The Power of the European Court of Human Rights to Order Specific Non-Monetary Relief: a Critical Appraisal from a Right to Health Perspective

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I. Introduction

The remedial practice of the European Court of Human Rights ("ECtHR" or "Court") is hardly known for being innovative or progressive. The reparations the Court uses to remedy violations of the 1950 European Convention of Human Rights ("ECHR") generally consist of declaratory judgments that establish breaches of Convention rights coupled with, depending on the circumstances, damages. Nevertheless, in some instances involving violations of the right to property and the right to liberty and security between 1995 and 2004, the Court has adopted a more proactive, innovative approach to redressing violations by requesting respondent states to provide specific non-monetary relief to victims.

This article explores whether the Court's new and bold remedial strategy, aimed at ordering *restitutio in integrum* and the adoption of legal and administrative measures, has been systematic and whether it has been applied to remedy violations of Convention rights other than the right to property and the right to liberty and security. In doing so, this article takes a right to health perspective. It analyzes whether the ECtHR, between 2002 and 2009, has ordered specific non-monetary reparations concerning violations of the right to health of prisoners and detainees, arising under Article 3 of the ECHR's fundamental prohibition of torture or inhuman or degrading treatment or punishment (hereinafter "Article 3").

This article begins with an elucidation of the ECtHR's jurisdiction to afford reparations and an analysis of the Court's remedial strategy, highlighting the Court's willingness to order specific non-monetary relief. It then looks at the protection of social rights under the ECHR and how the Court has interpreted Article 3 to include the right to health of persons deprived of their liberty. From there, this article undertakes a review of the relevant case law under Article 3 to determine: 1) whether the Court has

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extended its bold, new remedial approach to redress right to health violations that occurred in detention places and were deemed to be violations of Article 3, and 2) what significance, if any, such bold reparations may have for the implementation of the right to health. This article concludes that there has been no extension of the new remedial approach to redress violations of the right to health of prisoners and detainees using Article 3 of the ECHR. It then provides rationales for such an extension and outlines a two-pronged remedial scheme indicating non-monetary reparations that could be ordered to redress right to health violations that fall within the scope of Article 3.

II. The ECtHR's Authority to Afford Reparation

The ECtHR's authority to afford reparation is set out in Article 41 of the European Convention (previously Article 50): "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."[1] Interpreting this provision, the Court has outlined its own authority to decide whether or not to order just satisfaction after having evaluated the circumstances of each case and the alleged violations. In the famous *Vagrancy* cases, the Court spelled out three pre-conditions to exercise its power to order reparations under Article 41. First, the Court must find the conduct of a contracting state to be in violation of the rights and obligations set forth in the ECHR. Second, there must be an injury, that is to say moral or material damage, to the plaintiff. Third, the Court must deem it necessary to afford just satisfaction.[2] The third pre-condition hints at the discretionary nature of the exercise of the remedial power conferred by Article 41, a discretionary nature that the Court has further acknowledged in subsequent cases.[3]

Generally, just satisfaction afforded by the Court in application of Article 41 of the Convention is provided in two forms: either a declaratory judgment establishing one or more violations of the ECHR, or a financial award consisting of pecuniary and/or non-pecuniary damages, coupled with a declaratory judgment.[4] A declaratory judgment alone reflects a minor reme-

1. Convention for the Protection of Human Rights and Fundamental Freedoms art. 41, Nov. 4, 1950, 213 U.N.T.S. 221, as amended by Protocol No. 11, Nov. 1, 1998, E.T.S. No. 155.

2. Cases of De Wilde, Ooms and Versyp ("Vagrancy") v. Belgium (Article 50), App. Nos. 2832/66, 2835/66 and 2899/66, 1 Eur. H.R. Rep. 438 (1972).

3. *See, e.g.*, Guzzardi v. Italy, App. No. 7367/76, 3 Eur. H.R. Rep. 333, ¶ 114 (1980).

4. *See* Chittharanjan F. Amerasinghe, Jurisdiction of International Tribunals 393 – 94 (2003) (analyzing the ECtHR's practice under Article 41); Philip Leach, *Beyond the Bug River—A New Dawn for Redress Before the European Court of Human Rights?*, 10 Eur. Hum. Rts. L. Rev. 148 (2005) (illustrating the ECtHR's traditional approach to remedial action); Clare Ovey & Robin White, The European Convention on Human Rights 491 – 92 (4th ed. 2006) (analyzing the ECtHR's case law under Article 41); Dinah Shelton, Remedies in International Human Rights Law 195 – 97 (2d

dial role of the Court in the sense that it leaves to the respondent state the freedom to decide the actual redress to be provided to victims, limiting the Court only to establishing the occurrence of violations. Such a narrow remedial power of the Court conforms to the principle of subsidiarity, which dictates that states themselves should secure Convention rights and remedy their own breaches.[5] Thus, the first of the two avenues of redress (declaratory judgment) taken by the Court limits the scope of the Court's remedial competence.

Although states have some discretion in redressing violations of the ECHR, the Court's declaratory judgments have included remedial obligations. The Court has derived these obligations from Article 46(1), which requires states to abide by the final judgments of the Court in any case to which they are parties. The Court has explained that, following a ruling in which it finds one or more breaches of Convention rights, Article 46(1) requires contracting states to effectively put an end to the violations established by the Court[6] and fulfill *restitutio in integrum*.[7] *Restitutio in integrum* is the primary form of reparation that states parties to the ECHR must provide. Its purpose is to re-establish as far as possible the situation existing before the breaches and to "take something from the wrongdoer to which the victim is entitled and restore it to the victim."[8] When practicable, *restitutio in integrum* is the preferred form of reparation: it ends continuing violations and, more importantly, "corresponds to the needs and desires of victims."[9]

Insofar as the nature of the violation at stake makes it impossible to bring about *restitutio in integrum*, Article 46(1) establishes a provision for alternative forms of reparation.[10] States enjoy wide discretion in choosing alternative reparations, which may consist of individual measures specifi-

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ed. 2005) (discussing the ECtHR's interpretation of Article 41). The Court also awards legal costs and expenses incurred in the case, either in national proceedings or in Strasbourg. The costs must be actually and necessarily incurred and reasonable as to the quantum. *See* Kingsley v. United Kingdom, App. No. 35605/97, 35 Eur. H.R. Rep. 10, ¶ 49 (2002). The Court's practice vis-à-vis legal costs and expenses is beyond the scope of this article.

5. *See* Z and Others v. United Kingdom, App. No. 29392/95, 34 Eur. H.R. Rep. 3, ¶ 103 (2001).

6. Papamichalopoulos and Others v. Greece (Article 50), App. No. 14556/89, 21 Eur. H.R. Rep. 439, ¶ 34 (1995).

7. The Court's emphasis on cessation of the breach and *restitutio in integrum* reflects "the intention of the drafters of the Convention . . . that general international law principles of State Responsibility should be applied in order to determine the obligations of a State which is found by the Court to be in violation of the Convention." Murray Hunt, *State Obligations Following from a Judgment of the European Court of Human Rights*, *in* European Court of Human Rights: Remedies and Execution of Judgments 25, 26 (Theodora A. Christou & Juan Pablo Raymond eds., 2005). *See also* Council of Europe Committee of Experts, Report to the Committee of Ministers Submitted by the Committee of Experts Instructed to Draw Up a Draft Convention of Collective Guarantee of Human Rights and Fundamental Freedoms, *in* 4 Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights 44 (1950).

8. Shelton, *supra* note 4, at 272.

9. *Id.*

10. *See* Selçuk and Asker v. Turkey, App. Nos. 23184/94 and 23185/94, 26 Eur. H.R. Rep. 477, ¶ 125 (1998).

cally devised to provide relief to the applicant, and/or general measures addressing problems and circumstances of a wider scope.[11] The award of damages, the Court's other main avenue of providing just satisfaction, involves a more incisive remedial role of the Court, and is intended to provide direct relief to the applicant. Like the issuance of declaratory judgments, however, the power to order damages also is constrained by the principle of subsidiarity and can be exercised only when the Court "is satisfied that the injured party cannot obtain adequate reparation under the national law of the State concerned."[12] The purpose of the monetary awards is to "provide reparation solely for damage[s] . . . that cannot otherwise be remedied."[13] In other words, it is when full reparation (*restitutio in integrum*) cannot be attained at the national level that the Court is authorized under Article 41 to award financial just satisfaction in the form of pecuniary or non-pecuniary damages.

As the Court's practice has shown, damages may be ordered when the Court has found a violation of the ECHR and the applicant has successfully proven a causal link between the harm suffered and the violation at stake.[14] The sum to be awarded to the victim is assessed on an "equitable basis," a formula "which appears to be something akin to a mantra waved by the Court, in that it expresses the conclusion of the Court, but does not explain the basis of an award."[15] Due to the difficulty of proving that the violation of Convention rights has caused pecuniary harm, awards of pecuniary damages are less frequent than awards of moral damages.[16] Moral damages are typically afforded to compensate victims for non-pecuniary injuries such as harm to reputation, psychological harm, distress, frustration, humiliation, and sense of injustice.[17] Other factors that are decisive in the award of

11. Information on these measures is available at Council of Europe, A Unique and Effective Mechanism, http://www.coe.int/t/e/human_rights/execution/01_introduction/01_Introduction.asp (last visited Oct. 26, 2009). For an academic analysis of the measures see Tom Barkhuysen & Michel L. van Emmerik, *A Comparative View on the Execution of Judgments of the European Court of Human Rights*, *in* European Court of Human Rights: Remedies and Execution of Judgments 1 – 23 (Theodora A. Christou & Juan Pablo Raymond eds., 2005).

12. Hunt, *supra* note 7, at 31.

13. Scozzari and Giunta v. Italy, App. Nos. 39221/98 and 41963/98, 35 Eur. H.R. Rep. 12, ¶ 250 (2000).

14. *See* Goodwin v. United Kingdom, App. No. 17488/90, 22 Eur. H.R. Rep. 123, ¶¶ 48 – 50 (1996); Miloslavsky v. United Kingdom, App. No. 18139/91, 20 Eur. H.R. Rep. 442, ¶¶ 73 – 74 (1995); Neumeister v. Austria (Article 50), App. No. 1936/63, 1 Eur. H.R. Rep. 136, ¶ 40 (1974); *see also* Jane Wright, Tort Law and Human Rights 40 (2001) (analyzing damages under the U.K. Human Rights Act 1998) and Hunt, *supra* note 7, at 31 (discussing limitations on the ECtHR's power to award just satisfaction under Article 41). For a thorough analysis of the ECtHR's practice of awarding damages see Alastair Mowbray, Cases and Materials on the European Convention on Human Rights 867 – 88 (2007).

15. Wright, *supra* note 14.

16. *See* Shelton, *supra* note 4, at 319 (reviewing cases in which the ECtHR presumed non-pecuniary damages).

17. *See id.* at 298 (explaining the grounds for the award of pecuniary and moral damages).

damages are the seriousness of the violation, the conduct of the state and applicant, and the accuracy of the claim.[18]

States' obligation under Article 46(1) in instances in which the Court has ordered damages is to pay the sum awarded to the applicant within three months of the issuance of the Court's judgment.[19] In addition, states are requested to adopt "general and/or, if appropriate, individual measures . . . to put an end to the violation found by the Court and to redress so far as possible the effects."[20] Moreover, states' payment of financial just satisfaction and the adoption of all the remedial measures required by Article 46(1), including the provision of *restitutio in integrum*, are monitored by the Committee of Ministers of the Council of Europe (hereinafter "the Committee of Ministers") through an essentially diplomatic and political process.[21]

The Court's practice under Article 41 shows a tendency to provide declaratory relief to redress violations of the ECHR[22] and inconsistencies in the award of financial just satisfaction that are at variance with the principle of subsidiarity. In several cases, the Court has awarded damages without giving due consideration to required reparations at the national level, or has refrained from ordering damages irrespective of whether redress was available domestically.[23] More importantly, the Court has taken the view that Article 41 does not confer a power to order *restitutio in integrum* or other specific non-monetary measures to remedy violations of the ECHR.[24] Moreover, the Court does not view the provision as providing an individual right to reparation.[25]

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18. *See id.* at 295 (showing that the seriousness of the violation and the state's and applicant's conduct have an impact on the amount of compensation). A well-written and detailed reparation claim may influence the Court's assessment of damages. In this regard, note how the ECtHR relied on the applicants' claim in making the damage awards in Z and Others v. United Kingdom, App. No. 29392/95, 34 Eur. H.R. Rep. 3, ¶¶ 112 – 31 (2001).

19. *See* Barkhuysen & van Emmerik, *supra* note 11, at 4 (examining the scope of Article 41). As Bates pointed out, failure to comply with this deadline entails payment of simple interest from the end of the three month period until payment is effected. Ed Bates, *Supervising the Execution of Judgments Delivered by the European Court of Human Rights: The Challenges Facing the Committee of Ministers*, *in* European Court of Human Rights: Remedies and Execution of Judgments 49, 73 (Theodora A. Christou & Juan Pablo Raymond eds., 2005).

20. Scozzari and Giunta v. Italy, App. Nos. 39221/98 and 41963/98, 35 Eur. H.R. Rep. 12, ¶ 249 (2000).

21. The monitoring function of the Committee of Ministers is set forth in Article 46(2) of the ECHR. Further details are available at Council of Europe, Execution of Judgments of the European Court of Human Rights, http://www.coe.int/t/dghl/monitoring/execution/default_en.asp (last visited Oct. 17, 2009). For a critical analysis of the work of the Committee see Bates, *supra* note 19, at 49 – 106.

22. *See* Ovey & White, *supra* note 4, at 492 (discussing the *Kingsley v. United Kingdom* case).

23. Barkhuysen & van Emmerik, *supra* note 11 at 4 (examining the scope of Article 41).

24. *See id.* at 3 (analyzing the ECtHR's interpretation of Article 46(1)); Hunt, *supra* note 7; Christian Tomuschat, Human Rights: Between Idealism and Realism 207 (1st ed. 2003) (discussing the ECtHR's restrictive interpretation of Article 41).

25. Shelton, *supra* note 4, at 196 (discussing the "Vagrancy" cases).

Commentators have been critical of the Court's remedial practice. Tomuschat has stressed the "intellectual weakness" of such an approach and its inadequacy in providing practical and effective relief to individuals who are victims of the most flagrant violations of the ECHR, such as wrongful convictions.[26] Others, such as Shelton, argue that the Court's "stringent" interpretation of Article 41 has "hampered the evolution of remedies in the European system."[27]

III. A New Trend in the ECtHR's Remedial Practice

The Court has shown a willingness to change its restrictive approach to redress of violations of the ECHR by ordering specific non-monetary reparations, including *restitutio in integrum*, in five cases decided between 1995 and 2004. This article will briefly describe these cases and discuss their significance vis-à-vis specific reparations.

Papamichalopoulos and others v. Greece[28] and *Brumarescu v. Romania*[29] were the first two cases in which the ECtHR requested states to provide *restitutio in integrum*. Both cases concerned a state's expropriation of private property. The Court ordered the respondent governments to return the land at stake, a measure that was intended to "put the applicants as far as possible in a situation equivalent to the one in which they would have been if there had not been a breach of Article 1 of Protocol No. 1 [on the right to property]."[30] Three years after *Brumarescu*, the Court took a bold stand vis-à-vis *restitutio in integrum* in two cases. The Court ordered the respondent states to release applicants imprisoned unlawfully under domestic law and Article 5 of the ECHR (setting forth the right to liberty and security). In *Assanidze v. Georgia*[31] the applicant alleged that his continued detention constituted an Article 5 violation; he continued to be imprisoned despite having received a presidential pardon in 1999 and having been acquitted by the Supreme Court of Georgia in 2001.[32] The Grand Chamber concluded that this violated the relevant provision and, after noting that "by its very nature, the violation found in the instant case [did] not leave any real choice as to the measures required to remedy it,"[33] the Court ordered Georgia to "secure the applicant's release at the earliest possible date."[34]

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26. *See* Tomuschat, *supra* note 24, at 207; *see also* Antonio Cassese, International Law 366 – 67 (1st ed. 2001).

27. Shelton, *supra* note 4, at 195.

28. Papamichalopoulos and Others v. Greece (Article 50), App. No. 14556/89, 21 Eur. H.R. Rep. 439 (1995).

29. Brumarescu v. Romania, App. No. 28342/95, 33 Eur. H.R. Rep. 36 (2001).

30. *Papamichalopoulos*, App. No. 14556/89, ¶ 38; *see also Brumarescu*, App. No. 28342/95, ¶ 22.

31. Assanidze v. Georgia, App. No. 71503/01, 39 Eur. H.R. Rep. 32 (2004).

32. *See id.* ¶ 3.

33. *Id.* ¶ 202.

34. *Id.* ¶ 203. Georgia released Mr. Assanidze five days after the Court delivered the judgment. *See* Press Release, Council of Europe, Council of Europe Secretary General Welcomes the Release of

The Court came to similar conclusions in *Ilascu and Others v. Moldova and Russia*.[35] The case concerned three Moldovan nationals convicted by the Supreme Court of the Moldavian Republic of Transdniestria ("MRT"), a region of Moldova that proclaimed its independence in 1991 but has not been recognized by the international community.[36] The Court, sitting as a Grand Chamber, found a violation of Article 5, maintaining that "none of the applicants was convicted by a 'court,' and that a sentence of imprisonment passed by a judicial body such as the 'Supreme Court of the MRT'. . . [could not] be regarded as 'lawful detention' ordered 'in accordance with a procedure prescribed by law.'"[37] It went on to request that the respondent states "take every measure to put an end to the arbitrary detention of the applicants . . . and to secure their immediate release."[38]

In yet another 2004 case, *Broniowski v. Poland*, the Court specified the type of redress the respondent state should provide, not only for the claimant, but also for similarly situated people.[39] The Grand Chamber found that Poland had violated Article 1 of Protocol No. 1 by failing to compensate the applicant for property that he had lost as a consequence of the redrawing of Poland's Eastern border along the Bug River at the end of World War II. The Court noted that "the violation of the applicant's right guaranteed by Article 1 of Protocol No. 1 originated in a widespread problem which resulted from a malfunctioning of Polish legislation and administrative practice and which . . . affected and remain[ed] capable of affecting a large number of persons."[40] As a matter of fact, 80,000 people were in a similar situation, and 167 related applications were pending before the Court, threatening "the future effectiveness of the [European] Convention machinery."[41] In order to ensure that Poland fulfilled its Article 46(1) obligations, the Court held that Poland should perform one of two actions: it should either adopt appropriate legal measures and administrative practices to secure the remaining Bug River claimants' property rights under Article 1 of Protocol No. 1, or provide them with equivalent redress.[42] In 2005, Poland enacted a new law setting the ceiling for compensation for Bug River property at 20% of its original value. By doing so, Poland institutionalized the innovative relief ordered by the Court and avoided court proceedings for similar violations of the right to property. The ECtHR found

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Tenguiz Assanidze (Apr. 13, 2004) (*available at* http://portal.coe.ge/downloads/13.04.04E.a.pdf). On the *Assanidze* case, see generally Alexander Orakhelashvili, Assanidze v. Georgia, 99 Am. J. Int'l L. 222 (2005).

35. Ilascu and Others v. Moldova and Russia, App. No. 48787/99, 40 Eur. H.R. Rep. 46 (2004).

36. Initially, four applicants lodged a complaint with the ECtHR. One of them, Mr. Ilascu, was released on May 5, 2001, before the issuance of the Court's decision. *See id.* ¶¶ 1, 279 – 82.

37. *Id.* ¶ 462.

38. *Id.* ¶ 490.

39. Broniowski v. Poland, App. No. 31443/96, 40 Eur. H.R. Rep. 21 (2004).

40. *Id.* ¶ 189.

41. *Id.* ¶ 193.

42. *See id.* ¶ 194.

that the law met the requirements set in the *Broniowski* judgment.[43] The *Broniowski* judgment is regarded as the first "pilot judgment" adopted by the ECtHR: it is a ruling in which the Court ordered specific remedial measures aimed at affording relief not only to the applicants in the case at stake but to "a wider class of victims without each having to bring a separate complaint to Strasbourg."[44]

The above cases are illustrative of a new trend in the Court's practice that encourages states that have violated the ECHR to adopt specific reparations other than monetary compensation.[45] The request to provide *restitutio in integrum* represents a major shift in the Court's traditional remedial approach: it suggests that the Court has revisited its interpretation of Article 41 and come to the conclusion that it is in fact authorized to afford this form of reparation. This breakthrough may be ascribed to the actual possibility of attaining *restitutio in integrum* when continuing violations are at stake, and, as far as the *Ilascu* case is concerned, the willingness to put an end to flagrant violations of the right to liberty and security that had originated from the unusual situation of the creation of a state not recognized by the international community.

The Court has further broadened its remedial jurisdiction by ordering specific remedial measures of a general character. The *Broniowski* case suggests that the Court has reinterpreted Article 46(1) as providing the Court with the power to order general measures to tackle systemic problems that may give rise, or are giving rise, to numerous and identical breaches of the ECHR by the same state. By virtue of their capability to fulfill deterrent functions, general measures can be regarded as guarantees of non-repetition.

However, the key question for the purposes of this article is whether the Court has extended its new, bold remedial strategy to redress violations of the right to health of prisoners and detainees arising under Article 3 of the European Convention. Before analyzing the relevant case law of the Court, it is appropriate to consider briefly the protection of social rights within the

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43. *See* Grand Chamber, Annual Activity Report 2005, 36 – 37 (2006), *available at* http://www.echr.coe.int/NR/rdonlyres/AF356FA8-1861-4A6B-95E9-28ED53787710/0/2005GrandChamberactivityreport.pdf. Shelton and Leach have noted that in recognizing a widespread practice, the Court was following the Committee of Ministers' recommendation "to identify, in its judgments . . . what it considers to be an underlying systemic problem and the source of this problem." Committee of Ministers, Council of Europe, *Resolution of the Committee of Ministers On Judgments Revealing an Underlying Systemic Problem*, 114th Sess., Res (2004)3 (2004), *cited in* Leach *supra* note 4, at 160; Shelton, *supra* note 4, at 284.

44. Steven Greer, *What's Wrong with the European Convention on Human Rights?*, 30 Hum. Rts. Q. 680, 690 (2008). On "pilot judgments," see also Erik Fribergh, *Pilot Judgments from the Court's Perspective,* Stockholm Colloquy, 9 – 10 June 2008, and Eur. Parl. Ass. Committee on Legal Affairs and Human Rights, *Report of the Group of Wise Persons on the Long-Term Effectiveness of the European Convention on Human Rights Control Mechanism: Memorandum for the Attention of the Bureau of the Assembly*, Doc. AS/Jur (2007) 25, Apr 10, 2007, app. ¶¶ 20 – 21.

45. For an analysis of the *Assanidze* and *Broniowski* cases through the lens of international law norms on state responsibility, see Valerio Colandrea, *On the Power of the European Court of Human Rights to Order Specific Non-Monetary Measures: Some Remarks in Light of the* Assanidze*,* Broniowski *and* Sejdovic *Cases*, 7 Hum. Rts. L. Rev. 396 (2007).

ECHR system in order to illustrate how the Court has interpreted the Convention to encompass the right to health of persons deprived of their liberty.

IV. Protection of Social Rights under the ECHR

It is well known that economic, social, and cultural rights ("ESCR") are not the main focus of the ECHR and that the treaty was intended to codify a number of essentially civil and political rights and set up a system to supervise their implementation.[46] This emphasis on first generation rights can be seen as "a largely symbolic statement of the liberal democratic identity of [the] ten founding members [of the Council of Europe] in the Cold War aftermath of the Second World War."[47] The Council of Europe was supposed to fill the gap in its human rights activity some time after the drafting of the ECHR, when it adopted the 1952 Protocol No. 1 to the ECHR on the rights to property and education[48] and the 1961 European Social Charter (revised in 1996), a treaty providing for a catalogue of ESCR and the right to collective petition.[49]

Nevertheless, the absence of most ESCR in the text of the ECHR has not prevented the Court from protecting social rights through expansive interpretations of Convention rights and the positive obligations they impose.[50] The Court has not derived new free-standing rights from the ECHR, but rather has construed its text as implying social rights.[51]

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46. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 1.

47. Greer, *supra* note 44, at 680.

48. *See* Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms arts. 1, 2, Mar. 20, 1952, Europ. T.S. No. 009. The Protocol also provides for a right to free elections. *See id.* art. 3. Note that the ECHR sets out two provisions that have an economic and social dimension: Article 4 on the prohibition of forced labor and Article 5(1)(e) on lawful detention of persons of unsound mind, those with infectious diseases, alcoholics, drug addicts, and vagrants.

49. The petitions are examined by the European Committee on Social Rights, the body that supervises states' implementation of the European Social Charter. Organizations authorized to petition the Committee are: national employers' organizations, trade unions, and non-governmental organizations ("NGOs") with participative status with the Council of Europe. National NGOs can also file a complaint with the European Committee on Social Rights, provided that the state of origin has recognized and accepted their right to petition under the Charter. For further details on the Charter and the European Committee on Social Rights, see Council of Europe, European Social Charter, http://www.coe.int/t/dghl/monitoring/socialcharter/default_en.asp (last visited Oct. 26, 2009).

50. *See generally* Holly Cullen, Siliadin v France*: Positive Obligations under Article 4 of the European Convention on Human Rights*, 6 Hum. Rts. L. Rev. 585 (2006); Alastair R. Mowbray, The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights (2004); Rory O'Connell, *Social and Economic Rights in the Strasbourg Convention*, Rule of Law and Fundamental Rights of Citizens: The European and American Conventions on Human Rights 157 – 74 (2009); Olivier de Schutter, *The Protection of Social Rights by the European Court of Human Rights, in* Social, Economic and Cultural Rights: An Appraisal of Current European and International Developments 207 – 39 (Peter Van der Auweraert et al. eds., 2002).

51. *See* Airey v. Ireland, App. No. 6289/73, 2 Eur. H.R. Rep. 305, ¶ 26 (1979); de Schutter, *supra* note 50, at 213 – 14 (analyzing the *Airey* case).

The extension of judicial protection to social rights through far reaching interpretations of the ECHR has been defined as an "integrated approach."[52] This approach is predicated on the indivisibility of all human rights and "recognizes that, on the one hand, the enjoyment of civil and political rights requires respect for and promotion of social rights and, on the other hand, that social rights are not second best to civil and political rights."[53] As such, the "integrated approach" has the advantage of opening the door to creative possibilities for litigation of social rights and re-conceptualization of the contours of civil and political rights.[54] It also encourages strategies for the implementation of human rights that are "closer to the lived experience of rights"[55] because, as it has been rightly pointed out, "real people do not experience the needs or deprivations in their lives according to categories of rights."[56]

A pertinent example of this "integrated approach" is the Court's expansive interpretation of Article 6(1) on the right to a fair trial to protect the right to social security. Although the provision does not expressly refer to social security benefits, the Court has maintained that these benefits fall within the scope of "civil rights" in Article 6(1) and that their allocation must comply with all the standards of a fair trial.[57] Thus, in the *Deumeland* case,[58] the Court held that the right to a widow's supplementary pension on the basis of compulsory insurance against industrial accidents was a civil right within the meaning of Article 6(1).[59] The Court held that Article 6(1) was violated because of the length of the domestic proceedings to determine Mrs. Deumeland's pension rights, which lasted almost 11 years.[60] The Court took an even more progressive approach in the *Schuler-Zgraggen* case,[61] in which it held that Article 6(1) applies to welfare assistance and that the provision, read together with Article 14 of the ECHR on the pro-

52. Ovey & White, *supra* note 4, at 50 – 51 (elucidating the concept of integrated approach); Virginia Mantouvalou, *Work and Private Life: Sidabras and Dziautas v. Lithuania*, 30 Eur. L. Rev. 573 (2005) (showing that the ECtHR has applied the integrated approach in *Sidabras and Dziautas v. Lithuania*). For an analysis of the use of the "integrated approach" by the Inter-American Court of Human Rights see Mónica Feria Tinta, *Justicability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions,* 29 Hum. Rts. Q. 431 (2007).

53. Ovey & White, *supra* note 4, at 50.

54. Alicia Ely Yamin, *The Future in the Mirror: Incorporating Strategies for the Defense and Promotion of Economic, Social and Cultural Rights into the Mainstream Human Rights Agenda*, 27 Hum. Rts. Q. 1200, 1219 (2005) (analyzing strategies for the realization of economic, social, and cultural rights based on the indivisibility of all human rights).

55. *Id.*

56. *Id.*

57. Martin Scheinin, *Economic and Social Rights as Legal Rights*, *in* Economic, Social and Cultural Rights: A Textbook 29, 37 – 38 (Asbjørn Eide, Catarina Krause, & Allan Rosas eds., 2001) (discussing the *Salesi* and *Schuler-Zgraggen* cases).

58. *Deumeland v. Germany*, App. No. 9384/81, 8 Eur. H.R. Rep. 448 (1986).

59. *Id.* ¶ 74.

60. *Id.* ¶ 90.

61. Schuler-Zgraggen v. Switzerland, App. No. 14518/89, 16 Eur. H.R. Rep. 405 (1993).

hibition of discrimination, was violated when the Swiss Federal Insurance Court denied the applicant a statute-based invalidity pension on the assumption that women give up work once they have given birth to a child.[62]

The Court has also used Article 8 of the ECHR on the right to respect for private and family life to protect social rights, particularly housing rights and environmental rights. The leading authorities in this regard are the *Gillow*[63] and *López Ostra*[64] cases. In *Gillow*, the applicants were refused licenses to occupy their house and subsequently prosecuted for unlawful occupation by the British authorities. The Court concluded that the denial of the licenses constituted interference with the exercise of the applicants' right to respect for their private and family life that was disproportionate to the legitimate aim pursued and thus violated Article 8.[65] In *López Ostra*, the Court found the serious environmental damage caused by a plant for the treatment of liquid and solid waste from leather tanneries located in a residential area to be a violation of Article 8.[66]

The "integrated approach" has been instrumental to the indirect adjudication of the right to health under several provisions of the ECHR. Arguably, one of the best illustrations of such indirect adjudication is the protection of the right to health through Article 3's prohibition of torture or inhuman or degrading treatment or punishment. As the Court has explained in the *Poltoratskiy*,[67] *Kalashnikov*[68] and *Kudła*[69] cases, Article 3 imposes an obligation to secure prisoners' and detainees' health and well-being. This is tantamount to saying that prisoners' and detainees' right to health (that is, their right to be provided with healthy conditions of detention and adequate medical care) is part of the normative content of the prohibition of torture, inhuman or degrading treatment or punishment.[70]

This article now turns to the questions of whether the Court has extended the provision of non-monetary relief to redress established violations of the right to health of prisoners and detainees arising under Article 3, and, to the extent it has not, whether the Court should do so.

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62. *Id.* ¶¶ 64 – 67.
63. Gillow v. United Kingdom, App. No. 9063/80, 11 Eur. H.R. Rep. 335 (1986).
64. López Ostra v. Spain, App. No. 16798/90, 20 Eur. H.R. Rep. 277 (1994).
65. *Gillow*, App. No. 9063/80, ¶¶ 43 – 58.
66. *Ostra*, App. No. 16798/90, ¶¶ 44 – 58.
67. Poltoratskiy v. Ukraine, App. No. 38812/97, 39 Eur. H.R. Rep. 43 (2003).
68. Kalashnikov v. Russia, App. No. 47095/99, 36 Eur. H.R. Rep. 34 (2002).
69. Kudła v. Poland, App. No. 30210/96, 35 Eur. H.R. Rep. 11 (2000).
70. *See Poltoratskiy*, App. No. 38812/97, ¶ 132; *Kalashnikov*, App. No. 47095/99, ¶¶ 98 – 102; *Kudła*, App. No. 30210/96, ¶¶ 92 – 94; *see also* Ovey & White, *supra* note 4, at 510 (maintaining that the Court has developed "a body of new protections for prisoners"). For an overview of how the Court has interpreted other provisions of the ECHR to encompass the right to health, particularly Article 8 on the right to respect for private and family life, see Scheinin, *supra* note 57, at 41 – 42.

V. The ECtHR's Remedial Practice vis-à-vis Breaches of the Right to Health of Prisoners and Detainees amounting to Violations of Article 3 of the ECHR

The following section focuses on the ECtHR's remedial practice in respect to violations of the right to health of persons deprived of their liberty arising under Article 3 of the ECHR. It reviews and analyzes the relevant case law of the Court in order to determine whether the Court's new approach to redress has been used to remedy violations of Convention rights other than the right to property and the right to liberty and security. This section will also explore the significance of the Court's remedial practice from the point of view of the implementation of the right to health.

Several ECtHR judgments reflect the Court's position that circumstances violating the right to health of persons deprived of their liberty may amount to Article 3 violations. These circumstances include unsanitary pre-trial detention and prison facilities, lack of medical care, and death of prisoners and detainees as a result of defective medical assistance. In the case *Nevmerzhitsky v. Ukraine*,[71] for example, the applicant alleged that he had been subjected to inhuman and degrading treatment while detained at the Temporary Investigative Isolation Unit of Kyiv Region.[72] He alleged that his cell was infested with bedbugs and head lice, which eventually caused him to develop acute skin diseases.[73] He also claimed that the detention facility lacked medicine for the treatment of his chronic cholecystitis and the skin diseases developed during his detention[74] and that he was not provided with necessary medical assistance.[75] The Court held that the conditions of detention "had such a detrimental effect on [the applicant's] health and well-being . . . that they amounted to degrading treatment."[76] The Court found Ukraine's failure to provide adequate medical attention to the applicant to be a violation of the prohibition of degrading treatment.[77] It held that the applicant had proven that the conditions of his detention and their negative consequences for his health – which the Court found amounted to an Article 3 violation – caused him to sustain medical expenses.[78] The Court therefore awarded the applicant € 1,000 in pecuniary damages.[79] This award was € 4,400 less than what the applicant had claimed in compensation for pecuniary harm.[80]

71. Nevmerzhitsky v. Ukraine, App. No. 54825/00, 43 Eur. H.R. Rep. 32 (2005).
72. *Id.* ¶¶ 3, 30.
73. *Id.* ¶ 83. The skin diseases were scabies and eczema. *Id.*
74. *Id.* ¶ 100.
75. *Id.* ¶¶ 100, 104.
76. *Id.* ¶ 87.
77. *Id.* ¶¶ 100, 103 – 104, 106.
78. *Id.* ¶ 142.
79. *Id.*
80. *Id.* ¶ 140.

The applicant also maintained that "he had suffered spiritual and physical anguish, stress and worry throughout his detention" and that his health was "broken."[81] He sought an award of € 112,530 in compensation for non-pecuniary damage.[82] The Court awarded € 20,000 based on the gravity of the violation of Article 3.[83]

In *Sarban v. Moldova*,[84] the applicant, an individual who suffered from several medical conditions,[85] was detained for more than one year in a remand facility with no medical personnel and was denied medical care from other sources, such as his family doctor.[86] The Court concluded that Moldova's failure to provide the applicant with basic medical assistance amounted to degrading treatment within the meaning of Article 3 of the ECHR.[87] The Court considered that the applicant experienced a certain amount of stress and anxiety because of the neglect of his medical conditions by the government and awarded € 4,000 for non-pecuniary damages, approximately € 16,000 less than the amount that the applicant had claimed.[88] Mr. Sarban did not claim pecuniary damages, nor were they presumed by the Court.[89]

McGlinchey v. United Kingdom[90] involved the death of a prisoner who suffered from asthma and heroin withdrawal.[91] The Court found that the United Kingdom had violated the Article 3 prohibition of inhuman or degrading treatment by neglecting to react to Ms. McGlinchey's worsening condition.[92] The Court held that the government's failure to treat the victim's withdrawal symptoms contributed to her pain and distress, and it awarded the applicants (Ms. McGlinchey's family) € 22,900 for moral damages.[93] The applicants did not claim pecuniary damages, nor were they presumed by the Court.[94]

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81. *Id.* ¶ 143.
82. *Id.*
83. *Id.* ¶ 145. The award was also intended to compensate the applicant for the harm he suffered from multiple breaches of Article 5 and an Article 3 violation (force-feeding the applicant without any medical justification, which the Court found to amount to torture). *Id.* ¶¶ 89 – 99.
84. Sarban v. Moldova, App. No. 3456/05 (Eur. Ct. H.R. 2006), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (search by application number).
85. The medical conditions, all confirmed by medical certificates, included progressive cervical osteoarthritis (*mielopatie*) with displacement of vertebrae C5-C6-C7, pain disorder, gout and arterial hypertension of second degree with increased risk of cardio-vascular complications. *Id.* ¶ 25.
86. *Id.* ¶¶ 68 – 69, 82.
87. *Id.* ¶¶ 90 – 91.
88. *Id.* ¶¶ 133, 135.
89. *Id.*
90. McGlinchey v. United Kingdom, App. No. 50390/99, 37 Eur. H.R. Rep. 41 (2003).
91. *Id.* ¶¶ 9 – 29, 57.
92. *Id.* ¶¶ 57 – 58.
93. *Id.* ¶ 71.
94. *Id.* ¶¶ 69, 71.

The Court decided a similar case, *Yakovenko v. Ukraine*,[95] in 2008. In this case, the applicant, who had tuberculosis and was HIV-positive, was detained in a temporary detention center that had no medical practitioner.[96] While detained, the applicant was neither provided with antiretroviral or anti-tuberculosis treatment nor monitored for infections.[97] In April 2006, the applicant's health deteriorated, and he had to be taken to the hospital twice.[98] Doctors recommended the applicant's urgent hospitalization,[99] but the authorities refused to comply.[100] On April 28, 2006, Mr. Yakovenko was transferred to an anti-tuberculosis healthcare center, following a request made by the ECtHR under the interim measures of Rule 39 of the Rules of Court.[101] The applicant died on May 8, 2007.[102] The Court found that the government's failure to provide Mr. Yakovenko with timely and appropriate medical care amounted to inhuman and degrading treatment.[103] The applicant's mother sought € 434 in pecuniary damages for medical expenses incurred in the course of her son's treatment.[104] She also claimed € 50,000 in non-pecuniary damages.[105] The Court awarded the full amount claimed for medical costs.[106] It also awarded the applicant € 10,000 in compensation for moral damages.[107]

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95. Yakovenko v. Ukraine, App. No. 15825/06 (Eur. Ct. H.R. 2008), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (search by application number).

96. *Id.* ¶¶ 93, 100.

97. *Id.*

98. *Id.* ¶¶ 38 – 40.

99. *Id.* ¶¶ 39, 41.

100. *Id.* ¶¶ 39, 42.

101. *Id.* ¶¶ 43, 99. The Court exercised its power to order interim relief "in the interests of the parties and the proper conduct of the proceedings before the Court to ensure that the applicant was transferred immediately to a hospital or other medical institution where he could receive the appropriate treatment for his medical condition." *Id.* ¶ 3. The *Yakovenko* case shows that interim measures can be regarded as a sort of provisional remedy; more specifically, injunctions designed to provide applicants with short term relief when their right to health and right to life are seriously at risk. Similar points have been made by Verónica Gómez in her analysis of provisional measures ordered by the Inter-American Court of Human Rights. Verónica Gómez, *Economic, Social, and Cultural Rights in the Inter-American System*, *in* Economic, Social and Cultural Rights in Action 167, 189 – 193 (Mashood Baderin & Robert McCorquodale eds., 2007). The Rules of Court are available at http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf (last visited May 13, 2009).

102. *Yakovenko,* App. No. 15825/06, ¶ 5.

103. *Id.* ¶¶ 90 – 102. The Court also held that the manner by which the applicant was transferred to and from the Sevastopol City Temporary Detention Centre during the criminal proceedings against him and the material conditions of his detention violated Article 3. *Id.* ¶¶ 81 – 89, 103 – 113. Additionally, the Court found that there had been a violation of Article 13 given that "there was no effective and accessible remedy in respect of the applicant's complaints about the conditions of his detention." *Id.* ¶¶ 123 – 127.

104. *Id.* ¶ 129.

105. *Id.* ¶ 130.

106. *Id.* ¶ 133.

107. *Id.* ¶ 134. The moral damages were also meant to compensate the applicant's mother for the harm her son suffered from the violation of Article 13. *Id.*

In *Mouisel v. France*,[108] the applicant complained that his detention was incompatible with his life-threatening illness (lymphatic leukemia) and sought damages.[109] The Court found that the applicant's medical condition had become increasingly incompatible with his continued imprisonment[110] and that the French authorities "did not take sufficient care of the applicant's health to ensure that he did not suffer treatment contrary to Article 3 of the Convention."[111] It concluded that Mr. Mouisel was subjected to inhuman and degrading treatment.[112] Importantly, the Court maintained that the non-pecuniary damages sustained by the applicant could not be remedied by merely finding a breach of the ECHR, and warranted the award of € 15,000 in moral damages.[113] This was a significant departure from the applicant's damages claim, in which he sought € 304,898 for physical suffering while in detention, € 304,898 for mental suffering, and € 400,000 in compensation for reduced life expectancy.[114]

The Court took a similar remedial approach in *Bragadireanu v. Romania*,[115] a case concerning a prisoner suffering from cancer and severe functional deficiencies.[116] One of the issues at stake was whether the conditions of the applicant's continuing detention constituted inhuman and degrading treatment. Of particular concern were the fact that he shared a cell and beds with other inmates despite his severe medical condition, and the fact that he did not have access to hygienic facilities appropriate to his health situation, including a personal assistant to satisfy his basic sanitary needs.[117] The Court found that these conditions of detention constituted a violation of Article 3 and awarded Mr. Bragadireanu € 6,500 in non-pecuniary damages as a remedial measure.[118]

Finally, in 2009, the Court decided another dramatic case involving lack of medical assistance in prison. The case, *Güveç v. Turkey*,[119] involved a fifteen-year-old whose five year detention with adult inmates led him repeatedly to attempt suicide.[120] Considering the applicant's age, the duration of his detention in prison with adults, and Turkey's failure to provide

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108. Mouisel v. France, App. No. 67263/01, 38 Eur. H.R. Rep. 34 (2002).

109. *Id.* ¶¶ 3, 31 – 33, 50.

110. *Id.* ¶ 45.

111. *Id.* ¶ 48.

112. *Id.*

113. *Id.* ¶ 52.

114. *Id.* ¶ 50.

115. Bragadireanu v. Romania, App. No. 22088/04 (Eur. Ct. H.R. 2008), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (search by application number).

116. The applicant suffered from a perianal tumor. Due to this condition he had an artificial anus which made him unable to control his bowel movements. *Id.* ¶¶ 11, 48.

117. *Id.* ¶¶ 92 – 95.

118. *Id.* ¶¶ 97 – 98, 131. The award was also meant to compensate Mr. Bragadireanu for the harm suffered as a result of a violation of Article 6(1) of the ECHR. *Id.* ¶¶ 122, 131.

119. Güveç v. Turkey, App. No. 70337/01 (Eur. Ct. H.R. 2009), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (search by application number).

120. *Id.* ¶¶ 91 – 92. Other elements also induced the suicidal behavior of the applicant, including denial of access to legal advice for the first six and a half months of the applicant's detention and the fact

the applicant adequate medical care for his psychological problems and to prevent his repeated suicide attempts, the Court found a violation of the prohibition of inhuman and degrading treatment.[121] The applicant claimed € 32,000 in pecuniary damages for his lost earnings,[122] which the Court did not award on the ground that it did not "discern any causal link between the [violation] found and the pecuniary damage alleged."[123] The applicant also claimed € 103,000 in moral damages;[124] the Court awarded € 45,000.[125]

The review of the Court's case law under Article 3 as outlined above demonstrates that it has not been willing to extend its new remedial approach to redress violations of the right to health of prisoners and detainees. The Court has been faithful to its standard remedial practice, limiting itself to providing declaratory relief coupled with – depending on the circumstances of the case – a combination of pecuniary and non-pecuniary damages. In none of the cases reviewed has the Court considered the issuance of a declaratory judgment alone to be sufficient.

Generally, the Court's award of damages has been dictated by the gravity of the violations alleged by the applicants, the state's failure to provide medical care and sanitary conditions of detention, and the victim's health status. The Court has awarded non-pecuniary damages in the majority of cases, and ordered pecuniary damages, in addition to moral damages, in two cases in which the applicants succeeded in demonstrating a causal relationship between the Article 3 violations found by the Court and the medical expenses they incurred.[126] In most cases the Court has "resized" the amount of damages sought by the applicants without enunciating the rationales or principles for the determination of compensation. The assessment of pecuniary damages has rarely been carried out with precision,[127] and awards of non-pecuniary damages "are difficult to comprehend other than as subjective judgments about the moral worth of the victim and the wrongdoer."[128]

From a social rights perspective, it is submitted that the scope of the reparations at stake should not be limited to redress of breaches of the prohibition of inhuman and degrading treatment, but should extend to redress

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that for a period of eighteen months the applicant was tried for an offense carrying the death penalty. *Id.*

121. *Id.* ¶ 98.

122. *Id.* ¶ 137.

123. *Id.* ¶ 140.

124. *Id.* ¶ 138.

125. *Id.*

126. Nevmerzhitsky v. Ukraine, App. No. 54825/00, 43 Eur. H.R. Rep. 32 (2005); Yakovenko v. Ukraine, App. No. 15825/06 (Eur. Ct. H.R. 2008), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (search by application number).

127. SHELTON, *supra* note 4, at 301 (explaining the rationale for awards of pecuniary damages under the ECHR).

128. *Id.* at 345.

of violations of the right to health. A closer analysis of the Court's practice shows that the cases discussed above are, in reality, true right to health cases adjudicated and remedied under the chapeau of Article 3. They have involved serious breaches of the right to access to adequate medical care and sanitation, two components of the normative content of the right to health as defined by the U.N. Committee on Economic, Social and Cultural Rights.[129] This health dimension is also reflected in the damages awarded by the Court. Pecuniary damages have been ordered to compensate applicants for medical expenses incurred to treat medical conditions caused or worsened by unhealthy detention facilities. Non-pecuniary damages have provided relief for the stress, frustration, and anxiety the applicants suffered as a result of the seriousness of the infringements of their right to health, state authorities' negligence in providing the necessary medical care, and unsanitary conditions of detention. This is not to say that the ECtHR has remedied violations of a free-standing right to health under the ECHR but rather that, by affording damages for violations of the prohibition of inhuman and degrading treatment, the Court has indirectly redressed violations of the right to health. Consequently, the damages constitute *de facto* reparations for violations of the right to health that produce an indirect enforcement of a social right not expressly provided in the ECHR. This is an important implication of the "integrated approach" that has brought about not only "social" interpretations of the ECHR but also a concrete implementation of social rights through the use of civil and political rights enshrined in the Convention.

VI. Ordering Specific Non-Monetary Relief for Violations of the Right to Health of Prisoners and Detainees Arising under Article 3: Rationales and Concrete Proposals

The discrepancy between the Court's remedial practice with respect to right to health violations arising under Article 3 and the innovative redress the Court has afforded in the right to liberty and right to property cases analyzed above is complex. Commentators who have analyzed the Court's bold remedial approach developed between 1995 and 2004 have attempted to identify several factors underlying the provision of specific non-monetary relief. They point to the fact that the specific, bold measures constitute the only step to be taken to remedy the violations,[130] the occurrence of a continuing violation and the urgency of putting an end to it, the extent of the seriousness of the violation at stake, and the existence of a systemic problem

129. U.N. Econ. & Soc. Council [ECOSOC], Committee on Economic, Social and Cultural Rights, General Comment No. 14, ¶¶ 7 – 12, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

130. Bates, *supra* note 19, at 70 n.94.

that might lead to an increase in the Court's caseload.[131] These explanations, however, do not appear conclusive, since most of the right to health violation cases reviewed in this article exhibited most of these factors, yet have not warranted specific non-monetary reparations by the Court. These factors include: the particular gravity of the violations of the right to health of prisoners and detainees arising under Article 3, as acknowledged by the Court in the *Nevmerzhitsky, Mouisel* and *Güveç* cases; a continuing violation of the right to health as in the *Bragadireanu* case; and structural problems underlying lack of medical care and sanitation in detention places that may give rise to the same breaches of Article 3 by the state in the future, as observed in the *Nevmerzhitsky*, *Sarban*, *Yakovenko*, *Bragadireanu*, and *Güveç* cases.[132]

Perhaps one reason the Court did not deem it necessary to order specific non-monetary relief is that the right to health violations discussed above lack the exceptionality of some of the violations of the right to liberty and security, such as those alleged in the *Ilascu* case, and do not stem from traumatic historical events, as did the breaches of the right to property in the *Broniowski* judgment. If this is the case, however, such redress should

131. Leach, *supra* note 4.

132. These problems have been documented by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in its visits to Moldova, Romania, Ukraine, and Turkey and include: systematic lack of sanitation, generalized understaffing, chronic shortage of medicines, and, as far as Turkey is concerned, a policy of having juveniles detained in adult prisons. *See* European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Rapport au Gouvernement de la République de Moldova relatif à la visite effectuée en Moldova par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 20 au 30 septembre 2004*, CPT/Inf (2006) 7, ¶¶ 90 – 92, 94, http://cpt.coe.int/documents/mda/2006-07-inf-fra.htm; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Rapport au Gouvernement de la République de Moldova relatif à la visite effectuée en Moldova par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 10 au 22 juin 2001*, CPT/Inf (2002)11, ¶ 62, http://cpt.coe.int/documents/mda/2002-11-inf-fra.htm; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 29 March 2004*, CPT/Inf (2005) 18, ¶ 68, http://cpt.coe.int/documents/tur/2005-18-inf-eng.htm; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Report to the Ukrainian Government on the visit to Ukraine carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 9 to 21 October 2005*, CPT/Inf (2007) 22, ¶¶ 56, 58, http://cpt.coe.int/documents/ukr/2007-22-inf-eng.htm; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Report to the Ukrainian Government on the visit to Ukraine carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 24 November to 6 December 2002*, CPT/Inf (2004) 34, ¶¶ 14, 46, 117 (in particular, the recommendation concerning pre-trial prison [SIZO] No. 21), http://cpt.coe.int/documents/ukr/2004-34-inf-eng.htm; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Report to the Ukrainian Government on the visit to Ukraine carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 26 September 2000*, CPT/Inf (2002) 23, ¶¶ 55, 57, http://cpt.coe.int/documents/ukr/2002-23-inf-eng.htm. Regarding Romania, the ECtHR itself noted that the CPT visited Romania in 1995, 1999, 2001, 2002, 2003, 2004, and 2006 and that "[o]vercrowding of prisons and lack of reasonable hygiene facilities were constantly stressed by the CPT." Bragadireanu v. Romania, App. No. 22088/04 (Eur. Ct. H.R. 2008), ¶ 75, *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (search by application number).

be strongly discouraged as it indicates that the Court sees non-monetary relief as an *ad hoc* form of reparation rather than an integral component of its remedial strategy.

Without further speculation on the inconsistencies of the Court's remedial practice, it may be desirable and even compelling for the Court to extend its bold remedial strategy to right to health violations of prisoners and detainees arising under Article 3. There are two good reasons that warrant this change in the Court's practice.

The first reason is teleological and deeply rooted in international human rights law. International human rights law requires states to provide victims of human rights violations with access to effective remedies and, if appropriate, effective reparation.[133] However, when the state fails to fulfill such obligations, international human rights bodies become "the forum of last resort,"[134] the subsidiary providers of justice and redress. In other words, when redress is not available at the domestic level, international human rights bodies replace the state in affording effective relief to victims, a relief that should be capable of rectifying harms that victims have sustained and "restor[ing] to individuals to the extent possible their capacity to achieve the ends that they personally value."[135] Hence, in order to bring about effective relief as envisioned by international human rights law, the Court should interpret Articles 41 and 46(1) as providing it the authority to order *restitutio in integrum* and other specific non-monetary measures to remedy right to health violations of persons deprived of their liberty arising under Article 3. The Court should recognize that compensation or declaratory relief may not be suitable to remedy every breach of the right to health of prisoners and detainees amounting to an Article 3 violation, particularly when the applicant is still detained.

What is more significant is that these remedial measures cannot prevent the recurrence of the same breach as they are not meant to address systemic causes of the lack of medical care and sanitation in detention facilities of which the alleged violations are only a symptom. Such an expansive interpretation of Articles 41 and 46(1), although it limits states' discretion in

133. The literature on the right to a remedy under international human rights law is copious. *See generally* SHELTON, *supra* note 4, at 104 – 73; Richard Falk, *Reparations, International Law, and Global Justice: A New Frontier*, *in* THE HANDBOOK OF REPARATIONS 478 – 503 (Pablo De Greiff ed., 2006); RENÉ PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW, 43 – 49 (2002); Lisa J. La Plante, *The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru's Political Transition*, 23 AM. U. INT'L L. REV. 51, 54 – 57 (2007); M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUM. RTS. L. REV. 203 (2006); Silvia D'Ascoli & Kathrin Maria Scherr, *The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection* (Eur. Univ. Inst., Working Paper LAW No. 2007/02, 2007); Dianne Otto & David Wiseman, *In Search of 'Effective Remedies': Applying the International Covenant on Economic, Social and Cultural Rights in Australia*, 7 AUSTL. J. HUM. RTS. 5 (2001); GA Res. 60/147, U.N. DOC. A/RES/60/147 (Mar. 21, 2006).

134. SHELTON, *supra* note 4, at 238 (discussing the jurisdiction of international human rights tribunals vis-à-vis reparations).

135. *Id.* at 11.

redressing violations of Convention rights themselves, will significantly enhance victims' right to reparation under the ECHR and, more generally, under international human rights law.[136]

The second reason is more institutional and concerns the role of the Court. Affording specific non-monetary reparations to redress right to health violations arising under Article 3 will augment the scope of the Court's adjudicatory function which, together with the Court's eminent "constitutional" role, is the very cornerstone of the ECHR system. This bold remedial approach would shed more light on the scope of the Court's judgments and how they should be duly executed; it would induce and produce stricter and timelier compliance with Article 3; and finally, it would further solidify the Court's authority. As noticed, "[t]he current approach to enforcement of judgments leaves far too much space for disagreement about what amounts to compliance, and leaves important questions of execution to the vagaries of an essentially political process in the Committee of Ministers . . . ."[137]

In adopting this remedial strategy, the Court should embrace a two-pronged approach to violations of the right to health of prisoners and detainees falling within the scope of Article 3. First, it is of fundamental importance that the Court specifies reparations tailored to the applicant's situation in order to bring about *restitutio in integrum* whenever possible and appropriate. These individual measures should be accompanied by general measures, that is to say, guarantees of non-repetition, if, in the given situation, the problems and issues at the origin of the alleged violation may give rise to similar breaches or are giving rise to the same breaches. Second, whenever *restitutio in integrum* cannot be realized, the Court should award the applicant other forms of reparations, including compensation and alternative non-monetary reparations. If the situation warrants it, these individual measures should be coupled with guarantees of non-repetition.

In light of the case law analyzed in this article, it is possible to suggest several individual non-monetary remedies that, depending on the circumstances of the cases and whether the applicant is still in pre-trial detention or prison, may redress right to health violations arising under Article 3.

Restitutio in integrum may include:

1. regular provision of treatment to detainees and prisoners to treat curable diseases contracted as a result of unsanitary prison or pre-trial detention facilities; and

136. Interestingly, Laurence R. Helfer argues that the Council of Europe and the ECtHR should enhance remedies at the national level, making it unnecessary for individuals to seek relief in Strasbourg and "restoring countries to a position in which the ECtHR's deference to national decision-makers is appropriate." Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 125, 126 (2008).

137. Hunt, *supra* note 7, at 43.

2. transfer of detainees and prisoners to civilian hospitals that are better equipped than pre-trial detention centers or prisons to treat curable diseases developed as a consequence of unhealthy conditions of detention.

Conversely, alternative non-monetary remedies may consist of:

1. regular provision of adequate medical treatment and assistance to detainees and prisoners with a medical condition developed prior to pre-trial detention or imprisonment;
2. transfer of detainees and prisoners to civilian hospitals that are better equipped than pre-trial detention facilities or prisons to treat medical conditions developed prior to pre-trial detention or imprisonment;
3. availability of personal assistants for detainees and prisoners with severe functional deficiencies;
4. transfer of seriously ill prisoners and detainees to individual cells; and
5. apologies.

Additionally, the following guarantees of non-repetition could be afforded when a systemic problem undermines the provision of health care and sanitation in pre-trial detention places and prisons:

1. adoption of a plan of action with a timetable putting forward temporary and permanent solutions to overcrowding and lack of sanitation in pre-trial detention facilities and prisons;
2. creation of mechanisms for the effective implementation of regulations and legislation detailing medical care for prisoners and detainees with serious and life-threatening medical conditions and mandating separation of juveniles from adult inmates;[138]
3. national strategy to address lack of medicines, medical assistance, and mismanagement of medical care in prisons and pre-trial detention centers;
4. regular inspections to verify that adequate medical care is provided to persons deprived of their liberty;

138. This reparation is suggested on the basis of the *Yakovenko* and *Güveç* cases. *See* Yakovenko v. Ukraine, App. No. 15825/06 (Eur. Ct. H.R. 2008), ¶¶ 48 – 52, *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (search by application number) (showing the lack of enforcement of legislation on the provision of specific health care for detainees and prisoners with HIV-AIDS and tuberculosis); Güveç v. Turkey, App. No. 70337/01 (Eur. Ct. H.R. 2009), ¶ 63, *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (search by application number) (showing the lack of enforcement of legislation on the provision of administrative measures on detention standards for juveniles).

5. human rights training for medical officers of detention facilities; and
6. human rights training for detention facilities staff.

VII. Conclusions

This article has demonstrated that the innovative remedial approach with which the ECtHR experimented between 1995 and 2004 has not been extended to redress violations of Article 3 encompassing breaches of the right to health of prisoners and detainees. This is an inconsistency in the ECtHR's jurisprudence. This article has put forward legal and institutional arguments for changing the Court's remedial practice and has proposed specific non-monetary reparations that the judicial body could afford to remedy some of the violations of the right to health adjudicated under Article 3.

The implementation of the proposed measures will be a complex task for an affected state. In some cases it will require time, new skills and competencies, and allocation of new resources. However, states facing these challenges are not alone; they can avail themselves of the Council of Europe's technical assistance and means of action of the Council of Europe's Development Bank.

Effective implementation of these measures will also necessitate improved monitoring of the execution of the Court's judgments by the Committee of Ministers in conjunction with the Council of Europe's Parliamentary Assembly, national NGOs, and national human rights institutions. While some steps have already been taken in this direction,[139] there is still room for creative solutions envisioning a more proactive role for legislative, political, and educational bodies and institutions at the domestic level. Successful implementation of the proposed measures will also require changes in the culture and mentality of state officials and health professionals, and of entire societies. The inherent difficulty of such change should not be an excuse for inertia but a stimulant to start working toward

139. Protocol No. 14 to the ECHR has enhanced the Committee of Ministers' monitoring function by providing in Article 16(3) that "[i]f the Committee of Ministers considers that the supervision of the execution of a final judgment [delivered by the ECtHR] is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation . . . ." Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 16(3), May 13, 2004, Europ. T.S. No. 194. In addition, the Committee may start infringement proceedings against a state that refuses to comply with a judgment of the Court. *Id.* art. 16(4). For a critical appraisal of Protocol No. 14, see Lucius Caflisch, *The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond*, 6 Hum. Rts. L. Rev. 403 (2006). The Council of Europe's Parliamentary Assembly has also played a very proactive role vis-à-vis the execution of the ECtHR's judgments. *See, e.g.*, Council of Europe Parliamentary Assembly, Resolution No. 1516 (2006), http://assembly.coe.int/ASP/Doc/ATListing_E.asp (search for Resolution 1516) (naming and shaming states that have not implemented or have not fully implemented the Court's judgments).

this goal. The very implementation of the proposed measures could be instrumental in igniting this dramatic change.

Finally, the budgetary implications of some of the proposed remedial measures should not prevent the Court from being bolder when affording redress. As evidenced by state and international practice, adjudication of human rights may well entail decisions and recommendations requiring additional allocation of governmental resources.[140] The real question is the extent of these decisions and recommendations and whether adjudicatory and quasi-judicial bodies are able and willing to strike a fair balance between "judicial activism and judicial deference."[141]

Therefore, depending on the violations at stake, the Court could afford to be more progressive with reparations and order remedial measures similar to those recommended in this article. It should be inspired by the Inter-American Court of Human Rights, which has not hesitated to require demanding reparations such as the provision of health care services or food to redress violations of the Inter-American Convention of Human Rights.[142] Indeed, only by providing adequate remedial justice will the ECtHR be able to continue to be "the tangible symbol of the effective pre-eminence on {the European} continent of human rights and the rule of law"[143] and contribute to the concrete and meaningful enforcement of the right to health through the use of the ECHR.

140. U.N. Econ. and Soc. Council [ECOSOC], Commission on Human Rights, Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Analytical Paper by Chairperson-Rapporteur Catarina de Albuquerque, ¶¶ 35 – 43, U.N. Doc E/CN.4/2006/WG.23/2 (Nov. 30, 2005).

141. *Id.* ¶ 43.

142. Gómez, *supra* note 101, at 189 (detailing reparations the Inter-American Court of Human Rights ordered in cases concerning violations of indigenous peoples' rights).

143. Luzius Waldhaber, President, Eur. Ct. Hum. Rts., Address at the Warsaw Summit of the Council of Europe (May 16, 2005), http://www.coe.int/t/dcr/summit/20050516_speech_wildhaber_en.asp.