UNIVERSITÀ DEGLI STUDI DI PADOVA

DEPARTMENT OF POLITICAL SCIENCE, LAW,
AND INTERNATIONAL STUDIES

Master's degree in
Human Rights and Multi-level Governance

REGIONAL HUMAN RIGHTS COURTS, REMEDIAL PRACTICE, AND STRUCTURAL OBLIGATIONS:

THE INTER-AMERICAN COURT OF HUMAN RIGHTS AND THE REMEDY TO STRUCTURAL DISCRIMINATION

Supervisor: Prof. SARA PENNICINO

Candidate: MARIA CLARA BATISTA HERKENHOFF

Matriculation No. 2005600

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To Joana, Pedro Paulo, and Marcos for
teaching me through words and love

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After two years, with a change of professional pathway, the Covid-19 pandemic, online teaching, moving abroad twice, uncountable courses, group presentations, essays, and exams, all of them in a second language, I have a lot to be proud and thankful for completing the master's degree in Human Rights and Multi-level Governance at the University of Padova. I want to use this space to demonstrate my deepest gratitude to the ones that supported and accompanied me during this journey.

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I want to register that this master's thesis is the product of my sincere wish to get to know the world and the diversity which surrounds us and continue to be loyal to what matters to me. I have as a moto "*to love and to change the things interest me the most" ("Amar e mudar as coisas me interessa mais", Belchior).* I hope that my personal, academic, and professional trajectory will always be able to transcribe that.

Padova, November 14, 2022.

Se, na verdade, não estou no mundo para simplesmente a ele me adaptar, mas para transformá-lo; se não é possível mudá-lo sem um certo sonho ou projeto de mundo, devo usar toda a possibilidade que tenha não apenas para falar de minha utopia, mas para participar de práticas com ela coerentes.

If I am not in the world simply to adapt to it, but rather transform it, and if it is not possible to change the world without a certain dream or vision for it, I must make use of every possibility there is not only to speak about my utopia, but also to engage in practices consistent with it.

— Paulo Freire

Abstract

This study focuses on remedies arbitrated by Regional Human Rights Courts as relevant mechanisms of change at the national level and their correlation with structural human rights. This novel concept of human rights describes when a decision of a human rights jurisdictional body imposes structural obligations, aiming to impact the State governmental structures. Through their remedial practice, derived from primary structural obligations, courts can also enunciate structural human rights by awarding guarantees of non-repetition. Those measures, due to their main features (preventive and of general interest), are recognized as relevant mechanisms to tackle repetitive patterns of violations and structural discrimination, by orders such as legislative reform and policy implementation. To verify this connection between structural obligations and remedies, we propose a study on the Inter-American Court of Human Rights, known for its expansive approach to remedies, and a qualitative analysis of the landmark decision of the Cotton Field Case (2009). We concluded that although the decision correlated structural gender-based discrimination, remedies, and structural obligations, the Court did not explore its full remedial potential.

Keywords: Regional Human Rights Courts, remedies, structural human rights, guarantees of non-repetition, Inter-American Court of Human Rights, structural discrimination, gender-based violence.

Resumo

O presente estudo explora mecanismos de reparação, nomeados remédios, arbitrados por Cortes Regionais de Direitos Humanos como motor de mudança à nível nacional e sua relação com direitos humanos estruturais. Esse conceito novel de direitos humanos descreve situações em que uma decisão de um órgão jurisdicional de direitos humanos impõe aos Estados obrigações estruturais, almejando impactar suas estruturas governamentais. Através da sua prática e dos remédios ordenados, cortes também podem transcrever direitos humanos estruturais quando determinam garantias de não-repetição. Essa categoria de remédio, devido a suas características principais (preventivo e de interesse geral), é reconhecida por sua relevância em remediar padrões repetitivos de violações e discriminações estruturais, transcrevendo medidas de reforma legislativa e implementação de políticas públicas nos Estados. Com o objetivo de verificar a correlação entre obrigações estruturais e remédios, propomos um estudo da Corte Interamericana de Direitos Humanos, conhecida por sua abordagem expansiva a reparações, e uma análise qualitativa do caso paradigmático do *Campo Algodonero* (2009). Concluímos que, apesar da decisão correlacionar discriminação estrutural de gênero, remédios e obrigações estruturais, a Corte não explorou completamente seu potencial quando determinou os remédios.

Palavras-chave: Cortes Regionais de Direitos Humanos, remédios/reparações, direitos humanos estruturais, garantias de não repetição, Corte Interamericana de Direitos Humanos, discriminação estrutural, violência de gênero.

Table of Contents

Abbreviations

ACHR	The African Charter on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
AU	African Union
CEDAW	Convention on the Elimination of Discrimination Against Woman
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CBP	Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)
DEVAW	Declaration on the Elimination of Violence Against Women
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GBM	Gender-based murder
GBV	Gender-based violence
GC	General Comment
GNR	Guarantees of non-repetition
HRC	Human Rights Committee
IACHR	Inter-American Convention of Human Rights
IAComHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights.
IHL	International Humanitarian Law
ILHR	International Law of Human Rights
OAS	Organization of the American States

PCIJ	Permanent Court of International Justice
RHRC	Regional Human Rights Courts
RHRS	Regional Human Rights Systems
SHR	Structural Human Rights
SR	United Nations Special Rapporteur
UDHR	Universal Declaration of Human Rights
UN	United Nations

Introduction

The present master's thesis arises from the fundamental question of how human rights litigation at the supranational level can assess structural problems and what are the roles of Regional Human Rights Courts in that task. To answer this question, we will focus on the remedial practice of Regional Courts of Human Rights (RCHR) and in the measures that could affect the State's governmental structures. Although the study will not be able to assess to which extent State structures reflect and uphold discrimination in general, there are indications that Regional Courts, specifically, the Inter-American Court of Human Rights, (IACtHR) have been remediating structural discrimination with the imposition of non-repetition guarantees, including cases of gender-based violence (GBV) as in the landmark judgment *González et al. (Cotton Field) v Mexico.*[1]

Reflections on the impacts of International Human Rights Law (IHRL) and the work of Regional Courts are the guiding lines of the present study. For the development of the research, an interdisciplinary approach to the topic will be essential. Without the lens of Political Sciences and International Relations, it might not be intelligible that the legal force of a sentence of a regional human rights body is not established on physical institutionalized coercion, but in a series of external factors that operate in different levels (international, regional, national and local), as so as the role of civil society. Thus, while this study lies within the fields of Human Rights Law, Human Rights Litigation, and Regional Human Rights Courts and their remedies, studies from other fields, such as the aforementioned, will permeate the construction of this dissertation.

Our conceptual lines of research were drafted from the definition of structural human rights (SHR) proposed by the Belgium jurist Leloup in the context of the European Court of Human Rights and its correlation with structural obligations.[2] The author argues that certain human rights through the decisions of regional courts, "can have an impact on the way a State Party structured its government. In this regard, they could be referred to as structural human rights."[3]

[1] *Case of González et al. ("Cotton Field") v. Mexico*. Preliminary Objection, Merits, Reparations, and Costs. Inter-American Court of Human Rights, Series C No. 205 (Judgment of November 16, 2009

[2] Mathieu Leloup, "The Concept of Structural Human Rights in the European Convention on Human Rights," *Human Rights Law Review* 20, no. 3 (October 13, 2020): 480–501, https://doi.org/10.1093/hrlr/ngaa024.

[3] Leloup, "The Concept of Structural Human Rights", 480.

Faced with the novel definition, it was already possible to picture cases of the Inter-American System that appear to have had the same structural effect, for example, on Brazil's governmental structures.[4] Additionally, Leloup's study suggested that a similar exploration could be conducted within the Inter-American Court of Human Rights.

While researching the contentious practice of the IACtHR it was clear the relevance of the remedies. This Court adopts a bold and holistic approach, from reparation to victims to collective measures of a wide range, including legislative change, implementation of public policies, and educational programs. Extensive measures as such could describe the so-called structural human rights but through secondary obligations. At the same time, remedies appeared as the pressing forces of Regional Courts that could directly impact the State's structures, ensuring institutions and legal mechanisms more protective of human rights. Therefore, the present study proposes a conceptual underpinning, aiming to correlate the IACtHR's remedial practice with the concept of structural human rights.

This study does not discard the relevance of declaratory sentences to the development of legal standards or the importance of the evidentiary activity and the exposition of the facts for the disclosure of the truth. The choice to center the analysis on the remedies awarded by Regional Courts is because they are the direct tools to change the States' behavior concerning human rights. These reflections are transcribed in Chapter I, which first focuses on the Regional Human Rights Courts, their role, and institutional features that position them in a special place to influence the State's behaviors, mainly grounded on the work of the political scientist Haglund.[5] Then, the chapter presents an overview of the recognized remedies by Human Rights International Law and Regional Courts practice, having as guides the works of Shelton[6] and Antkowiak.[7] The description is certainly unbalanced to the side of the IACtHR, not only because the Court was the main subject of research in the beginning, but also because the Court

[4] As to exemplify, the Maria da Penha Law (Law n. 11340/2006) is a comprehensive statute establishing new police stations and judicial sections dedicated to receiving denounces and persecute cases of domestic violence, such as other legal mechanisms. The law was enacted after recommendations of the InterAmerican Commission of Human Rights in the case of same name: *Case Maria da Penha Maia Fernandes v Brazil,* Inter-American Commission of Human Rights. Report No. 54/01, 12.051 (4 April 2001).
[5] Jillienne Haglund, *Regional Courts, Domestic Politics, and the Struggle for Human Rights*, 1st ed. (New York: Cambridge University Press, 2020).
[6] Dinah Shelton, *Remedies in International Human Rights Law*, Third edition (Oxford, United Kingdom: Oxford University Press, 2015).
[7] Thomas M. Antkowiak and Alejandra Gonza, *The American Convention on Human Rights: Essential Rights* (New York, NY: Oxford University Press, 2017).

has the most extensive range of remedies. It also should be highlighted that most of the studies on remedies focus on the ECtHR and/or the IACtHR, which explains the few mentions of the remedial practice of the African Court on Human and Peoples' Rights (ACtHPR), also suggesting a fertile field for future research.

Chapter II will expose the correlation between human rights obligations and remedies, highlighting that human rights can give rise to all ranges of obligations, based on the study of Fredman,[8] including negative, positive, and structural. Then, we will explore the concept of structural human rights. While Leloup focuses on a normative concept of structural human rights, we connect his contributions with secondary obligations, in special when translated into guarantees of non-repetition (GNR). These measures, due to their features (preventive, general interest, and transformative) can impose secondary structural obligations that would arise from structural human rights. Lastly, the chapter will present how the Inter-American Court remedial practice also transcribes the concept of structural human rights. It will also demonstrate that structural human rights are generally present in cases in which the courts identify structural fractures, whether they are social or institutional, through the concept established by the IACtHR of structural discrimination/inequality.

The last part, Chapter III, contains the case study proposed, which correlates structural discrimination based on gender, remedies, and guarantees of non-repetition. The case selected from the Inter-American Court of Human Rights was *González et al. v Mexico*, known as the Cotton Field case. The case was chosen due to its relevance, as it is recognized by the Court itself as one of its most important decisions, and because the case is frequently cited in works about transformative measures and remedies. The case concerns the international responsibility of the State of Mexico for the abduction and killings of two girls and a woman whose bodies were found nearby a cotton field at Cuidad de Juárez. It was proven that the murders were committed in the context of structural gender discrimination and widespread violence against women. The study of the case aims to identify whether the Court correlated structural discrimination with structural obligations, also transcribing the concept of structural human rights through the remedies awarded. For that, first, it was relevant to clarify two concepts for the case: gender-based violence and structural discrimination. In sequence, the case analysis

[8] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford [UK]; New York: Oxford University Press, 2008).

was structured in a summary of the case, followed by the recognition of structural discrimination by the Court, the State's obligations, the orders and remedies, and, lastly, the analysis of guarantees of non-repetition and structural human rights. Thus, the study will comprise bibliographic research of the relevant topics aforementioned, followed by the analysis of international documents, and lastly qualitative research of the IACtHR judgments.[9]

We note that the present research is focused on the remedial practice of courts transcribed in their judgments, not on the execution phase of the sentence (enforcement and monitoring). Whether the States implemented the remedies ordered at the national level is outside the scope of the present study.

The proposed study of remedial practice and structural obligations can be valuable for the work of legal human rights scholars, lawyers, victims who seek redress in front of these tribunals, and including for the work of Regional Courts. First, the study is relevant for understanding better the full range of obligations that can arise from human rights, as well as the correlation between primary conventional obligations and the respective remedies awarded. The adoption of the concept of structural human rights and clarifying the remedial practice of courts can be important to strengthen the practice of the Regional Courts not rarely criticizing for having a "too broad" mandate and to be acting out of their legal scope. Correlating SHR and remedies, the courts' far-reaching measures could be recognized as a legal consequence of structural obligations, and not simply judicial activism. Therefore, the present study has the intention to contribute to the reflections on the remedial approach of the RHRC, and the possibility of impacting structurally States.

[9]. Lee McConnell and Rhona K. M. Smith, eds., *Research Methods in Human Rights* (Abingdon, Oxon; New York, NY: Routledge, 2018),72.

Chapter I - Regional Human Rights Courts and Remedies

1. Human Rights Law and Regional Systems: in between global and local

The present study recognizes, as a methodological premise, human rights as a set of legal norms that obliges and conforms the States' behaviors. Whether it can and should be discussed the extent of effective power and legitimacy of International Law of Human Rights in a wide range of perspectives,[10] States have agreed universally[11] to take further the commitments to human rights since the adoption of the Universal Declaration of Human Rights in 1958, giving birth to a system that has matured to a complex normative and institutional structure.

While human rights as a normative concept and the International Law of Human Rights (ILHR) as a source of legal obligations are both widely accepted, the implementation of those rights at the national level still poses a huge challenge. The gap between legal commitment and implementation has as one of its causes the nature of International Law, from which ILHR is derived, as a consensual agreement based on reciprocity among the States.[12] Thus, there is a fine line between cooperation and sovereignty drawing the extent and the power of implementation of the State's legal obligations at the national level.

Still concerning implementation, human rights norms have a different component from other international legal regimes. The British scholar Engstrom explains that "human rights regimes are not generally enforced by interstate action,"[13] but by the States themselves at the national level, in a context of "state-society relations".[14] Because of that feature, the level of compliance and engagement with human rights are directly affected by internal economic, social, and political contexts. While the level of compliance might be challenged by the diversity of these

[10] *See* Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen, eds., *International Court Authority*, First edition, International Courts and Tribunals Series (Oxford, United Kingdom: Oxford University Press, 2018), and B. Çalı, Anne Koch, and N. Bruch, "The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights," 2013, https://doi.org/10.1353/hrq.2013.0057.
[11] *See* Jack Donnelly, "The Relative Universality of Human Rights," *Human Rights Quarterly* 29, no. 2 (2007): 281–306, https://doi.org/10.1353/hrq.2007.0016.
[12] Rhona K. M. Smith, *International Human Rights Law*, Ninth edition (Oxford: Oxford University Press, 2020), 13.
[13] Par Engstrom, "Effectiveness of International and Regional Human Rights Regimes," in *The International Studies Encyclopedia* (Blackwell Publishing, 2010), 3.
[14] Haglund, *Regional courts, domestic politics, and the struggle for human rights*, 8.

contexts, it also indicates the relevance of regional mechanisms and the comprehension of a multi-level pathway through human rights implementation, in which implementation tools and solutions should be designed context-specific.

As reasoned by the political scientist Haglund,[15] ILHR is enforced by United Nations (UN) bodies and its diverse monitoring mechanisms, which are mainly responsible for standard setting through the definition of a minimum core and substance of human rights, and for encouraging domestic policies. Meanwhile, regional systems can advance in the protection of rights on the specific challenges and main issues of each region. Therefore, as explained by the Brazilian scholar and former Inter-American Commissary, Piovesan, the global and regional systems are not diatomic, but essentially complementary.[16] The complementarity between both levels can be understood through a multicultural perspective of human rights introduced by Boa Ventura de Souza Santos. The Portuguese sociologist argues, in synthesis, that the interaction between global and regional should not be seen as fragmentation of IHRL, but as a precondition of human rights defined by the author as the balance between global competence and local legitimacy.[17]

Concerns about the multiplicity of sources and consequent fragmentation and weakening of ILHR can be disentangled by observing the origins and the daily practice of regional systems. The human rights regional documents are highly inspired by human rights international treaties, and might even mirror some of its provisions, creating cohesion, and not competition, between the two normative systems.[18] Concerning their practice, ILHR standards function as interpretative canons for regional courts.[19] As explained by Haglund, "[r]egional (or supranational) human rights courts are *international* in nature, and when states accept their jurisdiction, regional courts have the authority and legal backing necessary to interpret international law".[20] The Inter-American Court of Human Rights (IACtHR), in special, made

[15] Haglund, *Regional courts, domestic politics, and the struggle for human rights*, 8.
[16] Flávia Piovesan, *Direitos Humanos e Justiça Internacional*, 5th ed. (São Paulo: Saraiva, 2014).
[17] Boaventura de Souza Santos, "Uma Concepção Multicultural de Direitos Humanos," *Lua Nova: Revista de Cultura e Política*, no. 39 (1997): 105–24, https://doi.org/10.1590/S0102-64451997000100007, 112.
[18] Flávia Piovesan, *Direitos Humanos e Justiça Internacional.*
[19] The Inter-American Court of Human Rights applies the Vienna Convention of the Law of the Treaties and the cannons and practices of the International Law in general. In the case Bejamin *et Trindad and Tobago* the Court stated its interpretation is conducted "in accordance with the canons and practice of International Law in general, and with International Human Rights Law specifically, and [in a manner] which awards the greatest degree of protection to the human beings under its guardianship." See Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, Second Edition (Cambridge: Cambridge University Press, 2013). 12.
[20] Haglund, *Regional courts, domestic politics, and the struggle for human rights*, 9 [marks from the author].

it clear that it applies the *corpus juris* of ILHR, which comprises treaties, conventions, resolutions, and declarations. The role of the IACtHR has been of contributing to the harmonization of international law, and not the opposite. [21]

Besides its capacity to capture local diversity of human rights issues, it is within regional systems that operate the "only supranational (operate above the level of state) judicial bodies designated to hold states accountable for human rights abuses".[22] Currently, there are three established Regional Human Rights Courts: the African Court on Human and Peoples' Rights (ACtHPR), the European Court of Human Rights (ECtHR), and the Inter-American Court of Human Rights. Each one of them was established within a supranational organization, respectively, the African Union (AU), the Council of Europe (CoE), and the Organization of the American States (OAS). They have, under their jurisdiction, the mandate to promote and protect human rights by advisory or contentious activity through inter-State complaint or individual petition systems.

One of the many consequences of RHRC as exclusive supranational jurisdiction which held States liable[23] is that a great part of discussions, and development of substantive human rights, are transcribed by daily activity and crystalized in their case law. Court's decisions not only consider international developments of IHRL but also domestic practices and constitutional principles of State parties[24], creating a bridge between local and global levels. Thus, supranational human rights jurisdictions locate themselves in a relevant position. As described by Engstrom,

> [t]he establishment of supranational jurisdiction over fundamental political choices and decisions underscores the extent to which current trends in global governance have led to the emergence of a transnational political space in the field of human rights and emphasises the depth of interaction between international human rights developments and national-level political and legal debates.[25]

While establishing RHRC within supranational organizations signalizes the importance of human rights for the region's political arena, it consequently creates an intermediary level for

[21] Pasqualucci, *The practice, and procedure of the Inter-American Court of Human Rights*, 13.
[22] Haglund, *Regional courts, domestic politics, and the struggle for human rights*, 8
[23] The International Criminal Court held individuals liable by violations of the Rome Statue (1998).
[24] Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*, 13.
[25] Par Engstrom, "Effectiveness of International and Regional Human Rights Regimes", 12.

protection and monitoring human rights, as well as correcting national practices. Those Human Rights Courts are in a strategic position to impact State's behavior regarding human rights. They are in an intermediary level between the UN, as the standard setting, and the local level, where implementation of human rights effectively takes place.

2. Regional Human Rights Jurisdictions: institutional features of change

While some authors claim the urgent necessity of an international human rights jurisdiction to hold States accountable,[26] it is also argued that regional human rights courts have special institutional features which make them "uniquely suited to influence states' human rights practice".[27] In that concern, Haglund lists three elements: the exclusive membership of those courts, their mechanism of influence, and institutional independence. The author conducted extensive research on the correlation between adverse judgments held by regional courts and the deterrence of human rights violations at the national level.[28]

Concerning the exclusive membership, we can recall the vocation of RHRC for capturing regional specificities. Haglund explains that the membership of a regional body is limited by some criteria. In case, RHRC are geographically restricted and while the UN treaty bodies might be "relatively removed from the political context of the countries where they make recommendations or make judgments",[29] regional courts have "greater familiarity with the domestic legal and institutional structure of the states (...) including public sentiment associated with particular cases".[30] As observed by the Professor Pasqualucci, in her book concerning Practices and Procedures of the IACtHR, "[r]egional human rights organs […] have an understanding of the cultural, historical, and legal background of the States in the system and thus can better evaluate human rights claims and craft relevant reparations".[31]

The geographic attachment allows RHRC to get to know and delimit the factual situation of the cases and award adequate remedies to a specific context. The courts' insertion in the regional

[26] Flávia Piovesan, *Direitos Humanos e Justiça Internacional*.
[27] Haglund, *Regional courts, domestic politics, and the struggle for human rights*, 8.
[28] Ibidem, 10.
[29] Ibidem.
[30] Ibidem.
[31] Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*, 4-5.

context permits them to assess local specificities and identify cases of structural violations of human rights. A better assessment of the factual situation and the harm caused by the State is essential to arbitrate reparation measures.[32]

It should be considered, however, that RHRC are not uniformly distributed globally. First, there are only a few States covered by one of the 3 existing regional courts. Not all the regional organizations enacted binding human rights documents, nor established a correlated jurisdictional body, as is the case of the Association of Southeast Asian Network and the Arab League. Even within the three recognized RHRC, not all the member States accepted the jurisdiction of the correspondent courts. This is precisely the case of the OAS, where key political actors of the region, such as the United States and Canada, did not ratify the Inter-American Convention nor accepted the Court's jurisdiction.[33] In fact, only 22 out of the 33 member States of the OAS accepted the jurisdiction of the Court.[34]

The second institutional feature mentioned is the mechanism of influence. Haglund argues that regional courts are more apt to answer to the enforcement challenges of human rights when compared with other international bodies due to the binding force of their judgments. Conversely from international human rights treaty bodies and other monitoring mechanisms that issue recommendations, the RHRC can "hold states accountable by rendering adverse judgments against states and monitoring state behaviors post-judgment".[35] She continues stating that "clear legal censure provided by an adverse court ruling may be more difficult for political actor to overlook, particularly when compared to recommendations from international human rights bodies."[36]

The judicialization of human rights and the growing importance of human rights courts are part of the tendency of the legalization of international law in the past decades. As described by Abbot and Snidal, in this context, States opted for the development of hard law instruments to establish their commitments. When the States give interpretative authority to courts, they intend

[32] This will be dealt in depth in Chapter 2, when tackling with structural human rights and guarantees of non-repetition.
[33] Organization of American States, Inter-America Commission of Human Rights, "Basic Documents - Ratifications of The Convention". 2022. https://www.cidh.oas.org/basicos/english/Basic4.Amer.Conv.Ratif.htm.
[34] Ibidem.
[35] Haglund, *Regional courts, domestic politics, and the struggle for human rights*, 9.
[36] Ibidem, 11.

to enhance credibility and constraint self-interpretation of the co-obligations. [37] The authors explain that "legal review allows allegations and defenses to be tested under accepted standards and procedures, it increases reputational costs if a violation is found".[38] Whether ultimately it depends on the States' political will to execute the courts' decisions, violating a sentence of a regional court entails high reputation costs.[39] Since international legal practices are built on compliance (*pacta sun servant* and good faith principle*)*, reputation effects are very costly, especially if the States consider themselves part of an international community.[40]

Therefore, the creation of legal obligations in the international arena is one of the manners to increase the credibility of States' commitments.[41] This practice might also explain why State's reputation concerns play a relevant role in international politics. As highlighted by Donnelly, mobilizing shamming is known to be one of the principal ways of persuasive diplomacy of human rights in international politics.[42] On that matter, shamming functions as a virtuous cycle on State's compliance with RHRC's decisions. While the high level of publicity given to most of the proceedings in front of a Court can function as a relevant spotlight to mobilize shame against States, shame can also be used to compel States to adequate their practice with the Court's orders.

The last feature mentioned by Haglund is the institutional independence enjoyed by the Regional Courts, which is a characteristic of the judicial bodies in general. Courts, as interpreters of the law, are "considered to be apolitical in nature"[43] and autonomous from the political branches to exert their mandate. In the case of RHRC, the mandate consists of determining whether there was a breach of the State's obligations under the convention through an independent analysis of the facts of the case.[44]
The RHRC's independence is secured by a series of guarantees, such as the composition of the court by highly qualified specialists of human rights from the member states. The judges are elected in their own capacity for a pre-determined period, securing they will not be removed

[37] Kenneth W. Abbott and Duncan Snidal, "Hard and Soft Law in International Governance," *International Organization* 54, no. 3 (ed 2000): 421–56, https://doi.org/10.1162/002081800551280.", 427.
[38] Ibidem, 427.
[39] Ibidem, 422.
[40]Ibidem, 428.
[41] Ibidem, 426.
[42] *See* Jack Donnelly and Daniel J. Whelan, "Human Rights and Foreign Policy," in *International Human Rights*, Sixth edition (New York, NY: Routledge/Taylor & Francis Group, 2020).
[43] Haglund, *Regional courts, domestic politics, and the struggle for human rights*, 11.
[44] Ibidem, 11.

arbitrarily. In addition, the judges do not serve the States but hold fidelity to the protection of the human rights enshrined in the Convention.[45] The Rules of Proceeding of the IACtHR prescribe that judges should refuse from consideration of a case if she/he is a national of the State Party concerned.[46] However, there are a series of challenges to maintaining the RHRC's independence. For example, the composition of the courts still has a highly political component, since the judges are primarily indicated by the State's executive branch and then elected by the organization's governing body, as is the case of OAS.[47]

In addition, courts might suffer budgetary constraints, since the allocation of funds (and its consequence expansion) is decided, not rarely, by the same governing body composed of representatives of State Parties. We note that RHRC are not only a creation of States, but they are, ultimately, financed by that same States. Known for its budgetary insufficiency[48], IACtHR's situation pictures the financial issue of RHRCs. Besides OAS funds, the Court received in 2021, 20.6% of its budget directly from Member States.[49]

To further illustrate the political tension of Regional Human Rights Systems' budget, in April 2011 the Inter-American Commission[50] ordered injunction measures against the construction of the hydroelectric plant of Belo Monte, located in the Xingu River Basin of the Amazonian rainforest within the land of the indigenous community of the same name. The order included the immediate interruption of the licensing procedure, and any material construction acts. It was received by the Brazilian govern as "precipitous and unwarranted"[51], which refused to comply. In the same period, Brazil sent back its OAS envoy and threatened to suspend the Commission's funding, alleging austerity measures.[52] After Brazil's written response, in June

[45] Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*, 9.
[46] Article 19, OAS, Rules of Procedure of the Inter-American Court of Human Rights, OEA/Ser.L/V/I.4 rev. 13, 30 June 2010. Available at http://www.corteidh.or.cr/reglamento.cfm
[47] Haglund, *Regional courts, domestic politics, and the struggle for human rights*, 11.
[48] Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*, 24.
[49] From the 2021 Annual Report, the IACtHR received 58.1% of the from the OASs, 20.6% from the Member States, 15.2% from Permanent Observers, and 6.1% from other Institutions. *See* Organization of American States (OAS), *Inter-American Court of Human Rights, Annual Report 2021.* Available at: https://www.corteidh.or.cr/docs/informe2021/ingles.pdf [accessed 15 September 2022], 1136.
[50] The Inter-American System, as it will be explained better on Chapter 3, has a dual petition system, as the Inter-American Commission the recipient of States complains, and individuals petitions that will be forward later to the Court.
[51]"OEA Pede Que Brasil Suspenda Belo Monte, E Governo Se Diz 'Perplexo' - BBC News Brasil". 2011. *BBC News Brasil*. https://www.bbc.com/portuguese/noticias/2011/04/110405_belomonte_oea_pai
[52] "OEA Pede Que Brasil Suspenda Belo Monte, E Governo Se Diz 'Perplexo' - BBC News Brasil". 2011. *BBC News Brasil*. Available at: https://www.bbc.com/portuguese/noticias/2011/04/110405_belomonte_oea_pai

of the same year, the Commission altered the measures to a more generic request for the protection of the local indigenous communities.[53]

Although courts should not be guided by political pragmatism and the States' bidding obligations are not negotiable, there is a delicate balance between courts' public support and States' compliance. Courts' strength and compliance depend on their very limited enforcement mechanisms. In some courts execution of the sentence can be delegated to another body, as in the case of ECtHR.[54] In others, the court itself monitors the execution of the decision and lacks political support, such as in the IACtHR.[55] Ultimately, compliance depends more on State's reputation costs than on specific enforcement mechanisms. At the same time, such costs are directly proportional to the public support and recognition of the court. In other words, the more courts' orders are followed, the more States are constrained to behave in accordance, creating a circular effect that can be enforced with the support of civil society and external pressure on local governments.

Irrespective of the issues mentioned, it is argued that supranational courts might not face "the same threats to independence from other political actors, such as executive or legislative",[56] as it occurs at the national level. The Regional Court's distance from the national political arena and its supranational character renders them relatively independent to hold judgments that, at the national level, could be intercepted by the political majority.

A case that illustrates this is the current role of the Court of Justice of the European Union (CJEU) in answering to threats to the Rule of Law in Poland and Hungary.[57] The CJEU is not

[53] "The IACHR requested that the State: 1) Adopt measures to protect the lives, health, and physical integrity of the members of the Xingu Basin indigenous communities in voluntary isolation and to protect the cultural integrity of those communities, including effective actions to implement and execute the legal/formal measures that already exist, as well as to design and implement specific measures to mitigate the effects the construction of the Belo Monte dam will have on the territory and life of these communities in isolation". *In: Case of Indigenous Communities of the Xingu River Basin, Pará v. Brazil*. Inter-American Commission of Human Rights, PM 382-10 (April 1st, 2011). Available at: http://www.oas.org/en/iachr/decisions/precautionary.asp?Year=2011 [accessed on August 12, 2022].

[54] In the European HRS, the Committee of Ministers supervises the execution of judgments, as provided by Article 46 of the ECHR. See Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950.

[55] The IACHR has a similar provision of Article 46 of the ECHR, but non-compliance reports should be followed to the OAS General Assembly. However, the political organ has never issued a comment on States non-compliance with judgments of Courts. Authors, as Pasqualucci claims, the political enforcement of IACtHR has, therefore, failed. See Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*, 28.

[56] Haglund, *Regional courts, domestic politics, and the struggle for human rights*,11.

[57] See Matteo Bonelli and Monica Claes, "Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical Dos Juízes Portugueses.,"

a regional human rights body, but as RHRC it possesses a supranational character, which makes it relatively independent from the national political arena. Because of that characteristic, the CJEU has been able to issue decisions on the Rule of Law and judicial independence, regardless of the political pressure and persecution some judges have been facing at the national level in their countries.

The three features combined situate Regional Human Rights Courts in a special position to influence States behavior concerning human rights. These bodies are close enough to capture regional diversity and distant enough to secure they are not dragged or influenced by local governments. In addition, their commands have legally binding force and, therefore, enclose higher reputation costs for the States. Thus, their sentences are harder to be overseen if compared with the recommendations of monitoring bodies.

The study of those institutional features is relevant to understand not only why States are more likely to follow Court's decisions and alter their behavior on human rights both at the international and national level, but also why RHRC are more indicated to impose far reaching measures that have impacts on State's governmental structures. State's institutional design. While the work of monitoring bodies for advancing human rights should be not underestimated, Leloup argues that structural human rights are result of legal binding decision from Human Rights Courts.[58]

Therefore, to understand how these courts can influence the States is important to grasp both the courts' institutional features, but also the type of measures States are obliged to follow because of a decision of a RHRC. The direct tools to influence on States' practice concerning human rights are the remedies. These measures are derived from the recognition of State's responsibility and correlated obligation to repair. Remedies will describe the necessary measures and changes States should undergo to comply with the rights enshrined by the regional binding documents.

European Constitutional Law Review 14, no. 3 (September 2018): 622–43, https://doi.org/10.1017/S1574019618000330.

[58] Topic will be dealt on Chapter 2.

3. Human Rights Regional Courts remedies[59] as tools of change

Remedies in the International Law of Human Rights are not only a consequence of State's responsibility for wrongdoings, but also an extension of the compromise of States to respect, protect, and promote human rights.[60] The United Nations Human Rights Committee (UNHRC) in the General Comment n. 31 affirmed about the content of the right to an effective remedy,[61] that "without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged."[62] It means that without the legal obligation to offer an effective remedy, human rights legal obligations would be void, no more than a moral suggestion, leaving it to the States the choice whether to repair injuries and correct their behavior towards human rights.

In general, the term remedies can designate at the same time procedural and substantive mechanisms[63]. Procedural mechanism comprises the victim's right to access justice and the possibility to make a claim, whether in front of an administrative or judicial branch. While the substantive element refers to the measure designated to redress or relieve the victim as the result

[59] Concerning terminology, as explains Shelton, some authors also use the term reparations to define the full range of substantive remedies others in a narrow sense refers to reparation as financial compensation (Shelton, Remedies in international human rights law, 32). The practitioners Guide on Remedies also explains: "measures of reparation are recognized in many forms under international law […]. It is impossible to find a coherent terminology for all systems or countries. One finds the general term 'reparation' (Article 34 of the ILC Articles on State Responsibility for Internationally Wrongful Acts), 'compensation' (official English version of Article 9(5) ICCPR)505 'remedy and compensation' (Article 63ACHR), 'reparation' or 'just satisfaction' (Article 41 ECHR),'redress and adequate compensation' (14 CAT), 'just and adequate reparation or satisfaction' (Article 6 CERD),'compensation' (Article 91 First Add. Prot), 'reparation, including restitution, compensation and rehabilitation'(Article 75 of the Rome Statute of the ICC), to name only some examples."'(Cordula Droege, *The Right to a Remedy and to Reparation for Gross Human Rights Violations - A Practitioners Guide*, Revised (Geneva: International Commission of Jurists, 2018)., 157-158). Here, the term reparations will be used generically, and we will call remedies the diverse types of orders a RHRC can determine in response of an adverse sentence against a State. Even though, remedy, redress and reparation might appear along the text as synonymous of actions or measures to repair violations.

[60] United Nations General Assembly. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, No. A/RES/60/147 (2005).

[61] "3. Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;(c) To ensure that the competent authorities shall enforce such remedies when granted." United Nations General Assembly, International Covenant on Civil and Political Rights (Entry into force 1976).

[62] Human Rights Committee, General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, No. CCPR/C/21/Rev.1/Add.13 (2004) https://www.refworld.org/docid/478b26ae2.htm

[63] Shelton, *Remedies in international human rights law*, 114.

of the proceeding's successful claim.[64] The focus of the present study is on the substantive remedies granted by Regional Courts of Human Rights, after the recognition that the State violated one or more correlated obligations of the human rights regional convention concerned.

According to the subsidiarity principle, applicants should only access a RHRC after exhausting the domestic remedies available "without affording the adequate relief"[65], or if they prove that there are no available or adequate procedural remedies at the domestic level. Therefore, accessing regional courts depends first on seeking and exhausting domestic procedural and substantive remedies. As explained by Antkowiak, "[t]his means that these institutions cannot find a State responsible for breaching its international legal obligations until it first has had a fair opportunity to address and remedy the situation".[66] The primacy of domestic courts is not only a matter of sovereignty, but they are also more suitable to provide an accurate and faster answer to the claims, due to their geographical proximity to the facts and a more comprehensive evidentiary activity.

The cases that reach RHRC are generally related to a lack of adequate remedies on domestic legislation, or to the impossibility to address the specific issue due to political interference and lack of judicial independence, which is especially true if the State is the perpetrator of the violations. As denoted by Pasqualucci, in general:

> [w]hen injured by the action of a State, an individual's only recourse was to convince his or her government to file a complaint. If that government were the violator, the victim had no recourse. When human rights abuses became endemic, only rarely did one State complain or take action against another, and these actions were often politically motivated. [...] The drafters of the American Convention had the foresight to give individuals the right to petition.[67]

For the victims, it is already relevant to be able to access RHRC. There they will be listened to and will have a standing place that was denied to them at the national level.[68] For these reasons,

[64] Antkowiak, "Remedial Approaches to Human Rights Violations", 356.
[65] Shelton, *Remedies in international human rights law*, 2.
[66] Antkowiak and Gonza, The American Convention on Human Rights, 10.
[67] Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*, 5.
[68] Geneviève Lessard, "Preventive Reparations at a Crossroads: The Inter-American Court of Human Rights and Colombia's Search for Peace," *The International Journal of Human Rights* 22, no. 9 (October 21, 2018): 1209–28, https://doi.org/10.1080/13642987.2016.1268405, 1209. Here the author uses the term Reparation as equivalent to substantive remedies.

the decision can be considered itself a "reparation". Illustrating that, the IACtHR before arbitrating the orders enunciates that "[t]his judgment constitutes per se a form of reparation".[69] The importance of social recognition granted by a declaratory sentence and the disclosure of the truth cannot be discarded, not only to the victims and their families. The publicity of the proceedings itself helps to fuel civil society dialogues regarding awareness of human rights. However, it is through substantive remedies that courts can impact directly on, firstly, the victims' life through reparation and compensation, and, secondly, on State's behavior through non-repetition measures with institutional structural impact, preventing future violations. As the Colombian jurist, Lessard noted, "reparations are the means by which international bodies truly exert their influence"[70].

The sentence of a RHRC recognizing the State's responsibility in a specific case, besides the declaration of the conventional provisions violated, not rarely will determine in the remedies section some conducts the State should undertake to repair, compensate and/or, cease the violation. The extent of the measures will consider not only the graveness of the violation but also the victims' conditions.

3.1 State responsibility for failure on human rights obligations and the duty to repair

In domestic legal systems, the breach of legal obligation will give rise to the duty to repair, if proved the link between the author, the conduct, and the harm caused. Even though there are necessary adaptations to be made, State's responsibility also arises from a breach of a legal obligation, but in this case, an international one.

The main principles concerning State Responsibility in International Law can be found in the Report of the International Law Commission of 2001 (referred to here as "ILC Report"),[71] which provides that when State responsibility is verified, there is a duty to repair the wrongdoing.[72] The basic elements of State responsibility are the same for all types of

[69] *Case of González et al. ("Cotton Field") v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Inter-American Court of Human Rights, Series C No. 205 (Judgment of November 16, 2009, Orders, parag. 11.
[70] Lessard, "Preventive Reparations at a Crossroads.", 1209.
[71] Report of the International Law Commission (ILC) on the Work of Its Fifty-third Session, UN Doc. A/56/10 (2201). The General Assembly took note of the ASR in UNGA Re. 56/83, 12 de December 2001.
[72] Ibidem.

obligations in the international sphere independently of the nature of the obligation: the breach of an international obligation which constitutes wrongdoing of the State and gives rise to State responsibility.[73] However, even if the reparation for human rights violations might be rooted in the doctrine of inter-state responsibility, it is not restricted to it.[74]

Shelton alerts us to the fact that the logic applied to international obligations might not be fully compatible with human rights obligations, since they generally do not concern inter-state relations, but state-individuals' relations.[75] In addition, the right to a remedy derives, on one side, from the failure of the State's general obligation to "respect, ensure respect for and implement international human rights law"[76] and, on the other, from a specific situation of violation of the rights of an individual or a group of individuals. Thus, there are State's primary obligations concerning the human rights international documents and the correlated secondary obligation to repair when the State violates those primary obligations.[77]

The content of human rights primary obligations can be extracted from the human rights treaties, the customary international law, and from the domestic legislation of each State. As explained in the UNHRC Comment n. 31, the nature of State's legal obligations that are derived from human rights is *erga omnes.*[78] This means that human rights obligations are binding towards the international community as whole, so all States can vindicate the realization of human rights,[79] even if there was no direct harm caused to the State's jurisdiction or its citizens. It is the interest of all States to protect and promote those essential rights. Secondly, the obligation is extended to all the sectors of the State, which means that all the government branches have obligations to promote/respect/fulfill human rights. Thus, even if the executive might represent the State in the international arena, all the acts undertaken by other bodies are part of the State's responsibility and can hold the State liable, as provided by both the UNHRC

[73] Katja Creutz, *State Responsibility in the International Legal Order* (Cambridge, United Kingdom; New York, NY, USA: Cambridge University Press, 2020), 16.
[74] Yulia Ioffe, "Reparation for Human Rights Violations," in *Elgar Encyclopedia of Human Rights* (Edward Elgar Publishing Limited, 2022), https://doi.org/10.4337/9781789903621.reparation.human.rights.violations.
[75] Shelton, *Remedies in international human rights law*, 59
[76] United Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law". Resolution/RES/60/147, 16 December 2005.
[77] María Carmelina Londoño Lázaro and Mónica Hurtado, "Las Garantías de No Repetición En La Práctica Judicial Interamericana y Su Potencial Impacto En La Creación Del Derecho Nacional," *Boletín Mexicano de Derecho Comparado* 50, no. 149 (May 2017), 733.
[78] Human Rights Committee, General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, No. CCPR/C/21/Rev.1/Add.13 (2004), parag. 2.
[79] Shelton, *Remedies in international human rights law*, 59.

Comment n. 31[80] and by the United Nations General Assembly Basic Principles and Guidelines on the Right to a Remedy (referred here as "Basic Principles").[81]

The Basic Principles also describe the conducts the States should undertake to honor the human rights commitments, such as the incorporation of ILHR and IHL into their domestic system, implementation of legislative and administrative measures to provide fair and effective access to justice, and ensure that domestic laws provide the same or higher protection for victims than international law.[82] If the States, failing to undertake those commitments, cause harm through action or omission, the victims have the right to an "effective, prompt and appropriate"[83] remedy.

3.2 Guiding principles

From the fundamental difference between legal rules and principles,[84] the right to a remedy is generally formulated as a legal principle, characterized as a legally binding obligation, as well as having the normative openness necessary by weight depending on the circumstances of the concrete case. As mentioned, the principle entails a procedural and a substantive character, meaning that someone that was harmed by an action or omission of a State, in violation of a legal obligation, is entitled to access justice effectively (procedural) and to receive a reparation proportional to the injury supported (substantive).

The arbitration of remedy in human rights law should be guided by a series of principles extracted from international documents and supranational courts case law, such as victim-based approach to remedies, the right to victims' access to justice and the integral restitution, which we will tackle below.

[80] Human Rights Committee, General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, No. CCPR/C/21/Rev.1/Add.13 (2004), parag. 4.
[81] United Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law". Resolution/RES/60/147, 16 December 2005.).
[82] Ibidem, I (1).
[83] Ibidem, I (2) b).
[84] Ronald Dworkin, *Taking Rights Seriously*, Paperback ed, Bloomsbury Revelations Series (London: Bloomsbury, 2013), 49-52.

As argued by the jurist Cançado Trindade, it is well established by RHRC that individuals are the right bearers of the right to remedies in international law of human rights[85]. After the World War II, human rights claims broke off the barriers of national jurisdictions, being recognized as an international right, and, therefore, victims could pursue their claims of reparation and redress also before international jurisdiction.[86] Progressively, obtaining remedies in front of courts also became part of the requirement to achieve justice, positioning victims in the center of reparations' concerns. The Basic Principles highlights that remedies for human rights violations should have primary a "victim-oriented perspective"[87]. As denoted by Professor Van Boven, the document meets the growing awareness with the "prevalence of victims' rights",[88] and it defines victims as:

> [p]ersons who individually or collective suffered harm, including physical or mental injuring, emotional suffer or economic loss or substantial impairment of their fundamental rights through acts or omission that constitutes gross violations of international human rights law or serious violations of international humanitarian law.

The document also explains that the right to the effective remedy englobes the "equal and effective access to justice", "adequate, effective, and prompt reparation for harm suffered" and "access to relevant information concerning violations and reparation mechanism".[89] In addition, it provides that reparation should be proportional to the gravity of the violation and the harm suffered".[90]

The former Permanent Court of International Justice of the League of Nations (PCIJ), defined long ago in the landmark case *Factory at Chorzów*, that remedies "must, as far as possible,

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[85] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Dissident opinion of Judge Cançado Trindade, International Court of Justice (3 February 2012).
[86] Theo van Boven, "Victims' Rights to A Remedy and Reparation: The New United Nations Principles and Guidelines," in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, ed. Carla Ferstman, Mariana Goetz, and Alan Stephens (Brill | Nijhoff, 2009), 17–40, https://doi.org/10.1163/ej.9789004174498.i-576.7., 16.
[87] United Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, No. RES/60/147 (16 December 2005).
[88] Theo van Boven, "Victims' Rights to A Remedy and Reparation", 16.
[89] United Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, No. RES/60/147 (2005), Section VII, parag. 11.
[90] United Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, No. RES/60/147 (2005), parag. 15.

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"[91]. This excerpt transcribed the principle *restitutio in integrum,* which has been consistently applied in the case law of the International Criminal Court (ICC), the IACtHR, and the ECtHR.[92] Concerning human rights, violations, however, there are many limitations on restoring the past and healing permanent traumas of victims. Additionally, this interpretation of the principle, might not be adequate for situations of structural inequalities, where a prior position is a place of vulnerability, and the victim can be exposed to similar violations.[93]

To apply the adequate remedy, the court should identify the harm caused by a human rights violation. This task is complex and demands assessing many factors, such as the specific rights violated, the gravity and the extent of the harm caused, and if the conducts are part of a pattern or a recurrent practice. Also, the identification should take into consideration the individual characteristic of the victims, such as age, gender, ethnicity, socio-economic condition, community stigma suffered, and others, explains Shelton[94]. Those elements will be essential to define the adequate types of remedies and their extent to repair, cease and prevent future violations.

3.3 Right to a remedy and its legal sources in International Law

Concerning its legal sources, some scholars as Shelton affirms[95] that the right to a remedy for human rights violations is a norm of customary international law. The same statement has been made by the Inter-American Court of Human Rights since the case *Aloeboetoe v Suriname,* declaring that Article 63(1), of the IACHR, "codifies a rule of customary law which, moreover, is one of the fundamental principles of current international law […]."[96] The same can be said of the landmark case of *Factory at Chorzów*, which has as another important contribution the confirmation that all violations of international law entail a duty to repair, whether mentioned

[91] *Case of Factory at Chorzów; Germany v Poland.* Order, Merits, Permanent International Court of Justice**,** PCIJ Series A no 17; ICGJ 256 (PCIJ 1928) (13 September 1928), parag. 29 and 47-48.
[92] Antkowiak, "Remedial Approaches to Human Rights Violations", 360.
[93] See Chapter 3.
[94] Shelton, *Remedies in international human rights law*, 13.
[95] Ibidem, 28-29.
[96] *Case of Aloeboetoe et al. v. Suriname. Reparations and Costs. Inter-American Court of Human Rights, Series C No. 15 (Judgment of September 10, 1993),* parag. 43.

expressly or not in the respective international document, because the right to repair is a norm of customary law[97]. Therefore, independently of ratification of the legal documents that will be mentioned bellow, States would have the duty to offer remedy in response of a violation of human rights.

In addition, the right to a remedy has been positivized in the main international and regional human rights instruments, from the founding Article 8 of the Universal Declaration of Human Rights (UDHR, 1948), which states that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law"[98], to the more recent articles 68 and 75 of Rome Statue (1998). These provisions define, respectively, the protection of victims and witnesses participating in the ICC's proceedings and the specific provisions on reparation to victims, including the establishment of a Trust Fund to offer effective remedies to the victims of crimes against humanity.[99]

Most of the mentioned provisions contain similar wording and demand effective remedy for the victims, but, as highlighted by the North American jurist Antkowiak "they do not offer specific guidance as to how states should undertake to repair violations of any character, much less of that terrible scale." [100] The most comprehensive document at international level is the previous mentioned UNGA's Resolution on Basic Principles and Guidelines on the Right to a Remedy[101] adopted in 2005. The resolution set the core principles for reparations in human rights violations extracted from international and regional human rights treaties.. As a soft law document, it assures not to create any new legal obligations for States but only to identify the "mechanism, modalities, procedures and methods for the implementation of legal obligations under international human rights law and international humanitarian law"[102]. Regardless of

[97] Droege, The Right to a Remedy and to Reparation for Gross Human Rights Violations - A Practitioners Guide, 153.
[98] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Article 8.
[99] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, Article 75. Reparations to victims.
[100] Antkowiak, "Remedial Approaches to Human Rights Violations", 356.
[101] UNGA Resolution/RES/60/147 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".
[102] United Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, No. RES/60/147 (2005), Preamble.

that, the document has high interpretative value for arbitrating remedies for human rights violations, including at the regional level.

Concerning regional documents, the human right to an effective remedy is referred on Article 7 of the African Charter on Human and Peoples' Rights (ACHPR),[103] Article 25 of the American Convention on Human Rights (ACHR),[104] and Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[105]. While there are diverse provisions in each document regulating the competence of regional courts to award remedies, the human right to an effective remedy is the substantial sources of this competence.

As we noted, due to the subsidiarity principle, when the States fail to offer effective remedy, by not recognizing the violation priorly or by not addressing properly the reparation, Regional Courts can access the factual situation to define State's responsibility for the violation and order remedies. All regional conventions also gave competence to their jurisdictional bodies to award remedies to victims in case State's responsibility is ascertained. If from one side the human right to a remedy is prescribed in a very similar wording, each one of the three documents have language specificities that are not even close to the diversity of how the courts apply their

[103] "Article 7. (1). Every individual shall have the right to have his cause heard. This comprises: 1. The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; 2. The right to be presumed innocent until proved guilty by a competent court or tribunal; 3. The right to defence, including the right to be defended by counsel of his choice; 4. The right to be tried within a reasonable time by an impartial court or tribunal.
(2). No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offense for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender". *In* Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

[104] "Article 25. (1). Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
(2) The States Parties undertake a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; b. to develop the possibilities of judicial remedy; and c. to ensure that the competent authorities shall enforce such remedies when granted". *In* Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969.

[105] Article 13. Right to an effective remedy. Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. [Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5].

arbitrated remedies. From the oldest to the newest document, the European Convention on Human Rights provides in article 41 the right to a "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.[106]

The dispositive contained in the Inter-American Convention, on the other hand, is broader, giving more space for the Court to arbitrate the remedies. Article 63(1) provides as it follows:

> 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[107].

When arbitrating the remedies, the Inter-American Court not rarely combines the provision above with Articles 1 and 2, expanding its mandate to order remedies. Those articles prescribe, respectively, the legal obligations to respect rights and to ensure free and full access to the conventional provisions, and the domestic legal effects of the Convention. Concerning the last provision, the joint reading given by the Court of Articles 2 and 63 makes it possible to amplify the extent of remedies to arbitrate guarantees of non-repetition, such as requirements of legislative change to prevent future human rights violations. These types of broad measures can be extracted from the wording of Article 2, which states that Contracting parties should adopt "legislative or other measures as may be necessary to give effect to those rights or freedom", [108] and has been applied consistently by the IACtHR.[109]

Lastly, the Protocol to the African Convention that established the ACtHPR in 2004, more in line with the provision of the Inter- American Court, as denoted by Antkowiak, "offers the Tribunal wide-ranging remedial competence",[110] as described below:

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[106] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950.
[107] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose",* Costa Rica, 22 November 1969.
[108] Ibidem.
[109] Lázaro and Hurtado, "Las Garantías de No Repetición en la Práctica Judicial Interamericana", 759.
[110] Antkowiak, "Remedial Approaches to Human Rights Violations, 359

> Article 27: Findings
> 1. If the Court finds that there has been violation of human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.[111]

While a right to a remedy as transcribed in the international documents serve as the baseline for State responsibility at domestic level, the last diapositives are the legal tools through which RHRC remediate State's violation of human rights at supranational level. Those Regional Courts more than recognizing the violation, can indicate adequate and effective remedies to address human rights violation and secure the rights of the victims.

4. Modalities of remedies and the correlated purpose

More than a in depth study of each regional system, the present research aims to identify the main types of remedies that appears coherently, not only in the legal framework, but also in the practice of regional courts. To recall, the main topic of inquiry of this study is to search for the correlation of human rights secondary obligations transcribed by remedies and the imposition of structural obligations and institutional change to States. Therefore, the aim of this topic is to identify the existent tools and correlated impact on Court's practice, localizing within this practice the mechanisms that can transcribe structural changes at national level. Additionally, knowing the types of remedies and their intended purpose will be essential to the case study conducted in Chapter 3.

Regardless of the existence of different legal sources and the variety of terminologies in the dispositive mentioned above, it is still "possible to identify a coherent set of principles on the right to a remedy and reparation"[112], as highlighted in the Practitioners Guide on International Remedies. Due to this coherence, we can also define modalities of substantial remedies, their characteristics, and their purposes. Thus, from the legal provisions and standards, in conjunction with the judicial practice of the three regional courts of human rights, we will tackle the following remedies: restitution, compensation, rehabilitation, satisfaction and guarantees of

[111] African Union, *Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human Rights and Peoples'Rights* (10 June 1998).
[112] Cordula Droege, The Right to a Remedy and to Reparation for Gross Human Rights Violations - A Practitioners Guide, 16.

non-repetition. While the types of remedies will be explained separately, it should be noted that depending on the complexity of cases they not rarely are applied combined.

The two main soft-law documents about remedies at the international level have some discrepancies when listing the measures. The ILC Report of 2001 states that full reparation shall take the form of restitution, compensation, and satisfaction "either singly or in combination",[113] as types of remedies, while it lists cessation and non-repetition assurance as State's obligations with "distinct legal consequence of the internationally wrongful act" [114], observed Professor Van Boven. Conversely, the Basic Principles published in 2005 lists the same measures of the ILC, but it included guarantees of non-repetition as a type of remedy[115]. If from one side the approach of the Guidelines is more coherent with the State's duty to repair as a general consequence of human rights obligations, not based solely on inter-state responsibility, from the other, Antkowiak criticized the insertion of cessation measures under the scope of restitution, meaning that in the case of absence of a victim "State would have no duty to cease the legal conduct"[116].

The Human Rights Committee, in the General Comment (GC) n. 31, when giving shape to the provision of article 2 of the ICCPR about States' obligations, affirmed that reparation might involve also, depending on the necessity of the case, "restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non- repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations".[117]

Trying to extract the modalities of remedies granted by the RHRC from the literal interpretation of the conventional provisions, we might lose the perspective on a variety of remedies. In fact, how courts arbitrate remedies depends more on their judicial practice and case law, than on its

[113] "Article 34. Forms of reparation. Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter" *In:* United Nations General Assembly. Report of the International Law Commission (ILC) on the Work of Its Fifty-third Session, UN Doc. A/56/10 (2201). The General Assembly took note of the ASR in UNGA Re. 56/83, 12 de December 2001.
[114] van Boven, "Victims' Rights to A Remedy And Reparation", 21.
[115] United Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, No. RES/60/147 (2005).
[116] Antkowiak, "Remedial Approaches to Human Rights Violations", 363.
[117] Human Rights Committee, General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, No. CCPR/C/21/Rev.1/Add.13, 26 May 2004.

legal provisions, usually succinct and vague.[118] On that concern, Antkowiak questioned when analyzing IACHR, "for example, what does 'just satisfaction' precisely demand, or to what extent should harmful 'consequences' actually be redressed? In order to assess the typical remedies afforded under international human rights law, then, we must consider how such instruments have been interpreted and developed by the relevant institutions."[119] As highlighted by Professor Van Boever, "the meaning and significance of access to effective remedies at national and international levels was given concrete shape" through the work of the international courts and quasi-judicial bodies.[120]

Apart from the International Criminal Court which has a wider legal commands on the rights of the victims and its remedies[121], the Regional Human Rights Courts, as exposed, have little description on how the remedies should be materialized. The specific frame of the remedies will vary in accordance with the case and while the practice of each court is diverse, it is always evolving. If from one hand the IACtHR, which is known for have crafted the "most comprehensive and holistic approach to reparations under international human rights law[122], explains the Colombian jurist Sandoval, from the other, the ECtHR adopts a stricter approach, sometimes without giving clear direction to the States on how the decision should be implemented, leaving to the national judiciary the task to undertake the remedies accordingly.

How far and detailed are the remedies is a matter of gradation from a wider to a shorter margin of appreciation for the States to conduct the reparations in accordance with national law. The court might present a declarative decision recognizing the violation and arbitrating generically the types of remedies, or it can go further indicating specific measures or even exact values and interest rate in case of non-payment of compensations. In that sense, the ECtHR and the IACtHR adopts opposite practices, while the first would give wider margin of appreciation to States, the second is known for being very detailed when concerning remedies. Shelton highlighted that the relevance of detailing remedies to assure victims' claims will be effectively

[118] See Antkowiak, "Remedial Approaches to Human Rights Violations", 357.
[119] Ibidem.
[120] van Boven, "Victims' Rights to A Remedy and Reparation", 18.
[121] The Statute of Rome, as the newest legal instrument, from 1998, also considered in its elaboration the practice and the case-law development of other Courts, as ECtHR and IACtHR. See on de development of ICC remedial practice on Shelton, *Remedies in international human rights law*, Chapter 5, "5.3. 3. Developing ICC Reparations Principles".
[108] Clara Sandoval, "Two Steps Forward, One Step Back: Reflections on the Jurisprudential Turn of the Inter-American Court of Human Rights on Domestic Reparation Programmes," *The International Journal of Human Rights* 22, no. 9 (2018), 1192.

redressed, noticing that "given that complaints are only admissible if all domestic remedies have failed, it may not be warranted to assume that internal procedures will redress the violation without some clear direction."[123]

In 2008, Antkowiak called attention to the ECtHR "minimalist" approach to remedies and argued that the flaws at the remedy's frameworks were one of the motives of Court's crisis at that time. The Court, nonetheless, endured a series of institutional reforms in the past years, and there were significant changes in its practice including more detailed remedies and structural measures[124], especially with the establishment of pilot judgment procedure, which indicates general measures States should undertake to prevent similar breaches in cases of systemic violations.[125]

It should be also highlighted the differences on the compliance and supervisory processes, which might influence on how courts have (or not) maneuver space to craft and adapt remedies. As described by Antkowiak, while the IACtHR "resolves disputes between the parties and dispenses binding instructions on how the reparations orders should be effectuated" [126], in the ECtHR the sentences are forwarded immediately to the Committee of Ministers, a political body that is responsible to supervise State's compliance with judgment and "[oversee] the fulfillment of judgments by issuing occasional recommendations".[127]

While it is not the objective of the present work to evaluate external factors suffered by the courts, it cannot be ignored the fact that the freedom and space for the courts to grant remedies not rarely are constrained by pragmatic and political reasons, such as the number of applications received and amount of workload, financial constraints, availability of enforcement mechanism to assess compliance, and external political pressure. Institutional multi-level dynamics' role in judicial human rights bodies activity should not be overestimated, as undesirable it might be for the rights of the victims. Those external factors, however, cannot disrupt the court to award an adequate remedy to redress the harm caused by the violation of human rights.

[123] Shelton, *Remedies in international human rights law*,193.
[124] See Leloup, "The Concept of Structural Human Rights in the European Convention on Human Rights", for a description of ECtHR case-law and the structural effects of its decisions.
[125]Council of Europe, European Court of Human Rights, "Factsheet - Pilot judgement" (2021). Available at: https://www.echr.coe.int/documents/fs_pilot_judgments_eng.pdf [accessed on 13 September 2022].
[126] Antkowiak, "Remedial Approaches to Human Rights Violations", 365.
[127] Ibidem, 365.

Remedies are commonly divided between individual and collective measures, concerning their immediate recipients and their range[128]. *Remedies of individual impact* have as main recipients and impact directly the victims of the violation. The Courts might also undertake collective measures that have far-reaching impacts of general interest that intend to affect the collectivity, such as legislative changes or implementation of educational programs, these will be called *remedies of collective impact*.

This division between individual and collective remedies has two important objectives for the development of the present study. First, it is to focus on direct and material impacts desired by the Courts when they outline the remedies, and second, while dividing we can identify the remedies that intend to impact structurally the States.

4.1 Remedies of individual impact: victim's focus

A victim-based approach to remedies means that an effective remedy should primally focus on redressing the injury suffered by the victims.[129]. With the rise of human rights legal instruments and correlated jurisdictional bodies, individuals are now entitled to reparation in response of a wrongdoing of States at supranational level. In this matter, Regional Courts give victims the opportunity to claim for their rights against acts of the State, including those acts conducted by State agents and acts of private parties that the State fails to address with due diligence.

It should be mentioned that the declaration of State's violation and, consequently, victims' rights, is extremely relevant by giving victims a voice, as detailed by Duff. The author, in her book concerning Human Rights Litigation, explains that the "crucial opportunity to be heard, accuse and explain"[130] can have restorative and empowering impact on victims. On the other hand, high attention should be given to victim's space to effective participation in the proceedings, with the most care to avoid re-victimization. Thus, a meaningful participation of

[128] See Helen Duffy, *Strategic Human Rights Litigation* (Oxford [UK]; New York: Hart Publishing, 2018); Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, Second Edition (Cambridge: Cambridge University Press, 2013).
[129] Antônio Augusto Cançado Trindade, *The Access of Individuals to International Justice* (Oxford University Press, 2011), https://doi.org/10.1093/acprof:oso/9780199580958.001.0001, 15.
[130] Duffy, *Strategic human rights litigation*, 51.

victims, besides restoring victim's voice and dignity, can be a very relevant tool to define the adequate remedies for each situation.

A. Restitution

Restitution measures are in the core of the right to substantive remedy and the principle of *restitution integrum*, in which the remedy "must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed",[131] as highlighted in the PCIJ's landmark case. Restitution aims to reestablish the victim's prior status, whenever possible.[132] As described in the UN Basic Principles, it includes "restauration of liberty, enjoyment of human rights, identity, family life and citizenship",[133] and others. Restitution, as other individual measures, should consider victim's circumstances and be proportional of the violation's gravity.[134] Thus, it is essential to conduct an accurate assessment of victim's factual situation to address the correct restitution measures.

Restitution measures might correspond to the cessation of the violation, especially in cases of continuous violations, in which the harm protracts through time. This can be illustrated by cases of unlawful arrested persons and decisions that order the person to be released, or cases of individuals that had their nationality requirement denied and the court orders for the recognition of the citizenship. Antkowiak, however, criticizes the UNGA Basic Principles for including cessation within restitution measures, as a secondary obligation, signalizing that without the identification of victims and harm the State would not have the duty to desist from illegal conducts.[135]

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[131] *Case of Factory at Chorzów; Germany v Poland. Order, Merits,* Permanent International Court of Justice**,** PCIJ Series A no 17; ICGJ 256 (13 September 1928), parag. 29 and 47-48.
[132] Pablo de Greiff, ed., *The Handbook of Reparations* (Oxford University Press, 2006), https://doi.org/10.1093/0199291926.001.0001, 452.
[133] United Nations General Assembly (UNGA), Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, No. RES/60/147 (2005), IX, parag. 19.
[134] United Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, No. RES/60/147, 16 December 2005, IX, parag. 18.
[135] Antkowiak, "Remedial Approaches to Human Rights Violations", 363.

While restitution measures can also transcribe the cessation of the violation, the main difference between them is that is acceptable that restitution to be substituted by compensation, in cases it creates a disproportionately burden to the State, while the is mandatory to the State to put end to an ongoing violation. As explained by the Practitioners Guide on Remedies, "whereas restitution must only be provided if it is not impossible or creates an unreasonable burden on the State who has to provide reparation, no such limitations apply to the duty of cessation, which must always be complied with."[136]

Whenever applying restitution measures, the Comment n. 3 of the Committee Against Torture alerts that States should be careful to not place the victim back in a place where the violations might happen again. The Comment mentions the "risk of repetition of torture or ill-treatment", as the thematic object of the Committee, but this general advice can also be applied to a diversity of rights and the risks related to restitution measures, especially in cases of violations decurrent of structural issues[137]. Related to the last observation, the Comment signalizes the insufficiency of individual actions for violations rooted in structural causes, which demands collective effort to address structurally "discrimination related to, for example, gender, sexual orientation, disability, political or other opinion, ethnicity, age and religion, and all other grounds of discrimination."[138]

While it might be ideally desired, in practice, restitution is the least applied remedy due to the common impossibility of returning the victim to the antecedent situation,[139] especially correcting damages made to someone's moral, and dignity caused by a human rights violation. Therefore, States are commonly required to offer compensation.

[136] Droege, The Right to a Remedy and to Reparation for Gross Human Rights Violations - A Practitioners Guide, 137.
[137] The concept of structural discrimination, adopted by the IACtHR will be exposed on Chapter 3, and its correlation with structural gender-based discrimination in the Cotton Field case.
[138] United Nations, Committee against Torture, General Comment No. 3 on the Implementation of Article 14 by States Parties, UN Doc CAT/C/GC/3, 13 December 2012, para 8.
[139] Droege, The Right to a Remedy and to Reparation for Gross Human Rights Violations - A Practitioners Guide, 173.

B. Compensation

Compensation is pointed as the "most obvious vehicle for direct impact to victims",[140] corresponding to "any economically assessable damage" which intend to make up for the harm suffered through its qualification and posterior monetary quantification[141] This remedy, therefore, comprises all the pecuniary and non-pecuniary damages consequences of the violation. It includes all economic loss and subsequent medical and other costs that the victims incurred to be able to take the case before the Court, as interpreted by the IACtHR.[142] Compensation also includes moral damage, since "harm goes far beyond mere economic loss, encompassing physical and mental injury, and in some cases moral injury as well",[143] explains Greiff.

Giving content to and measurement of economic loss consequent of grave human rights violations, the IACtHR presented in the landmark case *Loayza Tamayo v Peru*[144] the concept of life plan, stating a clear difference between the concept of lost earnings. The Court declared that compensation should take into consideration the full self-actualization of the victim, including the victim's plans and ambitions of life that were taken away by the violation.[145] In the case mentioned, although the recognition of harm to the victim's life plan, the Court did not conduct an economic assessment of it, stating that the material and moral damaged arbitrated represented some compensation for victims' injuries, due to the impossibility to "restore her or offer her back the options of personal fulfillment of which she has been unjustly deprived".[146]

While Court in the most recent case law abandoned this path for victim's life plan as a separate category of reparations, in the cases *Cantoral Benavides* and *Bairros Alto*, the IACtHR arbitrated compensation measures related specifically to the harm to victim's life plan.[147]

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[140] Duffy, *Strategic human rights litigation*, 52.
[141] United Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, No. RES/60/147, 16 December 2005, IX, parag, 20.
[142] Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*, 241.
[143] Greiff, *The Handbook of Reparations*, 452.
[144] *Case of Loayza Tamayo v. Peru.* Merits, Inter-American Court of Human Rights, Series C No. 33 (Judgment of September 17, 1997).
[145] Francisco Quintana, "Conference: Reparations in the Inter-American System: A Comparative Approach Conference," *American University Law Review* 56, no. 6 (June 2007), 1384.
[146] *Case of Loayza Tamayo v. Peru.* Reparations and Costs, Inter-American Court of Human Rights, 1997. Series C No. 42 (November 27, 1998), parag. 154.
[147] Droege, The Right to a Remedy and to Reparation for Gross Human Rights Violations - A Practitioners Guide, 188.

Therefore, such a concept subsists as a relevant guide to a more comprehensive reparation scheme, "combining financial compensation, satisfaction, and non-repetition measures".[148]

Besides the recognized economic importance for the victims in cases in which violations cause to victims economic dependence,[149] grave financial loss or interruption of victim's plans, compensation has also a symbolic value, since it can reinforce the validation of the judgement while it adds a material obligation accompanying the declarative relief.[150] At the same time, compensation faces the practical difficulty and, in fact, the impossibility of quantifying serious physical and psychological harms, the loss of relatives, and uncountable traumas and suffering decurrent of a human rights violation.[151]

As highlighted by Antkowiak,[152] compensation and declarative relief might not only be insufficient but also inadequate, especially in cases of massive human rights violations that affect a huge community. The author gives as an example the case *Plan the Sanchez* of the IACtHR, a massacre of more than 200 members of indigenous communities in Guatemala, in which the Court ordered an unprecedented set of reparations that went far beyond financial compensation.[153]

Illustrating more than the insufficiency of monetary measures, but also the inadequacy in some cases, the jurist Kristeva mentioned the claims of victims in the context of the *El Amparo* Case. The mother of a men executed by the Venezuelan military protested: "[m]y son was not a cow. I don't want money. What I want is justice."[154] Rarely financial compensation alone will be able to answer victim's demands of "recognition, restoration, and accountability"[155]. Additionally., it can be equally incapable to redress adequately the harm as it might not hinder future violations. As regards to that, there is the recurrent concern on States' will try to "get rid

[148] Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*, 245-246.
[149] Duffy highlights the importance of economic compensation to cases, such as modern slavery and we add cases of trafficking of human beings, in which financial independence is essential to break the dependence chain between victim and the aggressor. See Duffy, *Strategic human rights litigation, 52.*
[150] Ibidem, 52.
[151] Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*, 191.
[152] Antkowiak, "Remedial Approaches to Human Rights Violations", 335.
[153] *Case of the Plan de Sánchez Massacre v. Guatemala*. Reparations. Inter-American Court of Human Rights, Series C No. 116 (Judgment of November 19, 2004).

[154] Viviane Krsticevic, "Conference: Reparations in the Inter-American System: A Comparative Approach Conference," *American University Law Review* 56, no. 6 (June 2006): 1418–22.
[155] Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*, 191.

of" its obligations by paying compensations as a form of "exchanging money for impunity and silence".[156]

As reported a decade ago by the Open Society Justice Initiative,[157] in the Inter-American context, States are more likely to comply with the Court's decision of monetary compensation nature, leaving pending non-monetary measures, such as requirements of investigating of cases of forced disappearance, or orders requiring legislative change. Later in 2013, a follow-up report addressed implementation challenges, explaining the special difficulty of executing orders that transborder on the executive power, as well as seeking compliance on measures that depends directly on the judiciary and legislative. One of the reasons listed is the fact that while the executive is generally directly involved during the proceedings, implementation might demand coordination and coherent action between diverse government branches.[158] In addition, implementation experiences show States have not established domestic proceedings to execute court's decisions, and it was reported lack of budgetary provision for implementation of decisions and/or recommendations of RHRC, which also affects compensatory remedies.

Lastly, it should be noted that compensation orders can also suffer from the snow-ball effects, in which discrete compensation claims for individual victims can lead to broad schemas of reparations reaching an indeterminate number of individuals.[159] While the enlargement of reparations might be positive and necessary in cases of mass violations, it can also trigger non-compliance from States. In the last decade, States have argued financial difficulties in paying orders of the IACtHR which comprised large reparation schemas, such as *Plan the Sanchez* case, and have requested to implement their own Domestic Reparation Programs[160]. This situation has been generating tensions between the Inter-American and domestic reparation standards.[161] While monetary compensation schemas cannot be blamed isolated for the tension between regional and national levels, this snowball effect of financial reparation might suggest

[156] Duffy, *Strategic human rights litigation*, 54.
[157] David C. Baluarte, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions* (New York, NY: Open Society Foundations, 2010).
[158] Open Society Foundations, Justice Initiative, From Rights to Remedies: Structures and Strategies for Implementing International Human Rights Decisions, New York, 25/06/2013. Available at: https://www.justiceinitiative.org/uploads/7d34546e-dfe6-450b-82ec-77da3323d4bd/from-rights-to-remedies-20130708.pdf [Accessed 5 September 2022], 2-3.
[159] Duffy, *Strategic human rights litigation*, 55
[160] Sandoval, "Two steps forward, one step back: reflections on the jurisprudential turn of the Inter-American Court of Human Rights on domestic reparation programmes", 1995
[161] Ibidem, 1995.

for the necessity of more collective and long-term measures with less focus on monetary compensation.

C. Rehabilitation

The UN Principles states that "rehabilitation should include medical and psychological care as well as legal and social services."[162] The types of measures listed, however, are not exhaustive, but exemplificative. Rehabilitation is defined as non-monetary measures to respond to victims needs of restoring their physical and mental health, as well as their reputation.[163] This type of remedy is often considered together with compensation and there might be some overlapping of rehabilitation measures and compensation in cases the victims had afforded by themselves psychological and medical assistance, before accessing the court.[164] Though, there is a clear difference between posterior compensation by the State of victims' expenses and an order to the State to provide rehabilitation services, which is the specific category here described.

Rehabilitation measures, however, are not limited to the heath sphere, as highlights Gilmore (*et al.)* in a report elaborated on gender-sensitive reparations for cases of sexual violence[165]. The authors highlight that rehabilitation can also include educational and vocational services to the victims, which can have greater impact on structural issues, such as the case of gender-based violence. Those measures "provide the possibility of reparation 'with dignity' for victims, then this form of reparation could deliver more of its untapped potential and could have an impact in forming foundations of society that address the root causes of gender violence".[166]

The IACtHR has been known for applying those measures in cases of gross and systemic human rights violations to victims, including to "the next kin of decease of disappeared victims",[167] due to the grave physiological, and sometimes physical, traumas caused by those violations.

[162] United Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, No. RES/60/147, 16 December 2005, IX, parag 21.
[163] Ioffe, "Reparation for Human Rights Violations".
[164] Droege, The Right to a Remedy and to Reparation for Gross Human Rights Violations - A Practitioners Guide, 205.
[165] Sunneva Gilmore, Julie Gullerot, and Clara Sandoval, "Beyond Silence and Stigma: Crafting a Gender-Sensitive Approach for Victims of Sexual Violence in Domestic Reparation Programs" (Reparations, Responsibility & Victimhood in Transitional Societies, March 2020), 17.
[166] Ibidem, 17.
[167] Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*, 202.

Pasqualucci defends that victims should be consulted about the type of treatment necessary. Additionally, the care provided by the State needs to be "individualized, specialized, integrated, and free of charge."[168]

4.2 Collective and non-monetary remedies of general interest

While pointing to the insufficiency of individual and monetary measures, Antkowiak advocates for a "remedial methodology" which combines monetary and non-monetary measures, including guarantees of non-repetition.[169] In the same line, Shelton alerts that the injuries caused by States not rarely are "intangible, symbolic, and difficult to measure […]" and the "damages often undervalue the rights and paying to violate is cheaper than compliance"[170]. Therefore, to maximize the value of people's rights, remedies afforded should be the most effective in addressing the harm and eliminating the negative consequences of the injury.[171]

The complexity of cases regional courts has been exposed progressively demanded the expansion of the scope of remedies awarded, which is also portrayed by the UNGA Basic Principles established in 2005. The study which anteceded the adoption of the document was conducted by Professor Theo van Boever and it was composed in grand part by the judicial practice of International and Regional Courts[172] that, through time, gave meaning to the legal dispositive on right to a remedy, the extent of human rights obligations, and consequently the court's competence to award remedies.

While the literality of ECHR, IACHR and ACHR might constraint Courts' orders to restitution and compensation, the practice demonstrate that not only non-monetary, but also collective remedies gained space in RHRC case-law. On that regard, the evolutive characteristic of the regional human rights treaties is a relevant principle to update Courts' practice and make it possible to shape their orders to face the challenges and complexities of past, present, and future human rights violations. As Pasqualucci states:

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[168] Ibidem, p. 203.
[169] Antkowiak, "Remedial Approaches to Human Rights Violations", 392.
[170] Shelton, *Remedies in international human rights law*, 62.
[171] Ibidem, 62.
[172] van Boven, "Victims' Rights To A Remedy And Reparation."

> the Inter-American Court engages in an "evolutive interpretation" of the American Convention on Human Rights and of international human rights law in general. It does not impose a static interpretation of human rights on the American Convention. Rather, the concept of the basic rights owing to individuals has expanded over time. The Convention does not purport to grant human rights; it merely recognizes them and codifies them.[173]

The final decision of a regional human rights adjudication body has many impacts that can be awarded collectively, such as the development of legal standards, giving shape to human right, and influencing the jurisprudence at national, international, and supranational levels[174]. In addition, the new developed legal standards can, indirectly, expose domestic issues and trigger legislative change and development of new policies more aware and protective of human rights[175]. On the other hand, collective non-monetary remedies, as satisfaction and guarantees of non-repetition, can affects beyond the parts of the case and conduct Sates to institutional change.

A. Satisfaction

Although satisfaction measures are generally directed to the memory and recognition of victims, they are listed within collective remedies because their long-lasting impacts are essentially diffuse and directed to the society as a whole.[176] Grieff indicates that satisfaction is a broad category, and its measures might also include cessation of the violation and reification of the facts by the State through national adjudication bodies[177]. Thus, depending on the terminology used, some of the measures listed by the UN Basic Principles[178] as satisfaction might coincide with restitution and guarantees of non-repetition [179.] What all those remedies have in common is their non-monetary characteristic. Thus, independent of the court practice and terminology used, it is possible to generalize satisfaction as a different non-financial reparation for assessing moral damage of the dignity and reputation of the victims.[180]

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[173] Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*, 13.
[174] Duffy, *Strategic human rights litigation*, 61.
[175] Ibidem, 59.
[176] Ibidem, 58.
[177] Greiff, *The Handbook of Reparations*, 452.
[178] United Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, No. RES/60/147, 16 December 2005, parag 22.
[179] Greiff, *The Handbook of Reparations*, 452.
[180] Cordula Droege, The Right to a Remedy and to Reparation for Gross Human Rights Violations - A Practitioners Guide, 207.

This category comprises a variety of measures from public apologies, public disclosure of the truth, construction of memorials, naming public monuments with victim's names, to judicial and administrative sanctions of the liable persons for the injury.[181] Additionally, the abstention of the State to carry death penalty might be classified as satisfaction measure by the IACtHR.[182] Related with the tragic historical background of Latin American military dictatorships, cases of forced disappearances are recurrent in the Inter-American System and the Court developed a strong case-law on the matter. In those cases, the Court generally orders States to locate and identify the victims that have been forcibly disappeared, using all the available means to inform the families of the fate and whereabouts of their relatives. This satisfaction measure is a component of victims' families right to justice,[183] principle developed in the case-law of the IACtHR in situations of State omission in investigating and persecuting human rights violations. Violations of victim's right to justice will be remediated by the Court with orders of domestic accountability for human rights violations to investigate and persecute state agents or private parties.

Some of the satisfaction measures, as construction of memorials, naming public buildings and public acknowledgment, due to their nature, are also called symbolic reparation of victims. The relevance of these measures should not be overseen, as they can guarantee non-repetition by providing collective memory of the victims and the violations suffered.[184] As to say, well-publicized acts of the State acknowledging responsibility for human rights violations serve to recognize the "dignity of victims and console their relatives"[185] but they also remind society of what happened and, "as it is hoped, act as a deterrent to future violations", as denotes Pasqualucci[186].

[163] Antkowiak, "Remedial Approaches to Human Rights Violations", p. 361.
[164] Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*, 209. The author mentions the *Case of* Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago *Loayza Tamayo v. Peru.* Merits, Reparations, and Costs, Inter-American Court of Human Rights, Ser. C, No. 94 (21 June 2002), para. 105.
[183] Ibidem, 207.
[184] Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*, 58.
[185] Ibidem, 204.
[186] Ibidem.

B. Guarantees of non-repetition

As observed by the Practitioners Guides, guarantees of non-repetition "may be indistinguishable from the duty to prevent violations".[187] However, as a type of remedies afforded by the Courts to repair human rights violations, the general obligation gains specific shapes. To exemplify this diversity, UN Principles describes a series of measures, from civilian control of military forces, assuring impartiality and independence of judiciary, promotion of education and training in human rights and humanitarian law, as well as review and reform of legislation.[188]

The list is not exhaustive but guarantees of non-repetition (GNR) intend to assess the root causes of the violations. While the victim individually should be adequately compensated for material and moral injuries, similar human rights violations may continue to be perpetrated.[189] As a remedy, those measures are an opportunity for RHRC to apply changes on the State's structure for benefit of the collectivity, while also preventing future human rights violations. Thus, there is an essential forward-looking feature of GNR, aiming to avoid the re-occurrence of similar violations. On that concern, the UN Human Rights Committee also stressed in the GC n. 31 that the purposes of the ICCPR would be "defeated" without measures to prevent violations, which can "require changes in the State Party's laws or practices."[190]

The Inter-American Court is the only regional court that has a dedicated section to guarantees of non-repetition as a category of remedy.[191] The Court had recognized in the case *Trujillo-Oroza v. Bolivia*[192] that GNR can be granted by Article 1 of the IACHR, which prescribes the general obligation of States to respect, protect, and fulfill human rights. In the case law of the

[187] Droege, The Right to a Remedy and to Reparation for Gross Human Rights Violations - A Practitioners Guide, 137.
[188] United Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, No. RES/60/147 (16 December 2005), IX, parag 23.
[189] Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*, 212.
[190] Human Rights Committee, General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, No. CCPR/C/21/Rev.1/Add.13 (26 May 2004).
[191] We will also dive further on guarantees of non-repetition on Chapter III, Topic 3.
[192] *Case of Trujillo Oroza v. Bolivia*. Reparations and Costs., Inter-American Court of Human Rights, Series C No. 92 (Judgment of February 27, 2002), parag. 94-96.

IACtHR this remedy generally takes form of legislative reform order, which is only possible due to another provision contained in article 2 of the IACH[193]

It will be demonstrated that GNR can be related with the concept of structural human rights, since they are able to generate structural secondary obligations towards States due to its preventive and collective characteristic. In fact, those two components differentiate them essentially from other remedies and they will be object of specific analysis in the next Chapter. For that reason, this topic has no intention of exhausting the matter, but its main objective is to locate GNR in the context of RHRC's tools to endanger change and improve the human rights situation at the national level.

Guarantees of non-repetition should be, as the other remedies, designed case by case, but special attention is needed to the socio-political and economic context of the State in concern. These types of remedies can imply in structural institutional changes and install diverse government bodies to work simultaneously to implement Court's decision. While from one side these measures can be criticized as a form of judicial activism from courts and raise democratic concerns, from the other, they signalize a more collective and systemic assessment of human rights violation from Human Rights Courts, generally cited to have an individualistic and hard-set approaches of human rights, accused of picturing an unreal image on the totality of violations[194].

As it will be described next, the progressive recognition of the variety of obligations arising from human rights had also as a consequence the expansion of remedial approach of the courts. At the same time, collective remedial approaches appear as an alternative to the insufficiency of individual measures to prevent the repetition of patterns of violations. To undertake this broad mandate, the Regional Courts are supported by their legal mandate and evolutive case law. Additionally, they embrace specific institutional features, which position them in a privileged place to influence State's behaviors concerning human rights.

[193] Marcela Zúñiga Reyes, "Garantías de No Repetición y Reformas Legislativas: Causas de La Falta de Pronunciamiento y Denegación de Reparaciones En La Jurisprudencia de La Corte Interamericana de Derechos Humanos a Partir Del Caso Cinco Pensionistas vs. Perú," *Revista Derecho Del Estado*, no. 46 (April 23, 2020): 25–55, https://doi.org/10.18601/01229893.n46.02, 79.
[194] See Lona MacGregor, "Looking to the Future: The Scope, Value and Operationalization of International Human Rights Law," *Vanderbilt Journal of Transnational Law* 52 (2021).

Chapter II - Remedies and Structural Human Rights

Remedies are the means through which Regional Human Rights Courts can directly affect the States' behavior concerning human rights, from measures destinated to individuals or to the collectivity. The type of measure chosen will be based on a specific concrete case, responding to the victim's claims and adequate to repair the injury caused by the State. It was also noted that State's obligation to repair victims are not only a consequence of the recognition of a violation to conventional provision, but it is derived from the general obligation States must promote and respect human rights, as so as prevent future violations. Each human rights describe not only the entitlements of the right holders, but also the correlated duties of States.

It will be argued, on the line of Fredman,[195] that the dichotomy between positive and negative obligations and its correlation with civil and political from one side and socio-economic and cultural rights in the other, does not describe the reality of HR violations nor State's correlated duties. In that sense, RHRC are also responsible to substantiate rights and offer legally bidding interpretation to the extent to States obligations when they arbitrate remedies in concrete. Thus, remedies, as derived from State's primary obligations, can demonstrate the insufficiency and, more, the inadequacy in some cases of that dichotomy. The cases faced by RHRC give life to conventional provisions and demonstrates the diversity of scenarios that one single right can comport: different violations of the same provision might demand the most varied redresses.

The remedial practice of RHRC can outline State's obligations concerning not only to a specific right, but also to a specific pattens of violations. While the decisions can offer guidelines to large-scale reparation programs and financial compensation, they can also function as standard setting to legislative changes and implementation of public policies, which is the cases of guarantees of non-repetition. In fact, the study of guarantees of non-repetition demonstrates that civil and political violations can also give rise to positive, but also secondary structural obligations that implicates in changes of the institutional design of State. Structural obligations would impose changes in "how the State apparatus is organized", describing a diverse type of human rights, in case, structural human rights (SHR), as proposed Leloup[196].

[195] Sandra Fredman, *Human rights transformed: positive rights and positive duties* (Oxford [UK]; New York: Oxford University Press, 2008).
[196] Leloup, "The Concept of Structural Human Rights in the European Convention on Human Rights.", 484.

This second Chapter intends to correlate State's general obligations towards human rights, the concept of structural human rights proposed by Leloup[197], and the correlated secondary obligation of collective remedies, in special, guarantees of non-repetition. While the author focused on the context of the Council of Europe and the jurisdiction of the ECtHR, a dedicated section will demonstrate how this concept can be particularly relevant for the Inter-American Court of Human Rights.

1. Positive v. negative obligations and the role of Regional Human Rights Courts

> Transforming human rights therefore requires a greater focus on the positive duties to which all human rights give rise. It entails moving beyond artificial distinctions between civil and political rights and socio-economic rights, to recognizing that all rights give rise to the whole range of duties.
>
> — *Sandra Freedman*

Traditionally, human rights were identified as negative obligations aiming to offer protection to citizens against the State. In this perception, the role of the State would be to refrain from action in respect to individual's civil and politic rights, the so-called first generation of rights. This perspective has been already overcome with the progressive recognition of the wide range of positive and act-oriented functions of the Modern States[198] as so the indivisibility and the interdependence of human rights of all "generations". If from one side the idea of generations is useful to understand the historical acknowledgement by States of certain rights in some political contexts,[199] from the other it can create a mistaken idea of evolution between the previous and following generations, and an artificial division in groups of rights that are, in fact, interconnected.

The main obligations correlated with human rights are generally identified by the acts of to respect, to protect, to fulfill, and some documents add the duty to promote. They are a more nuanced conceptualization of negative/positive obligations, while "respect" would correspond to a negative behavior requiring States to "refrain from interfering or curtailing the enjoyment

[197] Ibidem.
[198] Fredman, *Human Rights Transformed,* 1.
[199] The generations perspective is more aligned with the progressive recognition of rights is a historical phenomenon that is, in fact, a feature of some of the European Modern States. The recognition of rights in other regions of the globe have been thorough a diverse historical process and might became more similar with the adoption of the UDHR in 1948. Therefore, the idea of generations should also be avoided because it represents a linearity of development of rights which is far from being universal. See Piovesan, *Direitos Humanos e Justiça Internacional*.

of rights"[200], the other commands demand positive actions of the State. Protecting requires positive actions of States to protect individuals or groups from human rights abuses of others and fulfill demands actions to "facilitate the enjoyment of human rights"[201] These commands are contained in the wording of the main HR documents and are relevant to identify the range of obligations each right can entail.[202]

If from one side the Universal Declaration of Human Rights (1948) presented a compilation of rights without thematic distinction or division, from the other, the dichotomy was crystalized with the later adoption in 1966 of two different bidding documents at the international level for civil and political rights (ICCPR) and economic, social and cultural rights (ICESCR). The regional organizations, except for the African Union,[203] followed the same pattern based on the mistaken belief that different types of rights would impose, consequently, diverse obligations towards the States.[204] However, as explained by Shelton, both international conventions transcribe in their provisions negative and positive obligations, signalizing for a "rapprochement", rather than separation.[205]

Later in 1995, willing to overcome the idea of hierarchy between rights, the Vienna Convention of the UN stated that: "all human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.[206]" This declaration was also directed to States that endorsed other rights but rejected the respect of women's rights and democratic participation in electoral process.[207]

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[200] Dinah Shelton e Ariel Gould, "Positive and Negative Obligations", in *The Oxford Handbook of International Human Rights Law*, org. Dinah Shelton, 1º ed (Oxford University Press, 2013), 562–84, https://doi.org/10.1093/law/9780199640133.003.0025, 566.
[201] Ibidem.
[202] Ibidem.
[203] The African Charter of Human Rights contains in the same document all rights and affirms in its preamble the indivisibility and interdependence of rights, stating: "Convinced that it is henceforth essential to pay attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights". *In:* Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)].
[204] Dinah Shelton e Ariel Gould, "Positive and Negative Obligations", 564.
[205] Ibidem, 564.
[206] UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23, available at: https://www.refworld.org/docid/3ae6b39ec.html [accessed 27 September 2022]), Section 1, para. 5.
[207] James W. Nickel, "Rethinking Indivisibility", 958.

The focus on the complementarity of human rights could have been a step forward to overcome the conceptual distinction between types of rights and negative v positive behaviors of a State. However, if theoretically, all human rights should be on the same footing, in practice civil and political rights still occupy a special position. While those rights are recognized as justiciable and have direct effectiveness, social and economic rights are put beyond the reach of courts.[208] At the domestic level, social rights are seen more as a matter of public policy and not as rights per se[209], thus the judiciary generally refrains from evaluating the merit and substance of social and economic measures due to a lack of democratic entitlement. At the regional level, the courts have their jurisdiction defined by regional documents that contain civil and political rights, whilst the socioeconomic rights have their implementation checked by reporting and monitoring bodies.

On that concern, the practice of RHRC is a relevant laboratory to demonstrate the artificiality of the dichotomy between positive and negative obligations, and their correlation with certain rights. Remedies are both a consequence of the State's responsibility for a breach in their conventional duties and of the general obligations States have towards human rights. Remediating a violation would require States to behave in accordance with stipulated obligations of the rights it failed to comply with. If we followed the traditional obligations for political and civil human rights, negative ones, besides declaratory orders of the violation, the courts could award compensation and cessation measures. The work of RHRC demonstrate quite the opposite.

To find State's primary and secondary obligations in a sentence of a RHRC one should look on the merits for the responsibility of the State and the remedies/reparation and the Court's orders. The relevance of the remedies section is exactly the prescription on how States should act after the Court delimitates the State's primary duties concerning a specific right, and in which extent the State failed to comply with those obligations in the concrete case. Thus, the substance of the rights and correlated obligations are essentially built through the role of courts. As it was demonstrated, the extent of State's obligation cannot be defined in abstract, and contexts of the violation, and specially the circumstances of the victims will delimit the extent of State primary and secondary duties.

[208] Ida Elisabeth Koch, "The Justifiability of Indivisible Rights", *Nordic Journal of International Law* 72, nº 3 (2003), 4.
[209] Fredman, *Human Rights Transformed,* 1.

The variety of remedies applied to violations of civil and political human rights attests the extension of State's obligations is not bounded by the traditional dichotomy. There are classic examples of ICCPR that to be fully implemented require positive conducts of the State, such as the right to a fair trial and the electoral and voting rights[210]. Whiteout an establishment of a judiciary system and the full range of guarantees to ensure impartiality of judges or an electoral system to conduct free elections, individuals could never actually enjoy those rights. At the same time, holistic approach of redress given by the IACtHR also demonstrates the interdependence of human rights and how social and economic rights can be essential to redress a violation and make possible the ability to enjoy political rights and civil rights might depend on the fulfillment of economic and social rights.[211]

Although the jurisdictions of the courts are limited to the civil and political rights, the recognition of positive obligations within both the European[212] and Inter-American conventions[213] is sedimented in both case laws confirming, progressively, the permeability of two types of obligations. In many cases, it can be hard to draw a distinction between the two duties and, there are situations that abstention and action of the State coexist or even overlap.[214] It cannot be denied that State's obligations are derived directly from the nature of human rights and their characteristics. However, due to the complexity of violations and the intersectionality of a multiplicity of factors, an abstract analysis of the nature of the rights will rarely enunciate the full range of obligations it can arise, especially when crafting remedies.

Concerning the Inter-American System, the legal scholar and former Commissioner Abramovich highlighted the imposition of affirmative duties generally is met with greater intensity by the Inter-American Court or the Commission as "a result of the recognition that certain social sectors live in disadvantaged structural conditions in accessing or exercising their

[210] Kotch, "The Justiciability of Indivisible rights", 6.
[211] The examples given on Chapter I, 4.1, B. concerning compensation and harm to a "life plan", such as the case of *Loayza-Tamayo v. Peru (1998).*
[212] See Jean-François Akandji-Kombe, *Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights*, Human rights handbooks 7 (Strasburg: Council of Europe, 2007).
[213] See Laurens Lavrysen, "Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights.", *Inter-American and European Human Rights JournalInter-American and European Human Rights Journal* 7 (2014): 94–115.
[214] Concerning overlapping obligations in the context of the European Court of human Rights, see Akandji-Kombe "Positive Obligations Under the European Convention of Human Rights", 12.

basic rights".[215] Assessing structural inequality and, consequently archiving equality, explains Fredman, implies on the he recognition that all human rights can generates all sorts of obligations. This approach to human rights duties describes "a conception of freedom which entails not just absence of interference with rights, but genuine ability to exercise these rights, a recognition of the role of society and State to enhancing freedom and a substantive view of equality with everyone should be able to exercise its rights".[216]

Positive, including structural obligations, can be, therefore, used to access structural inequalities by the RHRC. As observed by Abramovich, the main contributions of these regional bodies are, in fact, the same challenges they face concerning compliance and implementation of the decisions by national government, which are "institutional exclusion and degradation".[217] Regional Bodies can assess and impact those root cause in inequality by setting human rights and rule of law standards for the functioning of State institutions.

Overcoming the artificial dichotomy between types of rights and pre-established obligations to act or to refrain it is also essential for legitimizing the practice of human rights courts and remedies of positive and structural consequences. While positive actions of State were always considered a matter of policy, not rights, the roles of Courts have been historically associated with "imposing a duty to refrain",[218] affirmative orders would be considered intrusive and target as judicial activism, due to criticism of lack of democratic mandate, which became specially critic concerning RHRC. Therefore, the recognition of wider obligations of State's concerning human rights and, consequently a wider mandate to arbitrate remedies from the courts is essential due to the previous mentioned reputation costs and respectability of these institutions, which are directly related with State's compliance.

Thus, if we can recognize that civil and political rights can give rise to a full range of effects, we can also accept positive, collective, and structural implications of RHRC's decisions and their remedies. On that concern, it will be described next the concept of structural human rights, which is extremely relevant to understand the extent of impact RHRC can engender through their decisions.

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[215] Abramovich, "From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System", 17.
[216] Fredman, *Human Rights Transformed, 29.*
[217] Ibidem, 17.
[218] Ibidem, 181.

2. Structural obligations and Human Rights Courts: towards a normative concept of structural human rights

As exposed, Regional Human Rights Courts have an important role in substantiating human rights obligations and their extent, including when arbitrating remedies. The complexity of the practice, therefore, demonstrates that from human rights can arise more than positive obligations, but also structural ones. While from one side Leloup argues that this special type of obligations would describe a new normative concept, structural obligations can also be enforced by collective remedies, as guarantees of non-repetition. This section intends to expose the concept of structural human rights and its relevance for the Inter-American Court of Human Rights remedial practice as the materialization of structural secondary obligations.

2.1 Structural human rights: a conceptual shift between rights and structural provisions

While observing the expansion of the European Court of Human Rights' case-law, Leloup noticed that some of the decisions imposed to States "changes in the very structure of the government".[219] Behind these decisions there was an assessment of the Court that specific human rights violations to be corrected depend directly on changes in the institutional design of the States. This extensive mandate concerning structural impact and institutional change is only possible due to the *erga omnes* effect of ECtHR decisions, in which a decision direct to individual applicants affects the structure of that State and, consequently, impacts the society as a whole. In those cases, the court prescribes "the State will need to introduce general measures to eradicate this problem with a view to avoiding future cases".[220]

Structural change would correspond to interferences on provisions and/or institutions that establish and organize the State's governing bodies, including such as separation of powers, federalism, checks and balances, as well other changes that affects the way the state is

[219] Leloup, "The Concept of Structural Human Rights", 481.
[220] Ibidem, 486.

organized.[221] Those types of change would not correspond to negative nor positive obligations, because these duties are essentially decurrent from the relation between States and individuals, while in the case of structural human rights their effects:

> […] transcend the relationship between the person and the government for the case in question, and even surpass people who are in a similar position to the original applicant. Rather, the application of the convention rights in these examples has impact on the very manner in which the State Party is structured, for example, by altering the composition of a government institution, thereby exceeding the personal scope of human rights".[222]

The relevance of this classification is that here human rights, as fundamentally individual rights, impacts on State's structure. While from the point of view of remedies and judicial practice this might be evident, from the conceptual perspective these types of rights and obligations part ways both with the traditional dichotomy of human rights obligations was presented on the previous topic, and with the division belonging to Constitutional Theory. According to this theory, fundamental rights as rights of individuals would be opposed to structural provisions.[223] The constitutions would be divided between the provisions that would secure individuals their essential rights (fundamental rights) and provisions containing the organization of the State and its powers (structural provisions).[224]

Varol argues that there are many studies concerning the effects of structural provisions on the protection of fundamental rights, but few of them analyses how individual rights can also impact on state's structure.[225] SHR breach this division, because while they are "rights" type of provisions, they also have structural effects and, at the same time, part with the personal conception of human rights in which individuals are the immediate repository of State's obligations. In certain cases, it is possible to recognize the State's governmental structure can be the immediate receptor of change, however, ultimately, those changes have as final objective to assure individuals to have a certain human right respected.

[221] Ozan O. Varol, "Structural Rights", *The Georgetown Law Journal* 105:1001 ([s.d.]), 1009.
[222] Leloup, "The Concept of Structural Human Rights", 483.
[223] Ozan O. Varol, "Structural Rights", 1004.
[224] Ibidem, 1005.
[225] Ibidem.

While you should not lose the right holders in the picture of structural change, the enjoyment of rights of those individuals, as recognized by Fredman[226], it is not automatic, but the State should provide conditions for that enjoyment. In many cases, the direct violation or the impossibility of accessing rights might be due to a faulty institutional design. In that regard, Leloup identified in an overview of the ECtHR case law several provisions that were given structural effects by the ECtHR, such as the right to an effective remedy (Article 13),[227] right to life (Article 2) and the prohibition of torture or inhuman treatment (Article 3),[228] the right to respect for private life (Article 8),[229] and the right to free elections (Article 3, First Protocol).[230]

Leloup's propositions meet the studies of Kosař and Lixinski[231] concerning the implications of the European and Inter-American case law on the institutional design of national judicial systems. In an extensive analysis of both courts' decisions, the authors identified some relevant topics concerning judicial design that have a direct relation with the concept proposed by Leloup. In these decisions the courts enunciated the necessity of structural reforms on practices and/or the organization of the judiciary to comply with the correlated convention's provisions.[232] They demonstrated that both courts "have been undertaking a broader array of roles than those originally envisioned and that their recent case law reduces the monopoly power of parliaments to determine how to structure their judiciaries, at least on the assumption that states comply with their international human rights obligations."[233]

It should be noted that Regional Human Rights Courts decisions are not the only human rights mechanisms that can engender institutional change. International bodies also issue recommendations that can be "structural in nature",[234] as is the case of the UN Treaty Bodies and of the Universal Period Review, in which many of the recommendations can intend to change government structures. In fact, it was not expected RHRC to have such an extensive mandate, since their main role is to receive petitions of individual applicants or State's communications. However, human right jurisdictions are archiving the same type of impact (at least, intended to) generally associated with monitoring bodies, but with the biding

[226] Fredman, *Human Rights Transformed* 13.
[227] Leloup, "The Concept of Structural Human Rights", 492.
[228] Ibidem, 494.
[229] Ibidem, 495.
[230] Ibidem, 496.
[231] See Kosař and Lixinski, "Domestic Judicial Design by International Human Rights Courts."
[232] Ibidem, 716.
[233] Ibidem, 714.
[234] Leloup, "The Concept of Structural Human Rights, 486.

characteristic of Regional Human Courts decision, and the other institutional features addressed previously.[235] Those features advocate together with the concept of structural human rights, on why those Regional Courts are indicated to engender far-reaching measures as institutional change on States.

Structural effects on States derived from a decision of RHRC have been already identified by other authors, especially concerning cases of the IACtHR,[236] but none of them proposed this structural effect should be translated into a normative concept that describes not a circumstantial effect of the court's decisions, but a different nature of human rights. The conceptual underpinning to RHRC's decisions is positive because it can help to grasp the complexity of human rights obligations and how human rights function, disclosing an intermediate category between rights and structural provisions.[237]

The concept is also relevant to comprehend the extent of influence of RHRC on the States, since when "we understand that some human rights to have the power of altering government powers, the 'far-reaching consequence' of impacting a State Party becomes more intelligible", and acceptable. It is not new to the hardships RHRC faces to execute their decisions and archiving State's compliance, especially measures such as the ones which comprise structural obligations.[238] Thus, a normative concept of SHR can be a relevant tool from the perspective of victims and their representatives that bring the cases to the Court to require a correlated structural effect to the right violated. At the same time, it can also give theoretical backing to the court's practice, clarifying the correlation of human rights to the States structure.

While positive obligations of the State concerning human rights are widely accepted, extensive measures still face great criticism, especially those with an impact on State's structures, sometimes "confusing" human rights courts with the role of constitutional courts or even parliaments.[239] The concept of SHR, therefore, can help to clarify that "far-reaching effects are

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[235] See Chapter 1, topic 2.
[236]See Víctor Abramovich, "From Massive Violations to Structural Patterns"; Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*".
[237] Leloup, "The Concept of Structural Human Rights, 487.
[238] Open Society Foundations, Justice Initiative, From Rights to Remedies: Structures and Strategies for Implementing International Human Rights Decisions, New York, 25/06/2013. Available at: https://www.justiceinitiative.org/uploads/7d34546e-dfe6-450b-82ec-77da3323d4bd/from-rights-to-remedies-20130708.pdf [Accessed 5 September 2022], 2-3.
[239] There is extensive literature on the role of RHRC as Constitutional Courts. In the case of IACtHR the Court itself affirmed the existence of a control of conventionality States should undertake independently on the

then not a consequence of judicial activism or a '*government des juges'* but of the structural nature of the Convention rights".[240] In fact, the concept of structural human rights can be relevant to understanding and justifying the expansive remedial approach Courts have been undertaking. Thus, while the recognition of the amplitude of States' obligations can have impact for itself, RHRC can outline and conduct this transformation by awarding remedies of collective range as guarantees of non-repetition.

2.2 Primary and secondary obligations and structural human rights in the remedial practice of Courts

As described by Leloup, some human rights to be fulfilled will demand from States far-reaching measures that will involve on structural changes. Depending on the remedial competence of the RHRC, those measures can be translated to guarantees of non-repetition. Thus, SHR can be also identified when the courts impose structural obligations though remedies. However, this is not a rule since the Court might recognize and enunciate structural obligations without imposing a correlated measure.

On that concern, it should be recalled the concepts of primary and secondary obligations and the difference between the recognition of the extent of State's responsibility within the conventional provisions and the correlated remedy imposed. Lázaro and Hurtado explain that primary obligations are the duties of the State as a party of an international treaty, decurrent of its provisions. On the other hand, secondary obligations are the ones imposed when the Court recognizes the State failed to comply with the primary obligations. Even tough secondary obligations derive from the first one, they are autonomous duties belonging to the regime of States responsibility in repairing integrally victims, ceasing the violations and, if necessary, offering non-repetition assurances.[241]

recognition of State's responsibility. Under this doctrine, national courts and parliaments must take the Convention provisions and the Court's rulings as a parameter of interpretation and validity of national law. See Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, 300-303.

[240] Leloup, "The Concept of Structural Human Rights, 489.

[241] Lázaro and Hurtado, "Las Garantías de No Repetición En La Práctica Judicial Interamericana y Su Potencial Impacto En La Creación Del Derecho Nacional", 733.

The Courts in their judgments are responsible to substantiate primary obligations, giving content to the legal provisions, and will apply the correlated remedy. However, depending on the extent of the remedial mandate of the Court, the decision might recognize wider primary obligations than the extent of secondary ones. On the other hand, secondary structural obligations will be very likely to be preceded by the Court's recognition of structural primary obligations. In other words, the correlation between the fulfillment of the rights with the structural measures, such as the organization of governmental apparatus and legal mechanisms. While the mere recognition of the extent of primary obligations might not cause a direct impact on the State as a specific remedy, this recognition will also integrate the substantive content of conventional rights and their legal standards.

The remedial practice of the Court can be relevant to substantiate and strengthen the concept of structural human rights, since structural secondary obligations can take the form of guarantees of non-repetition. Due to its content and nature, GNR not rarely will also describe secondary structural obligations and, therefore, structural human rights. Leloup argued that SHR can be identified in cases the State is required to undertake "general measures" in a preventive manner, "with a view to avoid future cases". [242] Although regional systems have diverse approaches and practices concerning remedies, including different nomenclature and compliance mechanisms, it can be said that the main characteristics of GNR match with the features of SHR.

The preventive and general interest are the two main features of GNR, and, as it will be exposed, they make possible to Courts to remediate structural problems and repetitive patterns of human rights violations by also imposing changes on State's government structure. Thus, GNR can be the translation of SHR to the remedial practice of human rights courts.

[242] Leloup, "The Concept of Structural Human Rights", 486.

3. Guarantees of non-repetition and transformative impact

> The law of remedies can serve both individual and societal goals, the underlying purposes of which include corrective justice, deterrence, retribution and restorative justice.
>
> — *Rashida Manjoo*[243]

Regional Courts have the possibility to generate structural change on States through its decisions. The study has been elaborating on how those institutions can also be responsible for long-lasting impacts which can practically prevent the same violations to occur in the future. This impact is a consequence from one side to the recognition of multiplicity of obligations derived from civil and political rights, from the other side on the expansion of the remedial practice of the Courts when ordering remedies, as the cases of guarantees of non-repetition. In fact, structural human rights can be translated by guarantees of non-repetition in the matter of remedies.

Originally designed to adjudicate human rights violations of individuals, the practice of RHRC have evolved to a way broader role, including direct impact on State's structure and institutional design.[244] In that sense, the development of RHRC's case law concerning remedies exposed in the previous chapter illustrates how a more individual approach gave space to a comprehensive set of remedies aiming more than make up harms of specific victims, but, in addition, to tackle preventively systematic human rights violations.

When reflecting on the positive impacts of human rights litigation, Duffy proposed that the "[l]itigation process can contribute to the creation or strengthening of social structures within affected groups that enhances the effectiveness of other, non-litigation strategies."[245]These advancements can be archived indirectly by the development of legal standards that will be applied supranationally or by domestic courts, by the recognition of the State's responsibility and the publicity awarded to the judgment, or directly by awarding remedies of legislative reform and of policy implementation by the local governments. These collective measures which describe structural change in the States can be identified under the category of guarantees of non-repetition.

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[243] Human Rights Council (HRC). *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo,* Twenty-third session, 14 May 2013. A/HRC/23/49.
[244] Kosař and Lixinski, "Domestic Judicial Design by International Human Rights Courts", 714.
[245] Duffy, *Strategic Human Rights Litigation, 75.*

The UN Basic Principles contains a non-exhaustive list of GNR, such as assuring effective control of civilian forces, educational measures, and legislative reform.[246] What all these diverse actions have in common is that they surpass the parts of the case and are directed to the collectivity, and have a forward-looking component, intending to prevent similar occurrences in the future. As elucidated by Lessard, this type of remedy "has a different function and orientation: to *prevent* the recurrence of violations in the future. Given that non-repetition aims to act in the very roots of the violation it is of general interest."[247].

Guarantees of non-repetition, as to be understood both as a general obligation to prevent human rights violations[248] and a specific type of remedy,[249] is considered a component also of the rule of law.[250] Rule of law, as a principle of governance, means that all persons and all in private and public institutions, including the State, should be held accountable to laws that should be consistent with IHRL.[251] The courts wish through their remedies, to redress the victims' injuries, and to avoid recurrence of similar violations. For the last enterprise, they can order measures that will impacts the collectivity by employing change on State's governmental structures.

Due to their broad scope, GNR can be a tool to engender structural transformation on States aiming to correct systemic discriminations and inequalities. In accordance with the transformative justice theory, "in order to reparations to produce a true transformative effect, they must address the general conditions that existed prior the violation, and whenever these conditions are found to have caused or allowed the violation due to their inherent inequality, reparations must be designed to subvert them."[252]. This transformative effect might be only reached with a holistic and collective remedial practice by the court, as defended by

[246] United Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, No. RES/60/147, 16 December, 2005.
[247] Lessard, "Preventive Reparations at a Crossroads", 1209 [Marks from the author].
[248] Report of the International Law Commission (ILC) on the Work of Its Fifty-third Session, UN Doc. A/56/10 (2201). The General Assembly took note of the ASR in UNGA Re. 56/83, 12 de December 2001.
[249] United Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, No. RES/60/147, 16 December 2005.
[250] Shelton. *Remedies in International Law,* 97.
[251] Brianne McGonigle Leyh, "A New Frame? Transforming Policing through Guarantees of Non-Repetition", *Policing: A Journal of Policy and Practice* 15, nº 1 (21 May 2021): 362–72, https://doi.org/10.1093/police/paaa035, 363.
[252] Geneviève Lessard, "Preventive Reparations at a Crossroads", 1211.

Antkowiak.[253] Courts, however, might face a couple of challenges on grating such comprehensive measures, as lack of political support or political pressure from the State parties, limited assessment of the facts and of the national context. Even though, the path towards this transformative effect of RHRC could not be undertaken without guarantees of non-repetition.

The possibility of granting far-reaching remedies derives from the progressively recognition by RHRC of not only positive obligations within the conventions, but also of structural implications of human rights on States. This expansive approach on remedies can be observed the practice of the RHRC, whether they explicitly called or not the measure as an GNR. While the ECtHR might classify non-monetary and collective measures as satisfaction measures, the IACtHR in its sentences has a section dedicated only to GNR and developed specific monitoring compliance mechanisms for the same measures.

In a short overview of this expansion towards GNR, The European Court of Human Rights, known for a more conservative approach to remedies compared with the IACtHR[254], have been relying on the principle of effective protection of the Convention to demand positive duties from States in most of the ECHR provisions.[255] In 2004 the Court adopted the pilot judgment system dedicated to group repetitive cases which the Court has identified the same pattern of human rights violations.[256] The mechanism can both be used to reduce the excessive workload of the Court and, at the same time, to eliminate "some of the root problems which lie behind repetitive applications as well as establishing a remedy for those adversely affected by them".[257]

In its first contentious case in 1988, the Inter-American Court of Human Rights affirmed States should organize their "governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of legally ensuring the free and full enjoyment of human rights".[258] However, the Court limited to award the victim's remedies to financial compensation. In comparison, in the landmark case *Plan de Sánchez v Guatemala* in

[253] See Antkowiak, "Remedial Approach to Human Rights".
[254] Kosar and Lixinski, "Domestic Judicial Design by International Human Rights Courts", 715.
[255] Leloup, "The Concept of Structural Human Rights", 482.
[256] Council of Europe, Registry "Pilot-Judgment Procedure". Available at: https://www.echr.coe.int/documents/pilot_judgment_procedure_eng.pdf
[257] Ibidem.
[258] *Case of Velásquez Rodríguez v. Honduras.* Reparations and Costs. Inter-American Court of Human Rights, Series C No. 7 (Judgment of 29 July 1989).

2004,[259] the remedy section included a comprehensive set of measures, including reparation to survivors and to the next kin of victims of the massacre, publication of the sentence at national level, conduction of the investigation with due diligence by the State, as well as ordered to conduct housing and development programs for the community affected.[260] In fact, the IACtHR started to apply measures of non-repetition in 2001 and raised its frequency from 2005, the year in which the Court awarded GNR for nine cases in a total of the ten sentences issued.[261] Reyes explains the shift in the Court's case-law from 2001 might have been due to the reform of the Court's rules of proceedings which made possible victims to present their own considerations through their representatives during the proceedings.[262] The IACtHR been following the holistic approach of remedies consistently at least until last decade when the Court orders started, ins some cases, to overlap with Domestic Reparation Programs (DRP), and the Court preferred to apply the subsidiarity principle, as observed Sandoval.[263]

The African Court on Human Rights and People's Rights was established in 2004 and the first contentious case was sentenced in 2011. In the sentence, Shelton observed that the tribunal "made limited use of its remedial power"[264] when affirmed that the prohibition of independent candidates to run for elections in Tanzania violated the Charter. Although the Court called the government to adopt all constitutional and legal measures to redress the violations, which could be converted into a non-repetition guarantee, the order was open-ended and stated the government should act "within a reasonable time".[265] On the other hand, the African Commission, established by the ACHR (1986) to promote human rights, have been adopting in the last decade "injunctive orders, including restitution (demanding the release of persons wrongfully detained), repeal of laws or decrees found to be in violation of the Charter and the reinstatement of wrongfully dismissed workers"[266]. However, the Commission has been

[259] *Case of the Plan de Sánchez Massacre v. Guatemala*. Reparations. Inter-American Court of Human Rights, Series C No. 116 (Judgment of November 19, 2004).
[260] Sandoval, "Two steps forward, one step back: reflections on the jurisprudential turn of the Inter-American Court of Human Rights on domestic reparation programmes",1993.
[261] Marcela Zúñiga Reyes, "Garantías de no repetición y reformas legislativas", 33.
[262] Ibidem.
[263]See Sandoval, "Two steps forward, one step back: reflections on the jurisprudential turn of the Inter-American Court of Human Rights on domestic reparation programmes",1995: "Indeed, until one decade ago, it could be taken for granted that the court would continue to award its holistic and victim-centered reparations. After this time, the nature of litigation began to change when legal representants of the victims' or states' representatives attacked or referred to the DPRs in their pleadings".
[264] Shelton, *Remedies in International Human Rights Law*, 238.
[265] Ibidem, 238.
[266] Ibidem, 234.

reluctant in requiring financial remedies from States, demonstrating a more collective and even structural approach in their recommendations.

Identified as a general trend towards remedies, the expansion of courts orders is a recognition that full reparation of human rights violations, as it might be impossible financially, can only be achieved if the State commits itself to not incur in the same wrongdoing again. Thus, GNR appears as essential tool to this enterprise due to its especial characteristics if comparted with other remedies. Thus, in the next sub-sections, the central characteristics of GNR will be tackled separately: the preventive function and general interest feature.

3.1 Preventive function of guarantees of non-repetition and State's deterrence

Guarantees of non-repetition do not share the same characteristics of other measures, as affirms Lázaro in her doctoral thesis concerning the topic.[267] The author asserts that GNR cannot be equated to "regular" reparations measures —that intent to reestablish the harm caused to the victim and guarantee the enjoyment of her rights[268]—, since their focus is not directed to the victims or the past injury, but to the "future victims". In case, preventing similar violations in the future. The *ratio* behind GNR is the following: when the court identifies recurrent violations it considers when arbitrating the remedies what could the State "fix" to avoid the same violation in the future. In fact, prevention is on the core of the RHRC's activity, as noted by Laplant:

> The ultimate goal of an international human rights tribunal [...] should be to render itself obsolete. In an ideal setting, the Court will have served its purpose the day all member States take every step possible to prevent human rights violations, or when not possible, guarantee their non-repetition by ensuring effective internal remedies that lead to prompt criminal investigations and just compensation for victims, measures that will help deter future violations.[269]

All the courts remedies, as a matter of principle,[270] intend to prevent the repetition of human rights violations by the States, whether it is an individual compensation to the victims or

[267] María Carmelina Londoño Lázaro, "La Prevención De Violaciones A Los Derechos Humanos: Estudio Garantías Sobre Las De No Repetición En El Sistema Interamericano" (Buenos Aires, Universidad Austral, 2013), 96-97.
[268] Ibidem.
[269] Lisa J. Laplante, "Bringing Effective Remedies Home: The Inter-American Human Rights System, Reparations, and the Duty of Prevention", *Netherlands Quarterly of Human Rights* 22, nº 3 (2004), 347.
[270] Shelton, *Remedies in international human rights law,* 22.

demands specific policy and legislative change. Deterrence, more referred in studies of Criminology measuring the effects of punishment to prevent the commitment of crimes, also applies to States' behavior in response to Human Rights Regional Courts, as points Haglund.[271] Shelton further explains that "deterrence is assumed to work because rational actors weight the anticipated cost of transgression against the anticipated benefit".[272]

In fact, any functioning legal system should be capable, at some level, of deterrence or prevention. International Law and more specifically International Law of Human Rights is no different.[273] Adapting deterrence for the context of regional courts, States would be subjected to general and special deterrence. General deterrence would explain how the mere existence of a RHRC in the region and the subjection of States to its jurisdiction might impact on their behavior concerning human rights.[274] The possibility of being a target of a court's proceedings might prompt States to adopt policies more protective and respectful of human rights to avoid punishment by the Courts.[275] While specific deterrence is characterized when the State has been already held responsible of a human rights violation.

Haglund argues this second type of deterrence has a stronger impact on States and consequently on preventing new violations.[276] When a State receives an adverse judgment the possibility of a future punishment grows for three main reasons. First, the adverse judgment signalizes to States and their governments that human rights violations are detectable. Second, the facts and details of the cases are publicized, and the conducts of State agents are put in the spotlight. Lastly, the adverse judgment will be accompanied by censure and monitoring of State's behavior by the Court.[277] Beyond the "naming and shaming"[278] and the reputation costs brough by the judgment, the sentence transcribes a concrete legal enforcement, which includes the declaration of State responsibility for the violation of international law and the correspondent remedy to repair the wrongdoing.[279] States, towards the possibility of a new "punishment", will be more willing to implement Courts' orders.

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[271] Haglund, *Regional courts, domestic politics, and the struggle for human rights,* 29.
[272] Shelton, *Remedies in international human rights law*, 22.
[273] Creutz, *State responsibility in the international legal order*, 157.
[274] Haglund, *Regional courts, domestic politics, and the struggle for human rights,* 31.
[275] Ibidem, 32
[276] Ibidem.
[277] Ibidem, 33.
[278] Ibidem, 34
[279] Creutz, *State responsibility in the international legal order*, 158.

Measures as GNR have a special standing among different possible remedies, not only because they hold deterrence in their names, but they are a commitment to not perpetrate the same violation again. In addition, when the State is undertaking measures to repair past violations and commits with preventing reoffence, GNR "reinforce 'confidence in a continuing relationship' between the state and those falling within its jurisdiction".[280] Beyond the symbolic strength of those actions, considering guarantees of non-repetition are in fact implemented, they will not only signalize good practices or promises of the government, but they can perform as material tools to hinder future violations. In that sense, non-repetition guarantees can impose on States an institutional design which practically prevents the commitment of other violations of human rights.

3.2. Guarantees of non-repetition as measures of general interest

Diversely from other remedies, GNR do not restrain their scope within the parts of the proceedings. Their reach is argued to be of general interest because they affect an indeterminate number of people[281]. The amplitude of GNR is directly related with its preventive character, because when the court "explicitly or *de facto* directed to the 'society as a whole', it is an indication that the judge considered the immediate need to redress the violation efficiently and effectively and specially to prevent its recurrence", explains Schonsteiner.[282]

The measures in question intend to engender *changes* in the States. Those modifications can incur on governmental structures change, legislative reform or implementation of public policies. While they can protect the victims of the case to not to be positioned again in the same place they had their rights violated, it can also impede that an undetermined number of individuals do not become victims.

It is important to mark the difference between collective and general interest measures. While collective remedies might be extended to a huge number of people, or an entire community, a general interest measure has unlimited reach, affecting the "society as a hole".[283]This category was adopted by the IACtHR and it refers to a violation due to its gravity affected the society in

[280] Laplant, "Bringing Effective Remedies Home", 347.
[281] Lessard, "Preventive Reparations at a Crossroads", 1211.
[282] Judith Schonsteiner, "Dissuasive Measures and the 'Society as a Whole': A Working Theory of Reparations in the Inter- American Court of Human Rights", *American University International Law Review* 23, nº 1 (2001), 130.
[283] Schonsteiner, "Dissuasive Measures and the 'Society as a Whole'", 130.

its integrity, their values, and memory, and right to truth.[284] At the same time, it can refer to redresses directed to the collectivity, as the case of GNR. While the scope of victims for the Court might be broad, including acknowledge an entire community, as the cases of the indigenous communities *Plan de Sanchéz*[285] or *Moiwana Community,*[286] the Court does not expand the scope of the beneficiaries of reparation (in especial compensation) to beyond the injured part of the violation[287]. On the other hand, when granting guarantees of non-repetition, such as legislative reform, the Court refers "to society's role in pursuing the aim of nonrecurrence of violations.", directedly linked to GNR and its preventive feature exposed above.[288]

Thus, differently from "regular" remedies, GNR are not directed to redress the past harm to the ones recognized as victims of the proceedings, but to prevent future violations of the same pattern. This feature of GNR not rarely brings critics on characterizing them as a form of remedy, because parts with the traditional role "specifically focused on restoring a victim back to the position they were in prior to the violation taking place (a basic principle of reparation) or about individual remedy".[289] At same time, the identification of GNR as remedies is important because it allows victims "bringing a claim for a remedy to seek specific court-ordered actions aimed at preventing future violations".[290]

If in theory actions brough in front of a RHRC would have only *inter pars* effects, when a court grants a GNR, in practice, it has *erga omnes* outcomes. The European Court of Human Rights has declared that because of the "*res interpretata* effects, the Court case-law is biding *erga omnes*, at least in its effects in practice"[291], which means the Court will apply same interpretation of the Convention if faced with the same issue again, but also that States are expected to follow principles and standards decurrent from its judgments, even if they were concerned to other State. The same occurs with the Inter-American Court, but even further. The IACtHR has established a doctrine of Conventionality Control, in which the Convention,

[284] Here it should be considered specially cases of forced disappearance in the context of Military dictatorships in Latin America, in which the Court has an extensive case-law.
[285] *Case of the Plan de Sánchez Massacre v. Guatemala*. Reparations. Inter-American Court of Human Rights, Series C No. 116 (Judgment of November 19, 2004).
[286] *Case of Gómez Palomino v. Peru.* Merits, Reparations, and Costs. Inter-American Court of Human Rights, Series C No. 136 (Judgment of 22 November 2005).
[287] Here it should be considering the measures listed under topic 4.1 (Chapter I) as individual remedies.
[288] Schonsteiner, "Dissuasive Measures and the 'Society as a Whole"', 139-140.
[289] Leyh, "New Frame? Transforming Policing through Guarantees of Non-Repetition,366.
[290] Ibidem.
[291] Leloup, "Structural Human Rights", 485.

including the Court's interpretations, should be parameter of validity of national law.[292] Those far-reaching consequences of the RHRC decisions are, ultimately, consequence of the recognition of the *erga omens effect* of human rights obligations[293] and the dual character of GNR as both a remedy and a general obligation of states under international responsibility regime.

Although GNR might be directed to the collectivity, the non-repetition assurance of a human rights violations is also a desire of the individual victim and not rarely the requests came directly from their representatives pushing through effective changes in the State. When describing the transformative impact human rights litigation might have on individuals, Duffy stress that "for many survivors, an important part of their motivation in perusing litigation is to ensure that the crimes do not occur again, that other do not suffer and that lessons are learned. The impact on them is closely linked to the other levels of impact"[294], such as legal impact, policy and practice of the States concerning human rights.

The characteristics listed match with the ones pointed by Leloup concerning the enforcement of SHR in the RHRC decisions; the preventive and general interest which overburdens the parts. While the author mentions the work of the European Committee in shaping the decision of the ECtHR into measures that will imply structural obligations,[295] in the case of the IACtHR you might be able to extract the same types of obligations within the remedies arbitrated in a sentence of the Court. Thus, we discuss next the existence of structural obligations, primary and secondary, in the context of the IACtHR.

[292] Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights,* 218.
[293] Human Rights Committee, General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, No. CCPR/C/21/Rev.1/Add.13, 26 May 2004.
[294] Duffy, *Human Rights Litigation,* 59.
[295] Leloup, "Structural Human Rights", 486.

4. The Inter-American Court of Human Rights remedial practice and structural human rights

From the remedial practice of the IACtHR, recognized as more expansive than the ECtHR[296], is easier to identify demands of structural reforms on the State Parties, including in its remedial practice. However, the fact the Court has one dedicated section in its sentences to "satisfaction and guarantees of non-repetition" does not mean that all the measures under the umbrella of these collective remedies necessarily will implicate on structural change, due to the diversity of measures considered by the Court. The GNR arbitrated by the Court can be divided by their nature and purpose in 3 categories: measures to adapt domestic law to the parameters of the Convention, human rights training for public officials, and adoption of other measures to guarantee the non-repetition of violations.[297]

The remedial practice of the IACtHR can endorse the concept of SHR, because the Court has been ordering GNR aimed to impede the repetition of violations which are the result of structural issues, through 4 generic mandates: derogate, create or modify laws, practices, policies or institutions of the States, as so educate its personal and the civil populations."[298] Lázaro and Hurtado identified these three commands in a study that mapped all the GNR ordered by the IACtHR since the first contentious case, from 1998 to 2015. In 63% of all the judgments included orders of GNR, and 95% of them intended collective effects from individual sentences and benefit groups or populations that are not direct parts of the case.[299] In addition, 33% of the GNR ordered in that period were expressly dedicated to creating legislation, mechanisms, policies, and practices within the State.[300] Those measures, in fact, can enunciate structural obligations and, therefore transcribe SHR if we adopt Leloup's

[296] As exposed, it is almost an unanimity in the literature. See Antkowiak, "Remedial Approaches to Human Rights Violations."; Sandoval, "Two Steps Forward, One Step Back: Reflections on the Jurisprudential Turn of the Inter-American Court of Human Rights on Domestic Reparation Programmes."; Shelton, *Remedies in International Human Rights Law*; and others.
[297] Organization of American States (OAS), *Inter-American Court of Human Rights, Annual Report 2021.* Available at: https://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2012.pdf [accessed 15 September 2022], 18.
[298] [Free translation]: *"[c]on base en la práctica judicial interamericana, una GNR puede ordenarle a un Estado cuatro mandatos genéricos: 'derogar, crear o modificar' leyes, prácticas, políticas o instituciones del Estado, así como "educar"a sus funcionarios públicos o a la población civil".* In: Lázaro and Hurtado, "Las Garantías de No Repetición en la Práctica Judicial Interamericana", 732.
[299] Ibidem, 726.
[300] Ibidem, 742.

definition of structural change as measures that "affects how the state apparatus is organized".[301]

Lázaro and Hurtado focused on the identification of legislative change at national level imposed by the IACtHR and margin of appreciation given by the courts, concluding that GNR generally take form of legislative reform and can, eventually, imply on changes on State's governmental structure, as it happened in the case of *Castillo-Petruzzi v. Peru* (1999).[302] Antkowiak highlighted[303] this was the first case the Court ordered directly to the State to "adopt the appropriate measures to amend those laws"[304] after recognizing that laws that placed civilians under the same jurisdiction of military tribunals violated the Convention. Therefore, the Court instated through its decision a legislative change that could affect the institutional design of the Peruvian judiciary.

On the same line, Kosar and Lixinski have identified a series of decisions of the IACtHR "rather than having effects only with respect to the individual whose rights have been violated, have much deeper structural effects in the design and operation of domestic judicial structures."[305] The authors conducted extensive research on the Court's "judicial reform" agenda and delimited some trends such as cases about military and special courts, disciplinary proceedings and removal of judges, as well cases concerning the extent and interpretation of what is "law". They observed that the cases assessed structural issues on judiciary systems and the decisions had "structural implications for the management of other cases"[306]. While ordering structural measures, the authors observed the Courts (IACtHR and ECtHR) were, at the same time, imposing their vision on the arrangement of the national judiciary system, and slowly consolidating their role as constitutional courts[307]. The authors raised concerns on the level of interference of Regional Courts on domestic judicial design, calling attention that the Courts might be mostly empowering themselves, rather than effectively establishing common standards for the protection of judicial guarantees in the Americas and in Europe.[308]

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[301] Leloup, "The Concept of Structural Human Rights", 484.
[302] *Case of Castillo Petruzzi et al. v. Peru.* Merits, Reparations, and Costs. Inter-American Court of Human Rights, Series C No. 52 (Judgment of May 30, 1999).
[303] Antkowiak, "Remedial Approaches to Human Rights Violations", 382.
[304] *Case of Castillo Petruzzi et al. v. Peru.* Merits, Reparations, and Costs. Inter-American Court of Human Rights, Series C No. 52 (Judgment of May 30, 1999).
[305] See Kosar and Lixinski, "Domestic Judicial Design by International Human Rights Courts".
[306] Ibidem, 719.
[307] Ibidem, 759.
[308] Ibidem.

Additionally, one cannot talk about remedial practice of the IACtHR without mentioning structural problems, rooted in social and economic inequality and discriminations. Not rarely, GNR are described as tools to correct structural problems. While conducting the research on structural obligations within the Inter-American Convention and the role of the Court, we found a series of mentions concerning structural flaws on States, posing GNR as diverse of other remedies since it would have as main role the "correction of an structural issue,"[309] "structural institutional deficiencies,"[310] as an "attempt to remedy a structural wrong that the court has recognized in its examination of a case."[311]

Structural obligations and the correlated remedy, in case, guarantees of non-repetition, appears to be a trend on Court's decisions that identifies structural inequalities or discriminations. Many of those issues are, in fact, shared by Inter-American States, as the colonial past, authoritarian heritage of military dictatorships, poverty and elevate rates of socio-economic inequality, as well gender and racial discriminations[312].

Therefore, we have consistent indications that SHR can be described on the interpretation of the Inter-American Convention by the Court in both primary and secondary obligations. Structural obligations can also be identified when analyzing the Court remedial approach through the GNR awarded. The role the IACtHR attributed to these measures can indicate that structural obligations and, consequently, SHR might be strongly related to cases of structural inequality and/or discrimination. Therefore, as the next step of this study, is to describe how the identification by the Court of a case of structural discrimination[313] can give rise to structural human rights.

The choice of the Court to a collective and structural remedy, we argue, can be related to the nature of the contextual violation and victims' status and a specific vulnerability which are not

[309] [Free translation]: "*Estas intentan corregir un error de tipo estructural identificado al examinar un caso, cuestión que se encuentra respaldado por el artículo 2° de la CIADH que obliga a los Estados a adoptar medidas legislativas (entre otras)"*. In: Reyes, "Garantías de no repetición y reformas legislativas", 27

[310] [Free translation]: "*GNR explican por qué su finalidad no es reparar integralmente a las víctimas —como a veces se juzga—, sino eliminar de manera directa uma alegada deficiencia estructural del Estado para prevenir violaciones repetitivas (hacia el futuro) de los derechos humanos"*. In: Lázaro and Hurtado, "Las Garantías de No Repetición en la Práctica Judicial Interamericana", 730.

[311] Schonsteiner, "Dissuasive measures and the 'society as a whole', 149.

[312] Abramovich, "From Massive Violations to Structural Patterns", 17.

[313] Paola Pelletier Quiñones, "La 'discriminación estructural' en la evolución jurisprudencial de la Corte Interamericana de Derechos Humanos", *Revista Instituto Interamericano de Derecho Humanos* 60 (2014): 205–15.

individual, but portrayed by a group which can be or not a minority. These types of violations, due to their nature, rooted in cultural, social, and economic discriminations can only be remediated and prevented by a collective and wide range of State politics, including the restructuration of the State apparatus. That is when structural discrimination meets structural human rights.

Chapter III - The Inter-American Court of Human Rights, Structural Obligations, and Gender-Based Discrimination

> Reparations must go above and beyond the immediate reasons and consequences of the crimes and violations; they must aim to address the political and structural inequalities that negatively shape women's and girls' lives.
>
> — *Nairobi Declaration*

After understanding guarantees of non-repetition and their correlation with structural human rights, it is possible to identify how RHRC can influence on State's governmental structures through their remedies and be a trigger to an institutional design and policy change. The analysis of the remedial practice of the human rights courts demonstrated a remedial approach progressively more concerned with patterns of violations, structural inequalities, and discriminations. Especially in the IACtHR, these types of violations would be remediated with general interest measures that go beyond the parts of the proceedings.

As this study proposed, guarantees of non-repetition can transcribe structural human rights' secondary obligations. Due to the common correlation of those measures with systematic human rights violations, it can be said that GNR, which can describe SHR, are relevant tools to remediate structural issues. However, we should be aware that there are two *types* of structure in the discussion. As exposed before, the concept of structural human rights presented by Leloup concerns fundamental rights that impact the structure of the State, therefore, governmental and institutional structures. While structural discriminations are very likely to be also reproduced by State's institutions and policies, the structure referred to now is the social configuration that produces discrimination against a certain group of individuals.[314] Those two types of structure can meet when Regional Courts, in special the IACtHR, adopt guarantees of non-repetition which affects the structure of the State as means to correct structural discriminations.

There is no pretension to affirm that RHRC can by themselves correct structural discrimination. Change can be better described by a complex process involving a diversity of actors and multi-

[314] The concept of structural inequality/discrimination will be clarified this chapter on topic.1.2.

levels of governance of State and non-State actors, rather than one sentence arbitrating state's responsibility. However, RHRC, due to their institutional features and through remedial practice, can be a starting point and a driving force of change, especially against the inertia of States unwilling to act with due diligence to protect individuals and prevent violations.

To verify the possible correlation with structural change, remedies and structural flaws, we propose the study of the case González et al. v Mexico (2019), also known as *Cotton Field (Campo Algodonero).* The case is considered one of the most relevant decisions of the IACtHR, in which the Court recognized gender-based violence against women as a situation of structural discrimination. While there are various studies on the case, due to its relevance, most of them focus on the *Merits* of the case, as such the characterization of gender-based murder (GBM), structural discrimination and GBV or about the expansion of the jurisdiction of the court, while only a few of them are dedicated exclusively to the analysis the *Orders* and the remedial approach given by the Court, in special to the GNR awarded.[315]

Additionally, most of the studies concerning remedies (referred as reparations) and gender-based violence are concentrated and developed in the context of transitional justice and Domestic Reparation Programs (DRP). Those works highlight the importance to craft gender-sensitive measures, which should consider the specifies of victims when arbitrating remedies.[316] While there are clear differences between single applicants in front of a Court and the collective measures awarded by DRP, added to the specificities of post-conflict situations and transitional justice, the concept of transformative measures can be relevant to understand the role of GNR in cases of structural inequalities. As noted by the former Special Rapporteur Rashida Manjoo, in cases of GBV the traditional concept of *restitutio integrum,* intended to position the victim in the situation prior to the violation is not satisfactory.[317] *That place* the victims might be returned, without tackling the root causes of the violation, can be a position

[315] See, in special, Ruth Rubio-Marín and Clara Sandoval, "Engending the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgment," *Human Rights Quarterly* 33 (2011): 1062–91 and María Caterina La Barbera and Isabel Wences, "La 'Discriminación de Género' En La Jurisprudencia de La Corte Interamericana de Derechos Humanos," *Andamios, Revista de Investigación Social* 17, no. 42 (March 4, 2020): 59, https://doi.org/10.29092/uacm.v17i42.735.

[316] On the subject see: Sunneva Gilmore, Julie Gullerot, and Clara Sandoval, "Beyond Silence and Stigma: Crafting a Gender-Sensitive Approach for Victims of Sexual Violence in Domestic Reparation Programs" (Reparations, Responsibility & Victimhood in Transitional Societies, March 2020); Ruth Rubio-Marín, ed., *What Happened to the Women? Gender and Reparations for Human Rights Violations* (New York: Social Science Research Council, 2006).

[317] Human Rights Council (HRC). *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo.* Seventeenth session, 2 May 2011. A/HRC/17/26.

of vulnerability where their rights can be violated again. Thus, as explained by Yepes, "reparations in transitional contexts should be seen not only as a way to fix a problem of the past; they should be conceived as an instrument to promote a democratic transformation and to attain better conditions of distributive justice for all".[318] Thus, this transformation implies in incorporating measures that goes beyond restitution, including specially GNR that aimed to conduct institutional and policy reform.[319]

As reported, since there is a constant correlation of GNR purpose and structural flaws, the aim of the analysis is to verify whether the IACtHR, in the case to be studied, applied GNR containing structural obligations to tackle structural discrimination, therefore describing SHR through its remedial approach. The choice to center the study in the IACtHR is a consequence of focusing on the role of Courts in arbitrating remedies and structural obligations. During the study of RHRC became clear that it would not be possible to identify those types of measures in the direct work of the ECtHR, due to the restrictive interpretation of remedies and, consequently, its case law concerning guarantees of non-repetition. As it was highlighted by Henn, individual applications before both the "IACtHR and the ECtHR can have systemic impact and improve the human rights situation in the respondent State"[320]. And even though the content of guarantees of non-repetition can be similar in both regional systems, in the IACtHR these measures are arbitrated by the Court itself, while in the ECtHR the discussion concerning not repetitions guarantees take place on the sentence executing phase by the Committee of Ministers (CoM), a political organ of the Council of Europe which supervises the execution of judgments of the Court.

Specially concerning cases of GBV, it was observed by Ferstman that while the ECtHR recognize the "systematic and structural nature of domestic violence in a number of cases, the European Court has refrained from indicating the type of general measures that might be taken in order to put an end to the situation it has found to exist."[321] The author confirms, therefore,

[318] Rodrigo Uprimny Yepes, "Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice," *Netherlands Quarterly of Human Rights* 27, no. 4 (December 2009): 625–47, https://doi.org/10.1177/016934410902700411, 638.
[319] Ibidem, 638.
[320] Elisabeth Veronika Henn, *International Human Rights Law and Structural Discrimination: The Example of Violence against Women*, vol. 280, Beiträge Zum Ausländischen Öffentlichen Recht Und Völkerrecht (Berlin, Heidelberg: Springer Berlin Heidelberg, 2019), https://doi.org/10.1007/978-3-662-58677-8, 125.
[321] Carla Ferstman, "Do Guarantees of Non-Recurrence Actually Help to Prevent Systemic Violations? Reflections on Measures Taken to Prevent Domestic Violence," *Netherlands International Law Review* 68, no. 3 (December 2021): 387–405, https://doi.org/10.1007/s40802-021-00204-8, 396.

that discussions on GNR are conducted by the CoM. Since the aim of the study is to identify a structural characteristic of the remedies arbitrated by the courts, and the correlated concept of structural human rights, we decided to focus on the IACtHR which has a broader mandate, not only to define but also to reflect on the remedies.

Secondly, when researching remedies and structural obligations, the case of the Cotton Field recurrently appears as an example of the use of collective remedies as transformative reparations to assess systemic gender discrimination. Therefore, the choice to analyze this case was a result of the findings of the bibliographic research on the amplitude of Regional Courts and its impact on structural discrimination/inequality. Gender-based violence is recognized to be an issue rooted in social and culturally stigmatized gender stereotypes which, as a human right violation, impairs the fulfillment and enjoyment of women's right.[322]

Therefore, purpose of the chapter is to correlate remedial practice of the IACtHR and cases structural discrimination, as is the case gender-based violence through qualitative analysis of the Cotton Field case. To conduct the analysis, first it will be tackled the concepts of gender base violence as a human rights violation prescribed in the main International and regional documents, including the mentions on States' obligations and gender-based approach to remedies. Then, we will expose the definition of structural discrimination found in the literature and adopted by the IACtHR.

1. Relevant concepts to the case analysis

To conduct the analysis of the Cotton Field case is necessary to introduce two main concepts that crosscut the IACtHR's sentence, and we did not deal before in this study, which are gender-based violence and structural discrimination. It would not be possible to analyze and identify structural obligations and correlated remedies without those two concepts, since the Court grounded the measures of non-repetition on the nature of the violation (structural gender-based discrimination).

[322] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 35: Violence against women updating general recommendation No. 19,* CEDAW/C/GC/35,July 26, 2017. Available at: https://digitallibrary.un.org/record/1305057 [accessed 10 October 2022]

1.1 Gender-based Violence against Women and Remedies

The task of this subsection is to introduce the legal definition of gender-based violence (GBV) and its evolution at International and Inter-American levels, which are the standards applied by the IACtHR when analyzing the case object of the present study.

The first international document to define gender-based violence[323] against women was the Declaration on the Elimination of Violence Against Women (DEVAW) in 1993, as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."[324] The Declaration was adopted within the Committee on the Elimination of Discrimination Against Woman, the treaty body responsible to monitor the implementation of the correlated Convention (CEDAW).

Anticipating the DEVAW, the CEDAW Committee issued one year before a General Comment (GC) 19, which was later updated by the General Comment No. 35 in 2007. In the first document, GBV is defined as an "form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men", making clear that Article 1 of the CEDAW, which defines that discrimination against women also comprises GBV, concluding that this violence is as a violation of women's human rights. GBV is caused by negative stereotyped roles, in which women are subordinated to men englobing widespread practice of violence. It can take various forms, such a "family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision".[325]

The second document, later in 2007, clarifies the relevance to use the term gender-based violence against women instead of violence against women (VAW), explicating that the

[323] It is relevant to note that the study will be limited to gender-based violence against women, however, it recognizes that gender-based violence can be related to any gender and intersects a multiplicity of factors of economic, social, cultural, and ethnical nature.
[324] United Nations General Assembly (UNGA), *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104, available at: https://www.refworld.org/docid/3b00f25d2c.html [accessed 10 October 2022]
[325] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence against women*, CEDAW/C/GC/19, 1992, available at: https://www.refworld.org/docid/52d920c54.html [accessed 10 October 2022].

problem is a widespread and social issue, not individual, that have as origin the socially constructed gender stereotypes. Thus, the GC No. 35 states that:

> The expression 'gender-based violence against women', as a more precise term that makes explicit the gendered causes and impacts of the violence. This expression further strengthens the understanding of this violence as a social - rather than an individual- problem, requiring comprehensive responses, beyond specific events, individual perpetrators and victims/survivors.[326]

This relevant perspective highlights that GBV against women is, in fact, rooted in social, cultural and economic factors that perpetrate stereotypes based on gender[327]. GC n. 35 add other forms in which GBV can be manifested, adding that it should be included an analysis on the multiplicity of concurring factors, intersections of discrimination, that can have an aggravating negative impact on GBV[328]. Concerning the general obligations of States, the document affirms they should be responsible whether the perpetrator is a state agent or not. On that concern, States must act with due diligence against acts and omission of including non-state actions, which means they "will be responsible if they fail to take all appropriate measures to prevent as well as to investigate, prosecute, punish and provide reparation for acts or omissions by non-State actors which result in gender-based violence against women"[329].

Concerning GVB and reparations, the Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, issued in March 2017,[330] focus on mass violations of human rights, such as post-conflict situations. The declaration contains relevant principles to tackle transformative reparations for structural discrimination, recognizing that gender-based violence

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[326] Ibidem.

[326] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19,* 26 July 2017, CEDAW/C/GC/35, available at: [accessed 14 October 2022].

[327] Gender is a social construction in which women should undertake a pre-defined roles based on the feminine and masculine, which is not correlated with natural attributes, but contextual social constructions. See: La Barbera and Wences, "La 'Discriminación de Género' En La Jurisprudencia de La Corte Interamericana de Derechos Humanos", 66.

[328] The documents lists: "ethnicity/race, indigenous or minority status, colour, socioeconomic status and/or caste, language, religion or belief, political opinion, national origin, marital and/or maternal status, age, urban/rural location, health status, disability, property ownership, being lesbian, bisexual, transgender or intersex, illiteracy, trafficking of women, armed conflict, seeking asylum, being a refugee, internal displacement, statelessness, migration, heading households, widowhood, living with HIV/AIDS, deprivation of liberty, being in prostitution, geographical remoteness and stigmatisation of women fighting for their rights, including human rights defenders.", ibidem, parag. 12.

[329] Ibidem, 24.b.).

[330] Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation. International Meeting on Women's and Girls' Right to a Remedy and Reparation. Paris: International Federation for Human Rights, 2007.

is a result of “discriminatory interpretations of culture and religion that impact negatively on the economic and political status of women and girls". The document mentions that transformative gender-based reparations:

> must drive post-conflict transformation of socio-cultural injustices, and political and structural inequalities that shape the lives of women and girls; that reintegration and restitution by themselves are not sufficient goals of reparation, since the origins of violations of women’s and girls’ human rights predate the conflict situation.[331]

The document also lists that women and girls should have access to reparation programs gender-sensitive crafted, but not only restitution and compensation, but also “gender-aware forethought and care, could have reparative effects, namely reinsertion, satisfaction and the guarantee of non-recurrence”.[332] The declaration makes clear that reparations should go beyond the immediate causes of the violations suffered and “must aim to address the political and structural inequalities that negatively shape women’s and girls’ lives."[333]

Concerning the work of the UN Special Rapporteur (SR) on Gender-based Violence, the report issued in 2011 concerns specifically the matter of remedies.[334] The document presented both individual and general interest measures with gender-sensitive application Concerning GNR, the report mentions that those measures “can offer the greatest potential for transforming gender relations. In promising to ensure non-recurrence, such guarantees trigger a discussion about the underlying structural causes of the violence and their gendered manifestations and a discussion about the broader institutional or legal reforms that might be called for to ensure non-repetition.” [335] However, the report also limits the comments on GNR to the context of broader reparation programs of post-conflict and mass human rights violations contexts. In fact, the same report highlights that the Cotton field case was the first case in which gender-sensitive reparations outside the scope of transitional justice, inaugurating a standard in international human rights jurisprudence.[336]

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[331] Ibidem, parag.3.
[332] Ibidem, 3-A.
[333] Ibidem, 3-H.
[334] Human Rights Council (HRC). *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo.* Seventeenth session, 2 May 2011. A/HRC/17/26.
[335] Ibidem, parag. 20
[336] Ibidem, parag. 20

In the SR of September 2014,[337] GBV is listed as one of the main reasons of death and disabilities of women. The report characterizes GBV as "a pervasive and severe violation of human rights, resulting in women's civil, political, social, cultural, economic and development rights violations",[338] impacting and obstructing the fulfillment of women's citizenship rights. Citizenship, according to the document, is characterized by meaningful participation in a community with autonomy and agency.[339]

The same report describes how violence affects the exercise of women's human rights, tackling individually the impact on each right, from the right to life and physical integrity to the right to work, and many others. In addition, it presents the relevance to consider intra- gender inequalities of indigenous populations, persons with disabilities, refugees, and ethnic and cultural minorities. These factors cannot be considered isolated and their intersectionality with gender stereotypes increase "the risk that some women will experience targeted, compounded or structural discrimination, in addition to gender-based violence."[340] Concerning State's obligations, the SR affirms that States have failed to act with due diligence and calls attention to lack of transformative remedies that "require that the problem of violence against women is acknowledged as systemic and not individual".[341]

At the regional level, the Inter-American System adopted in 1994 the first biding document concerning violence against women in the world, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, known also as Convention of Belém do Pará (CBP),[342] because of the place where the document was signed in Brazil. Article 1 defines violence against women[343] (VAW) as "any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere", including a series of conducts such as domestic

[337] UN Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences*, September 2014, A/HRC/32/42, available at: https://www.refworld.org/docid/57615d1e4.html [accessed 18 October 2022]
[338]Ibidem, parag. 8.
[339] Ibidem, parag. 10.
[340] Ibidem, parag. 44.
[341] Ibidem, parag. 56.
[342] Organization of American States (OAS), *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belém do Pará")*, 9 June 1994, available at: https://www.refworld.org/docid/3ae6b38b1c.html [accessed 18 October 2022
[343] As indicated on the GC No. 35, the term more adequate to referrer to VAW would be GBV against women, and progressively the Inter-American Commission and the Court progressively adopted the term, as it will be seen in the case object of study.

violence, sexual violence, torture, trafficking of human beings, kidnapping, harassment at workplace, whether conducted by State or non-State agents.[344]

The duty of States is contained in Chapter III, which provides they should condemn all forms of violence against women, and "pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence".[345] State's obligations are not only of a negative nature of refraining from acts of GBV but also positive and structural. The positive obligations include applying due diligence to investigate and persecute cases of VAW and adapting national legislation to better prevent and protect women from violence. As described by Leloup, structural obligations would include, for example, the establishment of legal and administrative procedures and mechanisms for women victims of violence to be heard and to efficiently access procedures.[346] In addition, the document also mentions the establishment of mechanisms to provide effective remedies to victims[347]. As it will be explained, violations on the primary obligations contained in Article 7 were recognized for the first time under the material competence of the IACtHR in the landmark Cotton Field case.

In the past years, the Inter-American system issued a series of relevant documents on the topic, such as the Guide to apply the Convention of Belém do Pará (2014),[348] Juridical Standards to apply gender equality by the Inter-American Commission (from 2011, updated in 2015),[349] and the Jurisprudence Guide of the Court updated in 2018 (*Cuadernillho 4*) on Women's Human Rights, containing an compilation on the relevant case-law on GBV, including topic such as gender discrimination, discriminatory culture, stereotyped roles, and gender sensitive reparations. Those documents will be also essential to conduct the case study.[350]

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[344] Organization of American States (OAS), *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belém do Pará")*, 9 June 1994, available at: https://www.refworld.org/docid/3ae6b38b1c.html [accessed 18 October 2022], Article 1.
[345] Ibidem, Article 7.
[346] Ibidem, Article 7, d), e), f).
[347] Ibidem, Article 7, g).
[348] Organization of American States (OAS), *Guide To The Application Of The Inter-American Convention On The Prevention, Punishment And Eradication Of Violence Against Women,* March 2014.
[349] Comisión Interamericana De Derechos Humanos. *Estándares jurídicos vinculados a la igualdad de género y a los derechos de las mujeres en el sistema interamericano de derechos humanos: desarrollo y aplicación,* actualización de 2015.
[350] Organization of American States (OAS), *Cuadernillo de Jurisprudencia de la Corte Inter-Americana de Derechos Humanos N. 4: Derechos Humanos y Mujeres,* updated on 2018, available at: https://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo4.pdf [accessed 10 October 2022].

1.2 Structural discrimination

Structural discrimination refers to systemic discrimination that groups of individuals suffer due to the structure of the social order.[351] This discrimination impairs the access to fundamental rights or exposes individuals belonging to a certain group to recurrent violations. More than diving into the concept of the structure of discrimination, the target of this topic is to identify how this category has been adopted by the IACtHR. Quiñones, who studied the jurisprudential evolution of this category, proposed that structural discrimination, also called structural inequality, aggregates historical and social backgrounds that explain *de jure* and *de facto* inequality[352] as a result of a situation of social exclusion of venerable groups. This inequality can be attributed to a complex chain of social practices, prejudice, and systems of beliefs. The author also states that structural discrimination can be manifested in a specific region, or it can be widespread on the entire State's territory.[353]

From the study of the Court's jurisprudence, the same author was able to extract standards to the recognition of structural discrimination by the Court: a) the existence of an affected group with similar characteristics, that could be a minority group or not; b) the group is marginalized, excluded or suffers unreasonable disadvantages; c) the discrimination has a historical and socio-economic context; d) there are systemic, massive or collective patterns of discrimination in a specific geographic zone, or in the entire State extension; lastly, e) the policy, measure or norm *de jure* or *de facto* discriminatory or creates an unreasonable disadvantage to the group, whether is intentional or not.[354]

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[351] Claudia Paz Iriarte Rivas, "La Discriminación Estructural de Género y Su Recepción Sistémica En El Sistema de Derechos Humanos.," *Anuario de Derechos Humanos*, no. 14 (November 8, 2018): 55, https://doi.org/10.5354/0718-2279.2018.49168,64.

[352] *De jure* and *de facto* discrimination would be, respectively, direct and indirect discrimination. The first case is when the law or policy explicitly discriminate a group, while *de facto* discriminations is when the statement might not discriminate explicitly, but the effects are discriminatory.

[353] Paola Pelletier Quiñones, "La 'Discriminación Estructural' En La Evolución Jurisprudencial de La Corte Interamericana de Derechos Humanos,", 207.

[354] [Free translation]: *"podemos extraer un concepto y estándares de "discriminación estructural". El test sería el siguiente: a) Existencia de un mismo grupo afectado con características comunes, pudiendo ser minoría. b) Que el grupo sea vulnerable, marginalizado, excluido o se encuentre en una desventaja irrazonable. c) Que la discriminación tenga como causa un contexto histórico, socioeconómico y cultural. d) Que existan patrones sistemáticos, masivos o colectivos de discriminación en una zona geográfica determinada, en el Etado o en la región. Estado o en la región. e) Que la política, medida o norma de jure o de facto sea discriminatoria o cree una situación de desventaja irrazonable al grupo, sin importar el elemento intencional"*. Ibidem, 212.

Resurrección observes that the Convention of Belém do Pará carries under the description of GBV the concept of structural discrimination[355] when it states in the Preamble that "violence against women is an offense against human dignity and a manifestation of the historically unequal power relations between women and men".[356] In addition, the Convention mentions in Article 8 (b) the existence of gender stereotypes that affect | women as a group and exacerbates GBV, being its cause and consequence. In a vicious cycle, violence enforces the subordination stereotypes of women and consequently leaves women in a more vulnerable position to suffer violence. As it will be studied next, the Cotton field case was the first decision of the Court to recognize GBV as a product of structural discrimination, particularly when arbitrating the remedies.

2. Structural obligations towards States and gender-based violence against women: *González et al. v Mexico ("Cotton Field")* (2009)

2.1 Summary of the case

The case *Gonzaléz et al. v. Mexico* ("Cotton Field") concerns the international responsibility of the State of Mexico for the failure to act with due diligence in preventing, investigating and prosecuting the abduction, sexual abuse and killing of Claudia Ivette González, Esmeralda Herrera Monreal and Laura Berenice Ramos Monárrez, whose bodies were found nearby a cotton field on November 6th of 2001 in Ciudad de Juárez (Chihuahua, Mexico).[357]

The murders were identified as having a gender motivation and inserted in a context of widespread violence against women in the region. The case was the first to reach the Inter-America Court related to the "*Feminicidios of Juárez*"[358] (*Feminicides of Juárez*), where it is estimated the occurrence of more than 300 murders of women between 1993 to 2002. Although

[355] Liliana María Salomé Resurrección, "El concepto 'discriminación estructural' y su incorporación al Sistema interamericano de protección de los derechos humanos" (Master's thesis, Madrid, Universidad Carlos III de Madrid. Instituto de Derechos Humanos Bartolomé de las Casas, 2017), https://e-archivo.uc3m.es/handle/10016/24956, 107.
[356] Organization of American States (OAS), *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belém do Pará")*, 9 June 1994, available at: https://www.refworld.org/docid/3ae6b38b1c.html [accessed 18 October 2022], Preamble.
[357] *Case of González et al. ("Cotton Field") v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Inter-American Court of Human Rights, Series C No. 205 (Judgment of November 16, 2009), parag, 2.
[358] Marín and Sandoval, Engendering the Reparation Jurisprudence of the Inter-American Court of Human Rights, 1063.

there is no consistent data, and reports indicate different numbers, the report of the Office of the Special Prosecutor for Crimes related to Murders of Women's in Juárez revealed that from 1993, 4.456 women and girls were reported to have disappeared, and until 2005 the whereabouts of 34 were still not identified.[359] Even before the Court's final decision, the situation of the city has already been reported by CEDAW Committee[360], the Special Rapporteur on Gender-based Violence,[361] and denounced by civil society organizations, such as Amnesty International,[362] raising public awareness on the issue.

On March 6, 2002, the victims' next of kin lodged an initial petition in the Inter-American Commission of Human Rights, being represented by the *Asociación Nacional de Abogados Democráticos A.C.*, the Latin American and Caribbean Committee for the Defense of Women's Rights, the *Red Ciudadana de No Violencia y por la Dignidad Humana* and the *Centro para el Desarrollo Integral of the Mujer*[363]. After concluding on the non-compliance of the State to address the recommendations received, the Commission submitted the case to the Court, alleging State's responsibility on:

> the lack of measures for the protection of the victims, two of whom were minor children, the lack of prevention of these crimes, in spite of full awareness of the existence of a pattern of gender related violence that had resulted in hundreds of women and girls murdered, the lack of response of the authorities to the disappearance […]; the lack of due diligence in the investigation of the homicides […], as well as the denial of justice and the lack of an adequate reparation[364]

States and Representatives were notified of the application, respectively, on December 21, 2007, and January 2, 2008. It should be highlighted that Inter-American System has a dual

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[359] Ibidem, parag. 119.
[360] United Nations, Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under Article 8 of the Optional Protocol of the Convention, and reply from the Government of Mexico, CEDAW/C/2005/OP.8/MEXICO, 27 January 2005.
[361] United Nations Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk*, Integration of the human rights of women and an gender perspective: violence against women, Mission to Mexico*, E/CN.4/2006/61/Add.4, January 13, 2006.
[362] Amnesty International, Mexico: Intolerable killings: 10 years of Abductions and Murders or Women in Ciudad Juárez and Chihuahua, AMR 41/027/2003
[363] Victims lodged separately petitions and the Commission decided to joinder the cases.
[364] *Case of González et al. ("Cotton Field") v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Inter-American Court of Human Rights, Series C No. 205 (Judgment of November 16, 2009), parag. 1.
It should be noted that in the precedent case, since the competence was not questioned, the Court arbitrated State responsibility concerning the Belém do Pará Convention. Reference to the *Case of the Miguel Castro Castro Prison v. Peru.* Merits, Reparations and Costs. Inter-American Court of Human Rights, Series C No. 160 (Judgment of November 25, 2006)].
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procedure in which individuals cannot access the Court directly, and the applications must be launched previously to the Commission.[365] In case of non-compliance of States with the IACH recommendations, the case should be forwarded to the Court. While the system still receives many critics to the obstacle to the access of individuals,[366] since 2009 the Commission is obliged to formulate a grounded decision on the reasons the case will not be forwarded, widening the access of the Court since then.[367]

Before the analysis of the merits, the sentence has a dedicated section to a preliminary objection raised by the State concerning the jurisdiction of the Court. In fact, the Cotton Field case was the first case in which the Court confirmed: "it has compulsory jurisdiction *ratione materiae* to examine violations to Article 7 of the convention Belém do Pará".[368] This provision, as exposed in the previous topic, describes State's duties concerning the eradication of GBV, including negative, positive and structural measures. While the detailed analyses of the Court's competence overburden the objective of the present study, this recognition of the Court is relevant because from this case is possible to evaluate if States are complying with specific primary obligations concerning GBV. Due to its relevance for the study, the specific breaches of State's obligations, and correlated remedies awarded based on Article 7 will be analyzed in dedicated topics.

The case was also marked by the huge participation of civil society. Fifteen organizations participated as *amicus curiare*, including human rights research centers from universities worldwide (Mexico, Chile, Canada, UK), and NGOs, such as Human Rights Watch and Amnesty International.[369] In addition, the Court also listened to almost 30 testimonies, including several expert witnesses.[370]

On its analysis of the merits, the Court conducted a careful assessment of the investigative proceedings, pointing out the violations committed by State agents during the investigation. This evaluation culminated with the development of standards on how security forces can

[365] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, Article 50.
[366] Pasqualucci, *The Practice and procedure of the Inter-American Court of Human Rights,* 18.
[367] Ibidem. See also Article 45 Of Organization of American States (OAS), *Rules of Procedure of the Inter-American Commission of Human Rights, Costa Rica*, 137th regular period of sessions, October 28-November 13, 2009 (modified on September 2nd, 2011, and August 1st, 2013),
[368] *Case of González et al. ("Cotton Field") v. Mexico*, parag. 80.
[369] Ibidem, parag. 14.
[370] Ibidem, parag. 82-84.

prevent the occurrence of gender-based violence, besides the relevance of adopting a sender-sensitive approach to investigations, which was the opposite of what happened in Cuidad de Juárez. The Court concluded that public officials stigmatized the victims, and the word of their relatives was undervalued as the proceedings were contaminated by gender stereotypes.[371] In addition, other irregularities were identified, such as forensic mistakes on the autopsies of the bodies. There were also reports of forced confession based on the torture of a supposed perpetrator and harassment of his lawyer.

The Court, therefore, concluded the State failed with its obligation to guarantee the victim's right to life, physical integrity, and personal liberty and breached its obligations to adopt domestic legal provisions, as recognized by Article 2 of the Convention, and the obligations prescribed by the Convention of Belém do Pará on Article 7(b) and (c). The Mexican State also violated the rights of the child (Article 19), concerning the two victims that were of minor age (seventeen years old). The Court also recognized the victim's families had their rights to justice (Article 8 and Article 25) and right to human treatment (Article 7) violated by the State.

2.2 Structural discrimination and gender-based violence against women in Ciudad de Juárez

In a very general social-economic panorama of the city, Ciudad de Juárez is located on the border with Texas (USA), which leads to a conversion of factors causing high levels of social inequality and diverse types of organized criminality, such as drug trafficking, trafficking of human beings, arms smuggling and money-laundering.[372] While the city might be surrounded by a general situation of violence and inequality, there was no apparent reason for the growing number of killings of women in higher percentages than men. The State and other reports alleged there were, in fact, "structural factors"[373] that lead to the occurrence of GVB against the women in Ciudad de Juárez. Those factors would be correlated with a change in the family roles after the establishment of the maquiladora industry in 1965, which gives preference to hiring women. Mexican State explained that "traditional roles began to change, with women becoming the household provider" and "[t]his social change in women's roles has not been

[371] *Case of González et al. ("Cotton Field") v. Mexico*, parag. 202
[372] Ibidem, parag, 113.
[373] Ibidem, parag, 113

accompanied by a change in traditionally patriarchal attitudes and mentalities, and thus the stereotyped view of men's and women's social roles has been perpetuated."[374]

Although there was a partial acknowledgment of the responsibility from the State, especially concerning the flaws in the first steps of the investigation[375], State's representatives recognized the challenges of subverting those cultural patterns added to emerging problems of "alcoholism, drug addiction and trafficking, gang crime, sex tourism, etc —, serve to exacerbate the discrimination suffered by various sectors"[376], it was declared in its response to CEDAW report of 2005. However, the Court considered State's allegations a "guilty certificate", since aware of the situation the State did not act with due diligence to protect the victims and prevent the killings. State public agents' inaction and lack of will to conduct the investigations lead to a situation of general impunity, which sends the message of tolerance and social acceptance of such grave crimes[377].

The State, ultimately, played a role in enforcing this structural discrimination against women. The Court recognized that both legislation and the *modus operandi* of judicial partitioners are not neutral, but the other way around. Without adopting a gender perspective, State agents will be reproducing and legalizing the sexist stereotypes the structural discriminations[378]. Thus, the State's responsibility is transcribed both by the way State agents behaved and in the State's structure itself. At the time of facts, the Court acknowledged the Mexican legislation was insufficient and inadequate to deal with gender inequality and cases of GBV, having as consequence widespread impunity and mistrust in the system of justice, lack of a gender-sensitive investigative procedure, and insufficient channels to denouncing and tracking disappearances.

It should be noted that the Cotton Field was the first case the Court expressly recognize the structural nature of GBV. A similar correlation has been done previously by Commission[379] in the landmark case Maria da Penha v Brazil (2000). The Commission at that time defined

[374] *Case of González et al. ("Cotton Field") v. Mexico*, parag. 129.
[375] Ibidem, parag. 20
[376] Ibidem, parag. 132
[377] Ibidem, parag. 400.
[378] La Barbera and Wences, "La 'Discriminación de Género' En La Jurisprudencia de La Corte Interamericana de Derechos Humanos", 74.
[379] Flávia Piovesan, Siddharta Legale, and Raísa Ribeiro et al., *Feminismo Interamericano: Exposição e Análise Crítica dos Casos de Gênero da Corte Interamericana de Direitos Humanos* (Rio de Janeiro: Núcleo Interamericano de Direitos Humanos - UFRJ, 2021, 45.

domestic violence as "gender-based discrimination"[380] and declared that in the case it was a "pattern of discrimination evidenced by the condoning of violence against women in Brazil".[381] After the recommendations of the Commission, Brazil enacted comprehensive legislation concerning domestic violence, named Maria da Penha Law[382] in honor of the applicant.

Ribeiro and Legale noted that even though there were cases linked with the theme of gender, as was the case of *Loayza Tamayo v Peru* (1997)[383] in which a professor was illegally detained and victim of sexual violence in prison, the Court only started reflecting on the correlation of human rights violations and gender gradually[384] after the signature and ratification by States of the Belém do Pará Convention.[385] The first case the Court attributed the State's responsibility of acts of gender-based violence was *Miguel Castro-Castro Prison v Peru,* in 2006[386], concerning the violation of the human rights of prisoners by State guards. The Court differentiated the treatment that was given to the women prisoners and observed that State agents used sexual violence against women as a form of punishment and repression and a symbolic way of humiliation.[387] In the case, the Court adopted a broad definition of sexual violation, recognizing the pervasive practice as a violation of the right to inhumane treatment[388]. Although the Court had stated that GBV is a form of discrimination, it did not go further on its cultural and social causes.[389] Thus, the development observed in the Court case-law with the Cotton Field case was precisely the careful assessment of social structures and their correlation with the violence suffered by the women of Ciudad de Juárez.

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[380] *Case Maria da Penha Maia Fernandes v Brazil,* Inter-American Commission of Human Rights. Report No. 54/01, 12.051 (4 April 2001), parag. 47 and 51.
[381]Ibidem, parag. 3.
[382] Federative Republic of Brazil. *Law Maria da Penha*, Pub. L. No. 11.340 (7 August 2006).
[383] *Case of Loayza Tamayo v. Peru. Merits,* Inter-American Court of Human Rights, Series C No. 33 (Judgment of September 17, 1997).
[384] Legale and Ribeiro et al., *Feminismo Interamericano: Exposição e Análise Crítica dos Casos de Gênero da Corte Interamericana de Direitos Humanos*, 83-84.
[385] Although the Convention was adopted in 1994 and entered into force in 1995, mostly of the States only ratified the document 1996, 1998 and some even after the 2000's, such as Grenada, Jamaica, Suriname. Ratification Status available at: OAS, Inter-American Commission of Human Rights. Convention Belém do Para Ratification Status, 2022. Available at: https://www.cidh.oas.org/basicos/portugues/n.Belem.do.Para.Ratif..htm. Accessed on 10 October 2022.
[386] *Case of the Miguel Castro Castro Prison v. Peru.* Interpretation of the Judgment on Merits, Reparations and Costs. Inter-American Court of Human Rights, Series C No. 181 (Judgment of August 2, 2008).
[387] Legale and Ribeiro et al., *Feminismo Interamericano: Exposição e Análise Crítica dos Casos de Gênero da Corte Interamericana de Direitos Humanos*, 84.
[388] Marín and Sandoval, Engendering the Reparation Jurisprudence of the Inter-American Court of Human Rights, 1076.
[389] *Case of González et al. ("Cotton Field") v. Mexico*, para. 303.

The decision of this case, therefore, has as a baseline the recognition of the murders and disappearances reported in Ciudad de Juárez have in common "a culture of gender-based discrimination",[390] which was declared by the State of Mexico. The State also reported to CEDAW that the violent crimes against women "are all influenced by a culture of discrimination against women based on the erroneous idea that women are inferior."[391] CEDAW in their reports on Mexico concluded on that GBV at Cuidad de Juárez is a "structural situation and a social and cultural phenomenon deeply rooted in customs and mindsets" represented by a "culture of violence and discrimination"[392].

The gender characteristic of the violence suffered by the women from Ciudad de Juárez were both described by the features of the crimes and by the social-cultural context. It was reported that more than 26% of all the gender-based murders identified in the city were preceded by sexual violence[393]. In the case of the three victims, their representatives expressed that "t]he way in which the bodies [of the three victims] were found suggests that they were raped and abused with extreme cruelty",[394] they added still that "the killings in this case are similar in their infinite cruelty; they are crimes of hate against the girls and women of Ciudad Juárez, misogynous crimes born from an immense tolerance – and social and State encouragement – of general violence against women."[395]

As highlighted before, the use of the category gender, thus gender-based violence instead of violence against women, comes from the progressive acknowledgment of socially rooted causes and consequences of this pervasive practice, breaching the old beliefs that violence against women came from isolated and individual causes. Barrera and Wences explain the focus on gender correlates women's disadvantage in accessing rights and freedoms with a discriminatory structure. This social structure is created, maintained, and reinforced by political and judicial institutions, which strengthen power imbalance[396].

[390] *Case of González et al. ("Cotton Field") v. Mexico*, Parag. 128.
[391] Ibidem, parag. 132.
[392] Ibidem, parag. 133.
[393] Ibidem, parag. 126.
[394] Ibidem, parag. 210.
[395] Ibidem, parag. 222.
[396] La Barbera and Wences, "La 'Discriminación de Género' En La Jurisprudencia de La Corte Interamericana de Derechos Humanos", 66.

The expression "structural discrimination" was mentioned twice in the decision, in an exert of the report of the UN Special Rapporteur on GBV[397] of 2006 and during the arbitration of remedies. Even if the IACtHR has not followed step by step the standards for the recognition of structural discrimination, as identified by Quiñones all the characteristics previously identified are present in the case, as such, the existence of a vulnerable group, systematic discriminatory treatment caused by social, cultural, political and economic structures, being limited or not by a region or widespread in entire State territory.[398]

In the Cotton Field case, it was proved that women and girls were victims of violence based on their gender, which is both caused and perpetuated by discriminatory treatment rooted in social structures. The decision not only mentioned the structural nature of the violations,[399] but also offered an extensive exposition of the socio-economic context of the city, and the correlation of the cases of violence with the patriarchal structures, the gender stereotypes, and the prejudices attributed to women — all of them also socially constructed and enforced by the Mexican State.

Recognizing GVB as structural discrimination is both relevant to identify the origins and consequences of the phenomena. While it is created by social structures, the recurrence of those acts of violence without an adequate response reinforces the same social and culturally rooted prejudices, creating a vicious cycle. In addition, GBV is essentially a matter of discrimination because it has as consequence the impairment of women's enjoyment of other rights, not only the right to life and physical integrity, as it was described by the UN Special Rapporteur on Gender-based Violence.[400]

In addition, the recognition of the structural nature of GBV also enforces State responsibility concerning private acts of GBV, perpetrated by non-state agents. The state is not only responsible for lack of due diligence in investigating and persecuting the occurrences, but also it is the State role to subvert structural patterns of discrimination, with legislative change, policy

[397] *Case of González et al. ("Cotton Field") v. Mexico*, parag. 134.
[398] Quiñones, "La 'Discriminación Estructural' En La Evolución Jurisprudencial de La Corte Interamericana de Derechos Humanos.", 209.
[399] *Case of González et al. ("Cotton Field") v. Mexico*, parag. 134.
[400] UN Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences*, September 2014, A/HRC/32/42, available at: https://www.refworld.org/docid/57615d1e4.html [accessed 18 October 2022]

initiatives, and educational and training programs, which the Court recognized when introduced the remedies.

2.3 Obligations recognized by the Court under the IACHR and the Convention of Belém do Pará

Before accessing the length of State duties attributed by the Court, it should be noted that from the Cotton field case States can be held responsible for breach of their obligations concerning the Convention of Belém do Pará (CBP), in special, Article 7. This landmark decision signalized an enlargement of the Court's jurisdiction to receive cases concerning GBV and to arbitrate gender-sensitive reparations based on the obligations contained in the CBP. Thus, there is both an impact on the primary and secondary obligations of the States concerning he Inter-American *corpus iuris.* If the Court priorly argued the interpretative value of the CBP,[401] from the Cotton Field case the Court "put an end"[402] to the question if the Court had competence *ratione materie* under the CBP. The decision was based on the interpretation of Article 12 of the CBP[403] in accordance with the general rule of interpretation contained in the Vienna Convention on the Law of Treaties.[404]

The Court concluded that even if the CBP does not give express jurisdiction to the Court, Article 12 allows it when it provides the competence of the Commission to receive complaints on violations of Article 7 and to process them in accordance with the "norms and procedures established by the American Convention on Human Rights"[405], which included the referral the

[401] *Case of the Miguel Castro Castro Prison v. Peru.* Interpretation of the Judgment on Merits, Reparations and Costs. Inter-American Court of Human Rights, Series C No. 181 (Judgment of August 2, 2008), parag. 288.
[402] Rubio-Marín and Sandoval, Engendering the Reparation Jurisprudence of the Inter-American Court of Human Rights, 1079.
[403] "Article 12.Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Inter-American Commission on Human Rights containing denunciations or complaints of violations of Article 7 of this Convention by a State Party, and the Commission shall consider such claims in accordance with the norms and procedures established by the American Convention on Human Rights and the Statutes and Regulations of the Inter-American Commission on Human Rights for lodging and considering petitions. *In:* Organization of American States (OAS), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belém do Pará"), 9 June 1994, available at: https://www.refworld.org/docid/3ae6b38b1c.html [accessed 18 October 2022].
[404] Article 31. General rule of interpretation. (1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: https://www.refworld.org/docid/3ae6b3a10.html [accessed 24 October 2022]
[405] Article 12, Convention of Belém do Pará.

Court.[406] As Rubio-Marín and Sandoval highlighted, this recognition made possible the "proper identification of facts, violations and harms"[407] by the Court, having as a new legal parameter, Article 7 of the Belém do Pará Convention.

In addition, States can be held responsible for failing to comply with specific obligations concerning the prevention of, protection from and persecution of GBV acts. As explained about the basic principle of State's responsibility, from the recognition of a breach on State's obligations raises the duty to repair the damage. If we consider now the specific commands contained in Article 7, from that decision States that accepted the jurisdiction of the Court and ratified the CBP can be held responsible for violating these obligations. Additionally, the IACtHR can arbitrate correlated secondary obligations: gender-sensitive remedies derived from gender-sensitive obligations. Thus, now, States must comply with the primary obligations contained in Article 1 and 2 of the Inter-American Convention[408] and, also, Article 7 of the Belém do Pará Convention.[409]

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[406] Marín and Sandoval, Engendering the Reparation Jurisprudence of the Inter-American Court of Human Rights, 1079.

[407] Ibidem, 1079.

[408] "Part I - State Obligations and Rights Protected. Chapter I - General Obligations.
Article 1. Obligation to Respect Rights: 1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition; 2. For the purposes of this Convention, "person" means every human being.
Article 2. Domestic Legal Effects: Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake 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." *In:* Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969.

[409] "Article 7. The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to:
a. refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation;
b. apply due diligence to prevent, investigate and impose penalties for violence against women;
c. include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary;
d. adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property;
e. take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women;
f. establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures;
g. establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies; and
h. adopt such legislative or other measures as may be necessary to give effect to this Convention." *In:* Organization of American States (OAS), *Inter-American Convention on the Prevention, Punishment and Eradication of*

In the Cotton Field case, the Court recognized that the State violated the rights to life, personal integrity, and personal liberty "in relation to the general obligation to guarantee contained in Article 1(1) and the obligation to adopt domestic legal provisions contained in Article 2 thereof, as well as the obligations established in Article 7(b) and 7(c) of the Convention of Belém do Pará, to the detriment of Claudia Ivette González, Laura Berenice Ramos Monárrez and Esmeralda Herrera Monreal".[410] The Court also recognized the State violated the obligation of not to discriminate of the same rights in connection with the duty to guarantee. In relation to the victim's families, the Court acknowledged the State violated their right to justice, which is a combined reading of the conventional provisions of Articles 8(1) (right to a fair trial) and 25(1) (right to an affective remedy).[411] Also, the State violated the Article 19 of the rights of children, "in relation to Articles 1(1) and 2 thereof, to the detriment of the girls Esmeralda Herrera Monreal and Laura Berenice Ramos Monárrez".[412] Lastly, the Court evaluated the acts of harassment families had suffered during the investigation constitutes a violation to the right to humane treatment, prescribed by Article 5(1) and 5(2) of the American Convention, in relation to Article 1(1).[413]

In sum, the Court recognized the State violated three main obligations of the IACHR concerning different rights: the obligating to guarantee, the obligation to adopt domestic legislation and the obligation of equal treatment (or to not discriminate). Concerning the CBP, the Court recognized the State failed with its obligations to apply due diligence to investigate and persecute, and to adopt legal measures (criminal, civil, and administrative) to prevent and eradicate gender-based violence.

It should be noted that the Court did not recognize the violation of the obligation to respect the right to life, physical integrity, and liberty, as required by the victim's Representative, stating it was "unable to attribute to the State international responsibility for violations of the substantive rights embodied in Articles 4, 5 and 7 of the American Convention."[414] The impunity of the cases made it impossible to define whether the perpetrators were state agents or not and, therefore, the Court could not presume the participation of public officials in the

Violence against Women ("Convention of Belém do Pará"), 9 June 1994, available at: https://www.refworld.org/docid/3ae6b38b1c.html [accessed 18 October 2022].
[410] *Case of González et al. ("Cotton Field") v. Mexico*, parag. 286.
[411] Ibidem, parag. 402.
[412] Ibidem, parag. 411.
[413] Ibidem, parag. 440.
[414] Ibidem, parag. 242.

murders. According to the IACtHR case law, the obligation to respect is breached when the State, by an action or omission, violates a conventional right and it includes actions of all the governmental benches independently of the hierarchy. Thus, the duty to respect, highlights it is correlated with the imposition of limitations on State power to protect human rights,[415] requiring negative behavior from the State.

The obligation of guaranteeing can be fulfilled in diverse manners, by positive or structural obligations, and it is bipartite by the Court in preventive measures and investigation of the crimes and persecution of the responsible.[416] The necessity and extent of measures of guarantee will depend on the needs of the right to be protected and the specificities of the concrete case. The Court stressed "this obligation refers to the duty of the States to organize the entire government apparatus and, in general, all the structures through which public authority is exercised, so that they are able to ensure by law the free and full exercise of human rights".[417] Therefore, identifying breaches on these obligations demands analyzing State's efforts on investigation and persecution and, at the same time, whether the legal and institutional apparatus of the State are protective of the rights and capable of preventing violations.

Before concluding the State incurred on the violation on guaranteeing victims' right to life and physical integrity, the Court highlighted that those rights to be fulfilled depends not only on negative actions from the State, but also positive ones.[418] This acknowledgment from the Court is in line with the recognition of GBV as structural discrimination and the duty of the State to guarantee through its institutions and legal mechanisms the prevention of this practices which culminate with the violation of an variety of human rights. As it was observed by Leloup concerning the European System, while right to life and the prohibition of torture and inhuman treatment might appear to be the "archetypal rights with personal scope", in cases when the States undertake effective investigations when an individual was killed the right to life also has a procedural limb.[419] This procedural feature, as it is also identified in the Cotton Field case, requires positive and structural obligations, especially in cases where the failure to act is related with deficient institutional structures.

[415] *Case of González et al. ("Cotton Field") v. Mexico*, parag, 235.
[416] Ibidem, parag. 236.
[417] Ibidem, parag. 236.
[418] Ibidem, parag. 243.
[419] Leloup, "The Concept of Structural Human Rights", 494.

The analysis of the violation of the right to justice, concerning the rights to a fair trial (Article 8) and an effective remedy (Art. 25), was derived from the obligation to guarantee the rights of life and physical integrity and liberty. The Court correlated the obligations contained in the right to justice with the duty of the State to investigate the facts effectively. For those rights, the structural feature of the obligations is even clear, as Leloup highlighted about the correlated rights under the European Convention, as the "rights with the clearest structural character".[420] The right to a fair trial can entail structural effects regarding the institutional architecture of the State, with an establishment of a justice system and legal mechanism to guarantee its independence and effectivity. On the same line, the right to an effective remedy depends on the existence of a national "remedy to able to provide redress".[421] The right to justice, as a jurisprudential construction from the IACtHR entails the characteristic of the two provisions but focuses on the right of the victims and their families to have access to the truth, which should be undertaken through an effective investigation and persecution of the responsible for the violations. The realization of this task will depend on the existence of a series of positive and structural obligations, from investigative efforts, training of personnel, and adequate legal mechanisms.

As noted above, the Court fractionated the obligation to guarantee in two parts: preventions in relation to the right to life, personal integrity, and liberty[422]and the obligation to investigate the facts in accordance with Articles 8 and 25.[423] The Court analyzed first if the Mexican State could have prevented the crimes and how. On that concern, it was highlighted the inactivity and lack of support received by the families. Adding to that, the Commission indicated the State did not mention an implementation of norms or practices that would make it possible to the police to determine an immediate search order after receiving missing reports.[424]When describing the obligation to prevent, the Court stated:

> Obligation of prevention encompasses all those measures of a legal, political, administrative and cultural nature that ensure the safeguard of human rights, and that any possible violation of these rights is considered and treated as an unlawful act, which, as such, may result in the punishment of the person who commits it, as well as the obligation to compensate the victims for the harmful consequences. It is also clear that the obligation to prevent is one of means or

[420] Leloup, "The Concept of Structural Human Rights", 494.
[421] Ibidem, 492.
[422] *Case of González et al. ("Cotton Field") v. Mexico,* topic 4.2.1.
[423] Ibidem, topic 4.2.3.
[424]Ibidem, parag. 249

> conduct, and failure to comply with it is not proved merely because the right has been violated.[425]

The Convention of Belém do Pará determine States should prevent, punish and eliminate GBV with due diligence[426]. The definition of what is to act with "due diligence" has been developed by the UN by the work of CEDAW[427] in reaffirming the States should take appropriate preventive measures and to be held responsible when it fails to hinder the occurrence of GBV, including acts of private actors. Later in 2010, the HRC Resolution clarified the duties of States in preventing and eradicating violence with due diligence and stated that "effective prevention"[428] of violence against women and girls demands actions and involvement of all the levels of government and the mobilization of the civil society, through the promotion of gender equality, education and training programs, as well as legislative and policy change.[429]

The previously mentioned case *Maria da Penha Fernandes v Brazil* (2000) is one of the references, but in front of the Inter-America Commission, concerning due diligence of the State, in which the organ recognized the violation of State's obligation to exercise due diligence in preventing, punishing and eradicating GBV, in which the State had not "taken effective measures […] from a legal standpoint",[430] and the perpetrator was not criminally punished after 15 years of the occurrence of grave violence including an attempt of murder committed by her husband at that time which left Maria da Penha with irreversible paraplegia and other physical and psychological traumas.[431]

In the case of Mexico, the Court denoted the State failed to take practical preventive measures to avoid the killings after the acknowledgment of the disappearances. In addition, at the time of the occurrences, the State did not have adequate legislation to prevent cases as such, highlighting that "[e]ven though the State was fully aware of the danger faced by these women

[425] *Case of González et al. ("Cotton Field") v. Mexico* , parag. 252
[426] Convention Belém do Pará, Article 7.b.
[427] United Nations, Declaration on the Elimination of Violence against Women. General Assembly resolution 48/104 of 20 December 1993. A/RES/48/104, February 23, 1994, Article 4.c.
[428] United Nations Human Rights Council*, Accelerating efforts to eliminate all forms of violence against women: ensuring due diligence in prevention*: resolution / adopted by the Human Rights Council, 14th session, A/HRC/14/L.9/Rev.1, 23 June 2010.
[429] Ibidem.
[430] *Case Maria da Penha Maia Fernandes v Brazil,* Inter-American Commission of Human Rights. Report No. 54/01, 12.051 (4 April 2001), parag. *20.*
[431] Ibidem, parag. 8.

of being subjected to violence, it has not shown that, prior to November 2001, it had adopted effective measures of prevention that would have reduced the risk factors for the women".[432]

In sequence, when carefully assessing the investigation at the national level, the IACtHR concluded that the procedure was filled with irregularities. The State did not fulfill its obligation to investigate and persecute the gender-based murder of those 2 girls and 1 woman with due diligence, an obligation extracted from Article 7(b) of the Belém do Pará.[433] There was evidence of inaction from the State, technical mistakes, prejudices and stereotypes of the victims from public agents, and lack of assistance to the families during the investigation. Those practices, as recurrent in the Mexican Justice System, culminated in a cycle of impunity and social tolerance of those crimes, violating the obligation to guarantee the right to life, physical integrity of the victims and, at the same time, the right to access justice and truth. In addition, concerning the families, the Court also recognized the psychological suffering and harassment they suffered during the investigation, violating their right to human treatment.

While accessing the obligation of non-discrimination, the Court highlighted what we dealt with in the previous topic, marking the gender discrimination feature of the killings, but also the discriminatory treatment public agents offered to the families when they communicated the disappearances and during the investigative procedure as a whole, filled with gender stereotypes and prejudices.

The Court also analyzed the State's obligation concerning the right of the two girls, under Article 19, in which it highlighted that the Convention requires an additional layer of protection, due to the special vulnerability of children.[434] Although Mexico had at the time special legislation concerning the rights of children, the evidence demonstrated the legal provisions were not "translated into effective measure"[435], since there was no prompt initiative for searching the girls who disappeared and, after the bodies were found, to investigate, persecute and punish the responsible. The situation of those two girls, far from denoting special care from the State, was treated with the same neglect. Representatives of victims affirmed the facts of

[432] *Case of González et al. ("Cotton Field") v. Mexico*, parag. 279.
[433] Rubio-Marín and Sandoval, Engendering the Reparation Jurisprudence of the Inter-American Court of Human Rights,1081.
[434] *Case of González et al. ("Cotton Field") v. Mexico*, parag. 408.
[435] Ibidem, parag. 410.

the case occurred almost 8 years after the first killings of women and girls at Ciudad de Juárez and the State have not taken any measure to prevent the repetition of the crimes.[436]

2.4 The Court orders and remedies

Understanding the extent of the obligations of State concerning the concrete case is essential to analyze the remedies arbitrated. After describing the State's failure of its primary obligations within the IACHR, The Court will determine correlated secondary obligations to emend the harm the government caused through actions, omissions, or lack of due diligence. As explained in the first chapter, the obligation to offer an effective remedy is a legal consequence of the recognition of the State's breach of its international obligations. The Court, as the primary interpreter of the Convention, is responsible to give substance to the duties provided by those legal documents, not rarely, portrayed in a very abstract manner. Additionally, the description of duties entailed by conventional provisions in the concrete case functions as a parameter to arbitrate adequate remedies.

The recognition of the extent of State's violations will function as the guide to adequate remedies, together with the identification of the structural gender-based discrimination. As highlighted before, the principle of integral restitution might not be satisfactory in situations such as the one, since returning the victims to the previous position is not only impossible, but it also means the return to a situation of vulnerability and discrimination, which other violations might occur again. Therefore, more than offering reparation to the victims directly affected is the role of the State to commit itself to changing the structures that caused the violations in the first place, whether they are institutional or socio-cultural, political or economic. Especially since the 3 victims are only a part of a tragic background of hundreds of similar cases.

Rubio-Marín and Sandoval explain that gender-sensitive reparations "requires the ability of craft remedies that are gender specific as well gender transformative".[437] A gender-sensitive approach to remedies does not mean only weighing compensation and satisfaction measures based on gender specificities but also awarding remedies that can help to subvert the

[436] *Case of González et al. ("Cotton Field") v. Mexico*, parag. 403.
[437]Rubio-Marín and Sandoval, Engendering the Reparation Jurisprudence of the Inter-American Court of Human Rights,1064.

discriminatory structures. For that undertaking, the same authors observe the jurisdictional or quasi-judicial body that is awarding remedies should follow certain steps. First, relevant facts of the case should be established, which means in a gender approach is to map the "experiences of women" and how certain types of situations shaped the entire situation differently between genders, for example, the occurrence of sexual violence in a context of arbitrary detention.[438] Second, the Court should identify the alleged violations, the specific rights, and who were the individuals affected.[439] In sequence, the court must identify the extent of harm and those harmed by the violations to offer an adequate reparation, as provided by Article 63.1 of the IACHR. Lastly, when ordering the remedies, the tribunal should consider the adequate reparations and measures and the transformative protentional of them.[440]

When the Court indicated the measures the State of Mexico should undertake, it enunciated two essential premises. First, the concept of integral reparation, which "entails the re-establishment of the previous situation and the elimination of the effects produced by the violation, as well as the payment of compensation for the damage caused."[441] Second, the decision signalizes to a gender approach when it states that "in the context of structural discrimination in which the facts of this case occurred, which was acknowledged by the State […], the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification"[442]. Cornering this position of the Court on remedies, the UN Special Rapporteur on GBV praised the decision:

> [T]he notion of gender-sensitive reparations has finally moved beyond the transitional justice discussions at State level and for the first time made an inroad into the international human rights jurisprudence. The Inter-American Court of Human Rights has recently affirmed the need to craft gender-sensitive reparations in its groundbreaking decision against Mexico.[443]

This approach announced by the Court matches also with the concept of transformative reparations adopted by the Nairobi Declaration of 2007, which affirms the insufficiency of reintegration and restitution measures for cases of GBV in the context of transitional justice

[438] Ibidem, 1065.
[439] Ibidem, 1066.
[440] Ibidem, 1066.
[441] *Case of González et al. ("Cotton Field") v. Mexico*, parag. 450.
[442] Ibidem, parag 450.
[443] Human Rights Council (HRC). *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo.* Seventeenth session, 2 May 2011. A/HRC/17/26, parag. 27.

and post-conflict situation, since the origin of the violations are antecedent to the conflict and, for those reasons, reparations should aim to address the political and structural gender inequalities.[444]

The purposes enunciated by the Court for defining the remedies required both by the Representatives and by the Commission are based on two premises: repairing the individual harms of victims and tackling the structural nature of violations, as they will be listed below:

> The Court will assess the measures of reparation requested by the Commission and the representatives to ensure that they: (i) refer directly to the violations declared by the Tribunal; (ii) repair the pecuniary and non-pecuniary damage proportionately; (iii) do not make the beneficiaries richer or poorer; (iv) restore the victims to their situation prior to the violation insofar as possible, to the extent that this does not interfere with the obligation not to discriminate; (v) are designed to identify and eliminate the factors that cause discrimination; (vi) are adopted from a gender perspective, bearing in mind the different impact that violence has on men and on women, and (vii) take into account all the juridical acts and actions in the case file which, according to the State, tend to repair the damage caused.[445]

The Court, aligned with the preconditions abovementioned by Rubio-Marín and Sandoval,[446] noted the relevance of defining the remedies based on the detailed assessment of the facts and the extent of the harm caused. The same authors also indicated that the proper assessment of facts, victims, and harms was facilitated by the adoption of the Convention of Belém do Pará as a legal parameter.[447] The decision since the begging recognized the gender motivation of the disappearances and murders, which reflected in an important shift in the Court's approach to reparations that can be seen clearly under the topics "iv", "v" and "vi" cited above. Those 3 topics concern, respectively, that restitution measures should not return the victim to a position of discrimination, that the elimination of facts that cause discrimination and lastly, that a gender-sensitive approach to remedies must consider the specific impacts that violence has on women. All of them functioned as guides to arbitrate both individual and measures of general interest.

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[444] Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation. International Meeting on Women's and Girls' Right to a Remedy and Reparation. Paris: International Federation for Human Rights, 2007.
[445] *Case of González et al. ("Cotton Field") v. Mexico*, parag. 451.
[446] Rubio-Marín and Sandoval, Engendering the Reparation Jurisprudence of the Inter-American Court of Human Rights,1064
[447] Ibidem, 1079.

The Court's orders are separated in the (A) measures concerning the "obligation to investigate the facts and identify, prosecute and, if appropriate, punish those responsible for the violations",[448] (B) satisfaction and guarantees of non-repetition, and (C) rehabilitation and compensation.

A. Measures concerning the obligation to investigate the facts and identify, prosecute and, if appropriate, punish those responsible for the violations

The many irregularities found in the investigation, the general situation of impunity and discriminatory conducts of State agents culminated with the order to effectively investigate and conduct the criminal proceedings to "identify, punish the perpetrators"[449] of the crimes. For that undertaken, the investigation and the judicial proceedings be "conducted promptly to avoid non-repetition,[450] adopting a gender perspective and in accordance with international standards.[451] The decision still highlights the importance of human and material resources to undertake the tasks abovementioned and the publicity that should be given to the Mexican society by the end of the criminal proceedings.[452] Lastly, the Court ordered the State to identify and punish the official that committed irregularities, including "obstructing of justice, cover-up, and impunity that prevailed in these cases".[453]

It should be highlighted that the duty to investigate and prosecute are specific obligations under the Belém do Pará Convention, having both individual and collective impact. The Court attributes those orders in a separated section, nor under individual reparations (compensation and rehabilitation), nor under general interest measures (satisfaction and guarantees of non-repetition). While the families of the victims have the right to truth, which included the disclosure of the facts and definition of the responsibility of the perpetrators, applying gender-sensitive approach and, consequently, removing legal and practical obstacles to the effective conduction of investigation, can generate a positive impact in the conduction of future investigations. In addition, interrupting the cycle of impunity can have preventive effect of

[448] *Case of González et al. ("Cotton Field") v. Mexico*, IX Reparations, topic 3.
[449] Ibidem, parag. 455.
[450] Ibidem, parag. 455, "a".
[451] Ibidem, parag. 455, "b".
[452] Ibidem, parag. 455, "c" and "d".
[453] Ibidem, parag. 456.

future violations. However, the directives given by the Court under the investigation and persecution orders are very generic. More specific standards for the correction and improvement of investigation and criminal proceedings will be found within the guarantees of non-repetition.

B. Measures of satisfaction and guarantees of non-repetition

Both types of remedies have in common the fact that their impacts surpass the directed injured parts and affects the collectivity. The Court stated those measures indent to "repair immaterial damage that is not of a pecuniary nature and will order measures of public scope or repercussion".[454]

Satisfaction is directed to honor the memory and recognition of the victims; their attributed impacts are long-lasting and diffuse.[455] Those measures are required due to the "gravity and nature of the facts"[456]. On that concern, the Court ordered the State to publish the judgment in a newspaper of national circulation and widespread reach, and to conduct a public act to acknowledge the State international responsibility and honor the memory of the victims.[457] Additionally, the State should construct a memorial for "women victims of gender-based violence murders in Ciudad Juárez"[458], which should be inaugurated in the same day of the acknowledgement ceremony.

It should be noted that the monument was also directed to all the girls and women who were victims of gender-based murder, signalizing the recognition of the general pattern and the structural nature of the violations. On that concern, Antkowiak argues that those constructions can also intend to prevent the repetition of similar events in the future.[459] However, Pasqualucci mentions backlash against some monuments which the construction was ordered by the Court, including in the present case. The memorial was considered expensive, costing more than a million dollars, and it was targeted as a waste of money by some relatives of other women and

[454] *Case of González et al. ("Cotton Field") v. Mexico*, parag.464.
[455] Duffy, *Strategic human rights litigation,* 58.
[456] *Case of González et al. ("Cotton Field") v. Mexico*, parag. 465.
[457] Ibidem, Orders, parag. 15 and 16.
[458] Ibidem, Orders, parag. 17.
[459] Antkowiak, "Remedial Approaches to Human Rights Violations", p. 381.

girls who were also victims of GBM. One of the victims' Representatives said the monument was a "low-key ranking priority".[460] Also, the father of a still disappeared girl of 14 years old raised a strong criticism stating that "[a]fter ten years you come to inaugurate a mausoleum that will become a tourist center for the rest of the world's morbid fascination".[461]Although the relevance of the preservation and honor of the memory of victims cannot be denied, the critics mentioned can indicate that the victims expect from States more than a public acknowledgment of the State, but stronger commitments.

Under the same section, the Court analyzed the guarantees of non-repetition required by the Commission and the Representatives, which intended to correct a series of legal and institutional obstacles to an effective investigation and the persecution of the crimes, as so the prevention of repetition occurrence the same violations.

In total, eight measures were requested under the category of non-repetition measures. The Commission required a "comprehensive, coordinated and long-term policy to ensure that cases of violence against women are prevented and investigated, those responsible prosecuted and punished, and reparation made to the victims"[462] and measures to harmonize the investigative and judicial proceedings with international standards.[463] While the Representatives required the implementation of a program to look for disappeared women in the State of Chihuahua[464], the improvement database on disappearances of women and girls to also include genetic data and cells samples of the next of the kin,[465] and the creation of a mechanism to transfer cases from civil courts to federal jurisdiction in cases of impunity or serious irregularities[466]. In addition, the Representatives asked for the prohibition of any official to commit gender discrimination,[467] to the State to enact a law regulating the support for victims of gender-based murders[468], and a gender perspective education and training for State agents.[469]

In response, however, the Court decided to grant only the Commission's request on the harmonization of investigative standards, and to update the Alba Protocol, a Mexican

[460] Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights,* 317.
[461] Ibidem, 317.
[462] *Case of González et al. ("Cotton Field") v. Mexico*, Reparations 4.2.1.
[463] Ibidem, Reparations 4.2.2.
[464] Ibidem, Reparations 4.2.3.
[465] Ibidem, Reparations 4.2.4.
[466] *Case of González et al. ("Cotton Field") v. Mexico*, Reparations 4.2.5.
[467] Ibidem, Reparations 4.2.6.
[468] Ibidem, Reparations 4.2.7.
[469] Ibidem, Reparations 4.2.8.

mechanism on disappeared persons, to implement prompt searches, including *ex officio* if necessary to protect the life and physical integrity of the disappeared person; the coordination between security agencies, elimination of legal obstacles which reduces the effectivity of the searches, to designate human and financial resources to conduct efficiently the searches, lastly, the Court highlighted that when girls are involved measures should be even "more urgent and rigorous"[470].

Concerning the Representatives, the Court accepted the requests for the creation of a webpage for disappeared women and girls, including personal information and a communication channel for the public to provide information also anonymously. It was also accepted the request to update the disappearance database and include personal information of the victims, DNA samples of the next of kin disappeared, and genetic information tissue samples of any unidentified body of deceased women and girls. In addition, the Court ordered the State to continue education and training for public officials on human rights and gender and to also provide educational programs on the same topics to the general population of the region.[471]

As described previously and it was demonstrated by the decision, under the GNR umbrella there are a series of measures, from legislative reform to educational measures that have in common the general interest and forward-looking character, aimed at preventing similar patterns of violations. Additionally, those measures are identified as relevant tools to tackle structural inequalities/discriminations, which will be the object of analysis in a separate topic.

C. Rehabilitation and Compensation

Lastly, the court tackled the individual reparations to the injured parties: "those who have been declared victims of the violation of a right recognized in the Convention"[472]. The Court defined victims as the ones that had their human rights violated by the State and who supported the harm of the conducts of the State: the three victims — Claudia Ivette González, Esmeralda Herrera Monreal, and Laura Berenice Ramos Monárrez —, and their next of kin.[473]

[470] Ibidem, Orders, parag. 19, "vi"
[471] Ibidem, Orders, parag.
[472] *Case of González et al. ("Cotton Field") v. Mexico*, parag. 448.
[473] Ibidem.

Rehabilitation measures are dedicated to restoring victims' physical, and mental health as well as their reputation[474]. The analysis of the requirement by the Commission that the State should offer medical and physiological rehabilitation. The Court considered when arbitrating rehabilitation measures the physical and physiological harm the next of the kin of victims suffered as result of GBV, the lack of State response, gender prejudices from public agents and the neglect showed by the State. Thus, it was determined the State should provide "appropriate and effective" medical, phycological or psychiatric treatment, immediately and free of charge".[475] The treatment should be available if the victims wish, and the adequate care should be defined by qualified professionals and institutions.[476]

Compensation are financial measures aimed to repair any economically assessable damage, especially in cases when restitution is not possible. The Court was very detailed when accessing both pecuniary and non-pecuniary damage, also considering the Support Fund the State of Mexico alleged to had offered to the families[477]. However, the Court affirmed that the assistance offered by the State, since they had diverse nature, could not be considered reparation under the violation of the State failure with its conventional obligations.[478]

The Court considered under pecuniary damage the consequential damages of the violations, such as extraordinary expenses, funeral expenses, burial of the bodies, and general expenses incurred in the searches.[479] The assessment of loss of earnings of the three victims were based on their jobs and salaries at the times of their murders and the average life expectation.[480] Concerning non-pecuniary damage, the court listed moral damage and damage to victims' life project. However, only moral damage was awarded. The Court argued the Representatives did not submit sufficient arguments on how the State damaged the victim's life projects. Additionally, it declared that this type of reparation is not applicable in case the victims are deceased since it would be "impossible to restore the individual's reasonable expectations of realizing a life project".[481]

[474] Ioffe, "Reparation for Human Rights Violations".
[475] Ibidem, parag. 549.
[476] Ibidem.
[477] Ibidem, parag. 552.
[478] Ibidem, parag. 558.
[479] *Case of González et al. ("Cotton Field") v. Mexico*, parag. 566.
[480] Ibidem, parag. 577-578.
[481] Ibidem, parag.589.

For arbitrating the moral damage, the Court considered that both the mental and moral integrity of the families of the victims were gravely affected by " (i) the deprivation of liberty, ill-treatment and death suffered by Mss. Herrera, González and Ramos; (ii) the irregularities in the investigation conducted by the authorities and the impunity, and (iii) the harassment suffered by the next of kin".[482] In addition, the Court pondered to be appropriated that the State should also compensate its failure to protect the life, personal integrity, and liberty of the tree victims. The quantification of the amounts was based on the previous case law and considered the context of the facts, the age of victims, and the "special obligations of the State for the protection of the child, and the gender-based violence that the three victims suffered"[483], indicating lastly a gender approach to the moral damages.

2.5 Guarantees of non-repetition in the Cotton Field case, structural obligations and structural human rights

After the exposition of the remedies awarded in the Cotton Field case, now it will be identified whether the Court enunciated structural obligations in the decision and its possible correlation with the identification of gender-based violence as a situation of structural discrimination. As demonstrated, the orders covered both repairs to individual damages and measures of general interest aimed at preventing future violations, such as satisfaction measures and guarantees of non-repetition. However, it was observed a gap between the extension of the obligation to guarantee and the remedies ordered.

The Court transcribed during the decision the structural nature of gender-based violence and made it clear that was caused by social and culturally rooted discrimination, reproduced and enforced by the public agents' behaviors and by State's structures. Additionally, the Court enunciated the insufficiency of the traditional concept of reparation to remediate the situation in Ciudad de Juárez, as it was proved to be a pattern of repetitive violations against girls and women. As highlighted by Rubio-Marín and Sandoval, this new approach to remedies signalized a transformative attitude in response to situations of discrimination, which is said to be one of the biggest contributions of the judgment. In their words:

[482] Ibidem, parag. 583.
[483] Ibidem, parag, 585.

> [t]he recognition that reparations in cases involving discrimination calls not for restitution but for transformative redress, since it would be against the foundations of human rights law to redress women, or for what that matter any other subordinated group, by returning them to the situation that allowed the violation to happen in the first place. The establishment of this principle is the main legacy of the Court for future cases.[484]

This recognition is registered in the decision priorly to the analysis of the measures required by the Commission and the Representatives, when the Court affirmed that "bearing in mind the context of structural discrimination in which the facts of this case occurred, which was acknowledged by the State […], the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, re-establishment of the same structural context of violence and discrimination is not acceptable".[485] To read between the lines of what the Court meant with "rectification", we should come back to the extent of the State's obligations signalized in the decision and the purposes of reparations, which would function as the guides to analyze the requests of the applicants.

When evaluating the State's responsibility, the Court announced that the obligation of guaranteeing rights, which the State failed to comply, entails "the duty of the States to organize the entire government apparatus and, in general, all the structures through which public authority is exercised so that they are able to ensure by law the free and full exercise of human rights".[486] Additionally, when enunciating the parameters that would guide the analyses of remedies, the Court affirmed that reparation should "restore the victims to their situation prior to the violation insofar as possible, to the extent that this does not interfere with the obligation not to discriminate […] and "are designed to identify and eliminate the factors that cause discrimination".[487]

When reading the "rectification" effects of remedies together with both citations, it is possible to conclude that the duty of the State, after the recognition of failing to comply with its obligation to guarantee rights, is to improve, reorganize and restructure legal mechanisms and

[484] Rubio-Marín and Sandoval, "Engendering the Reparation Jurisprudence of the Inter-American Court of Human Rights", 1090.
[485] *Case of González et al. ("Cotton Field") v. Mexico*, parag. 450.
[486] *Case of González et al. ("Cotton Field") v. Mexico*, parag. 236.
[487] Ibidem, parag. 451.

institutions that reproduce and reinforce discrimination, and to eradicate the GBV causes which are socially rooted. Guidance on these broad tasks is contained in the Convention of Belém do Pará, which entails States should undertake legislative reform to include in the legislation that may "prevent, punish and eradicate violence against women"[488] and "take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women".[489] Those duties indicate that cases of structural discrimination, such as GBV, would also demand from States structural obligations.

This recognition of the Court that the obligation to guarantee rights also implies the duty to organize the State apparatus[490] would describe the concept of structural human rights under the rights of life, physical integrity, liberty, and the right to justice. This extent of States' obligation does not transcribe a positive nor a negative mandate because it "transcend[s] the relationship of the person and the State"[491] and implies changes on how the governmental structures are organized. To define structural change, Leloup lends the concept from constitutional law of structural rules and focus on transformations in the "institutional architecture of the state […], composition of government institutions", and other measures capable of "alter[ing] the way which two government bodies relate to each other".[492]

The remedies awarded by a RHRC, as secondary obligations, reflect both the extent of State's primary obligations under conventional provisions and the magnitude of harm caused to the injured parts, due to its reparative nature[493]. Concerning the primary obligations to guarantee and the duties transcribed in the CBP, together with the emphasis on the role of public agents and deficient legal mechanisms on reproducing structural discrimination, it would be coherent that cases such as the Cotton Field imposed remedies on the States comprising structural obligations. Additionally, the rights analyzed by Leloup[494] were mostly the same as the ones violated in the case: the right to life, right to physical integrity and liberty, right to fair trial and effective remedy. However, if the extent of obligations recognized could have had structural

[488] Convention of Belém do Pará Article 7, "c".
[489] Ibidem, Article 7, "d".
[490] *Case of González et al. ("Cotton Field") v. Mexico*, Parag, 236.
[491] Leloup, "The Concept of Structural Human Rights", 483.
[492] Ibidem, 498-499.
[493] Lázaro and Hurtado, "Las Garantías de No Repetición En La Práctica Judicial Interamericana y Su Potencial Impacto En La Creación Del Derecho Nacional", 733.
[494] Leloup, "The Concept of Structural Human Rights", 490-495

impacts on the State of Mexico, the Court did not follow that on the remedies, as it was expected.

If from one side the Court enunciated that secondary obligations of States should also remediate structural flaws, on the other hand, when it analyzed specific GNR requirements, the Court exempted itself to order measures that would imply institutional change. The relevance of the GNR awarded by the Court should not be overseen, but most of them focus on "engendering the principle of due diligence"[495] especially concerning the investigation of the facts, as well as a faster and more efficient mechanism of searching disappeared women and girls. As demonstrated in the previous topic, most of the measures awarded were essentially dedicated to the prevention and persecution of GBV cases, seeking to end the impunity cycle. However, those measures cannot be awarded to be fully transformative because they do not tackle the pre-conditions and social basis that caused the vulnerability of women. In addition, the measures also ignored the intersectional factors of the discrimination suffered by the women and girls of the region, such as poverty and labor exploitation as workers of the maquiladora industry, which are indicated as causes of the special vulnerability of the victims, it was pointed by La Barbera and Wences.[496]

The measures awarded, in fact, only tackle the issue of GBV after its occurrence, with the exception of the order to establish an educational program directed to the community.[497] Educational measures are essential to eradicate social and culturally rooted gender prejudices, however, gender discrimination solely can be tackled efficiently if it is considered as a collective issue of power relations, which requires public intervention.[498] In fact, the Court was criticized because it did not considered necessary to alter the discriminatory social reality through legislative measures[499], even after recognizing that behind the grave crimes there is a situation of gender structural discrimination.

[495] Rubio-Marín and Sandoval, "Engendering the Reparation Jurisprudence of the Inter-American Court of Human Rights", 1089.
[496] La Barbera and Wences, "La 'Discriminación de Género' En La Jurisprudencia de La Corte Interamericana de Derechos Humanos.", 75.
[497] *Case of González et al. ("Cotton Field") v. Mexico*, parag. 543.
[498] La Barbera and Wences, "La 'Discriminación de Género' En La Jurisprudencia de La Corte Interamericana de Derechos Humanos." 67.
[499] Ibidem, 65.

Based on the requirement of the Commission and the Representatives, the Court could have enacted orders with institutional impact. As was listed in the previous topics, from the eight measures required as GNR, the four measures denied by the Court were the ones that could have had structural effects, and some of them also had transformative outcomes. The Commission requested a (1)"comprehensive, coordinated and long-term policy to ensure that cases of violence against women are prevented and investigated, those responsible prosecuted and punished, and reparation made to the victims".[500] From the Representative side was required to be created a (2) mechanism to transfer cases from civil courts to federal jurisdiction in cases of impunity or serious irregularities,[501] (3) the prohibition for any official to commit gender discrimination,[502] and to the State to (4) enact a law regulating the support for victims of gender-based murders.[503]

Without analyzing the pertinency of the measures or the extent of the transformative effect, we aim to compare the measures denied with the ones awarded concerning their legal and institutional impacts. As highlighted, the Court gave preference to measures focusing on the investigation phase, rather than changing the social reality with legislative measures.[504] However, most of the requests denied by the Court could have had a structural impact, depending on how the Mexican State would implement the measures.

First, the request to create a comprehensive policy would mean designing a "long term program with different social actors and in coordination with State institutions, with well-defined objectives, goals and indicators".[505] For this measure, it would be necessary to assess the Mexican "normative framework" for preventing, investigating and punishing GBV. This request was identified as "the only reparation with transformative potential" by Rubio-Marín and Sandoval,[506] which could encourage the State to create specialized government bodies and new legal mechanisms, such as specialized judiciary sections and police stations dedicated to

[500] *Case of González et al. ("Cotton Field") v. Mexico* , Reparations 4.2.1.
[501] Ibidem, Reparations 4.2.5.
[502] Ibidem, Reparations 4.2.6.
[503] Ibidem, Reparations 4.2.7.
[504] La Barbera and Wences, "La 'Discriminación de Género' En La Jurisprudencia de La Corte Interamericana de Derechos Humanos.", 75.
[505] *Case of González et al. ("Cotton Field") v. Mexico*, parag. 475.
[506] Rubio-Marín and Sandoval, "Engendering the Reparation Jurisprudence of the Inter-American Court of Human Rights", 1089.

dealing with cases of GBV, in case it would follow a similar model of the system implemented by Brazil after the recommendations given by the IAComHR in the case of Maria da Penha[507].

Secondly, the creation of a mechanism to transfer cases from one jurisdiction to another would directly impact the design of the judiciary, with the establishment of a novel legal mechanism of detaching competence from civil courts to federal jurisdiction in case of impunity or serious irregularities. The Representatives argued that both of the organs the State established in 2004, the Commission to Prevent and Eliminate Violence against Women of Ciudad de Juárez created at federal level and the Office of Special Prosecutor for Investigation of Crimes related to murders of Women at the level of the Municipality, could not propose corrections or rectify actions of the local jurisdiction, perduring the irregularities committed during the investigations.[508] The State contra-argument on the existence of an Joint Agency of Prosecutors for Juárez created in 2003, and affirmed that subsequently that Federal Prosecutors Office for Juárez could coordinate and supervise investigations that involved federal crimes.

Concerning the prohibition of any officials to discriminate based on gender, Representatives required that any official of the 3 levels of government who make statements or act minimizing and playing down acts of GBV should be punished.[509] This request could also imply in the creation of an administrative infraction or a new crime to the public officials and, if necessary, demands the establishment of a disciplinary procedure. The State contra-argument mentioning the existence of the General Law on Gender Equality enacted in 2006 and a series of other mechanisms aiming to eradicate gender discrimination.[510]

Lastly, the Representants required to be enacted a law regulating support for victims of GBM, so the assistance will not be under the discretion of the public officials temporally in power and should follow international standards on compensation, which was not observed with the Support Fund for Families and Victims established in 2005.[511] This measure would implicate not only a legislative reform, but it is essentially structural because it would involve the creation of a new legal remedy to victims of GBM and their families. The Court, however, argued that

[507] *Case Maria da Penha Maia Fernandes v Brazil,* Inter-American Commission of Human Rights. Report No. 54/01, 12.051 (4 April 2001).
[508] *Case of González et al. ("Cotton Field") v. Mexico*, parag. 513.
[509] Ibidem, parag. 521.
[510] *Case of González et al. ("Cotton Field") v. Mexico*, parag. 521.
[511] Ibidem, parag. 526-528.

"it cannot tell the State how it should regulate the support it offers to the individual as part of a social assistance program; accordingly, it abstains from ruling on this request by the representatives",[512] demarking the difference between the compensation of an injury caused by a violation of a conventional provision and social programs.[513]

In fact, it can be said the Court lost the opportunity to inflict structural change and impose measures that would help to subvert discriminatory structures, or at least to interfere and monitor the measures taken by the State. On that concern we can make two observations on the Court's work. First, the Court lost the timing to act. Between the time the Representatives lodged the petition in the Commission in 2002 and the sentence in 2009, the Mexican State undertook a series of legislative changes and created new mechanisms aiming to tackle gender discrimination, to improve the investigation ad persecuting, and prevent new cases of GBV of occurring. As is possible to notice, the legislative measures conducted by the State have essentially a structural character, as the ones mentioned below:

> In 2006 and 2007, the State adopted various laws and also amended the law in order to improve the penal system, access to justice, and the prevention and sanction of violence against women in the state of Chihuahua: (i) the new Penal Code of the state of Chihuahua; (ii) the new Code of Criminal Procedure of the state of Chihuahua; (iii) the State Law on the Right of Women to a Life without Violence; (iv) the Law to Prevent and Eliminate Discrimination, and (v) the Organic Law of the Judiciary of the state of Chihuahua.[514]

When the Court received the application from the Commission in 2007, and later when it published the sentence in 2009, all those measures were already taken. The State certainly was being pressured to act by local and international institutions, including CEDAW, NGOs, as well by the Commission, and it could not stay inept waiting for the final decision on the case. The Court made an extensive report on the changes conducted by the State, which were also welcomed[515].

The length of the proceeding, which took seven years until the final sentence, inhibited the Court to interfere directly and monitor those structural changes the State undertook. In a fast-paced proceeding, the reforms undertaken by the State could have been made accordingly with

[512] Ibidem, parag. 530.
[513] Ibidem, parag. 529.
[514] *Case of González et al. ("Cotton Field") v. Mexico*, parag. 479.
[515] Ibidem, parag. 494.

the standards developed by the Court, and following parameters of implementation, which also could have fueled the public debate about structural changes on a Conventional basis.

The long time taken to sentence a case can demonstrate the inefficiency of the system. Additionally, it refrains the Court from using all its remedial potential. This situation can be awarded to both to insufficient funding the Court suffers, and to the dual petition system, which makes the whole proceeding very long since the parties cannot access the IACtHR directly. Here, the case was under the Commission for 5 years before being forwarded to the Court.

Regardless of the time taken to give a final decision in the case, we are facing a situation in which the Court was not able or refrained from assessing the adequacy of the measures already taken by the State. All the requirements, except for the last one, were denied alleging the Commission or the Representatives did not present evidence of the insufficiency or inadequacy of the legal measure that were already undertaken by the State at the time of the judgment.[516] This point was also object of criticism. Rubio-Marín and Sandoval observed the Court lowered the burden of proof to award pecuniary compensation measures of loss of earnings, even if the Representatives did not present documental evidence whether the victims were working or not during the time of the facts.[517] While in the case of GNR, the Court could had inverted the burden of proof and require the State to demonstrate and provide evidence of not only existence of the policies, but if they were effective in preventing the occurrences of GBV.

CEDAW's 2006 Inform on Mexico pointed to weak mechanism of interstate coordination concerning gender equality, as well as lack of access to health services, high mortality rates of mothers, persistency of poverty, and illiteracy of women[518]. Ultimately, the case was forwarded to the Court in 2007 precisely, because the Commission considered the State did not satisfy the recommendations made and the violations persisted. The Court is not bounded by the Commissions requirements and allegations, but in this position, the Court could have required the State to prove the adequacy of structural measures undertaken, or even could have asked to

[516] Ibidem, parag. 493.
[517] Rubio-Marín and Sandoval, "Engendering the Reparation Jurisprudence of the Inter-American Court of Human Rights", 1085.
[518] United Nations Committee on the Elimination of Discrimination Against Women (CEDAW), *Committee on the Elimination of Discrimination against Women: Concluding Comments, Mexico*, 25 August 2006, CEDAW/C/MEX/CO/6, available at: https://www.refworld.org/docid/45c30c09c.html [accessed 9 November 2022]

a team of experts to "assess the effectivity of the measures and set forward recommendations"[519], as suggested by Rubio-Marín and Sandoval.

The lens of analysis of Rubio-Marín and Sandoval might be different than ours, since they focused on the transformative potential of the measures, but they also concluded the lost opportunity of the Court for similar reasons, as is described in the excerpt below:

> transformative reparations and guarantees of non-repetitions require the Court to be willing to depart from narrowly conceived role of administering justice in individual cases and to enter the domain of institutional reform and policy-making by requiring states to address structural shortcomings in the protection of human rights. However, when the shortcomings are indeed structural, triggering systemic transformation, is both necessary and legitimate task for a human rights tribunal.[520]

RHRC not only have the necessary legal tools, and institutional features, to trigger structural changes on States, as we reflected. These measures, more than a mere demonstration of influence of the Courts intend to tackle patterns of discriminations. Thus, while observing together structural human rights, remedial approach of the courts and structural discrimination we attempted to analyze which extent structural human rights can impose on States secondary obligations that will have transformative impacts.

The tools that would describe structural human rights within remedies would be non-repetition guarantee due to their amplitude and characteristics. At the same time, GNR are a tool for implementing transformative reparations. It should be considered that although those concepts can overlap at some extent, not all the structural obligations and makeovers undertaken on legal mechanisms and government bodies will necessarily have transformative impact. However, those obligations can have transformative impact in cases that State's structures are also a machinery reproducing discrimination, such as the present.

Although the Court did not award the measures above, we can visualize a correlation between structural human rights secondary obligations and transformative measures as adequate tools to overcome cases of structural discrimination. What was expected and it was not confirmed

[519] Rubio-Marín and Sandoval, "Engendering the Reparation Jurisprudence of the Inter-American Court of Human Rights", 1089.
[520] Ibidem, 1091.

was the fact the Court would also recognize structural human rights when awarding remedies, besides enunciating structural obligations. While the Court seized the opportunity to award remedies with structural impacts, the analysis of State obligation made by the Court under the duty to guarantee indicates a structural approach to remedies and the declaration of structural human rights.

The force of the recognition of structural obligations by the Court can be relevant to the general enforcement of human rights litigations. One of the many contributions of the litigation process in front of regional courts can be the "creation or strengthening of social structures within affected groups that enhances the effectiveness of other, non-litigation strategies".[521] Additionally, the Court also can work to foment the debate on human rights, acting as a "catalytic for the democratic debate".[522] Guarantees of non-repetition demonstrated to be, in fact, a relevant tool to describe secondary structural obligations and conduct institutional change. Even though their potential was not fully applied by the Court, the Cotton Field case has a significant contribution to the recognition of structural obligations decurrent of conventional rights, and its direct correlation with structural discrimination.

[521] Duffy, *Strategic Human Rights Litigation, 75.*
[522] Fredman, *Transforming human rights*, 125.

Conclusion

This study introduced Regional Human Rights Courts as relevant bodies to engender change in State's behavior concerning human rights. Due to some institutional features, RHRC occupy a special position to not only dissuade States from committing new violations, but also directly impact State's policies, and institutional and legal structures. First, their location between national and global levels makes it possible to better capture local complexity, such as economic, political, and cultural contexts; essential to order adequate remedies to the local reality. Additionally, this intermediary position also grants them relative independence from national political pressure that might hinder national courts from acting. Also, within the context of the legalization of human rights, RHRC appears as the only human rights jurisdiction which can hold States responsible for human rights violations through their legally binding decisions. These decisions inflict high reputation costs on States and, thus, might be harder to be overseen if compared with recommendations of a monitoring body. The legal force of human rights supranational decision comes also with high publicity of the proceedings and the consequent mobilization of civil society, creating a virtuous cycle of democratic participation and accountability of human rights.

Remedies are the tools that those institutions possess to directly influence the States' behaviors. Derived from the international regime of responsibility, the State has the duty to repair when verified it has breached its primary obligation concerning the human rights treaties. While the general structure of responsibility might be the same, the human rights regime demands some adaptations. Human rights remedies have as a focus on the victims affected negatively, and the correct assessment of the harm should consider their special characteristics and vulnerabilities. Those elements are essential for the courts to craft adequate measures, while also assuring that victims have an active voice during the process.

Additionally, remedies arise as a secondary obligation derived from the general commitments States assumed when ratifying a human rights treaty. Each one of the three established Regional Courts has a specific legal mandate to order remedies, which is more defined by their judicial practice rather than the textual reading of the provisions. Open concepts such as "just satisfaction" and "effective remedy" have taken shape in the decisions of those bodies,

signalizing a progressive expansion for a more collective approach concerned with the prevention of recurrent violations in addition to individual redresses.

As outlined, the remedial practice of the Court can be materialized in diverse types of measures. Some remedies are focused on the specific harm caused to induvial victims and the parts of the proceedings, such as the case of restitution, compensation, and rehabilitation. There are also measures of collective interest that affect beyond the injured parts and can have a wider impact, including on the State's structures, such as satisfaction and guarantees of non-repetition. These guarantees are recognized both as a general obligation of states concerning human rights and, at the same time, can materialize far-reaching measures such as policy and legislative change.

During the second chapter, we highlighted that the remedial approach of Courts can also be relevant to understand the variety of obligations that can arise from a single human right, breaching the traditional division concerning positive v negative obligations. It was important to recall the difference between primary and secondary obligations, and remedies as secondary ones are relevant to substantiate the content of obligations from the moment the State is called to, besides repairing the rights of individuals, amend the breaches of its primary obligation concerning the conventional rights. In this context, the concept of structural human rights emphasizes when these fundamental rights, viewed primally as individual rights, can also impact the State governmental structure through a decision of a human rights court. While in the context of the European Court of Human Rights structural obligations might be recognized mostly as primary obligations, in the practice of the Inter-American Court of Human Rights the declarations of the extent of States' duties can also be translated to the remedies awarded under the category of non-repetition guarantees.

In a dedicated section to the studies of GNR, concerning especially the Inter-American Court, those remedies were demonstrated to have preventive and general interest characteristics and to be relevant as a response to cases of repetitive patterns of violations of human rights and structural discrimination. This feature allowed us to conclude preliminarily about an existent correlation between structural human rights and structural discrimination, having as the essential bridge secondary structural obligations materialized by GNR. The assumption would be that the court, after recognizing a situation of structural discrimination and the necessity of structural obligations, such as legislative and policy change, could describe structural human rights through the remedies. To analyze how this correlation could have been described in a

decision of a regional human rights court, it was conducted the study of the landmark case *González Rodriguez ("Cotton Field") v Mexico* of the Inter-American Court of Human Rights.

Through the analysis of the Mexican State's international responsibility for the abduction and killings of 2 girls and a woman in Ciudad de Juárez, the Court recognized the violations arose from a context of widespread violence caused by structural gender discrimination. This was transcribed in the concrete case by the characteristics of the crimes, by the conduct of state agents, and by the insufficient legal mechanisms to prevent and eradicate gender-based violence. The situation in Juárez described social and culturally rooted discrimination, which was reproduced and enforced by State institutions. Additionally, it was conducted an analysis of the extent of primary obligations recognized by the Court of the duty to guarantee and take legal measures to protect the rights affected and the correlated remedies.

While it was expressly recognized by the Court the necessity of structural obligations of adapting and reforming the State apparatus to subvert the discriminatory structures, the Orders section did not include remedies that would conduct the State through this change. The Court lost the opportunity to be the pivot of structural changes in the Mexican State because at the time of the final decision, the State had already taken a series of legal and institutional reforms as a response to simultaneous advocacy work through international organizations, civil society, and within the Inter-American Commission. What is criticized is not that the State had acted, but the fact the Court did not evaluate the reforms undertaken by the State based on the legal standards and the extent of structural obligations concerning gender discrimination. Thus, we identified a gap between the recognition of structural obligations and the extent of the remedies.

The study demonstrated that while regional courts still face practical challenges in assessing the national context, they have the necessary legal tools to order structural changes in the States. In that concern, the concept of structural human rights when correlated with collective remedies such as GRN can sustain the remedial practice of Courts. On that matter, far-reaching remedies would be derived from the extent of obligations that arose from structural rights provided by the conventions, rather than judicial activism and centralism of the courts. The relevance of the conceptual shift brought by structural human rights and the study together with remedial practices can give legitimacy to RHRC work, especially to assist States to eradicate structural discrimination.

The work of RHRC, rather than substituting Parliaments, should intend to catalyze the democratic debate and offer a human rights lens on how to fight discrimination. Supranational courts can provide a perspective that will aggregate the national experiences with a diversity of practices conducted in the region, which are crystalized in their legal standards. Therefore, the transformative potential of human rights litigation and the role of the regional court is better described as one of the forces of change, rather than the protagonist of structural reform. Human rights law, also described through the work of the courts, should be a constructive narrative in the search for legal mechanisms and democratic institutional designs that fit diversity and make possible the full enjoyment of rights.

Bibliography

General Bibliography

Abbott, Kenneth W., and Duncan Snidal. "Hard and Soft Law in International Governance." *International Organization* 54, no. 3 (ed 2000): 421–56. https://doi.org/10.1162/002081800551280.

Abramovich, Víctor. "From Massive Violations to Structural Patterns: New Approaches And Classic Tensions in the Inter-American Human Rights System." *Sur. Revista Internacional de Direitos Humanos* 6, no. 11 (December 2009): 6–39. https://doi.org/10.1590/S1806-64452009000200002.

Alter, Karen J., Laurence R. Helfer, and Mikael Rask Madsen, eds. *International Court Authority*. First edition. International Courts and Tribunals Series. Oxford, United Kingdom: Oxford University Press, 2018.

Antkowiak, Thomas M. "Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond." SSRN Scholarly Paper. Rochester, NY, July 7, 2008. https://papers.ssrn.com/abstract=1329848.

Antkowiak, Thomas M., and Alejandra Gonza. *The American Convention on Human Rights: Essential Rights*. New York, NY: Oxford University Press, 2017.

Baluarte, David C. *From Judgment to Justice: Implementing International and Regional Human Rights Decisions*. New York, NY: Open Society Foundations, 2010.

Bonelli, Matteo, and Monica Claes. "Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical Dos Juízes Portugueses." *European Constitutional Law Review* 14, no. 3 (September 2018): 622–43. https://doi.org/10.1017/S1574019618000330.

Boven, Theo van. "Victims' Rights To A Remedy And Reparation: The New United Nations Principles And Guidelines." In *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, edited by Carla Ferstman, Mariana Goetz, and Alan Stephens, 17–40. Brill | Nijhoff, 2009. https://doi.org/10.1163/ej.9789004174498.i-576.7.

Çalı, B., Anne Koch, and N. Bruch. "The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights," 2013. https://doi.org/10.1353/hrq.2013.0057.

Cançado Trindade, Antônio Augusto. *The Access of Individuals to International Justice*. Oxford University Press, 2011. https://doi.org/10.1093/acprof:oso/9780199580958.001.0001.

Creutz, Katja. *State Responsibility in the International Legal Order*. Cambridge, United Kingdom ; New York, NY, USA: Cambridge University Press, 2020.

Donnelly, Jack. "The Relative Universality of Human Rights." *Human Rights Quarterly* 29, no. 2 (2007): 281–306. https://doi.org/10.1353/hrq.2007.0016.

Donnelly, Jack, and Daniel J. Whelan. "Human Righs and Foreign Policy." In *International Human Rights*, Sixth edition. New York, NY: Routledge/Taylor & Francis Group, 2020.

Droege, Cordula. *The Right to a Remedy and to Reparation for Gross Human Rights Violations - A Practitioners Guide*. Revised. Geneva: International Commission of Jurists, 2018.

Duffy, Helen. *Strategic Human Rights Litigation*. Oxford [UK] ; New York: Hart Publishing, 2018.

Dworkin, Ronald. *Taking Rights Seriously*. Paperback ed. Bloomsbury Revelations Series. London: Bloomsbury, 2013.

Engstrom, Par. "Effectiveness of International and Regional Human Rights Regimes." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, February 14, 2010. https://papers.ssrn.com/abstract=2004309.

Ferstman, Carla. “Do Guarantees of Non-Recurrence Actually Help to Prevent Systemic Violations? Reflections on Measures Taken to Prevent Domestic Violence.” *Netherlands International Law Review* 68, no. 3 (December 2021): 387–405. https://doi.org/10.1007/s40802-021-00204-8.

Fredman, Sandra. *Human Rights Transformed: Positive Rights and Positive Duties*. Oxford [UK] ; New York: Oxford University Press, 2008.

Greiff, Pablo de, ed. *The Handbook of Reparations*. Oxford University Press, 2006. https://doi.org/10.1093/0199291926.001.0001.

Haglund, Jillienne. *Regional Courts, Domestic Politics, and the Struggle for Human Rights*. 1st ed. New York: Cambridge University Press, 2020.

Henn, Elisabeth Veronika. *International Human Rights Law and Structural Discrimination: The Example of Violence against Women*. Vol. 280. Beiträge Zum Ausländischen Öffentlichen Recht Und Völkerrecht. Berlin, Heidelberg: Springer Berlin Heidelberg, 2019. https://doi.org/10.1007/978-3-662-58677-8.

Ioffe, Yulia. “Reparation for Human Rights Violations.” In *Elgar Encyclopedia of Human Rights*. Edward Elgar Publishing Limited, 2022. https://doi.org/10.4337/9781789903621.reparation.human.rights.violations.

Iriarte Rivas, Claudia Paz. “La Discriminación Estructural de Género y Su Recepción Sistémica En El Sistema de Derechos Humanos.” *Anuario de Derechos Humanos*, no. 14 (November 8, 2018): 55. https://doi.org/10.5354/0718-2279.2018.49168.

Jean-François Akandji-Kombe. *Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights*. Human Rights Handbooks 7. Strasburg: Council of Europe, 2007.

Koch, Ida Elisabeth. “The Justifiability of Indivisible Rights.” *Nordic Journal of International Law* 72, no. 3 (2003): 3–40.

Kosař, David, and Lucas Lixinski. “Domestic Judicial Design by International Human Rights Courts.” *American Journal of International Law* 109, no. 4 (October 2015): 713–60. https://doi.org/10.5305/amerjintelaw.109.4.0713.

La Barbera, MaríaCaterina, and Isabel Wences. “La ‘Discriminación de Género’ En La Jurisprudencia de La Corte Interamericana de Derechos Humanos.” *Andamios, Revista de Investigación Social* 17, no. 42 (March 4, 2020): 59. https://doi.org/10.29092/uacm.v17i42.735.

Laplante, Lisa J. “Bringing Effective Remedies Home: The Inter-American Human Rights System, Reparations, and the Duty of Prevention.” *Netherlands Quarterly of Human Rights* 22, no. 3 (2004): 347–88.

Lavrysen, Laurens. “Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights.” *Inter-American and European Human Rights JournalInter-American and European Human Rights Journal* 7 (2014): 94–115.

Lázaro, María Carmelina Londoño. “La Prevención De Violaciones A Los Derechos Humanos: Estudio Garantías Sobre Las De No Repetición En El Sistema Interamericano.” Universidad Austral, 2013.

Lázaro, María Carmelina Londoño, and Mónica Hurtado. “Las Garantías de No Repetición En La Práctica Judicial Interamericana y Su Potencial Impacto En La Creación Del Derecho Nacional.” *Boletín Mexicano de Derecho Comparado* 50, no. 149 (May 2017).

Leloup, Mathieu. “The Concept of Structural Human Rights in the European Convention on Human Rights.” *Human Rights Law Review* 20, no. 3 (October 13, 2020): 480–501. https://doi.org/10.1093/hrlr/ngaa024.

Lessard, Geneviève. “Preventive Reparations at a Crossroads: The Inter-American Court of Human Rights and Colombia’s Search for Peace.” *The International Journal of Human Rights* 22, no. 9 (October 21, 2018): 1209–28. https://doi.org/10.1080/13642987.2016.1268405.

Liliana María Salomé Resurrección. “El concepto ‘discriminación estructural’ y su incorporación al Sistema interamericano de protección de los derechos humanos.” Masther thesis, Universidad Carlos III de Madrid. Instituto de Derechos Humanos Bartolomé de las Casas, 2017. https://e-archivo.uc3m.es/handle/10016/24956.

McConnell, Lee, and Rhona K. M. Smith, eds. *Research Methods in Human Rights*. Abingdon, Oxon ; New York, NY: Routledge, 2018.

McGonigle Leyh, Brianne. “A New Frame? Transforming Policing through Guarantees of Non-Repetition.” *Policing: A Journal of Policy and Practice* 15, no. 1 (May 21, 2021): 362–72. https://doi.org/10.1093/police/paaa035.

McGregor, Lorna. “Looking to the Future: The Scope, Value and Operationalization of International Human Rights Law.” *Vanderbilt Journal of Transnational Law* 52, no. 5 (January 1, 2019): 1281.

Nickel, James W. “Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights.” *Human Rights Quarterly* 30, no. 4 (November 2008): 984–1001.

Ozan O. Varol. “Structural Rights.” *The Georgetown Law Journal* 105:1001 (n.d.): 1002–54.

Paola Pelletier Quiñones. “La ‘Discriminación Estructural’ En La Evolución Jurisprudencial de La Corte Interamericana de Derechos Humanos.” *Revista Instituto InterAmerican de Derechos Humanos* 60 (December 2014): 205–15.

Pasqualucci, Jo M. *The Practice and Procedure of the Inter-American Court of Human Rights*. Second Edition. Cambridge: Cambridge University Press, 2013.

Piovesan, Flávia. *Direitos Humanos e Justiça Internacional*. 5th ed. São Paulo: Saraiva, 2014.

Piovesan, Flávia, Siddharta Legale, and Raísa Ribeiro. *Feminismo Interamericano: Exposição e Análise Crítica dos Casos de Gênero da Corte Interamericana de Direitos Humanos*. Rio de Janeiro: Núcleo Interamericano de Direitos Humanos (UFRJ), 2021.

Quintana, Francisco. “Conference: Reparations in the Inter-American System: A Comparative Approach Conference.” *American University Law Review* 56, no. 6 (June 2007): 1382–89.

Ruth Rubio-Marín and Clara Sandoval. “Engending the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgemnt.” *Human Rights Quarterly* 33 (2011): 1062–91.

Sandoval, Clara. “Two Steps Forward, One Step Back: Reflections on the Jurisprudential Turn of the Inter-American Court of Human Rights on Domestic Reparation Programmes.” *The International Journal of Human Rights* 22, no. 9 (2018): 1192–1208.

Santos, Boaventura de Souza. “Uma Concepção Multicultural de Direitos Humanos.” *Lua Nova: Revista de Cultura e Política*, no. 39 (1997): 105–24. https://doi.org/10.1590/S0102-64451997000100007.

Schonsteiner, Judith. “Dissuasive Measures and the ‘Society as a Whole’: A Working Theory of Reparations in the Inter- American Court of Human Rights.” *American University International Law Review* 23, no. 1 (2001): 127–1641.

Shelton, Dinah. *Remedies in International Human Rights Law*. Third edition. Oxford, United KIngdom: Oxford University Press, 2015.

Shelton, Dinah, and Ariel Gould. “Positive and Negative Obligations.” In *The Oxford Handbook of International Human Rights Law*, edited by Dinah Shelton, 1st ed., 562–84. Oxford University Press, 2013. https://doi.org/10.1093/law/9780199640133.003.0025.

Smith, Rhona K. M. *International Human Rights Law*. Ninth edition. Oxford: Oxford University Press, 2020.

Sunneva Gilmore, Julie Gullerot, and Clara Sandoval. “Beyond Silence and Stigma: Crafting a Gender-Sensitive Approach for Victims of Sexual Violence in Domestic Reparation Programs.” Reparations, Responsibility & Victimhood in Transitional Societies, March 2020.

Viviane Krsticevic. “Conference: Reparations in the Inter-American System: A Comparative Approach Conference.” *American University Law Review* 56, no. 6 (June 2006): 1418–22.

Yepes, Rodrigo Uprimny. "Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice." *Netherlands Quarterly of Human Rights* 27, no. 4 (December 2009): 625–47. https://doi.org/10.1177/016934410902700411.

Zúñiga Reyes, Marcela. "Garantías de No Repetición y Reformas Legislativas: Causas de La Falta de Pronunciamiento y Denegación de Reparaciones En La Jurisprudencia de La Corte Interamericana de Derechos Humanos a Partir Del Caso Cinco Pensionistas vs. Perú." *Revista Derecho Del Estado*, no. 46 (April 23, 2020): 25–55. https://doi.org/10.18601/01229893.n46.02.

Table of Cases

Inter-American Court of Human Rights

Case of Aloeboetoe et al. v. Suriname. Reparations and Costs. Inter-American Court of Human Rights, Series C No. 15 (Judgment of September 10, 1993)

Case of Barrios Altos v. Peru. Reparations and Costs, Inter-American Court of Human Rights, Series C No. 87 (Judgment of November 30, 2001).

Case of Cantoral Benavides v. Peru. Reparations and Costs. Inter-American Court of Human Rights, Series C No. 88 (Judgment of December 3, 2001)

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

Case of El Amparo v. Venezuela. Reparations and Costs, Inter-American Court of Human Rights, Series C No. 28. (Judgment of September 14, 1996)

Case of Gómez Palomino v. Peru. Merits, Reparations, and Costs. Inter-American Court of Human Rights, Series C No. 136 (Judgment of November 22, 2005).

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

Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago *Loayza Tamayo v. Peru.* Merits, Reparations, and Costs, Inter-American Court of Human Rights, Ser. C, No. 94 (21 June, 2002).

Case of Loayza Tamayo v. Peru. Merits, Inter-American Court of Human Rights, Series C No. 33 (Judgment of September 17, 1997).

Case of Loayza Tamayo v. Peru. Reparations and Costs, Inter-American Court of Human Rights, 1997. Series C No. 42 (November 27, 1998).

Case of the Miguel Castro Castro Prison v. Peru. Interpretation of the Judgment on Merits, Reparations and Costs. Inter-American Court of Human Rights, Series C No. 181 (Judgment of August 2, 2008).

Case of the Miguel Castro Castro Prison v. Peru. Merits, Reparations and Costs. Inter-American Court of Human Rights, Series C No. 160 (Judgment of November 25, 2006).

Case of the Plan de Sánchez Massacre v. Guatemala. Merits. Inter-American Court of Human Rights, Series C No. 105(Judgment of April 29, 2004).

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

Case of Trujillo Oroza v. Bolivia. Merits, Inter-American Court of Human Rights, Series C No. 64 (Judgment of January 26, 2000).

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

Case of Velásquez Rodríguez v. Honduras. Reparations and Costs. Inter-American Court of Human Rights, Series C No. 7 (Judgment of July 29,1989).

Inter-American Commission of Human Rights

Case Maria da Penha Maia Fernandes v Brazil, Inter-American Commission of Human Rights. Report No. 54/01, 12.051 (April 4, 2001)

Case of Indigenous Communities of the Xingu River Basin, Pará v. Brazil. Inter-American Commission of Human Rights, PM 382-10 (April 1st, 2011).

Permanent International Court of Justice

Case of Factory at Chorzów; Germany v Poland. Order, Merits, Permanent International Court of Justice**,** PCIJ Series A no 17; ICGJ 256 (September 13, 1928).

International Criminal Court

Case of Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Dissident opinion of Judge Cançado Trindade, International Court of Justice (February 3, 2012).

Legal instruments

African Union, *Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human Rights and Peoples'Rights,* 10 June 1998.

Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950.

Federative Republic of Brazil. *Law Maria da Penha*, Pub. L. No. 11.340 (7 August 2006).

Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, 1982.

Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969.

—— *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belém do Pará")*, 9 June 1994, available at: https://www.refworld.org/docid/3ae6b38b1c.html [accessed 18 October 2022].

—— *Rules of Procedure of the Inter-American Commission of Human Rights, Costa Rica*, 137th regular period of sessions, October 28-November 13, 2009 (modified on September 2nd, 2011, and August 1st, 2013). available at: https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/basics/rulesiachr.asp [accessed 28 October 2022]

United Nations General Assembly (UNGA), *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104, available at: https://www.refworld.org/docid/3b00f25d2c.html [accessed 10 October 2022]

——. Convention on the Elimination of All Forms of Discrimination Against Women. *United Nations Treaty Series*, vol 1249, p. 1. A/RES/34/180. New York: UN, December 18, 1979.

—— International Covenant on Civil and Political Rights. *United Nations Treaty Series*, vol 999, p. 171. A/RES/2200A(XXI). New York: UN, December 16, 1966.
——. *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998.
—— Universal Declaration of Human Rights. Resolution A/RES/217(III). New York: UN, December 10, 1948.
——, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: https://www.refworld.org/docid/3ae6b3a10.html [accessed 24 October 2022]

International organizations' documents and resources

Council of Europe, European Court of Human Rights, "Factsheet - Pilot judgement" (2021). Available t: https://www.echr.coe.int/documents/fs_pilot_judgments_eng.pdf [accessed on 13 September 2022].
Organization of American States (OAS), *Cuadernillo de Jurisprudencia de la Corte Inter-Americana de Derechos Humanos N. 4: Derechos Humanos y Mujeres,* updated on 2018, available at: https://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo4.pdf [accessed 10 October 2022].
—— *Cuadernillo de Jurisprudencia de la Corte Inter-Americana de Derechos Humanos N. 4: Derechos Humanos y Mujeres,* updated on 2018, available at: https://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo4.pdf [accessed 10 October 2022].
—— *Guide To The Application Of The Inter-American Convention On The Prevention, Punishment And Eradication Of Violence Against Women,* March 2014.
—— *Inter-American Court of Human Rights, Annual Report 2012.* Available at: https://www.corteidh.or.cr/docs/informe2021/ingles.pdf [accessed 15 September 2022].
United Nations Committee on the Elimination of Discrimination Against Women (CEDAW), *Committee on the Elimination of Discrimination against Women: Concluding Comments, Mexico*, 25 August 2006, CEDAW/C/MEX/CO/6, available at: https://www.refworld.org/docid/45c30c09c.html [accessed 9 November 2022]
—— *CEDAW General Recommendation No. 19: Violence against women*, CEDAW/C/GC/19, 1992, available at: https://www.refworld.org/docid/52d920c54.html [accessed 10 October 2022]
—— *CEDAW General Recommendation No. 35: Violence against women* updating general recommendation No. 19, CEDAW/C/GC/35, 26 July 2017. Available at: https://digitallibrary.un.org/record/1305057 [accessed 10 October 2022]
—— Report on Mexico produced by the under Article 8 of the Optional Protocol of the Convention, and reply from the Government of Mexico, CEDAW/C/2005/OP.8/MEXICO, 27 January 2005.
United Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law". Resolution/RES/60/147, 16 December 2005.
——. Report of the International Law Commission (ILC) on the Work of Its Fifty-third Session, UN Doc. A/56/10 (2201). The General Assembly took note of the ASR in UNGA Re. 56/83, 12 de December 2001.
United Nations Human Rights Council (HRC). *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Juan E. Méndez*. Twenty-eight sess., March 5, 2015, A/HRC/28/68. https://undocs.org/A/HRC/28/68.

—— *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo.* Seventeenth session, 2 May 2011. A/HRC/17/26.
—— *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo.* Twenty-third session, 14 May 2013. A/HRC/23/49.
—— *Accelerating efforts to eliminate all forms of violence against women : ensuring due diligence in prevention* : resolution / adopted by the Human Rights Council, 14th session, A/HRC/14/L.9/Rev.1, 23 June 2010.
—— Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, *Integration of the human rights of women and a gender perspective: violence against women, Mission to Mexico*, E/CN.4/2006/61/Add.4, January 13, 2006.
—— *Report of the Special Rapporteur on violence against women, its causes and consequences*, September 2014, A/HRC/32/42, available at: https://www.refworld.org/docid/57615d1e4.html [accessed 18 October 2022]
United Nations Human Rights Committee, General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, No. CCPR/C/21/Rev.1/Add.13, May 26, 2004.
United Nations, Committee against Torture, General Comment No. 3 on the Implementation of Article 14 by States Parties, UN Doc CAT/C/GC/3, 13 December 2012.

Other Sources

Amnesty International, Mexico: Intolerable killings: 10 years of Abductions and Murders or Women in Ciudad Juárez and Chihuahua, AMR 41/027/2003. Available at: https://www.amnesty.org/en/documents/amr41/027/2003/en/ [accessed 18 October 2022].
Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation. International Meeting on Women's and Girls' Right to a Remedy and Reparation. Paris: International Federation for Human Rights, 2007.
Open Society Foundations, Justice Initiative, From Rights to Remedies: Structures and Strategies for Implementing International Human Rights Decisions, New York, 25/06/2013. Available at: https://www.justiceinitiative.org/uploads/7d34546e-dfe6-450b-82ec-77da3323d4bd/from-rights-to-remedies-20130708.pdf [Accessed 5 September 2022]