of independence and a fair trial. It is therefore repetitive findings of violations that lead to the conclusion that the office—of advocate general, military court, or other—has to be abolished, renamed, and symbolically moved into a different building, etc. In this context, the IACtHR is an exception. Whilst the Court initially refused to explicitly order changes to the structure of domestic military courts, in 1999 in *Castillo Petruzzi et al v Peru* it was more direct and held that 'domestic laws that place civilians under the jurisdiction of the military courts are a violation of the principles of the American Convention' and then proceeded to order Peru to adopt the appropriate measures to amend those laws (1999, 222).

F. Obstacles to Structural Remedies and Long-term Change

30 Political opposition and legal obstacles often prevent the adoption of structural remedies that could bring about real change. Governments either argue that they have limited capacity to pay large compensation schemes or invoke special circumstances—eg war in Ukraine in the case of *Burmych and ors v Ukraine*, 2017—to seek to minimize their obligation in respect of specific remedies or in order to delay their implementation.

31 In certain contexts, such resistance has been present for decades or centuries, and needs to be especially highlighted. With respect to contemporary problems of racism and discrimination and their historical origins in slavery and colonialism, various regional conferences have debated the need to acknowledge that 'enslavement and other forms of servitude of Africans and their descendants and of the indigenous peoples of the Americas, as well as the slave trade, were morally reprehensible' and to recognize that they constituted 'crimes under domestic law, and, if they occurred today, would constitute crimes under international law' (Report of the Regional Conference of the Americas, 2001, para 70). Yet, there is still great reluctance in the international community and on the part of individual States to provide formal apologies and acknowledge the pressing need to adopt national and international efforts to repair the 'substantial and lasting economic, political and cultural damage' that ensued from these practices (Report of the Regional Conference of the Americas, 2001, para 70). As the UN Special Rapporteur for Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Racial Intolerance reports, political opposition 'in some countries is so deep that event attempts to study the issue of reparations in this area is consistently blocked' (Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Racial Intolerance, 2019, 18).

32 Furthermore, a number of legal obstacles have been identified as hampering the adoption of reparations for slavery and colonialism. These relate to the issues of responsibility, causality, and individualization, especially in relation to the time that has passed since transatlantic trade and colonialism, and the difficult—or perhaps insurmountable—requirement to identify individuals responsible for horrific acts, the victims, their descendants, and the problems related to the quantification of damage caused. Perhaps the strongest obstacle relates to the intertemporal principle contained in Article 13 Articles on State Responsibility, which provides that an 'act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.' Many States have underlined that at the time slavery and other abusive practices were not a breach of international law. Yet Articles 14 and 15 Articles on State Responsibility provide that the intertemporal principle can be subject to exception if the effects or consequences of the wrongful act continue. In this context, the intertemporal bar does not apply to the racism, and discriminatory effects of slavery and colonialism that are still present today. The UN Special Rapporteur on Contemporary Forms of Racism has called on Member States and international lawyers involved in the interpretation and articulation of international law to 'do more to explore the application of the intertemporal principle's exceptions, especially as a mechanism for overcoming overstated legal hurdles to the pursuit of racial justice' (Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Racial Intolerance, 19). The same encouragement applies to the other legal hurdles, which often prevent courts from allowing claims for reparations to succeed. Although plaintiffs may not be able to identify the individual perpetrator or quantify the historic damage done to them, 'nothing prevents legislative and executive bodies from reforming the law' by putting in place meaningful reparation schemes that acknowledge past wrongs and their impact on contemporary structures of racial inequality, and providing for compensation and rehabilitation (Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Racial Intolerance, 20). In the context of indigenous communities, several countries have followed this approach by putting aside the conventional legal frameworks of torts and civil law wrongs, in favour of indigenous law and legal traditions (Mahoney, 2018, 199). A similar approach could be taken in the context of historic racism and discrimination.

G. Conclusion

33 Structural remedies are substantive types of relief or reparation aimed at addressing gross and systemic problems within domestic legal systems. Compared to individual remedies aimed at redressing the injury suffered by an individual victim, structural remedies aim to bring about change in the structure of relationships and processes within a specific State and seek changes to a State's practice in order to prevent future similar violations. Only very invasive remedies, such as generous compensation schemes, legislative restitution schemes, or a multitude of measures, can lead to a change in the structural relationships within the State or a fundamental shift in the decision-making processes. The analysis of the case law shows that although courts play an important role in triggering the process of reflection and solution seeking, it is most often states themselves that have to show the willingness and initiative to put in place such structural solutions. In this context, structural remedies can bring about real, long-term change

and can, with sufficient effort and motivation, lead to a restructuring and rebalancing of power in existing relationships. Often this is more easily said than done, especially in areas of long-term historical injustices and structural inequality, in which States are often unwilling to recognize past wrongs or redress them appropriately.

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