Reparation and enforcement of judgments: a comparative analysis of the European and Inter-American human rights systems

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Erstveröffentlichung / Primary Publication
Dissertation / phd thesis

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A Comparative Analysis of the European and Inter-American Human Rights Systems

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Published by epubli GmbH, Berlin, www.epubli.de

ISBN: 978-3-7375-8317-6

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at http://dnb.dnb.de.

Foreword

The Faculty of Law, Management and Economics of the University of Mainz accepted this doctoral thesis in 2015.

I extend my most sincere appreciation to Francisco Taborda Ocampo, former Dean of the Faculty of Law of the Universidad de Ibagué. He introduced me to the issue of execution of judgments by the IACtHR and thus made me delve into the matter in relation to the ECtHR. Also, he gave invaluable support to the development of this research by contacting me with the right people in Colombia and at the IACtHR.

My profound gratitude also goes to Prof. Dr. Marie-Bénédicte Dembour, professor of law and anthropology at the University of Brighton, whom I had the enormous pleasure to meet at the IACtHR. In intense conversations on our mutual researches (and on many other things), Marie shared with me her views on the IACtHR and the ECtHR, their relation and their differences.

The constant dialogue with Sigifredo Leal and his comments have allowed me to understand many of my findings from an anthropological perspective beyond their legal meaning.

The German Academic Exchange Service granted me financial support for my participation in the International Congress of Americanists in Vienna and for a research stay at the IACtHR. Thanks to the openness of Judges and staff there, as well as their disposition to spare time to answer my questions despite their heavy workload, I could understand the working of the Court and the ideas that support it. I was received with similar openness and interest at the ECtHR, the Department for the Execution of Judgments and the Parliamentary Assembly in Strasbourg.

Prof. Dr. Udo Fink of the Faculty of Law, Management and Economics of the University of Mainz supervised this thesis. Already before, he had nurtured my enthusiasm for public international law. Prof. Dr. Dieter Dörr, professor at the same faculty, thankfully wrote the second evaluation quickly.

My parents Heide and Albert Schneider always provided me with their fullest support during my studies and internships in Germany and abroad. They deserve special appreciation.

To everyone who had their share in this research: thank you, gracias and danke.

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All URLs were active on 31 October 2015

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Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ADC	Asociación de los Derechos Civiles *http://www.adc.or.ar*
AS/Jur	Parliamentary Assembly of the Council of Europe – Committee on Legal Affairs and Human Rights
BGBl.	Bundesgesetzblatt *http://www1.bgbl.de/*
CDDH	Steering Committee for Human Rights (CoE)
CETS	CoE Treaties Series *http://conventions.coe.int*
CJPA	Committee of Juridical and Political Affairs (OAS)
CM	Committee of Ministers (CoE) *http://www.coe.int/cm*
CoE	Council of Europe *http://www.coe.int*
DH/HR	Droits de l'Homme / Human Rights (meetings of the Committee of Ministers)
ECHR	European Convention on Human Rights
ECJ	European Court of Justice *http://curia.europa.eu*

ECommHR	European Commission of Human Rights
ECtHR	European Court of Human Rights *http:// www.echr.coe.int*
ETS	European Treaty Series *http:// conventions.coe.int*
F. Supp.	Federal Supplement
IACommHR	Inter-American Commission on Human Rights *http:// www.cidh.oas.org*
IACtHR	Inter-American Court of Human Rights *http:// www.corteidh.or.cr*
ICJ	International Court of Justice *http:// www.icj-cij.org*
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance
ICSID	International Centre for Settlement of Investment Disputes *http:// icsid.worldbank.org*
ILC	International Law Commission *http:// www.un.org/law/ilc*
LNTS	League of Nations Treaties Series *http:// treaties.un.org*
NGO	Non-Governmental Organization
OAS or OEA	Organization of American States
PACE	Parliamentary Assembly of the Council of Europe *http:// assembly.coe.int*

PCIJ	Permanent Court of International Justice *http://www.icj-cij.org/pcij*
RIAA	Reports on International Arbitration Awards *http://www.un.org/law/riaa*
UK	United Kingdom
UNTS	United Nations Treaties Series *http://treaties.un.org*
US or USA	United States of America
USD	United States Dollar
USSR	Union of Socialist Soviet Republics
WTO	World Trade Organization

Introduction

There are currently three regional human rights courts in the world: the European, the inter-American and the African one. The first court to be established was the European Court of Human Rights in 1959, followed by the Inter-American Court of Human Rights in 1979, and finally the African Court on Human and Peoples' Rights in 2006, which is to be combined in the near future with the African Court of Justice to form a new African Court of Justice and Human Rights.[1] Only the Inter-American and the European Court have issued executable judgments as of yet.

The European Convention on Human Rights[2] – the second regional human rights instrument after the American Declaration of Rights and Duties of Man of 1948[3] –, adopted soon after the Second World War, was the first human rights convention to provide a dedicated protection system. It became the prototype for other regional human rights protection systems, in the first case the inter-American one under the ACHR.[4] Each posterior system took inspiration from earlier systems, but also introduced modifications in areas that had proven to be unsatisfactory or adaptations required by different organizational or political circumstances. Therefore, comparison of the solutions adopted for similar problems – in our case reparation orders and their execution – is an appropriate tool to assess the effectivity of the human rights protection systems and to

[1] Article 1 of the Protocol on the Statute of the African Court of Justice and Human Rights, 2012.

[2] European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "ECHR"), 4 November 1950 (entry into force: 3 September 1953), CETS no. 005.

[3] American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, 1948, reprinted in: Basic Documents Pertaining to Human Rights in the Inter-American System, pp. 19–27.

[4] American Convention on Human Rights "Pact of San José, Costa Rica" (hereinafter "ACHR"), 22 November 1969 (entry into force: 18 July 1978), 1144 UNTS 123.

ideally filter the positive aspects of each system, which may become the basis for proposals of improvement.

This undertaking shall also serve the aim to raise awareness within the courts of each other's jurisprudence and procedures.[5] While there is a notable increase in mutual interest, e.g. expressed in visits by judges at the respective other Court, at least at the ECtHR one can still hear that the IACtHR was ineffective and published all its acts in Spanish only, making them inaccessible to most European readers. While this fails to recognize that nowadays all IACtHR decisions are translated into English, though not always free of even grave errors,[6] the myth of the IACtHR's lack of effectiveness shall be re-evaluated in this thesis.

Reparation and execution of judgments has been of limited interest to legal scholars until now. In Europe, this may be due to several factors: until the beginning of the 2000s, reparation was not mentioned in ECtHR judgments, which only found whether there had been a violation and eventually awarded monetary compensation. The Committee of Ministers, which is responsible for supervision of the execution of judgments, held sessions on compliance behind closed doors and did not publish information on its activities. Furthermore, it was a frequent assumption that compliance with ECtHR judgments was perfect anyways.[7]

The issue of reparation and their execution in Europe, however, contains a set of open questions that have become virulent, in particular since the accession of the new member states from Eastern Europe. Several of these states are still young democracies with sometimes severe shortcomings in their public administrations and suffering also from economic constraints. Repression remains a frequent instrument of their domestic policy, and in some states institutions such as the police or the judiciary commit grave and widespread violations of the ECHR's most fundamental rights. As

[5]It was only in 2012 that the ECtHR and the IACtHR formally established cooperation: ECtHR, *Annual Report 2012*, pp. 5, 14.

[6]Paúl, "Translation Challenges of the Inter-American Court of Human Rights and Cost-Effective Proposals for Improvement", 1–2 *IAEHRJ* 5 (2012). This also affects the denomination of judgments or the type of decision, which is not consistent in English. In this work we will maintain the denominations as they appear in the official translation of each decision.

[7]E.g.: Committee of Ministers, *Supervision Annual Report 2007*, pp. 9f.

a consequence, not only did the number of cases that reached the Court skyrocket, but also the quality of violations became more severe. This put the issue of effective reparation, in particular on the general level to prevent repetitive violations, on the Court's and the Committee's agenda. Also, the way in which the Committee of Ministers dealt with the Court's judgments in relation to the states started to be observed with growing interest.[8]

The inter-American system, on the contrary, is generally believed to be ineffective. While the IACtHR maintains a broad reparation practice, most of its judgments have not been fully complied with. Historical experience has furthermore shown that little support for the IACtHR's work can be expected from the OAS organs, so proposals to improve compliance mainly focus on domestic remedies.[9]

Nevertheless, the assumption of perfect compliance with the ECtHR's judgments and that of the IACtHR's notorious ineffectiveness seem difficult to maintain. The Committee of Ministers itself has acknowledged that there is an issue at least of slow execution.[10] But also situations such as the UK's opposition to adopt the legal measures required after the ECtHR in 2005 had declared the general ban on voting rights for prisoners a violation of the Convention gives reason to worry. On the other hand, the first impression of the IACtHR's work may be truly grim, with only 15 cases closed out of around 150 that were decided until the end of 2012.[11] This perspective however appears insufficient to evaluate the Court's results. The IACtHR maintains a very detailed reparation practice, handing down catalogues of specific orders to the states. Thus, even if most or at least the more fundamental of these orders have been fulfilled,

[8]See, among others, the works by Lambert, *Les effets des arrêts* and Lambert Abdelgawad, *The execution of judgments, 2008*, and von Staden, *Shaping human rights policy in liberal democracies*. Also, since 2008, the Committee publishes annual reports on its monitoring activities, which are available from its website at www.coe.int/cm.

[9]See, e.g.: ADC, *Efectividad del SIDH*, pp. 29f.; Huneeus, "Courts Resisting Courts", 3 *CILJ* 44 (2011); CEJIL, *Implementación*; Cavallaro and Brewer, "Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court", 4 *AJIL* 102 (2008), p. 770; Baluarte, "Strategizing for Compliance", 2 *Am. U. Int'l L. Rev.* 27 (2012), p. 282.

[10]Committee of Ministers, *Supervision Annual Report 2011*, p. 11.

[11]See the updated list in Annex 1.

a case is generally not closed by the IACtHR and remains on its list of unfinished issues.

Comparing both systems may also prove to be fruitful for the different political settings the courts are acting in. Unlike the ECtHR, which began its work among a group of like-minded liberal democracies marked by the atrocious experience of the Second World War, the IACtHR had to deal with a set of states that were either plagued by internal conflicts or had just overcome dictatorial regimes, which generally implied gross human rights violations. While the European Court, and in the beginning also the Commission, thus principally had to decide civil rights cases, the case of *Ireland v. United Kingdom* and *The Greek Case* being notorious exceptions,[12] a significant number of cases before the IACtHR stemmed from these gross violations, forced disappearances, mass murder by security or paramilitary forces, torture and other grave human rights violations.

Today, this situation is diametrically changing. While the IACtHR is increasingly occupied with civil rights cases,[13] the ECtHR is receiving more cases in particular from Eastern European states that concern massacres, forced disappearances, and impunity of state officials committing human rights violations.[14] Also, while effective implementation of judgments becomes more of a problem in some European states, several American states have set up special mechanisms to improve implementation of IACtHR judgments, which now require less intervention by the Court or OAS organs.

The level of integration of the states in each region is another factor that may influence the execution of judgments. The European states are integrated on many different levels, comprising not only the member states' governments but also their parliaments.

[12] *Ireland v. United Kingdom* (Merits and Just Satisfaction), ECtHR, no. 5310/71, 18 January 1978, Series A no. 25; *The Greek Case* (Report), ECommHR, nos. 3321/67 et al., 5 November 1969, YB 11, Vol. II, 690 and 730.

[13] Tanner, "Interview with Judge Antônio A. Cançado Trindade, Inter-American Court of Human Rights", 4 *HRQ* 31 (2009), pp. 988ff.; Parra Vera, *Lucha contra la impunidad, independencia judicial y derechos de los pueblos indígenas. Algunos avances y debates en torno a la jurisprudencia de la Corte Interamericana de Derechos Humanos (2004-2009)*, pp. 33f.

[14] Cf. the ECtHR statistics on its caseload and the violated rights in each annual report, e.g. ECtHR, *Annual Report 2012*, pp. 152ff.

Half of the CoE's members are furthermore participating in the European Union, which ensures even stronger integration on all levels of state administration.[15] Compliance with ECtHR judgments can thus be controlled on many levels. The American states, on the other hand, are much less integrated. States are represented in the OAS by their governments only; an integration of the legislative or judicial branches does not take place. Also, not all OAS members have ratified the ACHR or accepted the IACtHR's compulsory jurisdiction. This has led to accusations by several Latin American states that the IACommHR and the IACtHR were organs controlled by the United States of America, an argument put forward expressly by Venezuela when denouncing the ACHR in 2012.[16]

Implementation of the human rights courts' judgments depends on national and international actors. The following investigation will concentrate on the implementation of reparation judgments on the international level in the framework of the respective underlying regional organizations. It spares out domestic implementation mechanisms out of two reasons. First, it would be unrealistic to compare the domestic law and organization of 47 European states and 23 states parties to the ACHR. Secondly, and more importantly, the states' obligation to comply with the courts' judgments under Article 46(1) of the ECHR and Article 67 of the ACHR does not discriminate among the member states' domestic circumstances. All states are under the same obligation to comply with the respective court's decisions, no matter how their domestic legal and administrative order has been conceived. Also, the supranational supervisory mechanisms of both the OAS and the CoE apply indiscriminately to all states. It is therefore possible to compare these mechanisms without dealing with the differences in the member states' domestic laws. However, effective implementation requires that within the procedures we are going to describe, national particularities are being

[15] The European Union is set to become a member of the ECHR. CoE, *Press Release - DC041(2013)*, 5 April 2013, URL: www.coe.int. See an example for the potential of stronger integration of the Council of Europe and the EU for the execution of judgments *infra* in section 9.1.1.2.2.

[16] Minister of Popular Power for Foreign Affairs of the Bolivarian Republic of Venezuela, *Letter to the Secretary General of the OAS*, 6 September 2012, URL: http://www.oas.org/DIL/Nota_Rep%C3%BAblica_Bolivariana_Venezuela_to_SG.English.pdf.

taken into account, e.g. concerning the selection of domestic conversational partners. But, as these questions are of a practical nature, they have to be decided by the competent organs on a case to case basis. They will therefore only be touched upon in passing when describing particular cases.

The constitutional differences of the OAS and the Council of Europe, and in particular the place of human rights protection in their work, depend in part on the historical circumstances in which both organizations were established. The first part of this work will therefore briefly describe the historical background of both courts. It will also present the organs involved in the execution of judgments. Finally, the procedures before both courts will be exposed as far as they may result in executable state obligations.

The next part will retrace the courts' reparation practice in the light of international law of state responsibility. These rules and orders set out the states' obligations, whose compliance has to be supervised by the respective organs of both organizations. The ECtHR's reparation orders are marked by the principle of subsidiarity, underlined again by the states in the 2012 Brighton Declaration and codified in Article 34 of the ECHR.[17] Reparation measures are in principle to be determined by the states under supervision of the Committee of Ministers. To counter repetitive cases and in single other situations the Court has, however, begun to develop a more detailed reparation practice that goes beyond the mere awarding of monetary compensation and limits the principle of subsidiarity. The IACtHR's reparation powers are, on the contrary, almost unrestricted. It hands down very broad reparation orders that have even been criticized for sometimes being practically impossible to comply with.

Execution of judgments will be dealt with in part 3. After developing the binding force of the courts' judgments under public international law, the work of the diverse organs that influence the

[17]Council of Europe, *High Level Conference on the Future of the European Court of Human Rights*, 19 April 2012, URL: https://hub.coe.int/20120419-brighton-declaration, no. 12. The principle of subsidiarity will be included into the preamble of the ECHR, once the draft Protocol 15 enters into force: Article 1 of Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "Protocol no. 15"), 24 June 2013, CETS no. 213.

execution of judgments will be presented in detail. In Europe these are first and foremost the Committee of Ministers, but also the ECtHR and the Parliamentary Assembly, among others. In the Americas, the procedure is less complex, as responsibility is shared among the General Assembly and its sub-organs, and the IACtHR. Based on these findings, an assessment of both procedures and an overview of already planned and possible future reform measures will be presented. The last part contains the conclusions of the investigation.

Part I

Regional Human Rights Protection in the Americas and in Europe

Overview

It is a general rule of international law that individuals cannot denounce violations of international treaties before international tribunals. Only states or international organizations may do so, and even they only upon previous agreement. Therefore, individual claims usually require support by a state that can claim to have suffered damage.[1] Modern human rights treaties however directly confer rights on individuals. The violation of these rights gives rise to claims for reparation directly between the victim and the responsible state. Thus, objective obligations among the states become subjective rights of individuals.[2] The creation of subjective rights for individuals marks the particularity of human rights treaties such as the ACHR, the ECHR, and recently also the ACHPR.[3] States play a double role in this constellation. On the one hand they are the only institutions that can possibly violate Convention rights, but at the same time they are the born guarantors of these very rights, the institutional framework called upon to safeguard the existence, the freedom, and the property of the individual citizen.[4]

However, human rights cases, even among an individual and a foreign state, usually do not coincide with the political interests of the individual's state of nationality so that no support by the national state is to be expected. The general rule of international law

[1]Cf. *U.S. v. Noriega*, 746 F.Supp. 1506, at 1533.

[2]The dispute about whether all human rights are subjective rights, independent from the possibility of enforcement by the bearers, does not require further discussion in the scope of this thesis, as both the ECHR and the ACHR procure enforceability. See on the issue Seegers, *Das Individualrecht auf Wiedergutmachung*, pp. 53ff.

[3]See Article 1 of the ECHR and Meyer-Ladewig, *EMRK-Kommentar 2006*, Einleitung no. 28; Article 1 of the ACHR and Shelton, "Implementation Procedures of the American Convention on Human Rights", *GYIL* 26 (1983), p. 243 and *Effect of Reservations*, IACtHR, Advisory Opinion OC-2/82, 24 September 1982, Series A no. 2, para. 29; Article 1 of the African Charter on Human and Peoples' Rights (hereinafter "ACHPR"), 27 June 1981 (entry into force: 21 October 1986), 1520 UNTS 217 and Bortfeld, *Der Afrikanische Gerichtshof für Menschenrechte*, pp. 39ff.

[4]Tomuschat, *Human Rights: Between Idealism and Realism*, p. 8.

according to which states represent their citizens in all questions relating to international law before international organs (known as the right of diplomatic protection) would hence render human rights protection absurd and cannot apply to these cases.[5] It is therefore essential for human rights treaties to provide individual complaints procedures and the ability for individual claimants to defend their claims directly or through another neutral body such as a human rights commission. Out of the same consideration, reparation for damages suffered by individuals due to human rights violations may not be granted to the state, as would be the case under general international law, but must be granted to the victim.[6] The ECHR and ACHR comply with these requirements, establishing an individual complaints procedure,[7] and providing for reparation to be made directly to the victim.[8] Even in inter-state cases, where the affected individuals are not directly represented, the ECtHR has held that just satisfaction is afforded "for the benefit of individual victims", as long as the proceedings were not instituted to maintain European public order.[9]

The complaints systems are not restricted to the human rights courts solely but rely on different Charter organs of the CoE and the OAS. Therefore, before assessing the effectivity of the reparation process, it is necessary to have a brief look at the human rights protection systems as a whole. While the inter-American human rights protection system had largely been inspired by the European one, there are some significant differences that have historically evolved and mainly affect the execution of judgments. Section 1 will briefly show the origins of human rights protection in Europe and the Americas. The human rights protection systems under investigation were installed through human rights conventions adopted within the OAS and the CoE. The purpose of both organizations is

[5] Shaw, *International Law*, pp. 258f.

[6] Enrich Mas, "Right to Compensation under Article 50", p. 776, with further references for the ECHR. For further reasons why human rights cases cannot be resolved as cases of international state responsibility, refer to Shelton, *Remedies in International Human Rights Law, ed. 1*, pp. 47ff.

[7] Article 34 of the ECHR and Article 44 of the ACHR.

[8] Article 41 of the ECHR and Article 63 of the ACHR.

[9] *Cyprus v. Turkey* (Just Satisfaction) [GC], ECtHR, no. 25781/94, 12 May 2014, paras. 46 and 58f.

not limited to human rights protection. Their tasks range from culture and economy to political stabilization and the consolidation of representative democracy.[10] Consequently, the organizations have a number of organs that are not directly involved in the protection of human rights. Nonetheless, some of these organs, like the Committee of Ministers in the CoE or the General Assembly and the Permanent Council in the OAS, play significant roles in the process of human rights protection, particularly when enforcing Court judgments. Out of these considerations a short overview of the respective organizations that play a role in the protection process will be provided in section 2. Finally, in section 3, the procedures before the courts and, in the Americas, the Commission leading to the establishment of state responsibility for human rights violations will be described to the necessary extent, placing an emphasis on the reparation procedures before the courts.

[10] Article 1 of the Statute of the Council of Europe (hereinafter "Statute of the CoE"), 5 May 1949 (entry into force: 3 August 1949), ETS no. 001 and Article 1 of the Charter of the Organization of American States (hereinafter "Charter of the OAS"), 30 April 1948 (entry into force: 13 December 1951), 119 UNTS 48.

1 History

The CoE and the OAS were created with different historical needs, which is reflected in their aims. The OAS aims at the promotion of solidarity, the strengthening of collaboration, and the defence of sovereignty, territorial integrity, and independence of its members.[1] Consequently, it is directed much more strongly towards the interests of its member states than towards those of their citizens. Apart from the eradication of extreme poverty, mentioned in Article 2(g) of the Charter of the OAS, and the proclamation of fundamental rights in Article 3(l), none of the rights mentioned directly affects the people.

The aim of the CoE, child of the devastating Second World War and germ of European reconciliation and reconstruction, is "to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress."[2] These aims shall be achieved by means of discussions, agreements, and common action in economic, social, cultural, scientific, legal and fundamental freedoms, and through the maintenance and further realization of human rights and fundamental freedoms.[3] Although these aims are directed at the member states only, all of them directly affect the live of the citizens.

These differences influence the way in which human rights protection is organized in the Americas (1.1) and in Europe (1.2).

1.1 The American Convention on Human Rights

Human rights questions were a concern to the states of the Americas since the very beginning of inter-American cooperation. In the Treaty of Perpetual Union, League and Confederation of Panama

[1] Article 1 of the Charter of the OAS.
[2] Article 1(a) of the Statute of the CoE.
[3] Article 1(b) of the Statute of the CoE.

(1826), the signatory states already recognized the principle of juridical equality of nationals of a state and foreigners, and also assured to cooperate in the abolition of slave trade. Later, they dealt with questions of nationality and asylum, rights of women and labour conditions.[4] After the Second World War, the American states became pioneers in the codification of human rights. At the Inter-American Conference of Mexico City in 1945 they declared their conviction of the principles of international public law on human rights and ordered the American Juridical Committee to draft a declaration on the rights and duties of man.[5] The resulting American Declaration of the Rights and Duties of Man was adopted at the Inter-American Conference in Bogotá of 1948 as a simple, non-binding conference declaration, seven months before the Universal Declaration of Human Rights.[6] The Declaration lists civil, political, economic, social and cultural rights. Proposals to set up a juridical protection system for human rights brought up by the Uruguayan delegate to the Conference of Bogotá were rejected as interferences with the sovereignty of the states and were not even voted upon as the majority of states had already voted against giving the Declaration legally binding force.[7] Today, though, it is argued that the Declaration had obtained binding force at least for a part of the states parties. One author argues that, while the Declaration itself is not binding, its contents have become (regional) international customary law and reflect fundamental principles recognized by the American States.[8] Others hold that it has certain moral value, because it

[4]All examples from Buergenthal and Shelton, *Protecting Human Rights in the Americas: Cases and Materials*, p. 38.

[5]Resolution XL "Protección Internacional de los Derechos Esenciales del Hombre" (hereinafter "Resolution XL"), adopted by the Inter-American Conference on Problems of War and Peace, Mexico City, 21 February to 8 March 1945, 7 March 1945, Conferencias Internacionales Americanas: Segundo Suplemento 1945-1954, pp. 52–53.

[6]The states at the Conference of Mexico had originally intended the Declaration to take the form of a Convention; see Preamble of Resolution XL. See also Buergenthal and Shelton, *Protecting Human Rights in the Americas: Cases and Materials*, pp. 39f. and Gillich, *Konsens und evolutive Vertragsauslegung*, p. 20.

[7]Medina Quiroga, *The Battle of Human Rights*, pp. 37f. and Cassel, "Inter-American Human Rights Law, Soft and Hard", pp. 399f.

[8]Faúndez Ledesma, *The Inter-American System for the Protection of Human Rights*, p. 28.

lays out the "civilized behaviour" of the states.[9] In a detailed analysis of the question, Gillich reaches the conclusion that, by way of evolutive interpretation, the Declaration has obtained binding force for all states parties except the US, which adopted the role of a persistent objector, and Cuba, to which the progressive interpretation does not apply due to its suspension from the OAS.[10] The IACtHR went even one step further and sustained the opinion that the Declaration had become binding for all OAS member states.[11] When adopting the Declaration, the OAS member states at least declared what they considered at that time to be the human rights worth to be protected. The Declaration is therefore an important means to interpret human rights in the Americas, in particular the notion of "human rights" as it appears in the Charter of the OAS.[12] No other human rights document was ever adopted by all American states, making the Declaration the only truly pan-American human rights document.

Another important resolution was adopted at the Conference of Bogotá in 1948. In Resolution XXXI the states recommended that the Inter-American Juridical Committee elaborate the Statute for an Inter-American Court for the protection of human rights, arguing that these rights were internationally recognized and could only be protected by a tribunal.[13] But the project never grew out of the planning state. It reappeared in Resolution XXIX of the Tenth Inter-American Conference in Caracas in 1954,[14] where many delegations abstained from voting and thus did not let the resolution pass.[15]

[9]Grossman, "Proposals to Strengthen the Inter-American System of Protection of Human Rights", *GYIL* 32 (1989), p. 266.

[10]Gillich, *Konsens und evolutive Vertragsauslegung*, pp. 284ff.

[11]*Interpretation Art. 64 ACHR*, IACtHR, Advisory Opinion OC-10/89, 14 July 1989, Series A no. 10, para. 45.

[12]Articles 3(l), 17, 45, 106 and 145 of the Charter of the OAS refer to human rights.

[13]Resolution XXXI "Corte Interamericana para Proteger los Derechos del Hombre" (hereinafter "Resolution XXXI"), adopted by the Ninth International Conference of American States, Bogotá, 30 March to 2 May 1948, Conferencias Internacionales Americanas: Segundo Suplemento 1945-1954, p. 210.

[14]Resolution XXIX "Corte Interamericana Para Proteger Los Derechos Humanos" (hereinafter "Resolution XXIX"), adopted by the Tenth International Conference of American States, Caracas, 1 to 28 March 1954, Conferencias Internacionales Americanas: Segundo Suplemento 1945-1954, pp. 311–312.

[15]Medina Quiroga, *The Battle of Human Rights*, p. 54.

The fact that the plans for an inter-American court of human rights had been tacitly buried by the states did not mean standstill in the development of human rights protection in the Americas. At the Fifth Meeting of Consultation of Ministers of Foreign Affairs in Santiago de Chile in 1959, Resolution VIII was adopted, establishing the Inter-American Commission on Human Rights.[16] It is noteworthy that the Commission was not established by a treaty but by a simple conference resolution. The changing attitude of the American states towards human rights protection mechanisms can be explained by the changing political circumstances in the region. On 1 January 1959, Cuban dictator Batista was overthrown and the masses mobilized in other Latin-American states, hoping to get rid of unwanted Governments, too.[17] This is reflected directly in the Resolution: "It has been considered essential, as a fundamental corollary to this rule, that such rights be protected by a juridical system, so that men will not be driven to the extreme expedient of revolt against tyranny and oppression [...]". Nevertheless, as the region's only human rights document up to this date, the American Declaration of Rights and Duties of Man, was at that time undisputedly non-binding, the first Statute of the Commission of 1960 did not provide for the guarantee of human rights but only for their promotion.[18] The role of the Commission was to serve as an advisory body to the OAS in human rights questions (Article 9(e) of the Statute).[19] It was not conceived as an OAS body or organ but merely as an "autonomous entity", without defining what that should mean.[20] The second important decision taken in Resolution VIII was that the Inter-American Council of Jurists should proceed to prepare a

[16] Resolution VIII, adopted by the Fifth Meeting of Consultation of Ministers of Foreign Affairs of the OAS, Santiago de Chile, 1959, URL: http://www.oas.org/consejo/MEETINGS%20OF%20CONSULTATION/Actas/Acta%205.pdf.

[17] Kokott, *Das interamerikanische System zum Schutz der Menschenrechte*, p. 16.

[18] Article 2 of the Commission Statute of 1960 defined the rights of the American Declaration as the rights to be promoted. Buergenthal and Shelton, *Protecting Human Rights in the Americas: Cases and Materials*, pp. 48f.

[19] Ruiz Miguel, "La Función Consultiva en el Sistema Interamericano de Derechos Humanos: ¿Crisálida de una Jurisdicción Supra-Constitucional?", p. 1357.

[20] Scheman, "The Inter-American Commission on Human Rights", 2 *AJIL* 59 (1965), p. 337.

draft Convention on Human Rights and on the creation of an "Inter-American Court for the Protection of Human Rights".

Profiting from its unclear status, the Commission soon began to enlarge its own competence.[21] Thus, in 1965, the Commission Statute was changed for the first time by Resolution XXII of the Second Special Inter-American Conference in Rio de Janeiro, giving the Commission the possibility to receive individual complaints and to investigate *in loco*. Still, a power to satisfy for or repair identified human rights violations was not contemplated. The Commission finally received constitutional backing at the Buenos Aires Conference in 1967, where it was made one of the OAS's main organs in Article 51(e) of the Charter of the OAS. Furthermore, its existence was required in Article 112, making an amendment of the Convention a requirement for its abolition.[22] This reform entered into force in 1970.

On 22 June 1969 the American Convention on Human Rights was signed in Costa Rica after 10 years of preparation. It entered into force nineteen years later on 18 July 1978 after the 11th ratification. In 1988, the First Protocol to the ACHR was adopted by the OAS in the area of economic, social and cultural rights, also known as the Protocol of San Salvador.[23] The Second Protocol to the ACHR was signed in 1990 in Asunción dealing with the abolition of the death penalty, prohibiting its use under any circumstances in peacetime, allowing reservations to be made for the use in wartime.[24]

[21] Cançado Trindade, "The Evolution of the Organisation of American States (OAS) System of Human Rights Protection: an Appraisal", *GYIL* 25 (1982), p. 500.

[22] For a detailed description of this reform see Buergenthal, "The Revised OAS Charter and the Protection of Human Rights", 4 *AJIL* 69 (October 1975), pp. 828ff.

[23] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (hereinafter "First Protocol to the ACHR"), 17 November 1988 (entry into force: 16 November 1999), OAS Treaty Series no. 69. For more information see: Steiner and Alston, *International Human Rights in Context: Law, Politics, Morals*, pp. 870f.

[24] Protocol to the American Convention on Human Rights to Abolish the Death Penalty (hereinafter "Second Protocol to the ACHR"), 8 June 1990, OAS Treaty Series no. 73.

1.2 The European Convention on Human Rights

In the still war-torn Europe, the CoE was founded on 5 May 1949. Moves to ensure the protection of human rights on the Continent had however been undertaken already before this day. At the Congress of the European Movement in The Hague in May 1948, proposals for a European Charter of Human Rights were presented.[25] These proposals were cast into more tangible forms in the "Teitgen Report", named after former French Minister of Justice P.H. Teitgen. This report was accepted at the Consultative Assembly of the CoE on 9 September 1949.[26] In June 1950 the Committee of Ministers installed a Committee of Experts and convened a Conference of Senior Officials which annexed a draft convention to the report.[27] After further revision by the Consultative Assembly and the Committee of Ministers, the Convention was finally signed on 4 November 1950 and entered into force on 3 September 1953 after the tenth instrument of ratification was deposited with the Secretary General of the CoE. The European Commission on Human Rights was established on 18 May 1954 and the Court on 21 January 1959. Today, the signature of the ECHR is quasi-obligatory for all members of the CoE.[28]

The states' intention when adopting the ECHR was not to concede to each other reciprocal rights and obligations in pursuance of their national interests, but to realize the aims and ideals of the CoE,[29] particularly the "maintenance and realization of human rights and fundamental freedoms".[30] This is one of the major differences to the development of the human rights protection system in the Americas. Although European cooperation in general, and in the

[25] Frowein, "European Convention on Human Rights (1950)", p. 189.
[26] Haß, *Die Urteile*, p. 35.
[27] Frowein, "European Convention on Human Rights (1950)", p. 189.
[28] See for example concerning the application of Poland: Opinion No. 154, adopted by the Parliamentary Assembly, 2 October 1990, URL: http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta90/EOPI154.htm in relation with Resolution 1031, adopted by the Parliamentary Assembly, 14 April 1994, URL: http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta94/ERES1031.htm, nos. 2-7.
[29] Carrillo Salcedo, "The Place of the European Convention in International Law", p. 15.
[30] Article 1(b) of the ECHR.

field of human rights in particular, is more recent than in the Americas, it was established at a much faster speed and a higher intensity. Whereas in the 1950s the well-meant intentions of the American States stopped short of realizing an effective protection system after more than one hundred years of cooperative tradition and codification of inter-American relations, the Europeans, driven by the horrors of two devastating world wars within only 30 years, took several steps in one and established their human rights protection system in the record time of only five years. Unlike the inter-American system that was originally based on the non-binding American Declaration, the member states of the CoE had given themselves not only a legally binding human rights convention, but also an effective protection system that could monitor and punish human rights violations and even provided a mechanism for individual complaints, initially before the European Commission of Human Rights, which is still today unique in the world for its effectiveness. Worries about the sovereignty of the states and interventions into domestic affairs were put aside.[31] The European human rights system could thus become the model for other regional human rights protection systems in the world.

Since its entry into force, the European system for the protection of human rights has undergone various major reforms. The Convention was amended by 14 protocols, expanding the scope of rights protected or introducing procedural changes. The most important protocol with respect to the human rights protection system is Protocol no. 11, which brought fundamental changes in the organizational structure of the European human rights organs when it entered into force on 1 November 1998.[32] Most importantly, the

[31]Cassel identifies three elements that influenced the intervention fears as one reason why Latin American states were reluctant to binding human rights obligations: a "history of U.S. interventions" and the US policy to support dictatorial regimes as long as they were anti-communist during the Cold War, the predominance of repressive regimes in the region, and more or less active US opposition to human rights treaties in general. Cassel, "Inter-American Human Rights Law, Soft and Hard", pp. 402ff.

[32]Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (hereinafter "Protocol no. 11"), 11 May 1994 (entry into force: 1 November 1998), CETS no. 155.

European Commission of Human Rights was abolished and the individual complaints procedure to the Court established.[33]

The next important procedural modification was brought by the entry into force of Protocol no. 14 on 1 June 2010.[34] This protocol aims in the first place at enhancing the effectiveness of the Court's proceedings, enabling it in particular to better cope with its extensive workload.[35] It also introduced new facilities for the Committee of Ministers and the ECtHR on the stage of execution of judgment. While Russia was postponing the ratification of Protocol no. 14, adopted already on 13 May 2004, the other member states followed two different ways to alleviate the pressing situation of the Court's ever rising caseload.[36] Some states signed a Protocol no. 14bis of 27 May 2009.[37] Another number of states opted for the Agreement of Madrid of 12 May 2009 which declared parts of Protocol 14 immediately applicable.[38] Both solutions envisaged to facilitate the admissions procedure of individual complaints and the striking out of

[33]The current structure of the European Human Rights Protection System will be explained *infra* in section 2.1. See also Merrills and Robertson, *Human rights in Europe: A study of the European Convention on Human Rights*, pp. 297ff.

[34]Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (hereinafter "Protocol no. 14"), 13 May 2004 (entry into force: 1 June 2010), CETS no. 194. In detail hereon: Directorate General of Human Rights, *Guaranteeing the effectiveness*; "The 2004 Reform Package", *HRLJ* 26 (2005); Egli, "Zur Reform des Rechtsschutzsystems der Europäischen Menschenrechtskonvention", *ZaöRV* 64 (2004). The procedure under this Protocol will be described in chapter 3.

[35]By 31 December 2011 there were 151 600 cases pending before the Court, an increase of 9% compared to 2010. 64 500 new cases were filed, whereat only 52 188 cases were disposed of, 1 511 by judgment (-41%) and 50 677 by decision of inadmissibility or by being struck out of the list (+31%). See ECtHR, *Annual Report 2011*, p. 151. By 31 December 2012, the Court could reduce the number of pending cases to 128 100, mainly due to the measures explained *infra*, ECtHR, *Annual Report 2012*, p. 149.

[36]Hereon: Bowring, "The Russian Federation, Protocol No. 14 (and 14bis), and the Battle for the Soul of the ECHR", 2 *GoJIL* 2 (2010).

[37]Protocol No. 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "Protocol no. 14bis"), 27 May 2009 (entry into force: 1 October 2009), CETS no. 204.

[38]Agreement on the Provisional Application of Certain Provisions of Protocol no. 14 Pending its Entry into Force (hereinafter "Agreement of Madrid"), 12 May 2009 (entry into force: 1 June 2009), URL: http://conventions.coe.int/Treaty/EN/Treaties/Html/194-1.htm.

applications, allowing the Court to sit in a single-judge formation in order to decide these issues.[39] The new competence on the execution stage were not activated yet. Both solutions ended with the entry into force of Protocol no. 14 on 1 June 2010.

[39]See section 3.2.1 for more details on the modifications introduced by Protocol no. 14.

2 Structure of the Human Rights Protection Systems

The internal organization of the OAS and the CoE differs not only with respect to their aims but also their organs and the distribution of competence. Nevertheless, it is common to both systems that human rights protection in general and the execution of judgments in particular are processes that rely on multiple organs beyond those forming the human rights protection system in the strict sense. Before regarding the juridical processes in which violations are established, we therefore have to explain the participating organs' position within the structure of the organizations, their composition and their tasks.

Both the IACtHR and the ECtHR were established later than the OAS and the CoE and are not Charter organs but instruments under the human rights Conventions. The courts are the main organs for the protection of human rights, supported in Europe by the Committee of Ministers and in the Americas by the Inter-American Commission. These organs will be the centre of this investigation and shall therefore be presented in the first section of this chapter (2.1).

There is are a number of other organs of minor importance for the procedure of assessing human rights violations that play a role on the stage of execution of decisions. In Europe, these are in particular the Parliamentary Assembly,[1] the Secretariat of the CoE and the Human Rights Commissioner. The OAS has eight Charter organs: the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, the Councils, the Inter-American Juridical Committee, the Inter-American Commission on Human Rights, the General Secretariat, the Specialized Conferences, and the Specialized Orga-

[1]The Charter speaks of the "Consultative Assembly", but in 1974 the Assembly decided to call itself "Parliamentary Assembly".

nizations.[2] Besides the IACommHR, the General Assembly and the Permanent Council are occupied with questions relating to human rights protection and will be briefly presented (2.2).

At the time of writing, since 9 April 2012, the Permanent Council had launched debates on reforms of the inter-American human rights protection system to make it more efficient. This process contains several public hearings under participation of civil society and frequent exchanges between the member states on the Permanent Council and the IACommHR.[3] No decision that concerns the execution of judgments is though envisaged as of yet.

2.1 Central Human Rights Organs

Today, all member states to the CoE have ratified the ECHR and no state can become a member of the CoE without doing so. Ratification of the Convention entails recognition of the ECtHR's competence. On the contrary, not all OAS member states have ratified the ACHR and ratification does not entail automatic recognition of the IACtHR's jurisprudence. Its jurisprudence has to be recognized according to Article 62(1) of the ACHR, so that the IACommHR or other states may only submit cases to the IACtHR regarding states that have made the corresponding declaration. The Commission has different competences, too, depending on whether it acts under Article 106 of the Charter of the OAS or Articles 34ff. of the ACHR.[4] Due to the provisions in Articles 44 and 45 of the ACHR there is further division even among the states parties to the Convention. Article 44 of the ACHR establishes the right of individuals or NGOs to report violations of the Convention to the IACommHR without any previous act of recognition by the accused state. Inter-state denunciations to the Commission according to Article 45 of the ACHR how-

[2] Article 53 of the Charter of the OAS. An organigram of the OAS can be found at Buergenthal and Shelton, *Protecting Human Rights in the Americas: Cases and Materials*, p. 45.

[3] Information on the process is available at https://www.oas.org/en/iachr/mandate/strengthening.asp.

[4] The IACommHR's task under the OAS Charter are not an issue for this work and will therefore not be dealt with. They are of a purely political nature, while it has significant judicial powers under the ACHR. See Santoscoy, *La Commission interaméricaine*, pp. 31ff.

ever require the previous recognition of this competence by both the sending and the accused state.[5] As of 2013, 25 states have ratified the ACHR, two of which, Trinidad and Tobago and Venezuela, have subsequently denounced it.[6] Of these states, 20 (taking into account the two denunciations) have recognized the Court's competence and nine (taking into account Venezuela's denunciation) the Commission's competence to receive inter-state complaints.

The ACHR, in particular its Chapter VIII dealing with the human rights court, has been inspired by the ECHR.[7] Consequently, the two courts resemble each other. The IACommHR on the contrary no longer has a European counterpart, since the European Commission of Human Rights was abolished in 1998 with the entry into force of Protocol no. 11. Both the IACommHR and the Committee of Ministers in Europe are integral parts of the respective human rights systems and their participation is essential at different stages of the procedures. Following the moment of intervention in the procedure, the IACommHR will be presented first in section 2.1.1. The two courts will then be presented together in section 2.1.2, closing with the Committee of Ministers, which supervises the execution of the ECtHR's judgments, in section 2.1.3.

2.1.1 The Inter-American Commission on Human Rights

The IACommHR was established in 1960 as the organ for the protection of human rights under the Charter of the OAS. It is domiciled at the seat of the OAS in Washington, D.C. and is composed of seven members who are elected by the General Assembly of the OAS from a list of candidates proposed by the member states for a

[5] Hereon section 3.1 *infra*.

[6] Venezuela denounced the ACHR on 10 September 2012, the denunciation becoming effective one year later according to Article 78 of the ACHR: Minister of Popular Power for Foreign Affairs of the Bolivarian Republic of Venezuela, *Letter to the Secretary General of the OAS*, 6 September 2012, URL: http://www.oas.org/DIL/Nota_Rep%C3%BAblica_Bolivariana_Venezuela_to_SG.English.pdf.

[7] Gros Espiell, "La Cour interaméricaine et la Cour européenne des droits de l'homme", p. 235.

period of four years, reelection being allowed once.[8] When the Commission treats cases involving the native country of one of its members or countries where one or more of the members have served as diplomatic agents, they may, according to Article 17 of the Rules of Procedure of the IACommHR,[9] not participate in discussions, investigations, deliberations or decisions. The Commission shall, according to Article 2(2) of the Statute of the IACommHR,[10] represent all member states of the OAS.[11] Decisions by the IACommHR are never legally binding, no matter if taken under the Convention or under the Declaration.[12] The Commission should originally be a consulting organ, mainly making recommendations to the member states concerning the domestic human rights situation and preparing studies or reports. According to Article 2 of the Charter of the OAS, human rights were defined as those laid down in the American Declaration of Rights and Duties of Man. The Commission nevertheless quickly construed its powers widely and assumed the power to investigate human rights situations in one or all member states and to publish reports and other documents.[13] In 1965 the powers of the Commission were amended for the first time so that it could now

[8]Articles 34–37 of the ACHR. The composition of the IACommHR is different from the former European Commission of Human Rights, which was governed by the principle of equality of states, assuring every state a seat on the Commission: cf. Article 20 of the ECHR in the version before the entry into force of Protocol no. 11. See Hansungule, "Protection of Human Rights Under the Inter-American System: An Outsider's Reflection", p. 690.

[9]Rules of Procedure of the Inter-American Commission on Human Rights (hereinafter "Rules of Procedure of the IACommHR"), adopted by the IACommHR, August 2013, URL: http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp.

[10]Statute of the Inter-American Commission on Human Rights (hereinafter "Statute of the IACommHR"), adopted by the General Assembly of the OAS at its ninth session, held in La Paz, Bolivia, October 1979, reprinted in: Basic Documents Pertaining to Human Rights in the Inter-American System, pp. 137-146.

[11]See in detail on the organization of the Commission: Cerna, "The Inter-American Commission on Human Rights: its Organization and Examinations of Petitions and Communications", pp. 69ff.

[12]Kokott, *Das interamerikanische System zum Schutz der Menschenrechte*, pp. 27f. See in detail on the development of the Commission's powers: Medina Quiroga, *The Battle of Human Rights*, pp. 67ff.

[13]Buergenthal, "The Revised OAS Charter and the Protection of Human Rights", 4 *AJIL* 69 (October 1975), pp. 830f.

also act upon individual complaints.[14] Two years later the Commission became an official OAS organ prescribed in Articles 53(e) and 106 of the Charter of the OAS.

The Commission's tasks were widely expanded with the entry into force of the ACHR in 1978. While the Commission retained its functions under the Charter of the OAS, it gained broader new functions with respect to the ACHR member states when invoked under the terms of the Convention. The Convention established a two-step human rights protection system, whose first step is the IACommHR. The Commission's composition does though not change depending on whether it applies the Convention or the Charter.[15] Also, when acting as a Convention organ it represents all OAS member states, independently from whether they are members of the Convention or not.[16] Consequently, also members on the Commission from states that are not party to the Convention decide Convention-based complaints.[17]

Article 19 of the Statute of the IACommHR resumes the Commission's additional powers with respect to the ACHR member states as follows:

> (a) to act on petitions and other communications, pursuant to the provisions of Articles 44 to 51 of the Convention;
> (b) to appear before the Inter-American Court of Human Rights in cases provided for in the Convention;
> (c) to request the Inter-American Court of Human Rights to take such provisional measures as it considers appropriate in serious and urgent cases which have not yet been submitted to it for consideration, whenever this becomes necessary to prevent irreparable in-

[14] Resolution XXII, adopted by the Second Special Inter-American Conference, Rio de Janeiro, 17 to 30 November 1965, reprinted in: "Second Special Inter-American Conference", 2 *The American Journal of International Law* 60 (1966), pp. 458ff.

[15] Medina Quiroga, *The Battle of Human Rights*, pp. 116f.

[16] Article 35 of the ACHR.

[17] This argument was used to justify Venezuela's denunciation of the ACHR, see: Minister of Popular Power for Foreign Affairs of the Bolivarian Republic of Venezuela, *Letter to the Secretary General of the OAS*, 6 September 2012, URL: http://www.oas.org/DIL/Nota_Rep%C3%BAblica_Bolivariana_Venezuela_to_SG.English.pdf, pp. 20f.

> jury to persons;
> (d) to consult the Court on the interpretation of the American Convention on Human Rights or of other treaties concerning the protection of human rights in the American states;
> (e) to submit additional draft protocols to the American Convention on Human Rights to the General Assembly, in order to progressively include other rights and freedoms under the system of protection of the Convention, and
> (f) to submit to the General Assembly, through the Secretary General, proposed amendments to the American Convention on Human Rights, for such action as the General Assembly deems appropriate.

The Commission's role in the protection of human rights under the ACHR is thus manifold. It is not only the preliminary filter for any application concerning violations of the rights established in the Convention and investigative body concerning these cases, but also fulfils more basic tasks like the preparation of studies and reports on the human rights situation in the Convention states and generally promotes human rights, including efforts to secure wider ratification of the Convention, preparation of studies and reports on general issues related to human rights, the preparation of the annual report, the organization of seminars and the publication of the Inter-American Yearbook on Human Rights.[18]

2.1.2 The Human Rights Courts

The ECtHR and the IACtHR, seated in Strasbourg and San José, are the final – and in Europe the only – instances in the human rights protection procedure under both human rights Conventions. The ECtHR, as has been mentioned above, is the oldest human rights court in the world. Having been taken as an example for the creation of the IACtHR, it is convenient to present both courts side by side, in order to show their similarities and differences.

[18]See in detail on country reports Medina, "The Role of Country Reports in the Inter-American System of Human Rights", and on the other tasks Farer, "Inter-American Commission on Human Rights", p. 1005.

Before pointing out the differences in terms of organization and procedure, it must be underlined that the workload of the ECtHR was about 4 700 times that of the IACtHR, taking into account contentious cases pending before the courts at the end of 2013.[19] Counting the cases in which the IACtHR is monitoring compliance – a new task for the ECtHR in particular cases –,[20] the workload of the ECtHR remains about 590 times that of the IACtHR.[21] This enormous difference can, in part, be explained by the fact that direct applications to the Court are admitted only in Europe, whereat in the Americas the IACommHR examines the cases first and then decides which to submit to the Court. But taking into account the cases pending before the IACommHR, the number of cases being dealt with in the inter-American system is still significantly lower than the number of cases in the European system.[22]

The ECtHR is composed of one judge per member state, i.e. of currently 47 judges.[23] Nevertheless, there may be several judges of the same nationality, as member states are not bound to nominate nationals of their countries.[24] Judges are assigned full-time and the Court sits year round.[25] The election of judges takes place by majority vote in the Parliamentary Assembly for a period of nine years without the possibility of re-election.[26] Judges may not hear cases concerning the state on behalf of which they were elected to the Court only when sitting as a single judge.[27] Nevertheless, Ar-

[19] By 31 December 2013, there were 99 900 applications pending before the ECtHR (see: ECtHR, *Annual Report 2013*, p. 190). At the same moment, only 21 cases were pending before the IACtHR (see: IACtHR, *Annual Report of the Inter-American Court of Human Rights 2013*, p. 68).

[20] Cases on the stage of supervision of execution by the Council of Ministers may be referred to the ECtHR with questions relating to the interpretation of the judgment or to decide whether the party has failed to fulfil its obligations. See *infra* section 9.1.1.3.2.

[21] There were 158 cases at the stage of monitoring compliance by the IACtHR in 2014. See IACtHR, *Annual Report of the Inter-American Court of Human Rights 2014*, p. 72.

[22] The IACommHR received 2 061 new complaints in 2013 (see: IACommHR, *Annual Report 2013*, p. 40), compared to 65 900 received by the ECtHR in the same year (see: ECtHR, *Annual Report 2013*, p. 190).

[23] Article 20 of the ECHR.

[24] Erdal and Bakırcı, *Article 3 of the European Convention on Human Rights*, pp. 42f.

[25] Article 21(3) of the ECHR and Article 19 of the ECHR.

[26] Articles 22(1) and 23(1) of the ECHR.

[27] Article 27(3) of the ECHR.

ticle 27(4) of the ECHR ensures the presence of the judge elected in respect of the State Party concerned. If there is no such judge the President of the Court elects a person from a list that has been previously submitted by the state.

The IACtHR was created in 1979 at the Ninth Regular Session of the General Assembly of the OAS in La Paz, Bolivia.[28] The Court was not established as an OAS organ, but as an "autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights".[29] The number of judges of the Court is limited to seven, elected for a term of six years, with one re-election allowed.[30] They are elected by the states parties to the ACHR within the General Assembly of the OAS.[31] Consequently, not every state party is permanently represented by a judge. While the Court only hears cases from the states parties to the ACHR, its members, according to Article 52(1) of the ACHR, may be nationals of any member state of the OAS. Although Article 55(1) of the ACHR states that a judge is not hindered from hearing a case because he is a national of one of the states involved, paragraphs 2 and 3 of the same rule make sure that the state parties concerned always have the possibility to appoint *ad hoc* judges for cases in which no judge of their nationality is present.

The IACtHR does not function on a permanent basis. It holds regular sessions as often as is needed for the exercise of its functions.[32]

[28] Statute of the Inter-American Court of Human Rights (hereinafter "Statute of the IACtHR"), adopted by the General Assembly of the OAS, Resolution 448, adopted at the Ninth Regular Session, held in La Paz Bolivia, October 1979, reprinted in: Basic Documents Pertaining to Human Rights in the Inter-American System, pp. 181-191.

[29] Article 1 of the Statute of the IACtHR. The Court is an organ of the ACHR. There were efforts to include it into the Charter of the OAS when the Charter was amended by the Protocol of Cartagena de Indias in 1985, but "the Court was not included, through to an apparent misunderstanding, in the Protocol that was opened for signature of the Member States" (IACtHR, *Annual Report of the Inter-American Court of Human Rights 1986*, pp. 8f.).

[30] Articles 52(1) and 54(1) of the ACHR.

[31] Article 53(1) of the ACHR.

[32] Article 22 of the Statute of the IACtHR and Article 11 of the Rules of Procedure of the Inter-American Court of Human Rights (hereinafter "Rules of Procedure of the IACtHR"), adopted by the Court during its LXXXV Regular Period of Sessions, held from November 16 to 28, 2009 (entry into force: 1 January 2010), URL: http://www.corteidh.or.cr/reglamento.cfm.

The date for the next session is scheduled in the previous one. Currently, the Court holds around four regular sessions a year.[33] In addition, it can hold special sessions at the request of a majority of judges or on the President's own initiative.[34] These sessions can take place at the Court's seat or, according to Article 13 of the Rules of Procedure of the IACtHR, in any member state with the consent of the state concerned. Unlike the ECtHR, which can hold sessions out of Strasbourg too,[35] the Inter-American Court actually makes use of this possibility and conducts hearings or investigates abroad, particularly in order to facilitate access for victims of human rights violations to the Court and to improve its presence throughout Latin America.

Due to its limited number of judges, the Court only sits in plenary formation, although certain decisions may be taken by the President or the Permanent Commission, composed of the President, the Vice-President and any other judges named by the President.[36] This competence namely comprises decisions on provisional measures in periods when the Court is not in session.[37] For the same reason there are no chambers, sections or the like.[38]

The ECtHR, on the contrary, hardly ever sits as a plenary court.[39] Instead, there are single-judge formations, committees of three judges, chambers of seven judges, and a Grand Chamber of seven-

[33] Faúndez Ledesma, *The Inter-American System for the Protection of Human Rights*, p. 202.

[34] Article 22(2) of the Statute of the IACtHR and Article 12 of the Rules of Procedure of the IACtHR.

[35] Rule 19 of the Rules of Court (hereinafter "Rules of the ECtHR"), adopted by the European Court of Human Rights, 1 September 2012.

[36] Article 6 of the Rules of Procedure of the IACtHR.

[37] Article 26(5) of the Rules of Procedure of the IACtHR.

[38] Kokott, *Das interamerikanische System zum Schutz der Menschenrechte*, p. 121.

[39] The plenary court sits to take fundamental organizational decisions, like the election of the President and Vice-President, the setting up of sections, the election of Presidents of the sections, the adoption of the Rules of the Court and the election of the registrar, but does not decide cases. See Article 25 of the ECHR. While the Convention speaks of "chambers" both in 25 and 26 of the ECHR, the Rules 25 and 26 of the Rules of the ECtHR define that under Article 25 of the ECHR sections are to be built as administrative entities. There are to be at least four sections (currently there are five). Chambers are then constituted from within each section. Cf. Grabenwarter, *Europäische Menschenrechtskonvention*, p. 43.

teen judges.[40] The single-judge formations, introduced by Protocol no. 14, replace the committees as the principal filter for the admissibility of cases to the ECtHR, thus reducing the number of judges required for this task. These formations may declare inadmissible or strike out individual applications brought before the Court if such decision can be taken without further examination.[41] The merits of repetitive cases however remain to be decided by committees of three judges according to Article 28 of the ECHR. These may equally declare applications inadmissible. The seven judge chambers decide on the admissibility of all applications that have not been dealt with by either of the aforementioned formations, i.e. all cases raising difficult or new questions under the Convention, and take decisions on the merits. They are also the entry point for inter-state cases.[42] Cases raising serious questions of interpretation of the Convention or cases in which a chamber wants to deviate from a former Court decision may, according to Article 30 of the ECHR, be submitted to the Grand Chamber, if no party objects.[43] The Grand Chamber also serves as the appellate body for cases decided by the chambers.[44] It will also decide cases referred to the Court by the Committee of Ministers during the process of supervision of execution under the new Article 46(4) of the ECHR.

[40] Article 26 of the ECHR and Rules 24ff. of the Rules of the ECtHR.

[41] Article 27 of the ECHR. An application can be stricken out if a) the applicant does not intend to pursue his application; or b) the matter has been resolved; or c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.

[42] Article 29 of the ECHR.

[43] On the Brighton Conference in 2012 the member states adopted a proposal to eliminate the possibility for parties to object to the relinquishment of jurisdiction to the Grand Chamber. Article 30 of the ECHR will be amended correspondingly. See Council of Europe, *High Level Conference on the Future of the European Court of Human Rights*, 19 April 2012, URL: https://hub.coe.int/20120419-brighton-declaration, no. 25(d).

[44] Article 43 of the ECHR. Decisions by the single-judge formation or a committee become final without the possibility of appellation according to Articles 27(2) and 28(2) of the ECHR.

2.1.3 The Committee of Ministers

The Committee of Ministers is the Council's decision making body.[45] It consists of the ministers of foreign affairs of all member states or their representatives, which in general are the country's permanent representatives to the Council. In addition to the Council members, there are four external states with observer status, Canada, USA, Japan and the Holy See. The Committee is governed by Articles 13–21 of the Statute of the CoE and its Rules of Procedure.[46] It is not a jurisdictional but a political body. Meetings at the ministerial level are held once a year.[47] The ministers' deputies or permanent representatives hold three meetings per month and four human rights meetings per year.[48] The Committee's chairperson, whose state represents the CoE, changes every six months according to the English alphabetical order of member states.[49] Actions of the Committee are taken according to the aims of the Council, either on its own behalf or on recommendation by the Parliamentary Assembly.[50] It can also decide to adopt proper recommendations to the member states on certain points. The states must then inform the Committee of any action taken with regard to such recommendations.[51] The Committee's tasks include the admittance of new member states, the monitoring of the member states' commitments, the conclusion of conventions or agreements, and the adoption of common policies by the governments with regard to particular matters. In the latter field the Committee may issue non-binding recommendations to the member states. Before Protocol no. 11 came into force on 1 November 1998 the Committee was also competent to rule on alleged violations of the ECHR. But as all member states had already

[45] See in detail de Vel, *The Committee of Ministers of the Council of Europe*.

[46] Rules of Procedure of the Committee of Ministers (hereinafter "CM Rules of Procedure"), adopted by the Committee of Ministers, 2005, URL: https://wcd.coe.int/ViewDoc.jsp?id=814763&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383.

[47] CM/Del/Dec(2003)831/1.5

[48] https://www.coe.int/t/cm/iGuide/iGuide_IIB_en.asp.

[49] Article 6 of the CM Rules of Procedure.

[50] Article 15(a) of the Statute of the CoE.

[51] Article 15(b) of the Statute of the CoE.

accepted the mandatory jurisdiction of the ECtHR at that moment, this disposition had become unnecessary and was abolished.[52]

One of the Committee's major tasks is the supervision of the execution of ECtHR judgments.[53] Protocol no. 14 has extended the Committee's supervisory powers to the fulfilment of friendly settlement agreements, which could not be supervised before. Nevertheless, already before the ECtHR tried to remedy this loophole by giving decisions on friendly settlement agreements the form of judgments. But this practice was problematic for many states because a judgment against a state is commonly seen in a negative way by press and public. Consequently, states were generally reluctant to accept such agreements.[54] This is supposed to change under Protocol no. 14.

Under Article 46(3) and (4) of the ECHR, the Committee's powers have been broadened even further, enabling it to ask the ECtHR to interpret its judgments if doubts about its meaning impede the execution and to launch infringement proceedings before the Court in case a state refuses to abide by the terms of a judgment.

The Committee accomplishes its duties under the ECHR usually in four special human rights meetings (DH/HR) per year. During these two to three days long meetings, the Committee sits in the composition of permanent representatives. The meetings and the process of supervision are governed by a special set of rules, which will be explained in detail in section 9.1.1.

2.2 Other Human Rights Related Organs

Several other organs of the CoE and the OAS interfere in the process of human rights protection. These organs will be briefly presented, whilst their competence when it comes to the execution of judgments will be detailed in Chapter 9.

[52]Renucci, *Introduction to the European Convention on Human Rights: The rights guaranteed and the protection mechanism*, p. 124.
[53]Article 46(2) of the ECHR.
[54]Eaton and Schokkenbroek, "Reforming the Human Rights Protection System", *HRLJ* 26 (2005), p. 15.

2.2.1 The Secretariat of the Council of Europe

The Council of Europe's executive organ is the Secretariat General. It serves, under the terms of Article 10 of the Statute of the CoE, both the Committee of Ministers and the Parliamentary Assembly. The Secretariat consists of several Directorates and two Directorate Generals. Of these, Directorate General Human Rights and Rule of Law (DG I) houses the Department for the Execution of Judgments of the European Court of Human Rights, which assists the Committee of Ministers in its task to supervise the execution of judgments. The Department for Execution receives the correspondence by all parties to a case that may submit information to the Committee according to its Rules on the Execution of Judgments and prepares the Committee's DH/HR meetings.

2.2.2 The Parliamentary Assembly of the Council of Europe

In the Parliamentary Assembly delegations from the member states' national parliaments meet in yearly sessions, which are subdivided into four sub-sessions. Each sub-session takes place at the end of January, April and June, and at the beginning of October, each lasting for a week. The president of the Assembly is elected each year and may remain in office for a period of one to three years. The national delegations must equally represent the political parties within the national parliament. Today, there are five parliamentary groups in the Assembly.[55] The Assembly consists of 636 representatives and 18 observers.[56] Unlike the Committee of Ministers, the Assembly is not reigned by the principle of "one state one vote", but instead the number of votes depends on the population of the state. The Assembly is the main deliberative body within the CoE. The scope of its deliberations may comprise any matter mentioned as lying within the aim and scope of the Council according to Chapter I of the Statute of the CoE. It prepares reports which are transmitted to the Com-

[55] These groups are the European People's Party (EPP/CD), the Socialist Group (SOC), the European Democrat Group (EDG), the Alliance of Liberals and Democrats in Europe (ALDE) and the Unified European Left Group (UEL).

[56] The observers come from the non-European states of Israel, Canada and Mexico, and in deliberations on the Middle East from the Palestinian Legislative Council, and, if the island is concerned, from Northern Cyprus.

mittee, which may then take actions on the issue.[57] The Committee regularly requests the opinion of the Assembly in certain matters, e.g. on draft conventions.[58] The Assembly itself cannot take binding decisions, except for the election of the judges of the European Court of Human Rights.[59]

Among other tasks, the Assembly maintains a monitoring process assessing how the member states fulfil their obligations under the Council conventions. This monitoring process can also apply to cases of disregard for decisions of the Court. The Assembly may, as the most severe penalty for not complying with the obligations, recommend the Committee to exclude an offending state from the Council.[60]

The Assembly has several committees, among them the Committee for Legal Affairs and Human Rights (AS/Jur) with its subcommittee on human rights and on the election of judges to the European Court of Human Rights. This Committee is endowed with monitoring implementation of judgments and has since 2000 assigned special rapporteurs to this task. Furthermore, the subcommittee on human rights regularly examines the implementation of the decisions by the European Court of Human Rights, issues reports and conducts *in situ* visits to urge states to comply with the Court's decisions.[61]

[57] Making use of this competence, the Parliamentary Assembly has from time to time taken the initiative to recommend to the Committee of Ministers actions related to the improvement of the functioning and the procedures of the ECtHR. See for example Recommendation 1535(2001): Structures, procedures and means of the European Court of Human Rights, adopted by the Parliamentary Assembly, 26 January 2009, URL: http://assembly.coe.int/documents/adoptedtext/ta01/EREC1535.htm.

[58] Kleijssen, "The Monitoring Procedure of the Council of Europe's Parliamentary Assembly", p. 623.

[59] Article 22(1) of the ECHR.

[60] On that subject, see: Kleijssen, "The Monitoring Procedure of the Council of Europe's Parliamentary Assembly"; Drzemczewski, "Decision on the Merits: By the Committee of Ministers"; and Ravaud, "The Committee of Ministers".

[61] See Parliamentary Assembly, *Implementation of judgments of the European Court of Human Rights: Introductory memorandum*, Introductory memorandum AS/Jur (2008) 24, Strasbourg: Council of Europe, 28 May 2008, URL: http://assembly.coe.int/CommitteeDocs/2008/20080526_ajdoc24_2008.pdf, pp. 1ff.

2.2.3 The Council of Europe's Commissioner for Human Rights

The CoE's Commissioner for Human Rights was established in 1999 by the Committee of Ministers in CM Resolution (99) 50. While this resolution makes clear that the Commissioner shall not interfere with the work of the other supervisory bodies, one of his tasks is to "contribute to the promotion of the effective observance and full enjoyment of human rights in the member States".[62] His focal contact point in the member states are the national human rights institutions.[63] Among his instruments are visits to the member states to dialogue with national authorities and civil society, thematic reporting and awareness-raising activities.

The Group of Wise Persons, in its interim report to the Committee of Ministers in 2006 on the effectiveness of the ECHR control mechanisms, proposed a more active role in the Convention's control system for the Commissioner, specifically through close cooperation with national ombudsmen in order to reduce the Court's caseload. He might also act as a coordinator for the activities of the COE's organs.[64] As a consequence, he partakes in annual tripartite meetings with the Committee of Ministers and PACE on the issues.

2.2.4 The General Assembly of the OAS

The OAS does not have an organ comparable to the Council's Parliamentary Assembly that ensures the participation of the member states' parliaments in the decision-making within the organization. All cooperation within the organization is realized through the governments.

The supreme organ of the OAS is the General Assembly.[65] It meets annually in one of the member states or at the OAS headquarters in

[62] Nos. 1(2) and 3(b) of CM Resolution (99) 50, adopted by the Committee of Ministers at its 104th Session, 7 May 1999.

[63] No. 3(c) of CM Resolution (99) 50.

[64] Group of Wise Persons, *Interim report of the Group of Wise Persons to the Committee of Ministers*, Committee of Ministers at its 116th Session, 18 May 2006, nos. 43 and 48.

[65] Articles 54ff. of the Charter of the OAS. Before the reforms of the Protocol of Buenos Aires of 1967, the main organ was the Inter-American Conference.

Washington, D.C. and consists of the representatives of each member state.[66] The General Assembly is governed by the "one state one vote" principle. Decisions are adopted by an absolute majority, except in specific areas such as budgetary questions.[67] It decides the general policy and actions of the OAS, the structure and functions of its organs, and considers any matter relating to the friendly relations among the American States.[68] It furthermore determines the budget and the quotas of the member states and thus also decides on the IACourtHR's and the IACommHR's funding.[69] Among its tasks also figures the consideration of reports submitted by the Meeting of Consultation of Ministers of Foreign Affairs and the observations and recommendations made by the Permanent Council or reports of any other organ the Assembly may require. The consideration of the annual reports of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, which are presented according to Articles 41(g) and 65 of the ACHR, is its most important activity in the field of human rights protection.[70] The resolution on these reports however is usually only one among around 60 resolutions the General Assembly adopts during its three-day annual sessions. Consequently, there is hardly any time to discuss matters raised in the reports.

2.2.5 The Permanent Council of the OAS

In order to assure the day-to-day business in periods when the General Assembly is not in session and to prepare the Assembly's sessions, the Charter of the OAS has instituted the Permanent Council. Its task consists in maintaining the OAS at work and in taking decisions that cannot be postponed until the next General Assembly session. It is the organ of immediate reaction to threats to peace in the region, keeping vigilance over the maintenance of friendly relations among the Member States and assisting them in the peaceful

[66] These are usually the Ministers for Foreign Affairs.
[67] Article 59 of the Charter of the OAS.
[68] Article 54 of the Charter of the OAS.
[69] Article 55 of the Charter of the OAS.
[70] These reports and the corresponding OAS resolutions will be examined in detail in section 9.2.1.

settlement of their disputes.[71] It may take decisions on the resolution of conflicts by a vote of two thirds of its members, excluding the parties to the dispute. The Government of each member state appoints one representative in the rank of an ambassador to the Council.

According to Article 91(f) of the Charter of the OAS, the Council also considers the reports of the other OAS organs and presents observations and recommendations to the General Assembly. Among them are the annual reports of the Inter-American Commission on Human Rights and of the Inter-American Court of Human Rights.[72] It also fills vacancies on the Commission and the Court occurring outside the normal termination of mandates.[73] These tasks are being taken care of in the Committee of Juridical and Political Affairs (CJPA), which also treats other questions in relation to the Inter-American Human Rights System like amendments to the Rules of Procedure and Statutes of the Commission and Court and the budgetary needs of these organs. It equally consists of one representative per member state.[74] The Presidents of the IACtHR and the IACommHR make an oral presentation of their respective report each year in spring before the CJPA. Decisions on the CJPA and the Permanent Council are adopted by an absolute majority of its members.[75]

[71] Article 84 of the Charter of the OAS.

[72] Article 41(g) and Article 65 of the ACHR.

[73] Article 11(3) of the Statute of the IACommHR and Article 19(4) of the Statute of the IACtHR.

[74] Article 23 of the Rules of Procedure of the Permanent Council, adopted by the Permanent Council of the OAS, 2003, URL: http://scm.oas.org/doc_public/ENGLISH/HIST_03/CP11732E07.DOC.

[75] Article 57 of the Rules of Procedure of the Permanent Council.

3 Procedures before the Courts

The obligations of states that have violated convention rights are determined in judicial procedures.

> Enforceability of human rights, when having been violated, is an essential – but on no accounts the only – component of human rights protection. The possibility of individual applications in international human rights protection is a substantial condition for the successful realization of the human rights. It is this quality of enforceability that distinguishes rights from moral demands.[1]

Enforceability is provided, in the first place, by domestic laws and courts.[2] The procedures prescribed in the human rights Conventions and the specific procedural documents set up by the courts and, in the Americas, the Commission, can only be activated when the domestic remedies do not repair the damage caused by a violation.[3] The regional human rights systems can therefore be compared to a safety net in case national procedures do not comply effectively with their function to provide individual justice. They are subsidiary to domestic protection systems.

Both systems know three types of procedures: the individual application[4], the inter-state case[5] and the advisory opinion[6]. Only the first two types of procedures can result in enforceable decisions and obligations to repair victims.

The major difference in the applications procedures is that in the European system all cases, individual and inter-state, are directly

[1] Fritsche, *Menschenrechte*, p. 70, our translation.
[2] Article 13 of the ECHR and Article 25 of the ACHR.
[3] The "local remedies rule". Article 35(1) of the ECHR and Article 46(1)(a) of the ACHR.
[4] Article 34 of the ECHR and Article 44 of the ACHR.
[5] Article 33 of the ECHR and Articles 45 and 61 of the ACHR.
[6] Article 47 of the ECHR and Article 64 of the ACHR.

submitted to the ECtHR, since Protocol no. 11 entered into force in 1998 and the European Commission on Human Rights was abolished. In the inter-American system, on the contrary, all applications must be filed with the IACommHR, even if they are submitted by a state party. The IACtHR decided in *Viviana Gallardo et al. v. Costa Rica* that the procedures before the IACommHR cannot be waived, even if the accused state party is interested in doing so in order to obtain a quick judgment.[7]

3.1 Inter-State Cases

Inter-state cases form the far smaller part of the courts' workload. As of 2014, only 17 such cases have been filed before the ECtHR, while none has hitherto occupied the IACtHR.[8] They can be motivated either to protect the citizens of a state from human rights violations, as has been the case in *Denmark v. Turkey*.[9] Inter-state cases may also serve as a public motion in the case of human rights violations in other states to uphold the public order of Europe, as was the case for example in *The Greek Case*.[10]

The procedure triggered by state communications alleging human rights violations by another state is different in the European and the inter-American systems. First, in the inter-American system, it is obligatory that the IACommHR examines all cases before submitting them to the IACtHR. Secondly, state communications are not automatically receivable, unlike in the European system, but require the previous recognition by the responding state of the Commission's competence to deal with inter-state cases presented against it according to Article 45 of the ACHR. Therefore, the IACommHR must, in a first step, verify that both the responding and the submitting state party have made the corresponding declaration. As there is the possibility to recognize the Commission's com-

[7] *Viviana Gallardo et al. v. Costa Rica* (Decision), IACtHR, 13 November 1981, Series A no. 10181, para. 25.

[8] http://www.echr.coe.int/Documents/InterStates_applications_ENG.pdf.

[9] *Denmark v. Turkey* (Striking out), ECtHR, no. 34382/97, 5 April 2000, 2000-IV.

[10] *The Greek Case* (Report), ECommHR, nos. 3321/67 et al., 5 November 1969, YB 11, Vol. II, 690 and 730; see also: *Cyprus v. Turkey* (Just Satisfaction) [GC], ECtHR, no. 25781/94, 12 May 2014, para. 44.

petence on a case to case basis, all state communications are sent to the states concerned, so that they can eventually make a declaration according to Article 45(3) of the ACHR.[11] If such a declaration has already been made or is being made for the specific case, the Commission continues with its investigations in the same way as it would in the case of individual complaints.

In the European system, the competence for inter-state complaints does not have to be specifically recognized. Therefore, inter-state cases can be submitted by any member state or group of member states against any other member state according to Article 33 of the ECHR. The procedure does not differ from that of individual complaints.

Inter-state cases that are not aimed at systemic problems in the defending state but vindicate individuals' rights may also result in reparation orders. In the *Cyprus v. Turkey* (Just Satisfaction) decision, the ECtHR, making reference in particular to the ICJ's *Ahmadou Sadio Diallo* (Compensation) judgment,[12] held that just satisfaction under Article 41 of the ECHR was to be paid to the applicant state, which then had to distribute the sums awarded to the individual victims. The applicant government was under the obligation to establish, under the supervision of the Committee of Ministers, an effective mechanism to this end.[13]

3.2 Individual Applications

The vast majority of cases submitted under either system are individual applications. In Europe these applications must be filed with the ECtHR directly, whereat in the Americas the IACommHR has to examine the complaint first and will then eventually decide to submit it to the Court after having drafted its own report. Therefore, by far not all individual complaints submitted to the Commission finally reach the IACtHR. The Commission's role is however not

[11] Faúndez Ledesma, *The Inter-American System for the Protection of Human Rights*, pp. 222f.

[12] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Compensation), ICJ, 19 June 2012, ICJ Reports 2012, p. 324, p. 344.

[13] *Cyprus v. Turkey* (Just Satisfaction) [GC], ECtHR, no. 25781/94, 12 May 2014, paras. 58f.

limited to the mere decision on admissibility of a petition. It carries out a proper contradictory process and investigation of the situation.[14]

3.2.1 Preliminary Procedures

The individual complaints procedure can be launched in Europe exclusively by the person, NGO or group of individuals claiming to be victims of a human rights violations.[15] In the Americas, on the contrary, the circle of persons or entities permitted to submit denunciations is not limited to the victims of human rights violations. According to Article 44 of the ACHR, any person, group of persons or NGO may lodge complaints about human rights violations by any state party, independent from its status as a victim. Consequently, petitions containing denunciations of human rights violations can be submitted on behalf of, or even completely independent from the victim of the denounced violation.[16]

After a petition has been lodged with the IACommHR or the ECtHR, each organ assesses its admissibility. The first action of the ECtHR, since 2009, is to classify the case by its urgency, according to Rule 41 of the Rules of the ECtHR. This deviation from the hitherto applied chronological order was adopted as a way to cope with the serious crisis caused by the Court's caseload. The chronological order had cases from states with a particularly high number of pending cases to be dealt with only slowly, resulting in an unbearable delay of justice in grave cases. In response to this, the ECtHR established seven categories of cases, from urgent applications, applications concerning the effectiveness of the Convention system such as pilot judgment cases, applications under Articles 2, 3, 4 or 5(1) of the ECHR, other potentially well-founded applications, repetitive cases, cases raising a problem of admissibility, to applications that are manifestly inadmissible. However, each chamber or cham-

[14] Articles 48 and 50(1) of the ACHR.
[15] Article 34 of the ECHR.
[16] Faúndez Ledesma, *The Inter-American System for the Protection of Human Rights*, p. 221.

ber president may decide to treat an individual case differently.[17] In order to decide on the admissibility, the IACommHR sits as a plenary, whereat the ECtHR sits in the formations described *supra*.[18]

Grounds for inadmissibility are similar in both systems. First, the ECtHR and the IACommHR have to establish their jurisdiction, i.e. they have to establish whether the denounced violation has been committed by a member state under its jurisdiction.[19] Then they have to assess the quality of the person or entity lodging the application to comply with the prerequisites of Article 34 of the ECHR or Article 44 of the ACHR. In Europe it is of particular importance that the person or entity denouncing a violation claims to be a victim. Both entities then verify that the local remedies rule has been observed. Petitions are only receivable if all domestic remedies have been exhausted or are ineffective. The application must furthermore not be similar to another case already decided by the Court or be pending before another international organ. Also, anonymous applications are not permitted in either system and there is a term of six months for the application to be submitted after the final domestic judgment.[20] Unlike in the European system, a declaration of inadmissibility can only be taken by the IACommHR when the petitioner and the state party have had the opportunity to expose their positions concerning the application in accordance with Article 30 of the Rules of Procedure of the IACommHR.[21] The ECtHR may declare applications inadmissible according to Article 35 of the ECHR without prior participation of the state party concerned, although,

[17] European Court of Human Rights, *The Court's Priority Policy*, undated, URL: http://www.echr.coe.int/NR/rdonlyres/DB6EDF5E-6661-4EF6-992E-F8C4ACC62F31/0/Priority_policyPublic_communication_EN.pdf.

[18] *Supra* section 2.1.2. In the European system, 90% of all applications are clearly inadmissible. See Eaton and Schokkenbroek, "Reforming the Human Rights Protection System", *HRLJ* 26 (2005), p. 5. The IACommHR, on the other hand, has emitted 59 reports on admissibility in 2008, of which only 10 resulted in the inadmissibility of the petition, i.e. a mere 17% of cases. See IACommHR, *Annual Report 2008*, Chapter III., C., 3a.

[19] Articles 1 of the Conventions.

[20] Article 35 of the ECHR and Article 46 of the ACHR. This term shall be reduced to four months under the ECtHR: Article 4 of Protocol no. 15.

[21] Article 37 of the Rules of Procedure of the IACommHR.

if deemed necessary, it may ask the state party to submit its observations.[22]

Having been declared admissible, the procedure continues with the examination of the case, according to Article 38(1)(a) of the ECHR and Article 48(1)(d) of the ACHR, with the ECtHR and the IACommHR eventually conducting an investigation, for which the states concerned must furnish all necessary facilities. At the same time, both organs shall, at any moment of the procedure, be at the disposal of the parties to reach a friendly settlement of the case.[23] If this happens, the Commission draws up a report in accordance with Article 49 of the ACHR, which is then transmitted to the petitioner, the State Parties and the Secretary General of the OAS for publication. The ECtHR, in the same situation, proceeds to the striking out of the case from its lists, handing down a decision that contains a brief statement of the facts and the solution reached.[24] Under the ACHR friendly settlements can also be reached at any stage of the proceedings. If a case has reached the IACtHR, it will rule on the admissibility and the judicial effects of such a settlement.[25] Nevertheless, if required by the nature of the case and the violation denounced, the ECtHR continues the investigation even if the case should be stricken out from its list.[26] The decision or judgment to strike out a case is forwarded to the Committee of Ministers, which supervises its execution according to its general procedures.[27] Friendly settlement agreements are usually in the interest of the state, as neither the report of the IACommHR nor the decision to strike out the case by the ECtHR contain a juridical evaluation of

[22] Rule 54 of the Rules of the ECtHR.

[23] Article 38(1)(b) of the ECHR and Article 48(1)(f) of the ACHR.

[24] Article 39 of the ECHR.

[25] Article 63 of the Rules of Procedure of the IACtHR.

[26] Article 37(1) of the ECHR. See hereon: *Sur v. Turkey* (Striking out), ECtHR, no. 21592/93, 3 October 1997, *Reports* 1997-VI, para. 31.

[27] Rule 43(3) of the Rules of Court (hereinafter "Rules of the ECtHR"), adopted by the European Court of Human Rights, 1 July 2014.

the facts presented. The state can thus prevent the formal statement of a human rights violation.[28]

If a friendly settlement is not reached, the IACommHR continues its investigations into the case with the support of the states concerned. During the investigations the Commission may, according to Article 48(1)(e) of the ACHR, "request the states concerned to furnish any pertinent information and, if so required, [...] hear oral statements or receive written statements from the parties concerned". At the end of the investigations, it writes a report that contains the facts and its conclusions. This report is transmitted to the states concerned but remains unpublished. It is of a preliminary nature and contains recommendations that are obligatory but not legally binding to the states concerned, so that their disrespect does not cause state responsibility.[29] The state then has a period of three months to adopt the necessary measures to settle the matter. The case may also, within the same period of time, be submitted by the Commission or the state party to the IACtHR. If this does not happen, the Commission may, but is not obliged to, write a second report, setting forth its opinion and conclusions concerning the question submitted. In this report the Commission also makes, when appropriate, the pertinent recommendations. Unlike the first report, this report is legally binding and contains a term in which the state must take the measures incumbent to remedy the situation.[30] Otherwise cases that were not submitted to the Court would be disregarded in comparison to the cases presented to the Court to the effect that no binding decision could be taken.[31] The quality of the recommendations the Commission may give in the second report is broad, reaching from re-establishing and ensuring the enjoyment of the violated human right, the adoption of legislative and other

[28] Grabenwarter, *Europäische Menschenrechtskonvention*, p. 79. See in general on friendly settlements before the ECtHR: Berger, "FS Wiarda", and before the IACtHR and IACommHR: Beristain, *Diálogo sobre la reparación, Vol. 1*, pp. 307-381 and Salgado Pesantes, "La solución amistosa y la Corte Interamericana de Derechos Humanos".

[29] *Baena-Ricardo et al. v. Panama* (Merits, Reparations and Costs), IACtHR, 2 February 2001, Series C no. 72, paras. 191f.

[30] Article 51(3) of the ACHR.

[31] Cerna, "The Inter-American Commission on Human Rights: its Organization and Examinations of Petitions and Communications", pp. 105f.

measures indispensable for the guarantee of the right, to the various forms of reparation, like effective investigation of the situation underlying the human rights violation, payment of compensation, etc.[32] It is hence, as will be seen, of comparable scope to the decisions on reparation issued by the IACtHR. At the end of the prescribed period, the Commission votes with the absolute majority of its members whether the state has taken the adequate measures and whether to publish the report.[33] The outcome of the case can also be included in the country report the Commission prepares.[34] Furthermore, the Commission follows the outcome of the recommendations made to the state party and may adopt follow-up measures.[35]

The three months following the transmission of the first preliminary report to the state party concerned are therefore crucial for the decision whether a case is submitted to the IACtHR.[36] Petitioners must be notified of the fact that the Commission has found human rights violations in the case and of the fact that a preliminary report has been sent to the state party concerned. If the responding state has accepted the IACtHR's contradictory jurisdiction, they must also be given a term of one month to present their position on whether the case shall be submitted to the Court.[37] As a general rule, the Commission shall submit the case to the Court if it considers that the state did not comply with the recommendations of the preliminary report. The decision not to submit the case to the Court must be taken by an absolute majority of its members in a reasoned decision.[38] Independent from that, the state concerned may decide at any moment within the three months period following the transmission of the preliminary report to submit the case to the Court

[32] Bicudo, "Cumplimiento de las sentencias de la Corte Interamericana de Derechos Humanos y de las recomendaciones de la Comisión Interamericana de Derechos Humanos", p. 230.

[33] Article 51 of the ACHR. The interpretation of Articles 50 and 51 of the ACHR is disputed. See in detail: Faúndez Ledesma, *The Inter-American System for the Protection of Human Rights*, pp. 442ff.

[34] Article 41(3) of the ACHR and Article 56 of the Rules of Procedure of the IACommHR. See in detail on country reports: Medina, "The Role of Country Reports in the Inter-American System of Human Rights".

[35] Article 46 of the Rules of Procedure of the IACommHR.

[36] Article 50(1) of the ACHR.

[37] Article 43(3) of the Rules of Procedure of the IACommHR.

[38] Article 44 of the Rules of Procedure of the IACommHR.

itself.[39] Except in the *Viviana Gallardo et al. v. Costa Rica* case, in which Costa Rica wanted to present a case to the Court waiving the Commission procedure, no state has yet decided to present a case to the Court. While the Commission was reluctant to submit cases to the Court at the beginning, in 2011 a new record number of 23 new cases reached the Court.[40]

3.2.2 Procedure on the Merits before the courts

Once a case has been submitted to the IACtHR or has been declared admissible by the ECtHR, both courts continue with the hearing. The hearing is undertaken by at least five judges of the IACtHR and by committees or chambers of the ECtHR.[41] In cases that raise a serious question concerning the interpretation of the ECHR, or cases in which a chamber wants to divert from the case law of previous cases, the chamber may relinquish jurisdiction in favour of the grand chamber of seventeen judges.[42]

The state party accused of a human rights violation and the victim or NGO having suffered human rights violations that has filed the application before the Court, are the only parties allowed before the ECtHR. In addition to that, the state party whose national has filed a case before the Court may intervene in the hearing and submit written observations.[43] The parties are invited by the President of the chamber to submit further evidence and observations and eventually an oral hearing is held.[44] In inter-state cases the parties are also invited to produce further evidence, but there is room for the decision that a written procedure be dispensed with.[45] Together with their observations on the merits, applicants have to file their claims for just satisfaction together with supporting documentation under Article 41 of the ECHR. If no such claim is submitted or is submitted but fails to comply with the requirements mentioned,

[39] Articles 51 and 61 of the ACHR.
[40] IACtHR, *Annual Report of the Inter-American Court of Human Rights 2014*, p. 22.
[41] Article 56 of the ACHR and Articles 28 and 29 of the ECHR.
[42] Article 30 of the ECHR.
[43] Article 36 of the ECHR.
[44] Rule 59 of the Rules of the ECtHR.
[45] Rule 58 of the Rules of the ECtHR.

it may be rejected in whole or in part. Accepted claims will be forwarded to the responding government for comment.[46]

Locus standi before the IACtHR is granted to the IACommHR, the states parties accused of human rights violations and, since 1 June 2001, the alleged victims or their representatives.[47] After an application has been submitted to the IACtHR, notification has to be sent to the President and the judges of the Court, the respondent state, the IACommHR, in case it has not filed the application, and the alleged victim.[48] The alleged victim shall then have the possibility, within a non-renewable term of two months, to submit autonomously a brief containing pleadings, motions and evidence.[49] During the oral proceedings, the alleged victim shall have the right to make declarations.[50] Similar to the proceedings before the ECtHR, the application of Article 63(1) of the ACHR concerning the awarding of just satisfaction for the human rights violation suffered must be particularly invoked, with the difference that no term is fixed for such invocation.[51]

The ECtHR and IACtHR hand down three different types of judgments. Declaratory judgments, in which they find if the respective Convention has been violated (Article 41 of the ECHR and Article 63(1) of the ACHR), judgments granting just satisfaction (Article 41 of the ECHR and Rule 75 of the Rules of the ECtHR), or compensation and reparation (Article 63(1) of the ACHR and Article 60 of the Rules of Procedure of the IACtHR), and judgments concerning the interpretation of former judgments (Rule 79 of the Rules of the ECtHR and Article 67 of the ACHR and Article 62 of the Rules

[46] Rule 60 of the Rules of the ECtHR.

[47] Article 57 of the ACHR and Articles 21, 22 and 23(1) of the Rules of Procedure of the IACtHR. See on the participation of victims Rhenán Segura, "Presentación de casos ante la Corte Interamericana de Derechos Humanos", p. 634; Seifert, *Das interamerikanische System zum Schutz der Menschenrechte und seine Reformierung*, pp. 211ff. and Tanner, "Interview with Judge Antônio A. Cançado Trindade, Inter-American Court of Human Rights", 4 *HRQ* 31 (2009), p. 991. More details of an envisaged reform of the ACHR in this respect can be found in Cançado Trindade, "Informe: Bases para un Proyecto de Protocolo a la Concenvión Americana sobre Derechos Humanos, para Fortalecer su Mecanismo de Protección", pp. 3–64.

[48] Article 36 of the Rules of Procedure of the IACtHR.

[49] Article 37 of the Rules of Procedure of the IACtHR.

[50] Article 43(2) of the Rules of Procedure of the IACtHR.

[51] Article 31 of the Rules of Procedure of the IACtHR.

of Procedure of the IACtHR).[52] If no further requests are made, only a judgment declaring whether the Convention has been violated or not is being pronounced.[53] Otherwise, judgments on reparation or just satisfaction claims can be rendered together with the judgment on the merits or at a later stage. Interpretative judgments can be requested with respect to the declaratory judgment as well as with respect to the judgment on reparation or just satisfaction. Judgments rendered by the IACtHR must be communicated not only to the parties to the case, but also to all other states parties to the ACHR.[54] In addition, the Court submits an annual report to the General Assembly of the OAS on its work in the previous year wherein the cases it has dealt with are listed again and do thus come to the knowledge of all member states of the OAS.[55] Publication of the judgments of the IACtHR is not obligatory, whereat the ECtHR has to publish all of its judgments.[56]

3.2.3 The Reparation Phase

It is common to both courts that at the beginning reparation was not decided together with the merits, either because the parties to the case should try to reach a friendly settlement of the question of reparation or because there was not enough evidence submitted in order to establish the damages suffered.[57] In its initial cases, the IACtHR in particular used to give the parties, then still only the state and the IACommHR, a term of six months to reach an agreement on the question of reparation. It determined reparation itself only if such an agreement was not reached, as was almost always the case, or

[52]See for the ECtHR: Haß, *Die Urteile*, pp. 55f. Protocol no. 14 introduced proceedings to interpret a judgment and infringement proceedings that can be triggered by the Committee of Ministers while supervising execution of judgments. These proceedings will be explained *infra* in section 9.1.1.3.2.

[53]See on declaratory judgments Shelton, *Remedies in International Human Rights Law, ed. 2*, pp. 255ff.

[54]Article 69 of the ACHR.

[55]Article 65 of the ACHR.

[56]Article 44(3) of the ECHR and Rule 78 of the Rules of the ECtHR.

[57]For the ECtHR see Enrich Mas, "Right to Compensation under Article 50", pp. 779f.; and for the IACtHR: Cançado Trindade, "The Operation of the Inter-American Court of Human Rights, 1979-1996", p. 137.

found to be unfair by the Court.[58] The Court had to postpone the decision on reparation in many cases even if it did not consider that there was room for an agreement on this point between the state and the Commission because the required evidence had not been submitted.[59] Situations in which the IACtHR does not take a decision on reparation immediately can consequently be subdivided into two categories: either the Court decides to leave the parties room to reach a friendly settlement and, in case this does not succeed, decides itself on reparation, even if the parties resist to furthering the reparation process.[60] In other cases it decides to determine reparation at a later stage and to either open the reparation phase or to maintain the corresponding proceedings open.[61] Nevertheless, it does not always strictly distinguish between the procedure on the merits and on reparation: in certain cases the IACtHR has ordered measures to repair the human rights violations already in the decision on the merits and authorized the President of the Court to open the reparation phase in the same judgment.[62]

The ECtHR started treating questions of just satisfaction under the Convention in a similar way. At the beginning of its jurisdiction it did not take decisions on just satisfaction together with the decision on the merits, but only upon requests by the European Commission on Human Rights, at that time the only organ enabled to provide individual applicants a voice before the Court, after the decision on the merits had been rendered. It used to separate the decision on just satisfaction from that on the merits for four reasons.

[58] See e.g. *Velásquez Rodríguez v. Honduras* (Merits), IACtHR, 29 July 1988, Series C no. 4, paras. 191f. and *Velásquez Rodríguez v. Honduras* (Reparations and Costs), IACtHR, 21 July 1989, Series C no. 7.

[59] See e.g.: *Godínez Cruz v. Honduras* (Merits), IACtHR, 20 January 1989, Series C no. 5, paras. 200f. and *Godínez Cruz v. Honduras* (Reparations and Costs), IACtHR, 21 July 1989, Series C no. 8.

[60] García Ramírez, "Las Reparaciones en el sistema interamericano de protección de los derechos humanos", p. 135. See, e.g.: *Godínez Cruz v. Honduras* (Merits), IACtHR, 20 January 1989, Series C no. 5, para. 201 or *Barrios Altos v. Peru* (Merits), IACtHR, 14 March 2001, Series C no. 75, para. 50.

[61] *Caballero Delgado v. Colombia* (Merits), IACtHR, 8 December 1995, Series C no. 22, oper. para. 6 or *Loayza Tamayo v. Peru* (Merits), IACtHR, 17 September 1997, Series C no. 33, para. 85.

[62] E.g. *Bámaca-Velásquez v. Guatemala* (Merits), IACtHR, 25 November 2000, Series C no. 70, oper. paras. 8 and 9.

Either, the parties should have the time to find a friendly settlement, or the facts concerning the damages caused by the violation had not been determined yet, or because the victim could achieve satisfaction from local authorities through local proceedings, or because the national proceeding that violates the convention had not yet been terminated.[63] In the first case the Court found that Convention rights had been violated, the question of satisfaction was not even mentioned.[64] But already in the second such case the Court held, besides the violation of the Convention, that it "reserves for the Applicants concerned the right, should the occasion arise, to apply for just satisfaction in regard to this particular point", a recurring formula for future cases.[65] The first pronunciation of the Court on just satisfaction under the former Article 50 of the ECHR dates from the 1972 *Vagrancy* case.[66] In this case the Court held that Belgium had violated Article 5(4) of the ECHR by detaining four vagrants without offering them a remedy and had repeated its formula with respect to the eventual proceedings for just satisfaction. After the judgment had been rendered, the applicants' counsel had claimed from the Belgian government payment of just satisfaction for the violation of the ECHR suffered by the applicants. As the Government declined this claim, the case was brought before the Court again by the Commission upon request of the counsel. In its judgment of 10 March 1972 the Court declared the demands admissible but not well-founded and consequently rejected them.[67] The first satisfaction claim was granted by the Court in the *Ringeisen v. Austria* case in 1972.[68]

Today, the courts generally decide on the merits and reparation in one judgment. This change in practice could be noted in Europe after the Court had changed its rules in 1991 to render its procedures quicker. According to the new Rule 53(1), the ECtHR should

[63] See in detail on these reasons: Dannemann, *Schadensersatz bei Verletzung der Europäischen Menschenrechtskonvention*, pp. 48ff.

[64] See *Neumeister v. Austria* (Merits), ECtHR, no. 1936/63, 27 June 1968, Series A no. 8.

[65] *Belgium Linguistics Case* (Merits), ECtHR, nos. 1474/62 et al., 23 July 1968, Series A no. 6, oper. para. 1. See also *Stögmüller v. Austria*, ECtHR, no. 1602/62, 10 November 1969, Series A no. 9.

[66] *Vagrancy* (Merits), ECtHR, nos. 2832/66 et al., 18 June 1971, Series A no. 12.

[67] *Vagrancy* (Article 50), ECtHR, nos. 2832/66 et al., 10 March 1972, Series A no. 14.

[68] *Ringeisen v. Austria* (Article 50), ECtHR, no. 2614/65, 22 June 1972, Series A no. 15.

generally decide on the merits and the just satisfaction claim in the same judgment.[69] In the Americas, although there is no similar rule, the IACtHR seems to have changed its practice from 2001 on, when the new Rules of Procedure granted the applicant a *locus standi* in the proceeding before the Court and required the application also to contain the claims related to reparation and costs.[70] Although it has been argued that there is no general change in the IACtHR's practice and that the Court would generally take decisions on the merits and on reparation in separate judgments, the Court's practice during the last years indicates the contrary.[71]

It may be supposed that these changes were caused by the desire to facilitate and accelerate proceedings before the courts and to save the applicants from having to travel more than the strictly necessary to Strasbourg or San José. In addition, the courts may have realized that the parties hardly ever reached a friendly settlement agreement on the question of reparation within the term set. Nevertheless, in cases where the assessment of the question of reparation or satisfaction is difficult or there is room for a friendly settlement, particularly when the State Party has assumed responsibility for the violation, the courts still split their judgments.[72]

If the ECtHR cannot take the decision on just satisfaction together with the decision on the merits, the same chamber, if possible in the same composition, decides the question at a later moment.[73] For the IACtHR there is a similar rule in the ACHR and the Rules of Court.[74] Nevertheless, the IACtHR has, in an order of 9 September 1995, decided that the decision on preliminary objections, merits and reparation are each separate stages of the procedure, and that

[69] Today Rule 75 of the Rules of the ECtHR. Zwach, *Die Leistungsurteile des Europäischen Gerichtshofs für Menschenrechte*, pp. 53f. and Polakiewicz, *Die Verpflichtungen der Staaten*, pp. 101f.

[70] Today Article 35(1)(g) of the Rules of Procedure of the IACtHR.

[71] Faúndez Ledesma, *The Inter-American System for the Protection of Human Rights*, p. 818. See on the contrary the comprehensive list of decisions taken by the IACtHR at http://www.corteidh.or.cr/casos.cfm.

[72] See, e.g.: *Guiso-Gallisay v. Italy* (Merits and Just Satisfaction), ECtHR, no. 58858/00, 8 December 2005; or *Salvador Chiriboga v. Ecuador* (Preliminary Objections and Merits), IACtHR, 6 May 2008, Series C no. 179.

[73] Rule 75(2) of the Rules of the ECtHR.

[74] Article 54(3) of the ACHR and Article 17(2) of the Rules of Procedure of the IACtHR.

consequently the decision on reparation need not be taken by the judges that had heard the case from the preliminary objections on, but by the judges that compose the Court at the moment the respective stage begins. An exception is made for cases in which a public hearing has been held insofar as the judges present at the hearing must also decide the pertinent questions.[75]

Following from the principle of subsidiarity that governs the ECHR, the states are generally obliged to determine the amount of just satisfaction for the human rights violation under the ECHR themselves. Only if they fail to do so or if their internal law does not provide for full satisfaction can the ECtHR be summoned to determine the corresponding amounts.[76] Unlike in Europe, considerations of subsidiarity do not apply to the process as soon as the IACtHR has recognized its competence to hear a case. It may immediately determine the reparation for violations, although, depending on the circumstances of the case, it sometimes sets the parties a term in which they can try to reach an agreement on the question of reparation.[77]

The ECtHR requires a specific request for just satisfaction or reparation.[78] This request can be filed by any of the parties to the process. Rule 60(2) of the Rules of the ECtHR similarly states that the applicants have to submit their observations on the question of satisfaction in the same time limit set for the observations on the merits. As the ECtHR today usually applies the "joint procedure", i.e. it simultaneously decides on the admissibility and the merits of the case, the applicants have to file their claim for satisfaction at the same time as they are submitting observations in reply to those of the State party to the case. Notwithstanding, untimely claims may be allowed by the chamber.[79] In the rare case that the admissibility and the merits are decided in separate judgments, the claim has to be filed after the admissibility procedure. The Court will in any case

[75] *Order of the Inter-American Court of Human Rights*, 19 September 1995, reprinted in IACtHR, *Annual Report of the Inter-American Court of Human Rights 1995*, p. 129.

[76] Article 41 of the ECHR and *Ringeisen v. Austria* (Article 50), ECtHR, no. 2614/65, 22 June 1972, Series A no. 15.

[77] Article 63(1) of the ACHR, reading "if appropriate", and *Velásquez Rodríguez v. Honduras* (Reparations and Costs), IACtHR, 21 July 1989, Series C no. 7.

[78] Rule 60 of the Rules of the ECtHR.

[79] Rule 60(3) of the Rules of the ECtHR.

let the applicants know when they have to file their claim.[80] The Court adjourns the decision on satisfaction or grants a longer term to submit the documents for the satisfaction phase of the decision only in unusual cases, e.g. when there is room for a friendly settlement between the parties.[81] If the applicant fails to file the brief on just satisfaction in the term established, the Court generally does not grant satisfaction.[82]

The ECtHR has determined that just satisfaction claims must be specific and submitted with any supporting documents.[83] Applicants may claim just satisfaction for three types of damages: pecuniary or non-pecuniary damages and costs and expenses incurred for the procedure.[84] They have to show a casual link between the denounced violation and the damages claimed.[85] When claiming pecuniary damages and costs and expenses, the applicants must therefore show all financial losses incurred as a direct consequence of the alleged violation. These losses may, with respect to pecuniary damages, include damages already suffered (*damnum emergens*) as well as future losses (*lucrum cessans*).[86] Any claim for pecuniary damages and costs and expenses must be sustained by evidence, such as hospital bills, salary statements, etc. As non-pecuniary damages are usually not calculable in money, the Court invites the parties to indicate a sum they deem appropriate to compensate such damages.[87] The claim is then submitted to the responding government according to Rule 60(4) of the Rules of the ECtHR, which has the possibility to comment. Nowadays, as the decision on just satisfaction is usually taken together with the decision on the merits, hearings on claims under Article 41 of the ECHR are performed together with those on the merits. In the case of separate procedures, the ECtHR initially performed separate Article 50 (today Article 41) hearings, a practice that was not continued in later cases, except for particularly

[80] Erdal and Bakırcı, *Article 3 of the European Convention on Human Rights*, p. 183.
[81] Zwach, *Die Leistungsurteile des Europäischen Gerichtshofs für Menschenrechte*, p. 54.
[82] Grabenwarter, *Europäische Menschenrechtskonvention*, p. 88.
[83] Rule 60 of the Rules of the ECtHR.
[84] President of the ECtHR, *Practice Direction: Just Satisfaction Claims*, no. 6.
[85] Ibid., no. 7.
[86] Ibid., no. 10.
[87] Ibid., no. 6.

important cases before the Grand Chamber.[88] The grand majority of just satisfaction claims are today decided in written procedures. Having assessed the arguments of the parties, the Court determines the amount of just satisfaction in form of a judgment.

The IACtHR, on the contrary, may take decisions on reparation *ex oficio* according to Article 63(1) of the ACHR. Nevertheless, the President of the IACtHR usually initiates the reparation phase asking the alleged victim's representative, the Commission and the state party to submit briefs on reparation that indicate the evidence they will produce in order to sustain their claims.[89] Nowadays such claims shall be contained already in the initial plea so that the Court can ideally combine the decision on the merits and that on reparation in one judgment.[90] These claims may be introduced by the IACommHR and by the alleged victim under Article 25 of the Rules of Procedure of the IACtHR, which gives the alleged victim a general right to proper motions besides the IACommHR that originally conducted the process autonomously. These motions may be modified during the process as long as the state has the possibility to respond to such modifications.[91] They serve as a guiding line for the Court when determining the scope, type and amount of reparation due. The Court is therefore not limited by these claims.[92] Reparation claims may be supported by all means of evidence, i.e. witnesses, expert witnesses, factual evidence, documents, etc. Apart from that, the Court may initiate any studies or name any expert that may be convenient.[93] The Court does not necessarily conduct public hearings on the reparation stage. If the question of reparation is resolved together with the question on the merits, testimony on reparation is heard to-

[88] *Vagrancy* (Article 50), ECtHR, nos. 2832/66 et al., 10 March 1972, Series A no. 14; *Ringeisen v. Austria* (Article 50), ECtHR, no. 2614/65, 22 June 1972, Series A no. 15; and *The Former King of Greece and others v. Greece* (Just Satisfaction) [GC], ECtHR, no. 25701/94, 28 November 2002.

[89] Pasqualucci, *The Practice and Procedure of the IACtHR*, p. 286.

[90] Article 35(1)(g) of the Rules of Procedure of the IACtHR; Pasqualucci, *The Practice and Procedure of the IACtHR*, p. 285.

[91] *Aloeboetoe et al. v. Suriname* (Reparations and Costs), IACtHR, 10 September 1993, Series C no. 15, para. 81.

[92] See e.g. *Barreto Leiva v. Venezuela*, para. 128, where the Court ordered an appeals procedure to be enabled although neither Commission nor victim had required this.

[93] *Velásquez Rodríguez v. Honduras* (Reparations and Costs), IACtHR, 21 July 1989, Series C no. 7, para. 4.

gether with that on the merits. If a separate reparation phase is ordered, testimonial evidence can be ordered to be submitted in the form of affidavits, whilst testimony given before the Court is heard during the hearings on the merits or during the reparation stage.[94] The Court, after having deliberated in private, terminates the reparation phase issuing a judgment that determines the amount and type of reparation to be awarded. If the parties reach an agreement on the question of reparation, the Court nevertheless issues a judgment, accepting or rejecting the terms of the agreement, according to its fairness.[95]

[94] *"White Van" v. Guatemala* (Reparations and Costs), IACtHR, 25 May 2001, Series C no. 76, para. 67.

[95] *Barrios Altos v. Peru* (Reparations and Costs), IACtHR, 30 November 2001, Series C no. 87, paras. 46ff.

Part II

Reparation under the Conventions

Overview

The complexity of implementation procedures for international judgments depends in the first place on the quality of the measures that have to be executed by the responding states, i.e. the courts' reparation orders.

Despite their overall similarity, reparation is a major point of divergence between the European and the American human rights protection systems. This is mainly due to the European system's strict orientation by the principle of subsidiarity on all procedural stages, according to which the ECtHR's task should be limited to recognizing violations of the ECHR while the domestic authorities then take the corresponding reparation measures. This is reflected in Article 41 of the ECHR, which determines that

> [i]f 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.

The ECtHR, at the beginning of its activity, interpreted this article in such a way that there always had to be a domestic reparation phase before it awarded just satisfaction itself. This, however, quickly turned out to be an additional formality for the applicant that produced no effect. Therefore, the Court stopped to require this step and nowadays immediately awards just satisfaction in the judgment on the merits. Facing an enormous number of pending applications and domestic systems that are sometimes slow and unwilling to award individual and general reparation, the Court, based on Article 46 of the ECHR, has in the past years started to extend its reparation orders beyond mere financial reparation.

The inter-American system, on the other hand, does not limit the IACtHR's reparation practice by the principle of subsidiarity. Arti-

cle 63(1) of the ACHR contains a much broader competence, stating that

> [i]f 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.

Under this norm the IACtHR has developed a very wide practice of general and individual reparation measures.

The Conventions themselves however do not further detail the content of reparation. On the international level though, efforts have been undertaken to codify the legal obligation to repair for state inflicted damage, particularly in the area of human rights violations. As will be seen, both human rights courts recur to these international standards to determine state obligations for human rights violations.

In a first step, state responsibility in case of human rights violations under general public international law will be defined (4), before presenting the reparation practice of both courts (5 and 6).

4 Reparation in General Public International Law

Reparation for state inflicted damages to other states are governed by the customary rules of state responsibility. They have recently been codified in the draft articles on state responsibility, adopted by the General Assembly of the United Nations. These draft articles contain the basic principles of state responsibility that also apply to human rights violations (4.1). In 2006, another set of more specific rules on damages resulting from gross violations of human rights was adopted by the UN General Assembly, containing reparation for the specific situation of damages inflicted on individuals (4.2).

4.1 The ILC Draft Articles

State responsibility for breaches of international obligations nowadays is an established rule of customary international law.[1] It was recognized for the first time in the PCIJ's *Factory at Chorzów* decision:

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a con-

[1]See e.g. *Factory at Chorzów* (Jurisdiction), PCIJ, 26 July 1927, Series A no. 9, p. 21, confirmed by *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion), ICJ, 11 April 1949, ICJ Reports 1949, p. 174, p. 186; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), ICJ, 9 July 2004, ICJ Reports 2004, p. 136, p. 198; Shaw, *International Law*, pp. 778ff.; Aust, *Handbook of International Law*, pp. 407ff.; Report of the Secretary-General to the General Assembly: "Responsibility of States for internationally wrongful acts", A/62/62, 1 February 2007, supplemented by Addendum to Report of the Secretary-General, A/62/62/Add. 1, 17 April 2007.

> vention and there is no necessity for this to be stated in the convention itself.[2]

According to the general principles of state responsibility, as determined by the PCIJ, reparation shall "wipe out [as far as possible] all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed". It shall take the form of reparation in kind or, if this should not be possible, in money.[3]

Since the end of World War II, the International Law Commission has, in a long process, codified the rules on state responsibility.[4] At its 53rd session in 2001, it adopted the ILC Draft Articles.[5]

However, opinions differed among the ILC's members about what to recommend to the UN General Assembly in respect of the Draft Articles. Article 23 of the Statute of the International Law Commission prescribes that the ILC may recommend the General Assembly to (1) take no action, (2) take note or adopt as a resolution, (3) recommend the draft to members with the view to the conclusion of a convention, or (4) to convoke a conference to conclude a convention.[6] Some members advocated to propose that the ILC Draft Articles be adopted as a convention, given the fundamental importance of its subject and the fact that the ILC's task was to promote codification of international law. The opposing view was that the rules did not require implementation in domestic laws and feared that a convention that remained unratified could result in "reverse codification" and would leave the effects on states parties and non-parties unclear. Furthermore, the ILC Draft Articles would be bound to be influential because they were widely cited and relied on by the ICJ and other tribunals. A unanimous declaration of the General Assembly could have a stronger effect than a convention that was only ratified by a small number of states.[7] It was finally agreed to present the ILC Draft Articles to the General Assembly together with the

[2] *Factory at Chorzów* (Jurisdiction), PCIJ, 26 July 1927, Series A no. 9, p. 21.
[3] *Factory at Chorzów* (Merits), PCIJ, 13 September 1928, Series A no. 17, p. 47.
[4] ILC, *Yearbook of the International Law Commission 2001*, pp. 20f.
[5] Ibid., p. 25.
[6] Statute of the International Law Commission, adopted by the International Law Commission, 18 November 1981.
[7] ILC, *Yearbook of the International Law Commission 2001*, pp. 24f.

recommendation to take note of them and to possibly convene, at a later stage, an international conference on the issue and adopt them as a convention.[8]

The General Assembly adopted the ILC Draft Articles during its 56th regular session in 2001 and commended them to the states.[9] It came back to the issue at its 59th, 62nd, 65th and 68th sessions again.[10] Since its 59th session, it requested the Secretary General of the UN to prepare and update a compilation of decisions of international courts, tribunals and other bodies referring to the articles and invited Governments to submit information on their practice in this regard. It further constantly examines, in a working group, the question of a convention on state responsibility.[11]

The Secretary General's compilation of decisions referring the ILC Draft Articles shows their wide and constant application as a source of law by international jurisprudence. Also in literature, the ILC Draft Articles are widely seen as a codification of valid customary international law.[12] The ILC's assumption that the articles would be influential even without being adopted as a convention has thus proven to be true. This fact is also evidenced by the fact that all aforementioned resolutions were adopted by consensus within the General Assembly. This way of voting, while not prescribed neither in the Charter of the UN nor in the General Assembly's Rules of Procedure, means that the text of a resolution was negotiated in advance. While not all member states are necessarily in favour of adoption, at least no state objects.[13]

The ILC Draft Articles are subdivided into four parts, covering the definition and attribution of an internationally wrongful act, its consequences, implementation of state responsibility, and some general provisions. Article 12 of the ILC Draft Articles defines that "[t]here

[8]Ibid., pp. 25f.

[9]Draft Articles on "Responsibility of States for Internationally Wrongful Acts" (hereinafter "ILC Draft Articles"), adopted by the General Assembly of the UN at the 56th session 2001, A/Res/56/83, 12 December 2001.

[10]A/Res/59/35; A/Res/62/61; A/Res/65/19; A/Res/68/104.

[11]No. 5 of , A/Res/68/104, 16 December 2013.

[12]Karl, "Der Vollzug von EGMR-Urteilen in Österreich", p. 42; Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility", 4 *AJIL* 96 (2002), p. 833.

[13]Simma et al., *The Charter of the United Nations*, Article 18, no. 31ff.

is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character". The consequences of internationally wrongful acts are enumerated in Articles 30 and 31 of the ILC Draft Articles. They are subdivided into three categories: the responsible state must cease the act, offer "appropriate assurances and guarantees of non-repetition, if circumstances so require" and "make full reparation for the injury caused". Special Rapporteur Arangio-Ruiz further defined reparation as "restitution in kind [...], reparation by equivalent or compensation in its various elements of reparation in a narrow sense and satisfaction in various forms". According to this, reparation in kind and by equivalent are intended to make good the material injury, while satisfaction is directed at the reparation for moral injury. Arangio-Ruiz further noted that guarantees of non-repetition are a distinct form of reparation.[14]

Initially, the obligation to cease an ongoing wrongful act was considered a form of satisfactory relief.[15] But, according to Arangio-Ruiz, it is not a kind of reparation in the strict sense, because

> [i]t would serve to prevent, by ensuring the formerly wrongdoing party's undertaking or resumed compliance with the original obligation, the very coming into play, for the portion of wrongful conduct avoided thanks to cessation, of the duty to make reparation deriving from the so-called "secondary" rule establishing responsibility.[16]

The obligation to cease the wrongdoing hence results from the states' general obligation to act in conformity with international law.[17] Being an obligation that exists vis-à-vis the international community as a whole it has to be complied with even if cessation

[14] Arangio-Ruiz, *Preliminary report on State Responsibility*, no. 21.

[15] Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility", 4 *AJIL* 96 (2002), p. 839.

[16] Arangio-Ruiz, *Preliminary report on State Responsibility*, no. 22.

[17] Buyse, "Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law", 1 *ZaöRV* 68 (2008), p. 130; Colandrea, "On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures", 2 *HRLR* 7 (2007), p. 401.

was not particularly demanded by the injured state.[18] It targets the violation *per se* and not its remedies. Although cessation is not a means of reparation in itself, its consequences may be similar, e.g. if the violation consists in the irregular detention of a person.[19] The consequences of the violation however have to be remedied in other ways.

On the other hand, the obligation to give assurances or guarantees of non-repetition, "when circumstances so require", is a real form of reparation. Although such assurances do not make good the harm caused by an illegal act, they may help to re-establish confidence in international relations after a breach has occurred. They are consequently not directed at the past but the future. Assurances are usually given orally, while guarantees may require the implementation of practical measures to prevent further breaches of the international obligation in question.[20]

Reparation in the strict sense, i.e. the making good of injuries caused, can be conceived in three different forms: restitution, compensation and satisfaction.[21] It shall comprise material and moral damages caused by the unlawful act.[22] The paramount objective of reparation being the re-establishment of the situation prior to the violation, restitution is the first means the injured state may request of the responsible state. Full reparation may nonetheless require a combination of all three means.[23]

Restitution in the terms of Article 35 of the ILC Draft Articles, though, may only be requested within the limits of possibility and proportionality of "the benefit deriving from restitution instead of compensation". The authors of the Draft Articles further adopted a narrow notion of restitution that requires to establish the situation as it was before the violation occurred but does not cover losses suffered due to the situation, i.e. the injured state may not demand to

[18] ILC, "Text of the draft articles with commentaries thereto", p. 89; Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility", 4 *AJIL* 96 (2002), p. 840.
[19] ILC, "Text of the draft articles with commentaries thereto", p. 89.
[20] Ibid., p. 90.
[21] Article 34 of the ILC Draft Articles.
[22] ILC, "Text of the draft articles with commentaries thereto", p. 92.
[23] Ibid., p. 95.

be returned to the situation as if the violation had not occurred.[24] The ILC enumerates factual as well as legal measures as examples for restitution, stating that also legal reforms may be required as a form of reparation. Restitutionary orders by international courts may even determine a legal situation for the parties, declaring certain acts of a state illegal or ordering specific behaviour such as the withdrawal of troops.[25]

If restitution is impossible, excluded for reasons of proportionality or does not cover the damage caused by the breach of an international obligation, the injuring state, according to Article 36 of the ILC Draft Articles, has to compensate in money for the remaining damage. Compensation fills in the gaps left by restitution. It is nonetheless different from satisfaction in so far as satisfaction is intended to make good moral damages, while compensation is directed at material ones.[26] Considerations of proportionality cannot limit the obligation to compensate. Compensation is of particular importance for the right of diplomatic protection in case of personal injuries or damages suffered by citizens of another state. The amount of compensation must be established separately for each specific case.

The third form of reparation a state eventually has to offer is satisfaction. Satisfaction, as conceived in the ILC Draft Articles, nonetheless is exceptional for those cases where, despite restitution and compensation, damages have not been fully equalled. In human rights cases this is typically the case for psychological or moral consequences of a violation, satisfaction for corporal damages suffered by a victim or for grievances for the loss of a family member. Article 37(2) of the ILC Draft Articles gives examples for ways of satisfaction, namely "acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality". The appropriate form of satisfaction may though depend on the circumstances of the particular case.[27] Like restitutive measures, satisfaction, in the terms of Article 37(3) of the ILC Draft Articles, only has

[24]ILC, "Text of the draft articles with commentaries thereto", p. 96.
[25]Ibid., p. 97.
[26]Ibid., p. 99.
[27]Ibid., p. 106.

to be paid in the limits of proportionality and "may not be humiliating to the responsible State".

In conclusion, the ILC favours a purely restitutive approach to reparation, opting against preventive functions such as punitive damages or reconciliation to deter future violations. Human rights cases though require a particular form of reparation, in the first case because the victim is a human being and not a state, which possesses other means of self-defence against violations. Thus, the role of non-repetition in human rights cases is much more important than under general international law, given that human existences depend on the evasion of further violations. Guarantees of non-repetition also fulfil a direct function of reparation to the victim in the specific case because the knowledge that the same violation might occur to others is a continuing aggravation of the victim's situation.[28] Human rights victims often also request excuses by states and other more symbolic acts of reparation, such as public recognition of the harm suffered, acts of remembrance, restitution of their personal honour and reputation, etc.

The ILC Draft Articles can therefore only serve as general guidelines in human rights cases.[29] The international community has recognized this particularity in specific sets of rules dealing with reparation for human rights cases.

4.2 The Specific Case of Human Rights Violations

Human rights treaties are particular in so far as they do not only affect the inter-state level but introduce a new level of international relations: the relation between the individual and the state.[30] Violations of human rights treaties not only cause international responsibility of one state towards another but, according to several of these treaties, the violating state owes reparation directly to the

[28] Beristain, *Diálogo sobre la reparación, Vol. 2*, p. 462.

[29] Cf. Shelton, *Remedies in International Human Rights Law, ed. 2*, pp. 97ff.

[30] *Effect of Reservations*, IACtHR, Advisory Opinion OC-2/82, 24 September 1982, Series A no. 2, paras. 29ff.

individual.[31] This is a significant amplification of the object of protection compared to more traditional approaches in public international law.[32]

The extension of protection to individuals though requires other protection mechanisms and reparation rules. State and individual are not nominally equal subjects under international law but act on different levels. There is no synallagmatic relation, no *do ut des*, and, most importantly, there is nothing the individual could offer or withdraw from the table of negotiations in order to make a state comply with its obligation to repair a damage caused.[33] Furthermore, under the general rules of state responsibility, retaliation is an important defence by the injured state, a measure that would make no sense in human rights law. But also in terms of reparation, states whose rights have been violated require other measures than human beings do. In particular the field of symbolic reparation, the erection of memorials, public excuses etc., but also guarantees of non-repetition are of paramount importance to human victims, while they are far less so in inter-state cases.

This particular constellation is reflected in the work of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, a subsidiary body of the UN Human Rights Commission, which since the end of the 1980s is occupied with the problem of reparation for victims of human rights violations. As a first result of its work, Special-Rapporteur Theo van Boven presented a report that should serve as a basis for the adoption of a set of standards on

[31]See Mazzeschi, "Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights", *JICJ* 1 (2003), pp. 340f. and no. 5 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereinafter "GA Basic Principles on Reparation"), adopted by the General Assembly of the UN at the 60th session 2005, A/Res/60/147, 21 March 2006.

[32]In the same sense: Nash Rojas, *Las Reparaciones ante la Corte Interamericana de Derechos Humanos (1988–2007)*, p. 15.

[33]In the dispute settlement system of the WTO, for example, a state can be authorized to interrupt compliance with certain obligations towards another state that does not comply with a ruling of the Dispute Settlement Body. See Article 22 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter "DSU"), 15 December 1993, 33 I.L.M. 112.

reparation for gross human rights violations.[34] The *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms* was revised in 2000 by M. Cherif Bassiouni[35] and in 2002 again by Alejandro Salinas.[36] The UN General Assembly finally adopted the GA Basic Principles on Reparation in 2005 without a vote. They "identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law".[37]

The scope of application of the GA Basic Principles on Reparation however remains unclear as they contain only a very vague definition of the notion of "gross violations of human rights law or serious violations of international humanitarian law", comprehending them as acts "which, by their very grave nature, constitute an affront to human dignity".[38] According to former reports, "gross violations" shall include at least genocide, slavery and slavery-like practices, summary or arbitrary executions, torture and cruel, inhuman or degrading treatment or punishment, enforced disappearance, prolonged arbitrary detention, deportations or forcible transfer of population, and systematic discrimination, in particular based on race or gender.[39]

But the principles can find application even beyond these crimes, as they contain at least the germ of international human rights law in terms of justice, remedy and reparation.[40] However, it must be un-

[34] Van Boven, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, no. 4.

[35] Bassiouni, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law.*

[36] Salinas, *Report of the consultative meeting on the draft Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law.*

[37] Preamble of the GA Basic Principles on Reparation.

[38] Preamble of the GA Basic Principles on Reparation. See hereon d'Argent, "Le droit de la responsabilité internationale complété ?", *AFDI* 51 (2005), pp. 38ff.

[39] Van Boven, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, no. 13.

[40] Buyse, "Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law", 1 *ZaöRV* 68 (2008), p. 140. Some authors even consider them a summary of current customary law on the subject: Ramcharan, *Contemporary human rights ideas*, p. 147.

derlined that the GA Basic Principles on Reparation are mere guidelines and do not have binding force.[41] They do not create new legal obligations or grant new rights to individuals. On the other hand, they do not limit the scope of obligations under general international law for reparation for lesser forms of violations either.[42] Despite their lack of binding force they may function as guidelines for national legislative bodies and international courts and other bodies concerned with the adjudication of human rights violations.

According to no. 11 of the GA Basic Principles on Reparation, remedies for victims of gross violations include equal and effective access to justice, adequate, effective and prompt reparation for harm suffered, and access to relevant information concerning violations and reparation mechanisms. Chapter IX defines five types of reparation: the four already established by the ILC Draft Articles – restitution, compensation, satisfaction and guarantees of non-repetition –, and the obligation to rehabilitate the victim, which, in human rights cases, is of more importance to the victims than in inter-state cases.

Although claimants are free to choose the type of reparation that best fits their needs, there is a theoretical hierarchy of modes of reparation.[43] A state that has grossly violated human rights must in the first place, as far as possible, restore the victim to the situation before the violation, procuring, as appropriate, restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to the place of living, work, and restoration of property (also referred to as *restitutio in integrum*).[44] The State must furthermore compensate for economically assessable damages such as physical and mental harms, lost opportunities, material and moral damages, and costs related to legal, medical and technical assistance.[45] It is in

[41]Binding force was at issue during the debates on the GA Basic Principles on Reparation but turned down due to objections by several states. See Buyse, "Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law", 1 *ZaöRV* 68 (2008), p. 139.

[42]Preamble of the GA Basic Principles on Reparation.

[43]Buyse, "Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law", 1 *ZaöRV* 68 (2008), pp. 132f.

[44]No. 19 of the GA Basic Principles on Reparation; Article 35 of the ILC Draft Articles.

[45]No. 20 of the GA Basic Principles on Reparation; Article 36 of the ILC Draft Articles. See on the question of how damages are calculated under international law Seegers, *Das Individualrecht auf Wiedergutmachung*, pp. 71ff.

dispute if compensation in international law may also serve punitive functions, but until today neither the IACtHR nor the ECtHR have applied punitive reparation.[46] Rehabilitation or satisfaction has to be effected through medical and psychological care and social services.[47]

Apart from these measures directed at restituting the victim to the situation before the violation and, as far as possible, eliminating its consequences, the state must also take satisfactory measures and measures to guarantee non-repetition. Satisfaction comprises effective measures to procure the cessation of continuing violations, verification of facts and disclosure of the truth, search for disappeared persons and identification of dead bodies, declarations that restore dignity, reputation and rights of the victim, public apologies, sanctioning of those responsible, commemorations, and human rights and humanitarian law training and education taking into account the specific case.[48] As guarantees of non-repetition the state, when appropriate, has to ensure civilian control of the military and security forces, ensure due process, fairness and impartiality in all judicial proceedings, strengthen the independence of justice, protect particularly vulnerable persons in legal, medical and other related professions and human rights defenders, and review and reform the laws that contribute or allow gross violations of human rights or humanitarian law.[49]

In conclusion, the responsible state's obligation under international law reaches far beyond mere monetary compensation. Its

[46] Against: Shaw, *International Law*, pp. 804f.; *Velásquez Rodríguez v. Honduras* (Reparations and Costs), IACtHR, 21 July 1989, Series C no. 7, para. 38. Punitive damages were also excluded from the ILC Draft Articles due to objections by many states: Crawford, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect", 4 *AJIL* 96 (2002), p. 875; Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility", 4 *AJIL* 96 (2002), p. 844. In favour of their inclusion: Shelton, *Remedies in International Human Rights Law, ed. 2*, p. 54. See also *Cyprus v. Turkey* (Just Satisfaction) [GC], ECtHR, no. 25781/94, 12 May 2014, concurring opinion of judge Pinto de Albuquerque, joined by judge Vučinić.

[47] No. 21 of the GA Basic Principles on Reparation; Article 37 of the ILC Draft Articles.

[48] No. 22 of the GA Basic Principles on Reparation.

[49] No. 23 of the GA Basic Principles on Reparation.

foremost duty is to procure the victim with *restitutio in integrum*.[50] Although particularly grave or large scale human rights violations are by their nature irreparable, it is essential that the state remedy the victim to the fullest extent possible.[51] Reparation must be proportional[52] and must take into account the particular impact human rights violations usually cause due to the fact that they are committed by the state from which the victims should expect protection.[53]

The fact that the obligation to repair is an inevitable consequence of a violation of international law has another important implication: an international court that is competent to decide whether a violation has occurred may also decide about reparation without being expressively empowered to do so by an underlying treaty.[54] This fact is relevant for the assessment of the ECtHR's powers in terms of reparation, because the ECHR does not contain a clear reparation power for the Court except Article 46 of the ECHR dealing with just satisfaction in case domestic measures and laws do not fully repair the damage caused.

[50] *Factory at Chorzów* (Merits), PCIJ, 13 September 1928, Series A no. 17, p. 47; Seegers, *Das Individualrecht auf Wiedergutmachung*, p. 70.

[51] Van Boven, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, no. 131.

[52] No. 15 of the GA Basic Principles on Reparation.

[53] See Shelton, *Remedies in International Human Rights Law, ed. 1*, p. 50.

[54] *LaGrand (Germany v. United States of America)* (Judgment), ICJ, 27 June 2001, ICJ Reports 2001, p. 466, p. 485.

5 The ECtHR's Reparation Practice

Most rulings by the ECtHR may at a first view be surprising to the unacquainted reader because the Court usually does not indicate reparation measures even after having found grave human rights violations. In most cases its judgments are limited to awarding monetary satisfaction, but in general there is not a word to be found on the states' obligation to take further measures to repair the harm caused, prevent repetition, or rehabilitate the victim – in short to take any of the actions defined under international law in case of human rights violations. This apparent lack of consequence is remarkable in particular in comparison to IACtHR rulings. This is all the more so bearing in mind that there is no international practice to restrict the notion of "just satisfaction" to monetary compensation (5.1).[1]

Nevertheless, the perception that the organs in the European human rights protection system would not care about full reparation is not ascertained. There is the Committee of Ministers to which every decision by the Court is transferred and which supervises its execution and may indicate specific reparation measures to be effectuated by the state. On the other hand the ECtHR has begun to give indications to states on how to deal with certain problems under the still rather new pilot judgment procedure, and in some cases even introduced them into the operative part of the judgment. And in isolated recent cases, the Court has even set out in its reasoning or in the operative part punctual reparation measures itself (5.2). When the ECtHR orders reparation measures, it sets time limits for their fulfilment by the state (5.3).

[1]Shelton, *Remedies in International Human Rights Law, ed. 2*, pp. 280f.

5.1 The Principle of Subsidiarity

Judgments of the ECtHR are in general of a declaratory nature, and this is the primary relief the Court can afford.[2] The Court finds if certain obligations emanating from the ECHR have been violated in a specific case but, unlike the IACtHR, it usually does not indicate measures to repair the violation.

This though does not mean that the obligation to provide complete restitution to the victim would not exist under the ECHR. It is nevertheless derived only indirectly from the Convention. Article 41 of the ECHR indicates the extent of the obligation to repair, stating that the Court may order just satisfaction if the responding state's internal law "allows only partial reparation to be made". Read together with Article 46 of the ECHR, which orders the member states to comply with the judgments of the Court and provides that the judgments be transmitted to the Committee of Ministers, which shall supervise their execution, the Court concludes that, besides eventual orders to pay monetary satisfaction, there is a general obligation for the states to provide *restitutio in integrum* in cases where violations of the Convention have been found.[3] It has furthermore acknowledged the independent obligation to cease an ongoing violation, but does not explicitly mention it in most cases either.[4]

There is no definition of "full reparation" in the ECHR. The absence of a clear authorization to order specific and general reparation measures led the Court to the conclusion that the states are generally free to choose the means that are necessary to obtain full reparation for the victims. This freedom, according to the Court, is a reflection of the obligation in Article 1(1) of the ECHR to secure the rights and freedoms of the Convention. This obligation does not prescribe any particular means of protection or any competence for

[2] *Marckx v. Belgium*, ECtHR, no. 6833/74, 13 June 1979, Series A no. 31, para. 58.

[3] *Papamichalopoulos and others v. Greece* (Just Satisfaction), ECtHR, no. 14556/89, 31 October 1995, Series A no. 330-B, para. 34; *Scozzari and Giunta v. Italy*, ECtHR, nos. 39221/98 et al., 3 July 2000, *Reports* 2000-VIII, paras. 249f.; *Broniowski v. Poland* [GC], ECtHR, no. 31443/96, 22 June 2004, 2004-V, concurring opinion of Judge Zupančič; *VgT v. Switzerland (No. 2)* [GC], ECtHR, no. 32772/02, 30 June 2009, paras. 85f.

[4] See *Norris v. Ireland*, ECtHR, no. 10581/83, 26 October 1988, Series A no. 142, para. 50.

the Court to indicate particular reparation measures to the states.[5] The states' freedom to choose how to discharge their obligation to repair consequently derives from the principle of subsidiarity that governs the European protection system.[6] A typical judgment thus creates an obligation for the state to achieve a result (full reparation), but does not prescribe the means.[7]

Until a few years ago, and still today in the majority of cases, the Court did not give indications in its judgments on what a state had to do to repair for the violation found,[8] nor did it, in those cases in which it took the decision on just satisfaction separately from the decision on the merits, indicate what it would have expected from the state as *restitutio in integrum*.[9] In *Ireland v. United Kingdom* the Court turned down as being beyond its competence a specific request by Ireland to order the United Kingdom to investigate and punish those who had committed the acts found in violation of the ECHR.[10] In *Marckx v. Belgium* it again held that it would refrain from making specific indications to the states. Nonetheless the Court indicated that the decision which had found that a breach of the Convention stemmed directly from certain provisions of a Belgian law had "effects extending beyond the confines of this particular case". This was generally seen as an invitation to Belgium to amend its legislation.[11] In later cases the Court, referring to the decision in *Marckx v. Belgium*, rejected claims to order specific means

[5] *M.S.S. v. Belgium and Greece* [GC], ECtHR, no. 30696/09, 21 January 2011, para. 398; *Papamichalopoulos and others v. Greece* (Just Satisfaction), ECtHR, no. 14556/89, 31 October 1995, Series A no. 330-B, para. 34; Janis, Kay, and Bradley, *European Human Rights Law*, p. 834, with reference to *Ireland v. United Kingdom* (Merits and Just Satisfaction), ECtHR, no. 5310/71, 18 January 1978, Series A no. 25.

[6] See on this principle *Kudła v. Poland*, ECtHR, no. 30210/96, 26 October 2000, 2000-XI, para. 152.

[7] Lambert, *Les effets des arrêts*, p. 100.

[8] In some decisions, the Court made remarks on the question of reparation in the form of *obiter dicta*. See Breuer, "Zur Anordnung konkreter Abhilfemaßnahmen durch den EGMR", *EuGRZ* (2004), p. 258 with examples.

[9] See Zwach, *Die Leistungsurteile des Europäischen Gerichtshofs für Menschenrechte*, pp. 49f.; Breuer, "Zur Anordnung konkreter Abhilfemaßnahmen durch den EGMR", *EuGRZ* (2004), p. 257.

[10] *Ireland v. United Kingdom* (Merits and Just Satisfaction), ECtHR, no. 5310/71, 18 January 1978, Series A no. 25, paras. 186f.

[11] *Marckx v. Belgium*, ECtHR, no. 6833/74, 13 June 1979, Series A no. 31, para. 58.

of reparation such as the publication of the judgment in the concerned state or certain measures that would be indicated to end a violation or prevent further violations.[12]

The Court's longstanding restrictive attitude to the application of Article 41 of the ECHR may be explained by some historic particularities of the European human rights protection system. During the drafting of the ECHR there were no plans to limit the Court's competence concerning reparation. On the contrary, the draft adopted at the Hague Congress of 1948, where the idea for a European human rights protection system was born, foresaw a Court "capable d'appliquer les sanctions nécessaires pour faire respecter la Charte [des Droits de l'Homme préconisée par le Congrès]".[13] Article 13 of a Draft Convention submitted to the Committee of Ministers by the European Movement in 1949 was even broader and more specific, containing a proposal according to which the Court, in case it found a violation, could

> either prescribe measures of reparation or [...] require that the State concerned shall take penal or administrative action in regard to the persons responsible for the infringement, or it may demand the repeal, cancellation or amendment of the act.[14]

At the first session of the Consultative Assembly of the CoE that same year, opinions on the powers of the Court to sanction human rights violations were divided, ranging from Winston Churchill's point of view that the Court "of course would have no sanctions and would depend for the enforcement of their judgment on the individual decisions of the States [...]" to Pierre-Henri Teitgen who advocated for a broader reparation practice including the capacity to annul state actions.[15] The Draft Resolution prepared by the Legal Committee to the Consultative Assembly of 1949 nonetheless contained an Article 24 that was as broad as the original proposal by the

[12] *Vocaturo v. Italy*, ECtHR, no. 11891/85, 21 May 1991, Series A no. 206-C, para. 21; *Philis v. Greece*, ECtHR, nos. 12750/87 et al., 27 August 1991, Series A no. 209, para. 79. Further examples at Lambert, *Les effets des arrêts*, p. 116.

[13] ECtHR, *Preparatory work on Article 50 of the European Convention on Human Rights*, p. 1.

[14] Ibid., p. 2.

[15] Ibid., p. 3.

European Movement.[16] Later, the Committee of Experts in its first session was presented with a new draft by the Italian representative concerning the competence to award reparation which was almost similar to today's Article 41 of the ECHR.[17] In the commentary to that draft it was made clear that the Court "will not have the power to declare null and void or amend Acts emanating from the public bodies of the signatory states".[18] This formulation, in particular the restriction of the Court's competence to award just satisfaction and the impossibility to annul or declare invalid a rule that violates the Convention rights, was strongly criticized by Teitgen, but his proposals for an amendment were rejected.[19]

Former Article 50 (today's Article 41 of the ECHR) was inspired by an arbitral regulation that is supposed to reflect the expectation that the ECtHR would mainly decide inter-state applications.[20] It has been argued that it was an error to take inspiration from the aforementioned agreement for an international human rights treaty because it mainly applied to aliens demanding a state's international responsibility for a wrongdoing. It is easier acceptable for an alien to receive only compensation for a rights violation and no guarantee of non-repetition, as they can simply leave the country where the violation occurred. On the contrary, the typical situation in human rights cases is that the rights of nationals are violated by their home country, so that the guarantee of non-repetition gains much more weight because leaving the country usually is not an option, a fact disregarded by the ECHR. Furthermore, in cases of ongoing violations such as illegal imprisonment, cessation is more important than compensation.[21] The *travaux préparatoires* give quite clear evidence that the states' major concern was that the Court would not

[16] Ibid., p. 6.
[17] Ibid., p. 20.
[18] Ibid., p. 21.
[19] Ibid., pp. 27f., 29.
[20] See Greer and Williams, "Human Rights in the Council of Europe and the EU", 4 *EJL* 15 (2009), p. 464; *Vagrancy* (Article 50), ECtHR, nos. 2832/66 et al., 10 March 1972, Series A no. 14, para. 16; Article 32 of the Pacific Settlement of International Disputes, 26 September 1928, 93 LNTS 343. Critical: Shelton, *Remedies in International Human Rights Law, ed. 2*, pp. 191f.
[21] See ibid., pp. 191f.

become a final court of appeals with the power to quash national judicial decisions and declare laws void.

In line with these considerations, the Court, having found a violation of the Convention, usually either states that the judgment in itself is sufficient reparation or awards monetary compensation as just satisfaction under Article 41 of the ECHR. To the latter effect, the applicant has to submit a corresponding claim according to Rule 60 of the Rules of the ECtHR. Otherwise the Court only examines the possibility to award just satisfaction for reasons of public policy.[22]

According to the wording of Article 41 of the ECHR, the Court's competence to award just satisfaction is subsidiary to reparation awards under national law. Despite this, the Court today immediately orders reparation where necessary, even when national law allows corresponding claims. It argues that it would be "incompatible with the aim and the object of the Convention" if the victim, upon recognition of a violation by the ECtHR, would have to lodge another petition before the national organs in order to obtain reparation.[23] These satisfaction orders though not necessarily resolve the question of reparation entirely. As long as other reparation measures are possible, the state remains obliged to provide full reparation for all damages that have not been covered by the Court's orders.[24] Although there is no apparent pattern along which the Court decides to award satisfaction beyond the declaratory effects of the judgment, Shelton has found out that it is more likely to award monetary relief the less the judges are divided about the merits of the case.[25]

Monetary relief is awarded under the heads of "pecuniary damage", "non-pecuniary damage", "costs and expenses", and "default interest". The Court however dedicates little effort to sustaining its

[22] *König v. Germany* (Article 50), ECtHR, no. 6232/73, 10 March 1980, Series A no. 36, para. 19; Frowein/Peukert, *EMRK-Kommentar 2009*, p. 545 with further examples.

[23] *Neumeister v. Austria* (Just Satisfaction), ECtHR, no. 1936/63, 7 May 1974, Series A no. 17, para. 30; *Papamichalopoulos and others v. Greece* (Just Satisfaction), ECtHR, no. 14556/89, 31 October 1995, Series A no. 330-B, para. 40; Frowein/Peukert, *EMRK-Kommentar 2009*, pp. 540f.

[24] Ibid., p. 541; Ruedin, *Exécution des arrêts*, p. 193.

[25] Extensive: Shelton, *Remedies in International Human Rights Law, ed. 2*, pp. 258–263.

decisions under Article 41 of the ECHR which makes it difficult to elaborate patterns of calculation of the amounts awarded.

Reparation for pecuniary loss has been awarded, among others, for financial loss, detriment to property, loss of earnings, salaries or interest, fines, or damages and costs awarded by national courts.[26] In accordance with the general rules of law it comprehends *lucrum cessans* and *damnum emergens*.[27] If pecuniary damages are claimed, the Court applies a rather strict standard of proof, requiring applicants to detail the heads under which they seek compensation and to submit supporting documentation.[28] Applicants must also show the casual link between the violation and the damage claimed. Should the underlying situation be unclear, the Court however in some cases has calculated pecuniary damages on an equitable basis or has estimated damages.[29] Satisfaction for damages is awarded on an equitable basis insofar as the applicant has shown the existence of the damage and the casual link with the violation. Just satisfaction may also include inflationary compensation.[30]

Non-pecuniary loss has been claimed on account of stress, moral and physical pain and suffering, anguish and prolonged uncertainty directly caused by a violation of the Convention.[31] Non-pecuniary damages may be compensated independently from the compensation for pecuniary damages.[32] They are compensated under the same conditions as pecuniary damages, i.e. the applicant has to show the existence of the damage and the casual link with the violation.[33] If the Court recognizes this kind of damage – in many cases it rejects claims for non-pecuniary damages despite recognizing the existence of the damage and the casual link, considering the

[26]Enrich Mas, "Right to Compensation under Article 50", p. 784.

[27]President of the ECtHR, *Practice Direction: Just Satisfaction Claims*, 28 March 2007, URL: http://www.echr.coe.int/documents/PD_satisfaction_claims_ENG.pdf, no. 10.

[28]Rule 60(2) of the Rules of the ECtHR.

[29]Cf. President of the ECtHR, *Practice Direction: Just Satisfaction Claims*, 28 March 2007, URL: http://www.echr.coe.int/documents/PD_satisfaction_claims_ENG.pdf, no. 12.

[30]*Akkus v. Turkey*, ECtHR, no. 19263/92, 9 July 1997, *Reports* 1997-IV, paras. 35–39.

[31]Enrich Mas, "Right to Compensation under Article 50", p. 786.

[32]Pellonpää, "Individual Reparation Claims under the ECHR", p. 116.

[33]Ibid., p. 116.

declaratory judgment to be sufficient reparation – it takes the applicant's submission as a guideline and decides the amount of just satisfaction on an equitable basis.[34] In fact, the applicant should submit a well considered claim for reparation of non-pecuniary damages, given that the Court rejects excessive claims, claims for symbolic sums or claims where no indication concerning the amount has been made.[35] Compensation for non-pecuniary damages differs in each situation. The Court does not manage a table to determine compensation according to categories of violations, but makes an individual estimation based on equity for each case.[36] It takes into account the type of violation, the circumstances of the case, the objective of the compensation, and relief obtained before national organs.[37] Cases of excessive length of proceedings are special in so far as the Court manages the refutable assumption that the applicant has suffered non-pecuniary damages, which results in a lower standard of proof. In civil law cases the Court takes into account the number of instances, the importance of the case (cases concerning labour rights, honour or right of access to children among others are considered as particularly important for the applicant and consequently are considered to cause higher moral damages), and other

[34]President of the ECtHR, *Practice Direction: Just Satisfaction Claims*, 28 March 2007, URL: http://www.echr.coe.int/documents/PD_satisfaction_claims_ENG.pdf, no. 14; Pellonpää, "Individual Reparation Claims under the ECHR", p. 117.

[35]Enrich Mas, "Right to Compensation under Article 50", p. 787.

[36]Some authors suppose a new approach in the Court's jurisprudence on damages. They have noticed an increased tendency of the Court to detail the reasons that are underlying its decision on the amount of just satisfaction and indicate that it seems to develop case law fixing amounts of compensation for specific types of damages. See Frowein/Peukert, *EMRK-Kommentar 2009*, p. 565.

[37]Examples: Meyer-Ladewig, *EMRK-Kommentar 2011*, Artikel 41, no. 19. In its early cases, the Court had still held that it would have to base its decision on just satisfaction not on the reparation actually awarded by the national organs, but on "the remedies provided by national law" (*Vagrancy* (Article 50), ECtHR, nos. 2832/66 et al., 10 March 1972, Series A no. 14, Separate opinion by Judge Mosler, para. 6). This jurisprudential line could have led to ineffective reparation claims, because the Court would have had to refrain from ordering just satisfaction as long as national law provided for the basis of a reparation claim, no matter if the claim could actually be made effective by the victim. The Court nowadays awards just satisfaction taking into account the remedies that have actually been awarded. Example: *Öneryildiz v. Turkey* (Article 41) [GC], ECtHR, no. 48939/99, 30 November 2004, para. 171.

factors such as the behaviour of the applicant during the national proceedings (if the applicant had hampered the domestic proceedings the Court lowers their satisfaction).[38]

If well substantiated, the Court also awards indemnification for costs and expenses incurred by the applicant. Costs and expenses for proceedings before national tribunals and the ECtHR comprise expenses for lawyers, travel expenses or translations, as long as they were necessary and reasonable for the adjudication of the Convention breach.[39] National laws and rules on lawyer fees are not binding for the Court but it tends to take such rules as guidelines for its decisions. For the defence before the ECtHR itself the Court usually awards around EUR 1 500 to 4 000, while the amount may be higher in more difficult cases.[40]

The Court has until today awarded just satisfaction up to EUR 180 000 in a case of arbitrary detention despite judicial acquittal of the applicant,[41] although the average amount awarded tends to be considerably lower, hovering around EUR 42 000.[42] It does not award punitive damages.[43]

5.2 Recent Developments

In its first years of existence, the Court dealt with few gross or massive human rights violations. But even in situations such as the Northern Ireland conflict the respondent states were generally will-

[38] Meyer-Ladewig, *EMRK-Kommentar 2011*, Article 41, no. 21, with a table of amounts awarded according to the number of instances and length of proceedings.

[39] *Iatridis v. Greece* (Article 41) [GC], ECtHR, no. 31107/96, 19 October 2000, *Reports* 2000-XI, para. 98.

[40] Meyer-Ladewig, *EMRK-Kommentar 2011*, Article 41, nos. 32ff.

[41] *Ilaşcu and others v. Moldova and Russia* [GC], ECtHR, no. 48787/99, 8 July 2004, 2004-VII, para. 489.

[42] See the lists at Meyer-Ladewig, *EMRK-Kommentar 2011*, Article 41, no. 20; Leach, *Taking a Case to the European Court of Human Rights*, pp. 409ff.; and Committee of Ministers, *Supervision Annual Report 2010*, p. 54.

[43] See *Akdivar v. Turkey* (Article 50) [GC], ECtHR, no. 99/1995/605/693, 1 April 1998, *Reports* 1998-II, para. 38; *Varnava et al. v. Turkey* [GC], ECtHR, nos. 16064/90 et al., 18 September 2009, para. 223. Judges Pinto de Albuquerque and Vučinić though defend the position that certain orders by the Court had to be understood as punitive measures: *Cyprus v. Turkey* (Just Satisfaction) [GC], ECtHR, no. 25781/94, 12 May 2014, concurring opinion of Judge Pinto de Albuquerque, joined by Judge Vučinić.

ing to implement ECtHR judgments quickly. This situation changed with the participation of the eastern European states in the European human rights system since the 1990s. A new quality of cases arose from these states, encompassing massive violations like in Russia's Chechen Republic, the Turkish conflict with the Kurds or issues resulting from the occupation of northern Cyprus. Another group of new cases since the 1990s concern insufficiencies in the member states' justice systems, leading to slow administration of justice or problems with the implementation of domestic judgments. These issues have led to large numbers of similar cases. Finally, minority groups more frequently seise the Court over alleged discriminations.[44]

The new circumstances led on the one hand to a discussion between the Court, the Committee of Ministers and the Parliamentary Assembly over the improvement of execution of judgments and the prevention of recurrent applications, and on the other hand to developments in the Court's jurisprudence concerning just satisfaction, in particular a slight shift of focus from the practice of declaring the breach of the Convention towards a more obligations oriented jurisprudence, either in specific cases, also called "Article 46 judgments" or "quasi-pilot judgments" (5.2.1), or for systemic violations in a group of similar cases caused by the same systemic problem, called "pilot judgments" (5.2.2).

5.2.1 Specific Reparation Measures

As has been seen, the traditional assumption was that the Court's remedial powers were limited to awarding monetary satisfaction.[45] This assumption was based on the principle of subsidiarity, expressed in the *travaux préparatoires* and the reference to the priority of national law on reparation in Article 41 of the ECHR. Accordingly, the Court assumed that states have a broad freedom to choose reparation measures, which naturally limits the influence of

[44]Hereon Anagnostou and Millns, "Individuals from Minority and Marginalized Groups before the Strasbourg Court", 3 *EPL* 16 (2010); in general on the changed scope of issues: OSJI, *From Judgment to Justice*, pp. 37f.

[45]Cf. Frowein/Peukert, *EMRK-Kommentar 1996*, p. 694; Polakiewicz, *Die Verpflichtungen der Staaten*, p. 188.

the CoE organs in the reparation process and their possibility to impose specific means of reparation. The repartition of competence under the ECHR, specifically the Committee of Ministers's competence for the supervision of judgments, which entails the definition of specific measures, is a further element that explains the absence of pronunciations on reparation by the Court in the vast majority of its judgments. Particularly this second reason explains why it is a Committee document – the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements of 2006 – that contains the only guideline as to what can be expected of a state in terms of reparation and compliance with a judgment according to Articles 41 and 46 of the ECHR. As these rules define the Committee's competence in the process of execution of judgments, they will be explained *infra* in section 9.1.1.

Particularly in order to counter the growing caseload, the Court started changing its remedial jurisprudence with the 1995 judgment in the *Papamichalopoulos and others v. Greece* (Just Satisfaction) case where it indicated for the first time that restitution was the only appropriate way to repair an illegal expropriation. Apparently bothered by the particularly longstanding disregard by Greek authorities of national judgments ordering compensation or restitution, the Court, referring to the *Factory at Chorzów* (Merits) decision by the PCIJ, directly ordered the restitution of illegally dispossessed land. It nevertheless left open the "backdoor" of payment of just satisfaction in case the land was not going to be returned.[46] In subsequent cases the Court extended this practice to other violated rights such as judicial guarantees under Article 6 of the ECHR.[47] In particular the formula: "Lorsque la Cour conclut que la condamnation d'un requérant a été prononcée par un tribunal qui n'était pas indépendant et impartial au sens de l'article 6 § 1, elle estime qu'en principe le redressement le plus approprié serait de faire rejuger le requérant en temps utile par un tribunal indépendant et impartial," has become a recurring mantra in these cases.[48]

[46] *Papamichalopoulos and others v. Greece* (Just Satisfaction), ECtHR, no. 14556/89, 31 October 1995, Series A no. 330-B, paras. 38f.

[47] See Colandrea, "On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures", 2 *HRLR* 7 (2007), p. 399, with references.

[48] *Gençel v. Turkey*, ECtHR, no. 53431/99, 23 October 2003, para. 27.

The Court went one step further in the *Scozzari and Giunta v. Italy* decision, where, for the first time, it made explicit reference to Article 46 in combination with Article 41 of the ECHR as the legal ground for the states' obligation to provide *restitutio in integrum*.[49] The significant difference to the earlier *Papamichalopoulos and others v. Greece* case lies in that with this new argumentation the state no longer had the "backdoor" of discharging its obligation by simply paying a sum of money. Nevertheless, the obligation to provide *restitutio in integrum* did not yet make it into the operative paragraphs of the decision.

This last step was taken in the decision of *Assanidze v. Georgia* concerning the continuing detention of a Georgian citizen despite national court orders to release him.[50] The Court not only reiterated the right of the state to choose the means it deemed appropriate to provide full restitution, but concluded that "[h]owever, by its very nature, the violation found in the instant case does not leave any real choice as to the measures required to remedy it", and consequently ordered Georgia to release the victim at the earliest possible date. It did not allow the state to alternatively pay just satisfaction to the victim.[51] In this decision the Court for the first time ordered a specific means of restitution to a state. As Judge Costa underlined in his concurring opinion, the Court upholds the general principle of subsidiarity, but, he further explains, clear reparation orders may serve to ease the Committee of Ministers's task of execution because they limit the margin of discussions over appropriate solutions with the states. Nevertheless, Costa also warned that the limitation of this margin of discussion might at the same time lead to greater difficulties in finding political ways of implementing the Court's judgments.[52]

The Court in subsequent decisions recurred to ordering specific measures of reparation such as passing a law to provide the legal basis for an applicant's claim for compensations (or, in case of not do-

[49] *Scozzari and Giunta v. Italy*, ECtHR, nos. 39221/98 et al., 3 July 2000, *Reports* 2000-VIII, para. 249.

[50] *Assanidze v. Georgia* [GC], ECtHR, no. 71503/01, 8 April 2004, 2004-II, oper. para. 14(a).

[51] Ibid., paras. 198ff., in particular para. 202.

[52] Ibid., concurring opinion of Judge Costa, paras. 6ff.

ing so, ordering the state to pay a certain sum as just satisfaction),[53] reopening procedures that were concluded in an unfair way,[54] executing a domestic judgment by transferring funds to a specific entity,[55] limiting a sentence of life imprisonment to a maximum of thirty years,[56] ordering the state to proceed to prompt examination of asylum cases that do not meet ECHR standards and eventually refrain from deportation,[57] or ordering the implementation of legal provisions to ensure prisoner voting rights.[58] In the case of the dismissal of a judge of the Ukrainian supreme court, it even held that, considering the apparent flaws in Ukrainian law, reopening of the proceedings under which the applicant had been judged would not ensure an outcome that respected the principles of the ECHR. It therefore directly ordered the judge's reinstatement into its former position, going for the first time beyond the *Gençel formula.*[59]

In general terms, a set of factors were identified by Leach which influence whether the Court makes specific orders or not. These factors comprise the possibility of adequate remedy by payment of just satisfaction, uniqueness of the measure to be taken, urgency to end a continuing violation, extent of the unlawfulness of the violation, extent of effectiveness of a particular measure, consequences for other parties, feasibility or practicability of the measure and the possibility that the situation will lead to repetitive cases.[60]

The judges' opinions about whether the practice of specific measures should be employed more extensively apparently differ. In *Medova v. Russia*, a case concerning a disappeared person in Chechnya, Judge Spielman dissented from his colleagues and favoured the inclusion of a specific order in the operative paragraphs for the state

[53] *L. v. Lithuania*, ECtHR, no. 27527/03, 11 September 2007, oper. paras. 5 and 6.
[54] *Maksimov v. Azerbaijan*, ECtHR, no. 38228/05, 8 October 2009, oper. para. 3.
[55] *Karanović v. Bosnia and Herzegovina*, ECtHR, no. 39462/03, 20 November 2007, oper. para. 3(a).
[56] *Scoppola v. Italy (No. 2)* [GC], ECtHR, no. 10249/03, 17 September 2009, oper. para. 6(a).
[57] *M.S.S. v. Belgium and Greece* [GC], ECtHR, no. 30696/09, 21 January 2011, para. 402.
[58] *Hirst v. United Kingdom (No. 2)*, ECtHR, no. 74025/01, 30 March 2004, para. 60. Also see the list for 2012 in ECtHR, *Annual Report 2012*, pp. 139ff.
[59] *Oleksandr Volkov v. Ukraine*, ECtHR, no. 21722/11, 9 January 2013, paras. 205ff.
[60] Leach, *Beyond the Bug River*.

to investigate the disappearance of the victim.[61] It remains to be seen whether in the future there will be more such dissenting opinions, leading in the end to more frequent specific orders by the Court. Until now, the Court is restrictive when it comes to specific orders in another sense, too: it has not yet ordered more than one specific reparation measure at a time in a judgment.

The Court's possibilities end where its orders would directly affect domestic acts. None of the two courts functions as a supranational appellate jurisdiction and may therefore not quash national decisions. They may nevertheless order states to re-examine cases or to take appropriate steps to bar national judicial decisions that violate the Convention of their effects, leaving the practical means to achieve this goal to the state.[62] The ECtHR seems to apply this power preferably to states where legal dispositions to repair the damage already exist.[63] This may be due to a narrow interpretation of Article 41 of the ECHR. It has been sustained that the referral to reparation under national law would limit the Court's remedial jurisprudence to those damages that cannot be repaired under national law, thus establishing a "national law first" rule.[64] This narrow interpretation though does not coincide with the wording of the norm. The state's obligation to provide *restitutio in integrum* is not limited to its capabilities under national law. If full reparation is prevented by the insufficiencies of national law, the Court's judgment entails an obligation for the state to amend its internal law and make it coincide with the requirements under the Convention.[65] Ar-

[61] *Medova v. Russia*, ECtHR, no. 25385/04, 15 January 2009, partly dissenting opinion of Judge Spielman.

[62] Again, Article 2 of the ACHR provides a much clearer legal basis for a control of the conventionality of national laws. Article 1 of the ECHR nevertheless can, due to its open formulation, be construed in a similar way and seems to be understood like this by the ECtHR.

[63] In all of the above mentioned cases, except *Hirst v. United Kingdom (No. 2)*, individual measures were ordered because the states had not applied existing legal dispositions in a way that was consistent with their obligations under the ECHR.

[64] Polakiewicz, *Die Verpflichtungen der Staaten*, p. 127; Ruedin, *Exécution des arrêts*, p. 161.

[65] This is clear from Rule 6(b) of the CM Rules for the Supervision of the Execution of Judgments which mentions legal amendments as a type of general measure that have to be taken by the state if necessary. Also: Frowein/Peukert, *EMRK-Kommentar 2009*, p. 541.

ticle 41 of the ECHR is a fallback option to ensure that even in case of incomplete reparation the Court may, as a last resort, step in and award the payment of just satisfaction instead of other measures.[66] Thus, for example in case of a violation of Article 6 of the ECHR, the state has the obligation to eliminate the results of the process, be it by way of re-trial, reopening or other instruments. Should no such instrument be available in domestic law, the obligation of legal amendment is imposed onto the state by the judgment and could be ordered as such explicitly by the Court.[67] Independent from this obligation the Court may order the state to pay the victim just satisfaction.[68] The practice of the Court to oblige only those states to take specific measures that have the legal or administrative means in place or at least have shown their disposition to obey such orders, therefore has to be rejected because it creates an uneven treatment of the states that is not justified.[69]

The extent and the legal basis for specific reparation orders is disputed. Some authors argue that the Court has an annexed competence to order measures beyond monetary satisfaction, and that it cannot base its decisions on Article 41 of the ECHR, which would limit the possibility to issue direct orders, whereat others assume that the ECtHR could only order specific measures as cessation of continuing violations which leave no choice of means.[70] In fact, the words "just satisfaction", or "satisfaction équitable" in the French version, whose common meaning serve as the basis for their interpretation according to the rules of treaty interpretation in customary international law, do not require the restrictive approach chosen by the ECtHR. "Satisfaction" neither in English nor in French means monetary reparation, but "[...] the fulfilment of an obligation or claim; the atoning for an injury, offence, or fault by reparation, com-

[66] Ibid., p. 541.

[67] Cf. the pilot judgment procedure described *infra*, p. 5.2.2.

[68] See *Scozzari and Giunta v. Italy*, ECtHR, nos. 39221/98 et al., 3 July 2000, *Reports* 2000-VIII, para. 249.

[69] Judges and personnel of the ECtHR argued in this sense in personal interviews in 2011. See also Ruedin, *Exécution des arrêts*, p. 172.

[70] Cf. Breuer, "Zur Anordnung konkreter Abhilfemaßnahmen durch den EGMR", *EuGRZ* (2004) and Colandrea, "On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures", 2 *HRLR* 7 (2007), pp. 401f.

pensation, or the endurance of punishment"[71] or "Acte par lequel [quelqu'un] obtient la réparation d'une offense, acte par lequel on accorde à [quelqu'un] ce qu'il demande (en justice, dans une hiérarchie, etc.)".[72] In other areas of public international law the concept of "satisfaction" does not have this restricted meaning either. In the ILC Draft Articles for instance, satisfaction comprises all damages that are not financially assessable and "may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality".[73] This catalogue is though not finite and the appropriate form of satisfaction depends on the circumstances of the case.[74] The GA Basic Principles on Reparation provide an even broader list of measures in their no. 22 of what is to be understood as "satisfaction". These measures again contemplate specific means aiming e.g. at ending a continuing violation, full investigation and disclosure of the truth, search of disappeared witnesses, public apologies etc. These rules, being the outcome of a long process of codification of obligations of states for human rights violations, reflect the current international consensus on the question. It becomes clear that "satisfaction" is different from "compensation", which comprises financial reparation for monetary losses, whereat satisfaction shall make good damages that are not financially assessable. Similar differentiations can also be found among others in Article 24 of the ICPPED.[75] The reparation jurisprudence of the IACtHR also construes "satisfaction" in line with the international understanding as comprising non-monetary measures to make good moral damages caused.[76] The ECtHR's legal basis thus directly provides it with the possibility to adopt specific reparation measures. While it drew on different norms to sustain its power to

[71]OED Online, *Satisfaction, n.* September 2011, URL: http://www.oed.com/view/Entry/171223.

[72]Le Petit Robert, *Satisfaction*, 2011, URL: http://pr.bvdep.com.

[73]Article 37(2) of the ILC Draft Articles.

[74]See the examples at ILC, "Text of the draft articles with commentaries thereto", p. 106.

[75]International Convention for the Protection of All Persons from Enforced Disappearance (hereinafter "ICPPED"), A/Res/61/177, 21 March 2006.

[76]See *Manuel Cepeda-Vargas v. Colombia*, IACtHR, 26 May 2010, Series C no. 213, paras. 219ff., referring to *Usón-Ramírez v. Venezuela* (Merits, Reparations and Costs), IACtHR, 20 November 2009, Series C no. 207, para. 84.

order such measures in early decisions, it now constantly refers to Article 46 of the ECHR as the legal ground. As this article defines the state's obligation to comply with the Court's judgments and is as such the legal ground for the principle of subsidiarity on the reparation stage, the Court's more specific orders of the states' obligations must be considered a limitation of this principle.[77]

5.2.2 General Reparation Measures

Apart from specific measures in particular cases, the Court has also begun to order states to adopt general measures in cases where it could identify systemic problems underlying a huge number of similar human rights violations. In a "pilot judgment" the Court identifies the systemic problem in one exemplary case that is given priority treatment over other pending cases and indicates to the state which general measures it shall adopt to resolve the situation.[78]

This new type of judgment originated in certain cases where states had openly disrespected judgments of the ECtHR, which led the Parliamentary Assembly to question the Committee of Ministers over its state of affairs, expressing doubts about the member states' continuing dedication to the European human rights protection system.[79] In its exhaustive report from the year 2000 on the execution of judgments of the ECtHR, the rapporteurs of the Parliamentary Assembly saw a shared responsibility between states, the Assembly, the Committee, and the Court to ensure swift execution of judgments. Regarding the Court they emphasized that it should create a stable jurisdiction giving guidelines to the states, but that it would also be essential that the Court

[77] Cf. *M.S.S. v. Belgium and Greece* [GC], ECtHR, no. 30696/09, 21 January 2011, paras. 398ff.

[78] There are seven categories of priority, the first one is reserved to cases where life is at risk, the second one to pilot judgments. See Donald, "'The most creative tool in 50 years'?", *EHRAC Bulletin* 14 (2010), p. 13.

[79] See on the case *Loizidou v. Turkey*: *Doc. 8964 – Turkey and the European Court of Human Rights*, and other cases cited in Jurgens, *Execution of Judgments of the European Court of Human Rights*, Explanatory Memorandum no. Details about the reforms of the Court procedures can be found at "The 2004 Reform Package", *HRLJ* 26 (2005).

> take an interest in action on its judgments and give sufficient reasons to make it clear to states what reforms are needed to avoid the violations the Court has found. This is essential if states are to develop standards or effective remedies of their own to prevent any further violations.[80]

In the following year, the Evaluation Group set up by the Committee gave its report on the ECtHR, which also encompassed the issue of execution of judgments. Notwithstanding its general reluctance towards certain measures for the improvement of the execution of judgments by the Court, such as implementing an interpretation procedure that could be triggered by the Committee or the possibility to impose financial penalties on recalcitrant states, it supported the practice of the Court to indicate more detailed measures of restitution to the states, and generally welcomed a better communication between the CoE organs involved in the process of execution of judgments. It particularly underlined the necessity to find ways to deal with repetitive cases.[81]

The Steering Committee for Human Rights (CDDH), installed by the Committee of Ministers to prepare decisions about the future of the Court, in 2003 examined the situation of execution of judgments under a different point of view. Due to the enlargement of the CoE after 1990, the workload of the Court had become almost unmanageable. The effective execution of judgments was consequently examined as one instrument to limit the number of applications, particularly the number of repetitive applications.[82] The Steering Com-

[80] Jurgens, *Execution of Judgments of the European Court of Human Rights*, Explanatory Memorandum no. 24

[81] Committee of Ministers, *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights*, EG (2001) 1, Committee of Ministers, 27 September 2001, nos. 49–51.

[82] See Steering Committee for Human Rights, *Guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights: Addendum to the final report containing CDDH proposals*, CM(2003)55 Addendum 2, Committee of Ministers, 13 April 2003, no. C.1. With 60% of all applications received in 2003 being attributable to the same underlying systemic national problem, the issue of repetitive applications remains one of the most crucial issues the Court is facing: "The 2004 Reform Package", *HRLJ* 26 (2005), p. 5. Measures were also proposed concerning the national level and the Court procedures. See ibid., p. 4.

mittee made three proposals on this issue, among them that the Committee of Ministers should invite the Court to identify in its judgments underlying systemic problems and the source of these problems. The CDDH however underlined that the Court should not indicate corrective measures in order not to interfere with the states' freedom of choice.[83] The Committee adopted this proposal and invited the Court in May 2004 to indicate general measures, particularly when issuing pilot judgments.[84] It is important for the work of the Committee that the Court indicate the existence of a systemic problem underlying a situation because the Committee does not have the necessary information to evaluate the overall situation in a specific state. Only the Court, on the basis of the number of similar applications it receives, can make such an evaluation. It has to indicate this fact to the Committee in the judgment so that this organ can give due importance to the case.[85]

The Court embraced CM Resolution Res(2004)3 immediately and issued the first pilot judgment in the case of *Broniowski v. Poland* on 22 June 2004. The case concerned indemnification for repatriated inhabitants of areas "beyond the Bug River", which belonged to Poland before the Second World War but were invaded by the USSR in 1939 and are today Belarusian and Lithuanian territory.[86] It is one of some 80 000 cases brought before the ECtHR by persons seeking indemnification under international treaties concluded between Poland and the USSR over the cessation of these areas and the indemnification of the former Polish inhabitants, as well as under subsequent Polish legislation. The Court, when considering the application of Article 46 of the ECHR and making reference to CM Res-

[83] Steering Committee for Human Rights, *Guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights: Addendum to the final report containing CDDH proposals*, CM(2003)55 Addendum 2, Committee of Ministers, 13 April 2003, proposal C.1.

[84] Resolution Res(2004)3 (hereinafter "CM Resolution Res(2004)3"), adopted by the Committee of Ministers at its 114th Session, 12 May 2004, reprinted in: Guaranteeing the effectiveness of the European Convention on Human Rights, pp. 80-81.

[85] Szklanna, "The Impact of the Pilot Judgment Procedure", *EYHR* (2010), p. 226.

[86] *Broniowski v. Poland* [GC], ECtHR, no. 31443/96, 22 June 2004, 2004-V, para. 190.

olution Res(2004)3 and CM Resolution Res(2004)6[87], marking that the prospective of 80 000 similar claims in the future would represent "a threat to the future effectiveness of the Convention machinery", concluded that the cases rooted in a systemic problem. Therefore "[i]n this context the Court's concern is to facilitate the most speedy and effective resolution of a dysfunction established in national human rights protection".[88] In order to resolve the underlying systemic problem, the Court alluded that it might proceed to the examination of the execution of domestic legislation and practically indicated that specific legislative or administrative measure were to be adopted by the Polish state.[89] Both the recognition of the underlying systemic problem and the measures that were to be adopted by Poland were reflected also in the operative paragraphs of the judgment and thus became legally binding upon the state.[90]

In subsequent judgments the Court applied the pilot judgment procedure to cases concerning the right of people tried *in absentia* to have their cases reviewed, ordering that "the respondent state must, through appropriate measures, secure the right in question to the applicant and to other persons in a similar position".[91] Other cases

[87]Resolution Res(2004)6 (hereinafter "CM Resolution Res(2004)6"), adopted by the Committee of Ministers at its 114th Session, 12 May 2004, reprinted in: Guaranteeing the effectiveness of the European Convention on Human Rights, pp. 69–70.

[88]*Broniowski v. Poland* [GC], ECtHR, no. 31443/96, 22 June 2004, 2004-V, para. 193. Judge Zupančič in his concurring opinion criticizes – rightly in our opinion – the impression that the Court was motivated solely by the Committee's invitation and thus only by the aim to limit its growing caseload. On the contrary, it would have been appropriate for the Court to put forward the increased level of justice these decisions cause and the Court's autonomy to take them based exclusively on the ECHR and its doctrine of "living instrument" instead of restricting itself to the technocratic argument of limiting its caseload.

[89]Ibid., para. 194.

[90]Ibid., oper. paras. 3 and 4.

[91]*Sejdovic v. Italy*, ECtHR, no. 56581/00, 10 November 2004, oper. para. 3. Italy subsequently adopted legislative measures which led the Grand Chamber in the appeals procedure to refrain from recognizing the continuing existence of the systemic problem: *Sejdovic v. Italy* [GC], ECtHR, no. 56581/00, 1 March 2006, 2006-II, paras. 121ff.

affected issues such as the excessive length of court proceedings,[92] non-execution of domestic judgments,[93] violations of the freedom of expression,[94] violations of the right to private possessions in a case where bonds for currency deposits at state banks of the former Socialist Federal Republic of Yugoslavia were not issued by Bosnia and Herzegovina,[95] or excessive length of detention.[96]

Over time it became clear that the Court considered Article 46 of the ECHR the legal basis for its reparation decisions in pilot judgments. It established a certain pattern of application, which can be seen e.g. from the case of *Maria Atanasiu and others v. Romania.*[97] First, the parties submit their legal positions concerning the application of Article 46 of the ECHR to the case and the measures they wish to be ordered by the Court (Romania in this case supported the claim for detailed indications of which measures it had to take in order to tackle the widespread human rights violations). Then the Court explains the circumstances under which Article 46 of the ECHR can be applied, mentioning the general obligation of the respondent state to take general and individual measures to put an end to the violation and redress the effects, the freedom of the state to choose the measures by which to comply with the judgment, and explaining the fundamental rules of the pilot judgment procedure as developed in its jurisprudence. It then applies these fundamental

[92] *Lukenda v. Slovenia*, ECtHR, no. 23032/02, 6 October 2005, para. 98. Slovenia apparently did not comply with the judgment, so that the Court subsequently decided some 400 similar cases in similar terms, making reference to the *Lukeda* judgment. *Rumpf v. Germany*, ECtHR, no. 46344/06, 2 September 2010, oper. para. 4; *Olaru and others v. Moldova*, ECtHR, nos. 476/07 et al., 28 July 2009, oper. paras. 4–6.

[93] *Yuriy Nikolayevich Ivanov v. Ukraine*, ECtHR, no. 40450/04, 15 October 2009, oper. paras. 4–7.

[94] *Ürper and others v. Turkey*, ECtHR, nos. 14526/07 et al., 20 October 2009, paras. 50–52. The Court nevertheless did not include the obligation in the operative paragraphs, but only invited the state to revise its domestic legislation.

[95] *Suljagić v. Bosnia and Herzegovina*, ECtHR, no. 27912/02, 11 March 2009, oper. para. 4.

[96] *Kauczor v. Poland*, ECtHR, no. 45219/06, 3 February 2009, paras. 55ff. The Court apparently welcomed steps already taken by the state to remedy the systemic problem, but urged it to maintain its efforts. This may be the reason why the obligation to take these measures was not included into the operative paragraphs but remains a general obligation under the supervision of the Committee.

[97] *Maria Atanasiu and others v. Romania*, ECtHR, nos. 30767/05 et al., 12 October 2010, paras. 195–242.

rules to the specific case, determining whether there is "a recurrent and large-scale problem"[98] and that there is a large number of cases (usually running into the hundreds) caused by the same structural problem, "posing a threat to the future effectiveness of the Convention machinery".[99] In a third step it finally identifies the underlying systemic problem, "[suggests], on a purely indicative basis, the type of measures which the [state] authorities might take in order to put an end to the structural situation concerned",[100] and indicates how it is going to proceed in other cases pending until the deadline set to the state to introduce the suggested measures. Usually, the Court adjourns similar pending cases during the deadline set to the state, but exceptions may be made if a case "touches on the most fundamental rights of the person" or if the particular circumstances would make it unfair or unreasonable for the applicant to wait longer for a decision.[101]

The general measures expected by the Court to be taken by the respondent state usually appear in the operative paragraphs, making them legally binding. Nevertheless, in some cases the Court indicates measures according to Article 46 of the ECHR but for no apparent reason does not include them into the operative paragraphs.[102]

Depending on the particularities of each case, the Court gives more or less detailed orders as to which measures the respondent state has to adopt to put an end to the violations. In most cases the Court indicates the necessity to adopt changes in the domestic legal and/or administrative order without going very much into the details. These changes have to be adopted within a deadline of six months to one year.[103] In certain situations, the Court gives more specific hints to the state how to adapt its national legislation and administrative or judicial practices so that they coincide with the requirements of the ECHR and the Court's jurisprudence. In a case concerning delays in the execution of domestic judgments the

[98] *Maria Atanasiu and others v. Romania*, ECtHR, nos. 30767/05 et al., 12 October 2010, para. 216.
[99] Ibid., para. 217.
[100] Cf. ibid., para. 230.
[101] Registrar of the ECtHR, *The Pilot-Judgment Procedure*, nos. 5 and 7.
[102] Cf. *Scordino v. Italy (No. 1)* [GC], ECtHR, no. 36813/97, 29 March 2006, 2006-V.
[103] Cf. *Broniowski v. Poland* [GC], ECtHR, no. 31443/96, 22 June 2004, 2004-V, para. 194; *Rumpf v. Germany*, ECtHR, no. 46344/06, 2 September 2010, para. 73, among others.

Court for instance "invited" the respondent state to ensure the execution of domestic judgments within six months.[104] In another case concerning excessive length of proceedings before civil courts, the Court, while remarking that further reforms had to be undertaken to shorten the duration of proceedings, ordered the state to adopt legislation providing compensation for these situations. Referring to earlier judgments, it gave quite detailed guidelines the compensatory remedy had to comply with, particularly the respect for fairness in procedures, that no excessive burden may be placed on litigants where the claim was justified, that claims for compensation for excessive length of proceedings had to be heard within reasonable time, if necessary following special rules, that compensation had to be reasonable in comparison to similar cases and that there was a presumption that excessive length of proceedings caused non-pecuniary damages, and finally that compensation had to be paid promptly.[105] If, on the other hand, the situation underlying the systemic problem proves to be very complex, the Court has shown to be reluctant of taking a decision and refers the case to the Committee of Ministers which "is better placed and equipped to monitor the necessary reforms to be adopted".[106]

Some of the most complex cases currently under the Court's scrutiny concern the Chechen Conflict (1999–2009). The ECtHR has already decided more than 150 cases presenting human rights violations caused by Russian authorities during the conflict, concerning principally inhuman treatments, forced disappearances by Russian forces, violations of the right to life and inexistence of an effective domestic remedy.[107] Although these cases show all elements to qualify as pilot judgments, the Court had abstained from applying the instrument for a long time. It had first chosen to indicate, in a sort of *obiter dictum*, very specific guidelines for effective investigations in cases that imply the violation of Article 2 of the ECHR, which finally amount to a sort of general reparation measure for the pre-

[104] *Scordino v. Italy (No. 1)* [GC], ECtHR, no. 36813/97, 29 March 2006, 2006-V, para. 240.

[105] *Finger v. Bulgaria*, ECtHR, no. 37346/05, 10 May 2011, para. 130.

[106] *Burdov v. Russia (No. 2)*, ECtHR, no. 33509/04, 15 January 2009, para. 137.

[107] See the list in the Committee of Ministers's document CM/Del/OJ/DH(2011)1120list21 of 17 June 2011.

vention of future violations.[108] Despite these indications, Russia remained reluctant to conduct effective investigations into the unlawful killings and forced disappearances. As the Committee of Ministers's efforts to make Russia comply with its obligations emanating from the judgments were to no avail, the Court finally decided to apply Article 46 of the ECHR to condemn the non-compliance with its judgments and the Committee's measures by the Russian authorities and to underline that effective investigations were to be conducted by the Russian state.[109] After another interim report prepared by the Execution Department, the Court finally recognized the systemic character of several of the violations committed in relation to the Chechen Conflict.[110] Given the complexity of the situation, it however chose a different approach than the one described in *Maria Atanasiu and others v. Romania*. Combining its past judgments on this complex of cases as well as other reports by CoE organs and NGOs, it identified the situation of the victim's families and the effectiveness of investigations as the most urgent problems.[111] Within both complexes it identified more specific issues on which the state should concentrate its activities.[112] Then, however, it did not order the state to take any specific action but held that

> [g]iven their wide-ranging scope, the nature of the violations concerned and the pressing need to remedy them, it would appear necessary that a comprehensive and time-bound strategy to address the problems enumerated above [...] is prepared by the Respondent State

[108] *Bazorkina v. Russia*, ECtHR, no. 69481/01, 27 July 2006, paras. 117–119; this procedure has been baptized "quasi-pilot judgment" and was applied in several other cases, too. See further examples at Sitaropoulos, "Implementation of ECtHR judgments", 1 *ESIL-CPS* 1 (2011), 20, fn. 45.

[109] *Abuyeva et al. v. Russia*, ECtHR, no. 27065/05, 2 December 2010, paras. 235ff.; Leach, "Redress and implementation in the Chechen cases", *EHRAC Bulletin* 15 (2011). The execution of the Chechnya judgments will be detailed in section 9.1.1.2.2 *infra*.

[110] *Aslakhanova et al. v. Russia*, ECtHR, nos. 2944/06 et al., 18 December 2012, para. 217.

[111] It becomes evident here that the ECtHR applies a notion of "victim" that is different from that of the IACtHR. While in the IACtHR's jurisprudence, relatives of disappeared persons are considered victims, the ECtHR treats them as "the victims' families".

[112] *Aslakhanova et al. v. Russia*, ECtHR, nos. 2944/06 et al., 18 December 2012, paras. 222ff.

> without delay and submitted to the Committee of Ministers for the supervision of its implementation.[113]

Given the gravity of the underlying violations, the Court, for the first time, did not adjourn similar other cases pending before it, thus maintaining additional pressure on the state.[114]

The pilot judgment procedure was finally formalized with the entry into force of Rule 61 of the Rules of the ECtHR on 21 February 2011. According to this rule the pilot judgment procedure is not bound to a minimum number of similar cases pending before the Court but can be applied in any case of a "structural or systemic problem or a similar dysfunction which has given or may give rise to similar applications". This means that the Court may hand down a pilot judgment even if no other similar cases are pending yet but it must be feared that such cases will occur. The Court furthermore does not decide alone if such a situation is given but takes into consideration the points of view of the parties to the case on the existence of such a problem and on the suitability of the application in the specific case. The pilot judgment procedure may be triggered by the Court or by request of any one or both of the parties. Upon deciding the application of the pilot judgment procedure, the case is immediately given priority. As a result of the procedure, Rule 61(3) of the Rules of the ECtHR prescribes the identification of the nature of the problem and the remedial measures the state is required to take by virtue of the operative provisions of the judgment. There should hence no longer occur cases in which the Court identifies a systemic problem and a remedy but, for no evident reason, does not include this remedy into the operative paragraphs of the judgment. The remainder of the Rules coincides with the practice the Court has developed, in particular concerning the definition of a deadline in which the State has to adopt the measures, adjourning similar pending cases, and the fact that an eventual friendly-settlement agreement must contain an obligation by the state to comply with the general measures ordered by the Court. Rule 61(8) of the Rules of the ECtHR concerns the consequences if a state does not implement the general measures ordered by the Court. This situation had already

[113] Ibid., para. 238.
[114] Ibid., para. 239.

occurred in a decision of other "Bug River claimants". In this decision, the Court had stated that in case of non-compliance it would have to resume the examination of the case.[115] This has now become the general procedure. Finally, the Rule states that other CoE organs shall be informed about the initiation of a pilot judgment procedure and that such procedures, the adoption of judgments and execution, and their closure shall be published on the website.

5.3 Conditions of Compliance

Traditionally the Court did not establish conditions for compliance by the state such as deadlines. Only since *Moreira de Azevedo v. Portugal* in 1991 does the Court set a three months deadline for the state to pay the awarded sum of money to the applicant.[116] This deadline is since then a constant part of the Court's jurisprudence and has entered (without setting a specific number of months) into Rule 75(3) of the Rules of the ECtHR. After the deadline has expired, the state has to pay the applicant interests equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.[117] Just satisfaction usually has to be paid directly to the applicant. Nonetheless, in a recent judgment concerning expelled migrants who had made their claims to the Court through lawyers in Italy while they were in refugee camps in Libya, the Court ordered payment to be made to the applicants' lawyers who should act as fiduciaries. Although this solution seems attractive as a quick and uncomplicated way to pay compensation to unreachable applicants, the lawyers in the case faced serious difficulties to maintain contact with the victims due to the fact that they were returned to Libya and moved from there to other countries. At the moment of the judgment, the lawyers were in contact only with six of the originally 25 applicants (two had died in the

[115] *E.G. v. Poland* (dec.), ECtHR, no. 50425/99, 23 September 2008, para. 28.

[116] *Moreira de Azevedo v. Portugal* (Article 50), ECtHR, no. 11296/84, 28 August 1991, Series A no. 208-C, oper. para. 1.

[117] See e.g. *Broniowski v. Poland* [GC], ECtHR, no. 31443/96, 22 June 2004, 2004-V, oper. para. 6(c).

meantime).[118] Italy even challenged the validity of the powers of attorney on the basis that the difficulties to communicate with the applicants had made it impossible for their lawyers to establish their identities and obtain all the signatures required.[119] In this case the Court transferred the responsibility of paying the satisfaction to the victims onto the lawyers while it would have been more consistent to order the state to deposit the money in a bank account ready for the victims to claim it (such as the IACtHR does), and order Italy, under the supervision of the Committee, to take all necessary steps to locate the victims and ensure that they can effectively claim the payment. Italy obviously is in a far better position than the lawyers to reach this goal.

In pilot judgment cases, the Court has set deadlines between six and twelve months for the state to implement the general measures required by the Court to prevent repetition of the violation. If more specific measures, such as issuing government bonds and payments, are to be achieved, the deadline was set to six months,[120] while more complex measures such as legal reforms were granted twelve months to be completed.[121]

Nevertheless, no punitive measures are ordered in the judgment if the state fails to comply with these general measures within the stipulated deadline. The only consequence with respect of the Court is that adjourned similar cases will be reopened and the execution of each case put again into the hands of the Committee of Ministers.[122]

[118] *Hirsi Jamaa and others v. Italy* [GC], ECtHR, no. 27765/09, 23 February 2012, paras. 15–17.

[119] Ibid., paras. 45ff.

[120] E.g. *Suljagić v. Bosnia and Herzegovina*, ECtHR, no. 27912/02, 11 March 2009, oper. para. 4.

[121] E.g. *Finger v. Bulgaria*, ECtHR, no. 37346/05, 10 May 2011, oper. para. 5; *Rumpf v. Germany*, ECtHR, no. 46344/06, 2 September 2010, oper. para. 5.

[122] Rule 61(8) of the Rules of the ECtHR; *E.G. v. Poland* (dec.), ECtHR, no. 50425/99, 23 September 2008, para. 28.

6 The IACtHR's Reparation Practice

The ACHR provides the IACtHR with a much broader competence in terms of reparation than that given to the ECtHR. The IACtHR's competence comprises ensuring the enjoyment of the victims' right or freedom that was violated, remediation, and payment of fair compensation. Unlike under the ECHR, the IACtHR's compensatory competence is not subsidiary to the possibility to obtain reparation under domestic law.[1]

It is unclear why the states party adopted this broad approach to reparation in Article 63(1) of the ACHR, taking into account that deliberations on this norm were at first based on drafts by the Inter-American Council of Jurists, the Government of Chile and the Government of Uruguay, which had all been oriented by former Article 50 of the ECHR (current Article 41), and therefore limited the Court's compensatory powers to just satisfaction.[2] Nevertheless, the draft elaborated by the IACommHR, which was based on the three aforementioned drafts, contemplated a proper power for the IACtHR to award compensations.[3] There is no indication as to why the Commission modified the original proposals.[4] The Commission's draft was commented in particular by Guatemala which favoured further strengthening of the Court's competence, including the possibility to order remedies for the consequences of the violation and guarantees for the future enjoyment of the affected right or freedom.[5] Committee II, the drafting committee, accepted

[1] *Velásquez Rodríguez v. Honduras* (Reparations and Costs), IACtHR, 21 July 1989, Series C no. 7, para. 30. See also García Ramírez, "Las Reparaciones en el sistema interamericano de protección de los derechos humanos", p. 130.

[2] OAS, "Antecedentes, Convocatoria, Sede y Fecha de la Conferencia Especializada Interamericana sobre Derechos Humanos", p. 1.

[3] OAS, "Resolución aprobada por el Consejo de la OEA en la sesión celebrada el 2 de octubre de 1968", p. 31.

[4] Shelton, *Remedies in International Human Rights Law, ed. 2*, p. 217.

[5] OAS, "Enmiendas al Proyecto de Convención Interamericana sobre Protección de Derechos Humanos, Presentadas por la Delegación de Guatemala", p. 119.

the Guatemalan proposals and the Plenary adopted Article 63(1) of the ACHR in its current form.[6]

Despite its late start in comparison to the ECtHR, the IACtHR has developed a vivid practice of reparation, with a steep rise in the number of decisions rendered since 2001.[7]

Unlike the ECtHR, the IACtHR does not consider the principles of national law as the primary source of interpretation to determine the scope, characteristics and beneficiaries of compensations. The terms of Article 63(1) of the ACHR are entirely governed by international law.[8] This manifests a generally more limited importance of national legal orders in the inter-American system.[9] The Court leaves the determination of the amounts to national agencies under national procedures only in cases which entail restitution of salaries,

[6]Shelton, *Remedies in International Human Rights Law, ed. 2*, p. 217.

[7]Cassel, "The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights", p. 191. Compilations of decisions and measures of reparation can be consulted at Nash Rojas, *Las Reparaciones ante la Corte Interamericana de Derechos Humanos (1988–2007)*, pp. 95ff., Cassel, "The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights", pp. 217ff., and Shelton, *Remedies in International Human Rights Law, ed. 2*, pp. 468ff.

[8]Pinto, "La réparation dans le système interaméricain des droits de l'homme. A propos de l'arrêt Aloeboetoe", *AFDI* 42 (1996), p. 740; Pasqualucci, *The Practice and Procedure of the IACtHR*, p. 233; Faúndez Ledesma, *The Inter-American System for the Protection of Human Rights*, p. 754; Caflisch and Cançado Trindade, "Les conventions américaine et européenne des droits de l'homme et le droit international général", *RGDIP* (2004), pp. 40f.; fundamental: *Velásquez Rodríguez v. Honduras* (Reparations and Costs), IACtHR, 21 July 1989, Series C no. 7, paras. 25ff., referring to *Factory at Chorzów* (Jurisdiction), PCIJ, 26 July 1927, Series A no. 9, p. 21 and *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion), ICJ, 11 April 1949, ICJ Reports 1949, p. 174, p. 184; furthermore *Aloeboetoe et al. v. Suriname* (Reparations and Costs), IACtHR, 10 September 1993, Series C no. 15, para. 44.

[9]See in more detail: Harris, "Regional Protection of Human Rights: The Inter-American Achievement", pp. 11f. and García Ramírez, "Conference: Advocacy before Regional Human Rights Bodies: A Cross-Regional Agenda", *Am. U. Int'l L. Rev.* 59 (2009), p. 189.

pensions, dividends or corporate earnings due under national law.[10] When the identity of a victim could not be established with the necessary precision to award reparation to next of kin, the Court has likewise ordered the identification to be resolved under domestic law.[11] It applied the same solution when identifying family relations according to indigenous customs.[12] Nevertheless, as in all cases, the Court decides to monitor also the compliance with the procedures under domestic law and only closes the case when all of its orders have been fulfilled.[13]

Although Article 63(1) of the ACHR only names three of the five ways of reparation known under international law, namely ensuring the enjoyment of the violated right or freedom, remedies, and fair compensation, the Court makes broad use of its remedial powers.[14] Unlike the ECtHR, it has always shown to be open to new forms of reparation. Particularly since 1998 its remedial orders do not only oblige states to pay monetary damages to the victim but tend to entail a wide array of practical measures to obtain, in the best possible way, *restitutio in integrum*. In fact, the Court today applies all forms of remedies mentioned in the GA Basic Principles on Reparation, as will be detailed in this section.[15] It constantly holds that reparation primarily consists of restitution to the *status quo ante* and

[10] *Constitutional Court v. Peru* (Merits, Reparations and Costs), IACtHR, 31 January 2001, Series C no. 71, paras. 121 and 128; *Baena-Ricardo et al. v. Panama* (Merits, Reparations and Costs), IACtHR, 2 February 2001, Series C no. 72, para. 214.6; *Ivcher-Bronstein v. Peru* (Merits, Reparations and Costs), IACtHR, 6 February 2001, Series C no. 74, para. 191.8; *Cesti Hurtado v. Peru* (Reparations and Costs), IACtHR, 31 May 2001, Series C no. 78, para. 46; *"Five Pensioners" v. Peru* (Merits, Reparations and Costs), IACtHR, 28 February 2003, Series C no. 98, para. 187.5.

[11] *Caballero Delgado v. Colombia* (Reparations and Costs), IACtHR, 29 January 1997, Series C no. 31, para. 45.

[12] *Aloeboetoe et al. v. Suriname* (Reparations and Costs), IACtHR, 10 September 1993, Series C no. 15, para. 62.

[13] See the last operative paragraph of all the aforementioned cases.

[14] According to García Ramírez, "Conference: Advocacy before Regional Human Rights Bodies: A Cross-Regional Agenda", *Am. U. Int'l L. Rev.* 59 (2009), p. 190, the IACtHR can order at least 30 kinds of reparation.

[15] Cassel, "The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights", p. 193 with further references and Reisman, "Compensation for Human Rights Violations" in more detail on the Court's reparation practice.

only secondarily in compensation when restitution is impossible. A recurring phrase in almost all sentences is:

> Reparation of harm brought about by the violation of an international obligation consists in full restitution (*restitutio in integrum*), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm.[16]

In the *Aloeboetoe et al. v. Suriname* (Reparations and Costs) decision, the Court nevertheless recognized that *restitutio in integrum* may not always be "possible, sufficient or appropriate" as reparation.[17] In cases that include the disappearance or loss of life of a victim the state must therefore take other measures to repair, to the extent possible, the consequences of the violations and pay compensations.

Although the denomination of the different forms of reparation awarded is not consistent throughout the jurisprudential history of the Court, one can generally identify three topics under which reparation is granted: reparation for pecuniary damages, for non-pecuniary damages, and "other forms of reparation" which contain all measures that do not consist in compensation payable in money. Pecuniary and non-pecuniary damages were originally named "patrimonial and non-patrimonial damages", but this concept met criticism within the Court. In particular Judges Cançado Trindade and Abreu-Burelli opposed to the application of reparation concepts derived from civil law, which, in their words, were strongly determined by a patrimonial content and did not pay due respect to the particularity of human rights cases, whose foremost concern had to be the human person as a spiritual being. Consequently, reparation in such cases must not be determined solely by the relation of the person to its patrimonial goods or its capacities to work and to produce income. Human rights law must moreover respect the inte-

[16] *Velásquez Rodríguez v. Honduras* (Reparations and Costs), IACtHR, 21 July 1989, Series C no. 7, para. 26.

[17] *Aloeboetoe et al. v. Suriname* (Reparations and Costs), IACtHR, 10 September 1993, Series C no. 15, para. 49.

grality of the human person.[18] Today, the Court no longer refers to "patrimonial and non-patrimonial" damages.[19] When determining the kind of reparation to award, the Court takes into account the particularities of each case and each violation inflicted.[20] Nevertheless, some measures ordered as reparation are not reparation in the pure sense, but can better be qualified as measures with "reparatory effects", because strictly speaking they are aimed at the compliance of the State with its human rights obligations in more general terms. Such measures are e.g. the performance of proper investigations.[21]

6.1 Enjoyment of the Violated Right or Freedom

While Articles 41 and 46 of the ECHR, at least according to the current interpretation by the ECtHR, give restitutive powers to the Court only in exceptional cases, restitution is the foremost duty of the state in case of a breach of right and is ordered as such by the IACtHR under Article 63(1) of the ACHR. The Court, regardless of the discussion about whether restitution is a reparatory measure or not, orders restitution as a form of reparation.[22] Its restitutive power may be seen as a form of injunctive relief,[23] that has to be applied in an obligatory way ("*shall rule* that the injured party be ensured the enjoyment [...]" [emphasis by the author]). It is only limited by feasibility, i.e. restitution cannot be awarded in cases of death or disap-

[18] *Loayza Tamayo v. Peru* (Reparations and Costs), IACtHR, 27 November 1998, Series C no. 42, Joint Concurring Opinion of Judges Cançado Trindade and Abreu-Burelli.

[19] See *"Juvenile Reeducation Institute" v. Paraguay* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, 2 September 2004, Series C no. 112, para. 261. Faúndez Ledesma, *The Inter-American System for the Protection of Human Rights*, p. 779.

[20] *Garrido and Baigorria v. Argentina* (Reparations and Costs), IACtHR, 27 August 1998, Series C no. 39, para. 41.

[21] See hereon: Nash Rojas, *Las Reparaciones ante la Corte Interamericana de Derechos Humanos (1988–2007)*, pp. 87ff.

[22] See page 68. E.g. in *Loayza Tamayo v. Peru* (Merits), IACtHR, 17 September 1997, Series C no. 33, paras. 84 and 85, the Court ordered the liberation of the victim and then continued to deliberate on "other forms of reparation".

[23] Reisman, "Compensation for Human Rights Violations", p. 73.

pearance if the victim has most likely deceased.[24] Restitution mainly consists of the cessation of a continuing human rights violation and the re-establishment of the victim to the *status quo ante*. It has been ordered in particular in the form of immediate liberation[25] or the right to appeal a judgment in cases of illegal detention or violation of the rules of due process.[26] If judicial processes do not comply with the requirements of the ACHR they may not be executed, be it in the form of not executing convicted criminals,[27] or not charging court costs and interests.[28] In one case the Court even declared the nullity of a process and ordered its repetition, arguing that procedures that have "serious defects that strip them of the efficacy they must have under normal circumstances" cannot stand and a new judgment had to be handed down.[29] Due to the nullity of the original process, the state had to organize a new process in reasonable time. In less grave cases, states were ordered to adopt, within one year from the date of the judgment, all necessary judicial and administrative measures to leave the original criminal judgment without effect and guarantee that the victim would not be subject to another process of any kind for the same facts.[30] In another constellation the Court has or-

[24] García Ramírez, "Las Reparaciones en el sistema interamericano de protección de los derechos humanos", p. 143; Article 35 of the ILC Draft Articles; see also for the case of genocide *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ, 26 February 2007, ICJ Reports 2007, p. 43, p. 164.

[25] *Loayza Tamayo v. Peru* (Merits), IACtHR, 17 September 1997, Series C no. 33, para. 84; hereon: Acevedo, "La Decisión de la Corte Interamericana de Derechos Humanos sobre Enjuiciamiento Penal Múltiple (Non Bis in Idem) en el Caso Loayza Tamayo".

[26] *Barreto Leiva v. Venezuela* (Merits, Reparations and Costs), IACtHR, 17 November 2009, Series C no. 206, paras. 128ff.

[27] *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* (Merits, Reparations and Costs), IACtHR, 21 June 2002, Series C no. 94, para. 214.

[28] *Cantos v. Argentina* (Merits, Reparations and Costs), IACtHR, 28 November 2002, Series C no. 97, para. 70.1.

[29] *Castillo-Petruzzi et al. v. Peru* (Merits, Reparations and Costs), IACtHR, 30 May 1999, Series C no. 52, para. 219.

[30] *Suárez-Rosero v. Ecuador* (Reparations and Costs), IACtHR, 20 January 1999, Series C no. 44, para. 76; *Usón-Ramírez v. Venezuela* (Merits, Reparations and Costs), IACtHR, 20 November 2009, Series C no. 207, para. 213.

dered the execution of a judgment of *habeas corpus* in favour of the victim.[31]

Denial of justice for the victim is a violation of Articles 25(1) and 8(1) of the ACHR, which is, in criminally relevant cases, repaired by the conduct of a proper investigation and prosecution of the perpetrators, otherwise by granting the victim a due process before a competent judge. Although the Court calls the investigation of facts and judgment of perpetrators a "remedy",[32] it is technically a restitutive measure which also has remedial functions.

In other constellations restitution may take the form of reintegration of the victim into the former job and restitution for lost salaries and benefits,[33] the adoption of all necessary steps so that an exiled victim can return to the home country,[34] or the demarcation and titling of lands for indigenous communities.[35]

The right to restitution corresponds only to the victims personally or their heirs. Thus, in the case of the assassination of a member of the legislative branch, which occurred during an alleged plan of annihilation of party members and the destruction of a political party, the victim's representatives asked the Court to order the restoration of the victim's seat in Parliament, to reactivate the political party's legal status and to include it among recognized minorities granting it a special electoral circumscription. These demands were denied by the Court because, unlike in similar cases, the victim could not be reinstated and occupy the lost seat. Furthermore, the political party did not figure among the victims of the case so that no measures could be adopted on its or its members' behalf.[36]

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[31] *Cesti Hurtado v. Peru* (Merits), IACtHR, 29 September 1999, Series C no. 56, para. 193.

[32] *"Las Dos Erres" Massacre v. Guatemala* (Merits, Reparations and Costs), IACtHR, 24 November 2009, Series C no. 211, para. 231.

[33] *Constitutional Court v. Peru* (Merits, Reparations and Costs), IACtHR, 31 January 2001, Series C no. 71, para. 120; *Baena-Ricardo et al. v. Panama* (Merits, Reparations and Costs), IACtHR, 2 February 2001, Series C no. 72, para. 203.

[34] *19 Merchants (Tradesmen) v. Colombia* (Merits, Reparations and Costs), IACtHR, 5 July 2004, Series C no. 109, para. 279.

[35] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Merits, Reparations and Costs), IACtHR, 31 August 2001, Series C no. 79, para. 164.

[36] *Manuel Cepeda-Vargas v. Colombia*, IACtHR, 26 May 2010, Series C no. 213, paras. 239–241.

6.2 Remedial Measures

According to Article 63(1) of the ACHR, the Court "shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach [...] shall be remedied". Remedial measures take the second place to restitution and the Court is not obliged to order them. Nevertheless, the Court's practice of reparation was initially focused neither on restitution nor on remedial justice but on compensations. In its first decisions it completely refrained from ordering the state to remedy the consequences of violations, recurring exclusively to monetary compensation. In the *Honduran cases* it applied an argumentation more similar to that of the ECtHR, turning down demands by the IACommHR to order investigations of the facts related to the disappearance of a person or punishment of those responsible, because these measures were part of the reparation and not the indemnity in the sense of Article 63(1) of the ACHR. It referred to the judgment on the merits where respective duties of the Honduran government had already been mentioned and declared that these obligations continued until they were fully carried out.[37] Reparation going beyond monetary compensation were ordered for the first time in *Aloeboetoe et al. v. Suriname*, where the Court held that Suriname had to reopen a school so that the children of the killed victims could receive education.[38]

Today, the Court construes its remedial power in a much broader way. Although it has repeatedly decided that the declaratory part of the judgment may *per se* constitute a form of reparation for moral damages,[39] many decisions contain direct remedial orders. Besides awarding remedies for injuries suffered by the victim because of the violation, the Court orders states to grant access to justice, investigate the facts of the violation, bring perpetrators to court and take other remedial measures directed at preventing the repetition of similar cases, such as amendments of domestic laws or symbolic

[37] *Velásquez Rodríguez v. Honduras* (Reparations and Costs), IACtHR, 21 July 1989, Series C no. 7, paras. 32–35; *Godínez Cruz v. Honduras* (Reparations and Costs), IACtHR, 21 July 1989, Series C no. 8, paras. 30–33.

[38] *Aloeboetoe et al. v. Suriname* (Reparations and Costs), IACtHR, 10 September 1993, Series C no. 15, para. 96.

[39] E.g. *El Amparo v. Venezuela* (Reparations and Costs), IACtHR, 14 September 1996, Series C no. 28, para. 35, referring in particular to the ECtHR's jurisprudence.

measures. It is of particular interest to the Court that measures have public effects and "disseminate a message of official reproach for the violations of the human rights committed, as well as [...] prevent future violations as those dealt with in the instant case".[40]

Based on Article 2 of the ACHR, the Court orders legal and judicial measures to ensure non-repetition of similar violations.[41] Failure to investigate the facts and identify, prosecute and punish the responsible persons is a recurring fault of the states whose responsibility for human rights violations has been established by the Court. Beyond the restitutive effect, effective investigations also have a deterring effect on future violators.[42]

The case of *Manuel Cepeda-Vargas v. Colombia* provides a good example of remedial measures ordered by the Court. In this case, the IACtHR established the state's responsibility for the extrajudicial execution of a Colombian Senator and leader of the Colombian Communist Party and Patriotic Union, brought before it by the IACommHR as an exemplary case in a series of politically motivated murders against these political parties during the 1990s. The Court found that the state had not investigated the case with due diligence. It had failed to recognize the complexity of the extrajudicial executions under participation of state agents and paramilitary groups and had not investigated the threats taking into account an alleged extermination plan, resulting in the impunity of the victim's death. The state was consequently ordered to take all necessary measures according to its domestic laws to efficiently continue ongoing investigations and open new ones where necessary. Apparently unconvinced of the state's ability or willingness to take the pertinent measures, the Court further indicated some criteria to be taken into account during the investigations, such as the determination of the "intellectual authors", establishment of effective cooperation between the investigating state organs and institutions, removal of obstacles such as amnesties or arguments such as *non*

[40] *García-Asto and Ramírez-Rojas v. Peru* (Merits, Reparations and Costs), IACtHR, 25 November 2005, Series C no. 137, para. 276.

[41] Pasqualucci, *The Practice and Procedure of the IACtHR*, p. 245.

[42] Cassel, "The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights", p. 203, "The Inter-American Court of Human Rights", pp. 153f.

bis in idem or *res judicata*, adoption of security measures for investigators and victims, and the guarantee that eventual extraditions of paramilitaries would not interfere with the investigations. Furthermore, the state was ordered to protect the victim's relatives against threats.[43]

In other cases the Court ordered, among others, investigations to be conducted by ordinary criminal courts instead of military justice[44] or extradition procedures to be furthered.[45] It also confirmed a rule of general international law according to which in case a crime was not penalized in domestic law at the moment of its commission but was recognized as a crime against humanity under international law, the state had a *ius cogens* obligation to investigate the crime and consequently cannot apply amnesty laws.[46]

Beyond the victim's right to rehabilitation through the publication of investigation results, the Court had at first not acknowledged a general right of the public to know the truth.[47] This position changed in the *Caracazo v. Venezuela* decision where the publication of the investigation results was ordered "for Venezuelan society to know the truth".[48]

Furthermore, as a means of guaranteeing non-repetition of similar crimes, the Court has ordered in several cases since 1998 the adoption of laws or their reform if they constitute *per se* a violation of Convention guarantees or facilitate their commission, among others the adoption of a law on the sanctioning of forced disap-

[43] *Manuel Cepeda-Vargas v. Colombia*, IACtHR, 26 May 2010, Series C no. 213, paras. 214–218; similar criteria for the investigations are commonly established in other cases, see e.g. *"Cotton Field" v. Mexico* (Merits, Reparations and Costs), IACtHR, 16 November 2009, Series C no. 205, para. 455. Cf. also the similar indications by the ECtHR in *Bazorkina v. Russia*, paras. 117–119, *supra* p. 93.

[44] *19 Merchants (Tradesmen) v. Colombia* (Merits, Reparations and Costs), IACtHR, 5 July 2004, Series C no. 109, paras. 256, 263.

[45] *Goiburú et al. v. Paraguay* (Merits, Reparations and Costs), IACtHR, 22 September 2006, Series C no. 153, para. 166.

[46] *Almonacid-Arellano et al. v. Chile* (Merits, Reparations and Costs), IACtHR, 26 September 2006, Series C no. 154, paras. 152f.

[47] *Bámaca-Velásquez v. Guatemala* (Merits), IACtHR, 25 November 2000, Series C no. 70, para. 201; *Barrios Altos v. Peru* (Merits), IACtHR, 14 March 2001, Series C no. 75, operative para. 5; Pasqualucci, *The Practice and Procedure of the IACtHR*, p. 243.

[48] *Caracazo v. Venezuela* (Reparations and Costs), IACtHR, 29 August 2002, Series C no. 95, para. 118.

pearances of persons,[49] children's rights,[50] indigenous land rights,[51] or the expedition of statements of absence or presumed death and the installation of genetic information systems in relation to disappeared persons.[52] It indicated that

> the general obligations of the State, established in Article 2 of the Convention, include the adoption of measures to suppress laws and practices of any kind that imply a violation of the guarantees established in the Convention, and also the adoption of laws and the implementation of practices leading to the effective observance of the said guarantees.[53]

In former cases the Court had ordered legislative reforms based on Article 2 of the ACHR without establishing a violation of this article in the decision on the merits,[54] a practice it no longer maintains.[55] In cases of illegal detentions, the Court, based on Article 25 in relation with Article 8(1) of the ACHR, has also ordered the adoption of proceedings that grant every person effective and prompt access to justice.[56] More specifically, in the *Cesti Hurtado v. Peru* case, Peru was obliged "to ensure and make effect[*sic*] the recourses relating to judicial guarantees for the protection of fundamental rights and

[49] *Trujillo-Oroza v. Bolivia* (Reparations and Costs), IACtHR, 27 February 2002, Series C no. 92, para. 98.

[50] *"Street Children" v. Guatemala* (Reparations and Costs), IACtHR, 26 May 2001, Series C no. 77, para. 98.

[51] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Merits, Reparations and Costs), IACtHR, 31 August 2001, Series C no. 79, para. 164.

[52] *Molina-Theissen v. Guatemala* (Reparations and Costs), IACtHR, 3 July 2004, Series C no. 108, para. 91; see Cassel, "The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights", p. 205 for further examples.

[53] *"The Last Temptation of Christ" v. Chile* (Merits, Reparations and Costs), IACtHR, 5 February 2001, Series C no. 73, para. 85, cited by *Trujillo-Oroza v. Bolivia* (Reparations and Costs), IACtHR, 27 February 2002, Series C no. 92, para. 96.

[54] E.g. *"Street Children" v. Guatemala* (Reparations and Costs), IACtHR, 26 May 2001, Series C no. 77, para. 98.

[55] *Chitay-Nech et al. v. Guatemala* (Merits, Reparations and Costs), IACtHR, 25 May 2010, Series C no. 212, para. 260.

[56] *Loayza Tamayo v. Peru* (Reparations and Costs), IACtHR, 27 November 1998, Series C no. 42, para. 169.

freedoms, which include the procedures of *habeas corpus* and *amparo*".[57]

The Court nevertheless does not order specific changes to laws, leaving the states leeway to adopt appropriate measures to obtain conformity with the ACHR in the terms of the judgment.[58] Depending on the circumstances of the case, the Court may also refrain from ordering legislative reform, indicating that a law has to be construed in accordance with the ACHR.[59]

The IACtHR has also declared laws, in particular those establishing amnesties for human rights violations, without legal effects. As these declarations have immediate effect, they are consequently not made as part of the reparation phase but in the judgment on the merits.[60] At first, and despite strong criticism by Judge Cançado Trindade, the Court rejected to pronounce itself on the conformity of laws with the ACHR that were not applied in the case under examination.[61] In a later case though it ruled that an article of an Ecuadorian law violated Article 2 of the ACHR "whether or not it was enforced in the instant case", but did not declare the law void.[62] This step was taken in 2001, the first time ever an international tribunal quashed a national law.[63] As an effect of this declaration, in a later case against Peru, the Court decided that the

[57] *Cesti Hurtado v. Peru* (Reparations and Costs), IACtHR, 31 May 2001, Series C no. 78, para. 67.

[58] *"Street Children" v. Guatemala* (Reparations and Costs), IACtHR, 26 May 2001, Series C no. 77, para. 98.

[59] *Radilla-Pacheco v. Mexico* (Merits, Reparations and Costs), IACtHR, 23 November 2009, Series C no. 209, paras. 340–341.

[60] *Barrios Altos v. Peru* (Merits), IACtHR, 14 March 2001, Series C no. 75, para. 44; *Almonacid-Arellano et al. v. Chile* (Merits, Reparations and Costs), IACtHR, 26 September 2006, Series C no. 154, para. 119.

[61] *El Amparo v. Venezuela* (Reparations and Costs), IACtHR, 14 September 1996, Series C no. 28, paras. 59–60, citing *International Responsibility for Promulgation and Enforcement of Laws*, IACtHR, Advisory Opinion OC-14/94, 9 December 1994, Series A no. 14, para. 49; and dissenting opinion of Judge Cançado Trindade to the same case.

[62] *Suárez-Rosero v. Ecuador* (Merits), IACtHR, 12 November 1997, Series C no. 35, para. 98. The law was declared unconstitutional by the Ecuadorian Constitutional Court afterwards, so that no further measures had to be ordered in the reparation decision: *Suárez-Rosero v. Ecuador* (Reparations and Costs), IACtHR, 20 January 1999, Series C no. 44, para. 83.

[63] *Barrios Altos v. Peru* (Merits), IACtHR, 14 March 2001, Series C no. 75, paras. 41ff.

continuing application of the law had violated the Convention and awarded monetary reparation and psychological support to victims of acts of violence whose perpetrators had not been judged.[64] Jurisprudence in this area has developed insofar as the Court in the *Almonacid-Arellano et al. v. Chile* decision not only declared a decree establishing an amnesty void but also ordered, as a consequence of the voidness, in the reparation part of the judgment that Chile had to ensure that the decree would not continue to hinder investigations in the current and other similar cases.[65] It remains unclear why the Court felt that it had to make this additional order, which in fact should be considered an evident consequence of the decree's nullity. The Court reasons that amnesty laws shield perpetrators of crimes violating *ius cogens* rights and violate the survivors' and their families' right to a fair trial and judicial protection.[66] It derives its power to declare a law void from Article 2 of the ACHR and Article 27 of the Vienna Treaty Convention. However, none of these norms expressly authorizes the Court to directly interfere with the national legal order. Article 2 of the ACHR orders the states to adopt "in accordance with their constitutional processes" the measures necessary to give effect to the rights and freedoms of the Convention. Only under a strict monist understanding could the inclusion of the IACtHR into the domestic constitutional order be supposed. This though depends on each state's constitution. Article 27 of the Vienna Treaty Convention states that a domestic law cannot justify non-compliance with an international obligation. This does not mean that the contravening law would be without effects or could even be annulled by an international organ. The Court's competence to declare domestic laws without legal effects must therefore be doubted. It has nevertheless been accepted by tribunals in different states party to the ACHR.[67]

[64] *La Cantuta v. Peru* (Merits, Reparations and Costs), IACtHR, 29 November 2006, Series C no. 162, paras. 188f.

[65] *Almonacid-Arellano et al. v. Chile* (Merits, Reparations and Costs), IACtHR, 26 September 2006, Series C no. 154, para. 145.

[66] Binder, "The Prohibition of Amnesties by the Inter-American Court of Human Rights", 5 *G.L.J.* 12 (2011), p. 1211.

[67] Ibid., pp. 1222ff.

Besides legal amendments the Court has ordered the adoption of administrative measures. In a case involving indigenous land rights detailed step-by-step indications were handed down to the state on how the community's land was to be provided with basic services such as drinking water, medical and psycho-social care, care for pregnant women, food supply according to the community's habits, sanitation, and supplies for the local school, including the procedure to be adapted to determine the exact requirements, taking into account the community's needs. Other measures included the improvement of prison conditions,[68] implementation of a training programme for physicians working in arrest centres and official forensic institutes to provide them with technical and scientific know-how according to international standards,[69] human rights training for criminal court and law enforcement staff[70] and security forces.[71] In one case, the state was also obliged to establish a surveillance programme for the reparation measures adopted.[72]

Symbolic actions are another recurring measure to remedy human rights violations and prevent recidivism.[73] They have been ordered in a variety of ways, including public ceremonies where the state recognizes its responsibility or even apologizes for the facts, sometimes in presence of high representatives of the state,[74] production of a publication and a documentary on the life of the victim,[75] establishment of a university scholarship bearing the name of

[68] *Yvon Neptune v. Haiti* (Merits, Reparations and Costs), IACtHR, 6 May 2008, Series C no. 180, para. 183.

[69] *Gutiérrez-Soler v. Colombia* (Merits, Reparations and Costs), IACtHR, 12 September 2005, Series C no. 132, para. 110.

[70] Ibid., para. 106.

[71] *Mapiripán Massacre v. Colombia* (Merits, Reparations and Costs), IACtHR, 15 September 2005, Series C no. 134, paras. 316f.

[72] Ibid., para. 311.

[73] *Myrna Mack-Chang v. Guatemala* (Merits, Reparations and Costs), IACtHR, 25 November 2003, Series C no. 101, para. 285.

[74] *"Las Dos Erres" Massacre v. Guatemala* (Merits, Reparations and Costs), IACtHR, 24 November 2009, Series C no. 211, para. 262; *Barrios Altos v. Peru* (Reparations and Costs), IACtHR, 30 November 2001, Series C no. 87, para. 50.5(e); et al.

[75] *Manuel Cepeda-Vargas v. Colombia*, IACtHR, 26 May 2010, Series C no. 213, paras. 228–229; et al.

the victim,[76] naming of schools,[77] plazas, streets,[78] memorials,[79] or days[80] after the victims.

In many cases states also had to publish all or parts of the Court's judgment, including the operative part, in newspapers of national circulation, through official press releases,[81] or lately also on Internet sites,[82] if necessary translated into the language of the community the victims belonged to.[83]

When a victim had deceased, states have on several occasions been ordered to conduct a thorough search of their remains and procure for their burial at state expense,[84] taking into account particular burial rites of indigenous groups.[85] One state was even ordered to establish a national exhumations programme.[86]

In case of large-scale abductions of minors, states had to install internet sites where the contents of a database containing names, physical features and all other data relating to the children are published in accordance with the parents' agreement. Links to international websites and networks for the search of abducted minors had

[76] *Manuel Cepeda-Vargas v. Colombia*, IACtHR, 26 May 2010, Series C no. 213, para. 233; et al.

[77] E.g. *"Street Children" v. Guatemala* (Reparations and Costs), IACtHR, 26 May 2001, Series C no. 77, para. 103.

[78] *Myrna Mack-Chang v. Guatemala* (Merits, Reparations and Costs), IACtHR, 25 November 2003, Series C no. 101, para. 286.

[79] *Mapiripán Massacre v. Colombia* (Merits, Reparations and Costs), IACtHR, 15 September 2005, Series C no. 134, para. 315.

[80] *Serrano-Cruz Sisters v. El Salvador* (Merits, Reparations and Costs), IACtHR, 1 March 2005, Series C no. 120, para. 196.

[81] *Mapiripán Massacre v. Colombia* (Merits, Reparations and Costs), IACtHR, 15 September 2005, Series C no. 134, para. 318; *Caracazo v. Venezuela* (Reparations and Costs), IACtHR, 29 August 2002, Series C no. 95, para. 128.

[82] *Manuel Cepeda-Vargas v. Colombia*, IACtHR, 26 May 2010, Series C no. 213, para. 220.

[83] *Plan de Sánchez Massacre v. Guatemala* (Reparations and Costs), IACtHR, 19 November 2004, Series C no. 116, para. 102.

[84] *Caballero Delgado v. Colombia* (Reparations and Costs), IACtHR, 29 January 1997, Series C no. 31, para. 66.4; *19 Merchants (Tradesmen) v. Colombia* (Merits, Reparations and Costs), IACtHR, 5 July 2004, Series C no. 109, para. 295.6; et al.

[85] *Bámaca-Velásquez v. Guatemala* (Reparations and Costs), IACtHR, 22 February 2002, Series C no. 91, para. 81.

[86] Ibid., para. 83.

to be established to facilitate the reunification of families and the investigation of children's identities.[87]

Rehabilitation of the victim or its next of kin, apart from the aforementioned symbolic acts, may also take the form of free medical and psychological treatment,[88] educational programmes,[89] or a housing and development programme for members of a community whose village was destroyed during a massacre.[90]

6.3 Compensation

Monetary indemnification is, in the general theory of international law, the epitome of reparation. Apart from symbolic measures honoring the victim it is the most favourable way to grant the relatives of a deceased victim at least some kind of relieve for the loss suffered. But also for any other kind of damage that cannot be undone, like pain, exclusion due to false accusations or dishonouring, compensation can at least provide some satisfaction to victims and their relatives. As said García Ramírez: "It allows to compensate with a useful, universally appreciated good – money – the loss of or damage to a different good that cannot be replaced or recovered due to its own nature [our translation]".[91] Despite the vast measures awarded by the Court under the already discussed topics, compensation is a major concern to the victims. Many cases submitted to the Court usually involve the death or forced disappearance of, or the infliction of grave bodily harm to the victims. These damages can at best be partially compensated by other means of reparation. Consequently monetary compensation is essential. Economic loss adds

[87] *Serrano-Cruz Sisters v. El Salvador* (Merits, Reparations and Costs), IACtHR, 1 March 2005, Series C no. 120, paras. 189ff.; *"Las Dos Erres" Massacre v. Guatemala* (Merits, Reparations and Costs), IACtHR, 24 November 2009, Series C no. 211, paras. 271f.

[88] *19 Merchants (Tradesmen) v. Colombia* (Merits, Reparations and Costs), IACtHR, 5 July 2004, Series C no. 109, para. 278.

[89] *Cantoral-Benavides v. Peru* (Reparations and Costs), IACtHR, 3 December 2001, Series C no. 88, para. 80.

[90] *Plan de Sánchez Massacre v. Guatemala* (Reparations and Costs), IACtHR, 19 November 2004, Series C no. 116, paras. 105, 110.

[91] García Ramírez, "Las Reparaciones en el sistema interamericano de protección de los derechos humanos", p. 144.

to the grief and suffering caused by the disappearance of a provider for the family, missed opportunities due to torture or unjustified arrest, or the negation of the use of land due to illegal expropriation or occupation.

The Court has observed that compensation, in order to provide "just satisfaction", must be "in sufficiently broad terms in order to compensate, to the extent possible, for the loss suffered".[92] It must compensate indirect damages (*damnum emergens)*, loss of earning (*lucrum cessans*) and moral damages.[93] The possibility to award punitive damages was ruled out from the scope of application of Article 63(1) of the ACHR given that this type of damage exceeds the mere function of reparation.[94] It is insofar comparable to the notion of "just satisfaction" applied by the ECtHR.

Economic loss, which comprises the immediate reduction of economic possessions and the future reduction of possessions or economic possibilities, including lost salaries and other income, is awarded under the concept of pecuniary (also called material) damages, compensation for the moral consequences of the human rights violation as non-pecuniary (or immaterial) damages.[95]

Due to the complexity of the cases submitted to the Court, the exact determination of damages is almost impossible.[96] The Court has therefore determined a set of criteria according to which dam-

[92] *Velásquez Rodríguez v. Honduras* (Interpretation), IACtHR, 17 August 1990, Series C no. 9, para. 27.

[93] *Aloeboetoe et al. v. Suriname* (Reparations and Costs), IACtHR, 10 September 1993, Series C no. 15, para. 50.

[94] *Velásquez Rodríguez v. Honduras* (Reparations and Costs), IACtHR, 21 July 1989, Series C no. 7, para. 38; *Godínez Cruz v. Honduras* (Reparations and Costs), IACtHR, 21 July 1989, Series C no. 8, para. 36.

[95] García Ramírez, "Las Reparaciones en el sistema interamericano de protección de los derechos humanos", p. 145; *Aloeboetoe et al. v. Suriname* (Reparations and Costs), IACtHR, 10 September 1993, Series C no. 15, para. 50.

[96] An illustrative description of the difficulties to determine reparation for human rights violations has been given by Padilla for the case of the murdered bushnegroes in Suriname, which lived in conditions that differ considerably from Western societies. See Padilla, "Reparations in Aloeboetoe v. Suriname", 3 *Human Rights Quarterly* 17 (1995), pp. 545ff.

ages may be calculated, but the fixation of the corresponding values may, if necessary, be based on equity.[97]

6.3.1 Pecuniary Damages

Pecuniary damages comprise, according to the IACtHR, "the loss or detriment to the victims' income, the expenses incurred as a result of the facts, and the consequences of a monetary nature that have a causal connection to the facts of the case."[98] They can be claimed by the victims, their relatives and under certain circumstances also by other persons. While victims and their successors are *prima facie* considered to have suffered damages, other persons must present specific proof sustaining their right to compensations.[99] They must show that regular, periodic payments have been made by the victim in money or in kind, independent from the existence of legal obligations, that there is some basis for the assumption that such payments would have continued had the victim survived, and that they have experienced some financial need that was met by these contributions.[100]

The Court first examines the topic of lost income incurred by the victim. For surviving victims, this *lucrum cessans* comprehends the salaries and benefits the victim has not received due to the human rights violations, e.g. because they were unemployed, imprisoned or unable to work.[101] If the victim has died, a "prudent estimate of the possible income of the victim for the rest of his probable life" has to be undertaken.[102] Taking into account the last salary or, in case the victim had not been in stable employment conditions, a

[97] Faúndez Ledesma, *The Inter-American System for the Protection of Human Rights*, p. 775.

[98] *Bámaca-Velásquez v. Guatemala* (Reparations and Costs), IACtHR, 22 February 2002, Series C no. 91, para. 43, cited in *"Las Dos Erres" Massacre v. Guatemala* (Merits, Reparations and Costs), IACtHR, 24 November 2009, Series C no. 211, para. 275, fn. 275.

[99] *Aloeboetoe et al. v. Suriname* (Reparations and Costs), IACtHR, 10 September 1993, Series C no. 15, para. 54.

[100] Ibid., para. 68.

[101] *Constitutional Court v. Peru* (Merits, Reparations and Costs), IACtHR, 31 January 2001, Series C no. 71, para. 120.

[102] *Velásquez Rodríguez v. Honduras* (Reparations and Costs), IACtHR, 21 July 1989, Series C no. 7, para. 49.

base salary corresponding to a basic food basket, which must not be lower than the average rural wage, the Court subtracts 25% for basic life expenses and adds interests for the time between the violation and the moment the judgment on reparation is pronounced.[103] Given the difficulties to prove the facts on which *lucrum cessans* and *damnum emergens* are calculated, the Court admits the calculation based on equity.[104] In recent complex cases the Court has referred cases to national authorities in order to determine the amount of lost salaries or income and to calculate the corresponding amount of indemnification.[105]

If necessary the ensuing topic under the Court's scrutiny are consequential damages. These damages comprehend any deterioration of patrimony or belongings of the victim or their relatives or any other costs incurred in direct consequence of the violation. They cover expenses such as the investigation of the victim's whereabouts undertaken by relatives, as long as they cannot be classified as legal costs and expenses, earnings lost due to investigative measures and the defence of the case before domestic and inter-American organs, medical and psychological treatments of the victim or its relatives, or costs for relocation due to harassment resulting from the violation.[106] These costs can be awarded based on equity.[107]

Apart from lost income and other direct consequences of the violation, pecuniary damages have also been awarded under two new concepts: damage caused to the victim's life plan and social damage.

The concept of damages to the life plan (*proyecto de vida*) has been introduced to the Court's jurisprudence in the *Loayza Tamayo*

[103] *El Amparo v. Venezuela* (Reparations and Costs), IACtHR, 14 September 1996, Series C no. 28, para. 28.

[104] Ibid., para. 21.

[105] *Baena-Ricardo et al. v. Panama* (Merits, Reparations and Costs), IACtHR, 2 February 2001, Series C no. 72, para. 205; *Ivcher-Bronstein v. Peru* (Merits, Reparations and Costs), IACtHR, 6 February 2001, Series C no. 74, para. 181. See Pasqualucci, *The Practice and Procedure of the IACtHR*, pp. 259f.

[106] *Juan Humberto Sánchez v. Honduras* (Merits, Reparations and Costs), IACtHR, 7 June 2003, Series C no. 99, paras. 166f.; *Radilla-Pacheco v. Mexico* (Merits, Reparations and Costs), IACtHR, 23 November 2009, Series C no. 209, paras. 366ff.

[107] *Radilla-Pacheco v. Mexico* (Merits, Reparations and Costs), IACtHR, 23 November 2009, Series C no. 209, para. 370.

v. Peru (Reparations and Costs) decision. It is based on a doctrine developed by Carlos Fernández Sessarego.[108] Damage to the life plan, according to the Court, is different from the notions of pecuniary damages and loss of income. Loss of income, as has been seen, consists in the calculation of probable future income of the victim by certain indicators, whereat the concept of life plan

> deals with the full self-actualization of the person concerned and takes account of her calling in life, her particular circumstances, her potentialities, and her ambitions, thus permitting her to set for herself, in a reasonable manner, specific goals, and to attain those goals.[109]

In other words the life plan are the goals in life a victim is desirous to achieve, as long as they are reasonable and attainable in practice. In order to be compensable the life plan must have been affected in a way that renders it irreparable or reparable only with great difficulty.[110] In the words of the Court: "The reparation is thus closer to what it should be in order to satisfy the exigencies of justice: complete redress of the wrongful injury. In other words, it more closely approximates the ideal of *restitutio in integrum*."[111] Although the Court recognized this kind of damage in the aforementioned case, it stopped short of actually applying it, arguing that doctrine and case law had not yet developed quantification methods.[112] This last conclusion, however, was contended by Judge de Roux Rengifo who argued in his partially dissenting opinion that another USD 25 000 should have been awarded under the topic of life plan.[113] Judge Jackman generally doubted the need for the Court to introduce a new heading under which to award reparation, given that financial compensation could already be ordered for a wide variety of reasons under the known concepts.[114] The Court never elaborated

[108] Faúndez Ledesma, *The Inter-American System for the Protection of Human Rights*, p. 789; Sessarego, "El daño al proyecto de vida", 50 *Derecho PUC* (1996).
[109] *Loayza Tamayo v. Peru* (Reparations and Costs), IACtHR, 27 November 1998, Series C no. 42, para. 147.
[110] Ibid., para. 150.
[111] Ibid., para. 151.
[112] Ibid., para. 153.
[113] Ibid., Partially Dissenting Opinion of Judge de Roux-Rengifo.
[114] Ibid., Separate Concurring Opinion of Judge Jackman.

the monetary side of the concept, but underlined that damage to the life plan was substantially different from monetary compensation. While lost future income is quantified under the heading of *damnum emergens*, the life plan could not be expressed in money but required other measures of reparation, mainly the recognition of the violation.[115] In following cases, the Court maintained this jurisprudence. It stated for example in one case that a victim had suffered severe torture by law enforcement agents which

> caused irreparable damage to his life, forcing him to sever family ties and go abroad, in solitude, in financial distress, physically and emotionally broken down [..., which] not only left him physical scars, but has also permanently lowered his self-esteem, and his ability to have and enjoy intimate relations of affection. Considering all of the foregoing, the Court decides not to compensate for said damage financially, since the Judgment awarding damages herein contributes to compensate Mr. Wilson Gutiérrez-Soler for pecuniary and non pecuniary damages. The complex and all-encompassing nature of damage to the "life project" calls for action securing satisfaction and guarantees of non-repetition [...] that go beyond the financial sphere.[116]

Similarly it ordered in the case of a university student that he be granted a fellowship for advanced university studies and that the costs for a degree of his choice and his living expenses be covered.[117]

The concept of damage to the family estate seeks reparation for damages caused in the victim's social surroundings. The Court awards reparation to the victim's next of kin for consequences such as lost jobs, lost possibility to conduct daily activities or medical ex-

[115] See hereon University of Oslo, Faculty of Law, *Interview of Judge Cançado Trindade*, at 51 min.

[116] *Gutiérrez-Soler v. Colombia* (Merits, Reparations and Costs), IACtHR, 12 September 2005, Series C no. 132, paras. 88, 89.

[117] *Cantoral-Benavides v. Peru* (Reparations and Costs), IACtHR, 3 December 2001, Series C no. 88, para. 80.

penses. Again, the amount is estimated by the Court on the grounds of fairness.[118]

6.3.2 Non-pecuniary Damages

Non-pecuniary or moral damages cover all consequences of human rights violations that do not have a commercial value. Such damages

> may include both the suffering and distress caused to the direct victims and their next of kin, and the impairment of values that are highly significant to them, as well as other sufferings, of a non-pecuniary nature, related to the conditions of existence of the victim or their family.[119]

They may result, among others, from frustration and other psychological and emotional harm caused by the lack of justice and continued impunity, particularly in massacre cases.[120] In this respect the Court has recently extended its jurisprudence on immaterial damages to also entail moral damage suffered by groups.[121]

The Court has recognized the difficulty to prove moral damages. It has consequently eased the burden of proof, recurring mostly to the figure of *prima facie* evidence. In *Aloeboetoe et al. v. Suriname* (Reparations and Costs) it held that

> it is clear that the victims suffered moral damages, for it is characteristic of human nature that anybody subjected to the aggression and abuse described above will experience moral suffering. The Court considers that

[118] *Bulacio v. Argentina* (Merits, Reparations and Costs), IACtHR, 18 September 2003, Series C no. 100, para. 88; see also *Baldeón-García v. Peru* (Merits, Reparations and Costs), IACtHR, 6 April 2006, Series C no. 147, para. 187. In more detail: Nash Rojas, *Las Reparaciones ante la Corte Interamericana de Derechos Humanos (1988–2007)*, pp. 50ff.

[119] *"Street Children" v. Guatemala* (Reparations and Costs), IACtHR, 26 May 2001, Series C no. 77, para. 84, cited in *"Las Dos Erres" Massacre v. Guatemala* (Merits, Reparations and Costs), IACtHR, 24 November 2009, Series C no. 211, para. 275, fn. 276.

[120] Ibid., para. 286.

[121] *Sawhoyamaxa Indigenous Community v. Paraguay* (Merits, Reparations and Costs), IACtHR, 29 March 2006, Series C no. 146, paras. 207, 216–218.

> no evidence is required to arrive at this conclusion; the acknowledgement of responsibility by Suriname suffices.[122]

In case of death, the victim's heirs inherit the right to compensation for the loss of life. Additionally, they may claim proper rights to compensation for moral damages suffered due to the assassination of a family member.[123]

Due to the particularity that moral damages do not have a commercially determinable value, the IACtHR bases its decision on the principle of equity.[124] Although it accepted that earlier cases may constitute precedent, it underlined that such precedent could not be universally applied but that each case needed to be examined individually.[125] It further held that non-pecuniary damage could, according to the circumstances, be repaired by the judgment that recognizes the human rights violation itself. But the gravity of the damage inflicted might require pecuniary compensation besides the recognition of the violation in the judgment.[126] The Court consequently takes into account the gravity of the suffering endured by the victim and their relatives. For example in the *Aloeboetoe et al. v. Suriname* case, where six out of seven victims were assassinated by military forces while the lone survivor had to witness the death of his companions and see their bodies be devoured by vultures before he, too, died one month later, the Court awarded higher moral damages for the sufferings of the survivor than that of the other victims.[127] The death of minors also causes greater moral damages, according to the Court, due to their particular vulnerability and need for protection.[128]

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[122] *Aloeboetoe et al. v. Suriname* (Reparations and Costs), IACtHR, 10 September 1993, Series C no. 15, para. 52.

[123] Ibid., para. 54.

[124] *Velásquez Rodríguez v. Honduras* (Reparations and Costs), IACtHR, 21 July 1989, Series C no. 7, para. 27.

[125] *El Amparo v. Venezuela* (Reparations and Costs), IACtHR, 14 September 1996, Series C no. 28, para. 34.

[126] Ibid., para. 35.

[127] *Aloeboetoe et al. v. Suriname* (Reparations and Costs), IACtHR, 10 September 1993, Series C no. 15, para. 91.

[128] *Caracazo v. Venezuela* (Reparations and Costs), IACtHR, 29 August 2002, Series C no. 95, para. 102.

The Court nevertheless does not strictly assess moral damages on an individual level but tends to awards certain standard amounts for specific types of sufferings.[129] In recent judgments the forced disappearance of the victim was valued at USD 80 000 while the suffering of family members at about USD 50 000.[130] Only in particularly grave cases do these values alter.[131] It is unclear whether the Court honours the recognition of international responsibility by the state in terms of a reduction of moral damages because the recognition is partial reparation in itself. It did argue like that in one case,[132] but later awarded similar amounts for moral damages although the state had not recognized international responsibility.[133]

6.3.3 Litigation Expenses

Litigation expenses serve a double purpose. On the one hand they ensure that victims have realistic access to justice. If no such expenses were paid, the possibilities for the victims to defend their rights would depend on their economic situation. On the other hand litigation expenses are costs that have occurred as a consequence of the human rights violation and as such are also part of the reparation.[134] They are nevertheless not part of the compensation for the victims but "must be granted directly to the person or organization that represented the victim".[135] Although not directly mentioned in

[129] Pasqualucci, *The Practice and Procedure of the IACtHR*, p. 266.

[130] *Manuel Cepeda-Vargas v. Colombia*, IACtHR, 26 May 2010, Series C no. 213, paras. 251ff.; *Chitay-Nech et al. v. Guatemala* (Merits, Reparations and Costs), IACtHR, 25 May 2010, Series C no. 212, para. 278.

[131] See e.g. the award of USD 100 000 per victim in *Rochela Massacre v. Colombia* (Merits, Reparations and Costs), IACtHR, 11 May 2007, Series C no. 163, para. 273, while in *Miguel Castro-Castro Prison v. Peru* (Merits, Reparations and Costs), IACtHR, 25 November 2006, Series C no. 160, para. 433 and *Escué-Zapata v. Colombia* (Merits, Reparations and Costs), IACtHR, 4 July 2007, Series C no. 165, para. 156 the standard USD 50 000 for loss of life at that time were awarded.

[132] *El Amparo v. Venezuela* (Reparations and Costs), IACtHR, 14 September 1996, Series C no. 28, para. 34.

[133] *Neira Alegría et al. v. Peru* (Reparations and Costs), IACtHR, 19 September 1996, Series C no. 29, para. 58.

[134] *Garrido and Baigorria v. Argentina* (Reparations and Costs), IACtHR, 27 August 1998, Series C no. 39, para. 79.

[135] *"Cotton Field" v. Mexico* (Merits, Reparations and Costs), IACtHR, 16 November 2009, Series C no. 205, para. 594.

the ACHR, Article 65(1)(a) of the Rules of Procedure of the IACtHR contains the victims' right to claim costs. Such costs were not recognized by the Court until 1997 due to the fact that before that date the only parties admitted to the trial were the IACommHR and the states. The Court ruled that even if the Commission recurred to external lawyers, which was a regular practice due to its overload of cases, all expenditures had to be borne from its budget.[136] In 1997 victims were allowed direct standing before the Court for the reparation phase and from 2001 on for the entire case, so that from then on litigation costs were awarded to the victim.[137] Together with the recognition of *locus standi* to the victim, the Court also acknowledged that victims may claim honoraria paid for legal assistance, though limited to what is necessary and reasonable according to the specific circumstances of each case.[138] According to the Court, litigation costs have to be awarded for all instances, domestic and supranational, victims have recurred to and have not been restituted their expenses.[139]

The amount of litigation expenses awarded is determined by the Court through a

> prudent estimate [...] taking into account any receipts and vouchers provided, the particular circumstances of the case, the nature of the jurisdiction for the protection of human rights, and the characteristics of the respective proceedings, which are unique and different from those of other proceedings, both at the domestic and international levels.[140]

Calculation of litigation costs as a percentage of the reparation due has been clearly rejected by the Court.[141] Again, if no proof of the

[136] *Aloeboetoe et al. v. Suriname* (Reparations and Costs), IACtHR, 10 September 1993, Series C no. 15, para. 114.

[137] *Garrido and Baigorria v. Argentina* (Reparations and Costs), IACtHR, 27 August 1998, Series C no. 39, para. 81; *Loayza Tamayo v. Peru* (Reparations and Costs), IACtHR, 27 November 1998, Series C no. 42, para. 178.

[138] *Garrido and Baigorria v. Argentina* (Reparations and Costs), IACtHR, 27 August 1998, Series C no. 39, para. 80.

[139] Ibid., para. 81.

[140] Ibid., para. 82.

[141] Ibid., para. 83.

costs incurred can be produced by the victims, the Court awards litigation expenses based on equity.[142]

6.4 Conditions of Compliance

The obligation of the state to comply with the Court's judgments results from Article 68 of the ACHR. As the ACHR is an international treaty, the states are also bound by the dispositions of the Vienna Treaty Convention.[143] Of particular importance for the execution of judgments are Articles 26 and 27 of the Vienna Treaty Convention, which stipulate that states must comply with international treaties in good faith and that they may not excuse failures to comply with norms of domestic law. Besides these general rules, the Court gives particular indications to the states as to how the reparation orders must be complied with.

The Court today fixes compensation in US Dollars and no longer in local currencies to prevent the risk of currency devaluation, although the state may pay in both currencies.[144] If the beneficiary is a minor, the compensation shall be placed in banking accounts, certificates of deposit or similar investments in solvent banking institutions of recognized standing.[145] The State is "duty-bound to take the necessary measures to protect the minor's interests against inflation, insolvency, negligence or the incompetence of the trustee".[146] Although no taxes or other surcharges may be levied on the compensations, once they have become part of the beneficiary's assets, regular tax rules apply.[147] In recent judgments states were ordered

[142] *Neira Alegría et al. v. Peru* (Reparations and Costs), IACtHR, 19 September 1996, Series C no. 29, para. 42.

[143] Caflisch and Cançado Trindade, "Les conventions américaine et européenne des droits de l'homme et le droit international général", *RGDIP* (2004), p. 6.

[144] *Manuel Cepeda-Vargas v. Colombia*, IACtHR, 26 May 2010, Series C no. 213, para. 261.

[145] *Loayza Tamayo v. Peru* (Reparations and Costs), IACtHR, 27 November 1998, Series C no. 42, para. 184; *Garrido and Baigorria v. Argentina* (Reparations and Costs), IACtHR, 27 August 1998, Series C no. 39, para. 86.

[146] *Suárez-Rosero v. Ecuador* (Interpretation), IACtHR, 29 May 1999, Series C no. 51, para. 32.

[147] Ibid., para. 29.

to comply with payment orders within one year.[148] If, for causes attributable to the beneficiaries, compensation cannot be paid within this time period, the state must deposit the money for ten years under similar conditions as were established for payments due to minors. After ten years the money, including interests accrued, falls to the state.[149] In case of untimely payment, interests according to national rates are owed.[150]

The determination of specific time periods to comply with other means of reparation, such as the duty to investigate, rehabilitate the victim etc., depends on the type of reparation in question. Measures that depend on more or less complex domestic proceedings, such as the effective investigation of the facts and eventual judgment of criminals or the adoption of domestic legislation on a subject, must therefore be accomplished within "a reasonable period of time".[151] Furthermore, as has been shown *supra*, the Court usually indicates specific conditions how the state has to execute effective investigations of the human rights violation at the national level.

Other measures, such as the publication of the judgment, acts of public recognition of guilt, excuses, or commemorations, have to be fulfilled within time periods established by the Court, which have hovered between two months for the publication of the judgment and two years for the production of a film on the events underlying the judgment.[152] Procurement for medical or psychological treatment or similar measures must be complied with as soon as the judgment has been notified. States also have to report to the Court within one year on the measures that were adopted in order to comply with the judgment.[153]

[148] *"Cotton Field" v. Mexico* (Merits, Reparations and Costs), IACtHR, 16 November 2009, Series C no. 205, para. 597; *Chitay-Nech et al. v. Guatemala* (Merits, Reparations and Costs), IACtHR, 25 May 2010, Series C no. 212, para. 290; *Manuel Cepeda-Vargas v. Colombia*, IACtHR, 26 May 2010, Series C no. 213, para. 260.

[149] *Manuel Cepeda-Vargas v. Colombia*, IACtHR, 26 May 2010, Series C no. 213, para. 262.

[150] Ibid., para. 264.

[151] *"Las Dos Erres" Massacre v. Guatemala* (Merits, Reparations and Costs), IACtHR, 24 November 2009, Series C no. 211, para. 242; *Manuel Cepeda-Vargas v. Colombia*, IACtHR, 26 May 2010, Series C no. 213, para. 218.

[152] *Manuel Cepeda-Vargas v. Colombia*, IACtHR, 26 May 2010, Series C no. 213, paras. 220, 225, 229.

[153] Ibid., oper. para. 17.

7 Conclusions

Remedial justice probably is the issue where both courts' jurisprudence shows the most remarkable differences. While the IACtHR proceeds boldly and applies international standards in the broadest possible way, the ECtHR is bound by the principle of subsidiarity and therefore cautious not to interfere with the member states' sovereignty. This reflects a general difference in the approach both courts take to the interpretation of the respective Conventions. The IACtHR has clearly expressed that the ACHR (and other human rights treaties) shall be interpreted "*pro homine*", i.e. in such a way that they render the broadest protection of the rights laid down therein to the benefit of the individual person or group. This comprehends the interpretation of the reparation clauses because, as has been seen *supra*, reparation is an integral part of human rights justice.[1]

The ECtHR applies a much less clearly perceptible *pro homine* approach and acts in a more political fashion.[2] This is mainly due to historical reasons. The CoE had originally been conceived as a project by war-torn Western European states that had a real interest in improving their domestic human rights situations. The original system was focused on inter-state applications and the states parties were convinced that there were no massive-scale human rights violations to be dealt with.[3] Even politically charged cases such as *Ireland v. United Kingdom* concerned grave but not massive human rights violations and were complied with out of the states'

[1]This is a fact that does not yet seem to have been realized entirely by international bodies in charge of the adjudication of human rights violations. See Antkowiak, "Remedial Approaches to Human Rights Violations", *Colum. J. Transnat'l L.* 46 (2008), p. 354, referring to this as the "rights–remedy gap".

[2]Lixinski, "Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law", 3 *EJIL* 21 (2010), p. 588.

[3]Greer and Williams, "Human Rights in the Council of Europe and the EU", 4 *EJL* 15 (2009), pp. 463f.

own initiative.[4] The ECtHR, following this tradition, has never seen the need to justify its limited approach to remedial justice entirely with the text of the ECHR but constantly refers to the *travaux préparatoires* in the first place. It has however relaxed its very restricted attitude to reparation since the end of the 1990s.

While the *travaux préparatoires* of both Conventions show that the member states' intentions differed concerning the courts' reparation powers, the wording of the ECHR *per se* does not exclude specific forms of reparation. Although the Court still does not make full use of its generic reparation competence and mostly sticks to awarding just satisfaction in the form of monetary relief, its recent argumentation that specific measures can be ordered if "by its very nature, the violation found in the instant case does not leave any real choice as to the measures required to remedy it"[5] is a first step towards a more specific definition of the states' obligations resulting from a breach of the Convention. The Court adopted this new type of orders without making any reference to its previous restrictive case law. This permits to conclude that the ECHR, and in particular the principle of subsidiarity, contrary to the Court's earlier argumentation, can be construed in a broader fashion than it had done before. The coincidence of the new case law with discussions among the CoE member states about solutions to the Court's excessive caseload, which culminated in an explicit invitation by the Committee of Ministers – i.e. an underlying political decision by the member states – to give more specific indications on the consequences of a case to the states, may provide the Court with the necessary support to venture further into the new territory of specific reparation orders. Nevertheless, the ECtHR's case law on reparation continues to rely in the first place on the states' disposition to adopt the necessary measures, under guidance of the Committee of Ministers, to provide *restitutio in integrum* and prevent similar violations in the future. Still, the question today no longer is *whether* the ECtHR may order specific reparation measures, but where the limits of this new jurisdiction lie and whether it would be indicated that

[4] *Ireland v. United Kingdom* (Merits and Just Satisfaction), ECtHR, no. 5310/71, 18 January 1978, Series A no. 25; *Ireland v. United Kingdom* (Res-54), CM, (78) 35, 27 June 1978.

[5] *Assanidze v. Georgia* [GC], ECtHR, no. 71503/01, 8 April 2004, 2004-II, para. 202.

the Court made even more intense use of its broad reparation powers in order to facilitate the applicants' claims to receive a remedy. This also calls for a reflection on the IACtHR's reparation practice, which, while being grounded in the sound basis of Article 63 of the ACHR, has been met with criticism for having become too broad to be realistically implemented.

The ECtHR's restrictive approach was understandable at the time. When the Court began its work human rights law was far less well codified than today and human rights justice was new. Without a clear reparation power the Court focused on the principle of subsidiarity and followed the narrow interpretation of "satisfaction" that appeared in the *travaux préparatoires*. Since then concepts of state responsibility, human rights law and reparation have been developed and at least since the 1990s a large number of documents have been adopted that establish reparation concepts according to a different, more modern concept of "satisfaction". Furthermore, the high number of repetitive applications indicates that the concept of subsidiarity does not work as desired.[6]

The quality of cases to be decided by both courts is another important element to be taken into account when evaluating their reparation practice. Cases brought before the IACtHR tend to be considerably more severe than cases brought before the ECtHR. Cases of massacres, expulsion of entire communities from their living realms or other cases that originate in general or systemic shortcomings in the administration of a state are still the exception in Europe while they are a common ground for cases in the inter-American system. Effective adjudication of such systemic cases requires an entirely different set of measures than the remediation of more isolated human rights violations. This explains why judgments by the IACtHR contain broad sections on guarantees of non-repetition and social remedies. The necessity for broader remedies has been recognized recently by the European System, too, which tries to counter the nowadays more frequent systemic human rights violations more effectively by the indication of specific measures to be adopted by the states.

[6]Cf. Costa, *Memorandum of the President of the European Court of Human Rights to the States with a View to Preparing the Interlaken Conference*, p. 5.

Applying its own interpretation of the ECHR as a "living instrument",[7] the time hence seems to have come for the ECtHR to adapt its reparation practice to the developments in international law on state responsibility. This would however not mean that the ECtHR's competence could reach as far as that of the IACtHR, due to the limitations imposed by Article 41 of the ECHR. Particularly the evident differentiation between "reparation" and "satisfaction" and the states' recurrence to the principle of subsidiarity[8] indicate that the Court's competence to award "satisfaction" is different from the states' obligation to repair the violation. In the context of a more up-to-date understanding of the concept of "satisfaction", the Court should however take a step forward towards a more general use of detailed reparation orders.[9] This would not only make the procedure after a Court judgment easier to follow by the victim, but might also relax the Court's strained caseload.

Under the Court's traditional reparation practice, which is still applied in the majority of cases, applicants learn that they have suffered a human rights violation and sometimes even that they have a right to claim full restitution from the responding state. They would nevertheless not receive indications as to what this means in practice, i.e. what exactly it is they can request from the state in order to make good the violation. The Court even less provides them with a clear title ordering the state to do anything more than pay just satisfaction – which in many cases is insufficient or plainly inappropriate to make good the harm done. Practical reparation measures are supposed to derive implicitly from the judgment, leaving the choice of how to discharge this responsibility to the discretion of the state. The state's obligations get further specified only in the supervision procedure before the Committee of Ministers, where the applicant's participation is limited to written submissions. Unlike before the IACtHR, the reparation phase before the European

[7] *Tyrer v. United Kingdom*, ECtHR, no. 5856/72, 25 April 1978, Series A no. 26, para. 31.

[8] Cf. Council of Europe, *High Level Conference on the Future of the European Court of Human Rights*, 19 April 2012, URL: https://hub.coe.int/20120419-brighton-declaration, no. 12(a).

[9] See also: Breuer, "Zur Anordnung konkreter Abhilfemaßnahmen durch den EGMR", *EuGRZ* (2004), pp. 260f. and for the particular case of minority protection Sitaropoulos, "Implementation of ECtHR judgments", 1 *ESIL-CPS* 1 (2011), pp. 23ff.

human rights system is not contradictory and therefore cannot be labelled "fair".

A system that relies on the states' disposition to comply with the Court's orders however can only work if all members are truly dedicated to the human rights ideals laid down in the Convention. As soon as opposition to the implementation of these rights grows in a state – be it in an individual case or on a general level –, compliance will falter and the state will not do more than has been explicitly ordered, if it complies at all. In such cases of internal opposition the experience in the Inter-American System has shown that a detailed judgment by the Court can help to overcome obstacles, supporting sectors within the states that support reparation. Clear reparation orders that appear as such in a judgment will also be reproduced in press reports on the case, so that it is obvious to the general public that each human rights violation ensues an obligation of action for the state. This may raise public pressure on the state authorities.

Indications by the Committee of Ministers cannot have the same effect. First, the procedure before the Committee happens largely behind closed doors and does not produce tangible effects to be covered by the press. Secondly, it lacks the impact of a Court order because it is susceptible of being politically motivated. Furthermore, the state cannot be sure that even if following these indications it will not be condemned again in a similar situation, i.e. if the Court considered insufficient the measures approved by the Committee.[10] This opens a margin for discussion with the Committee that may delay implementation.[11] The Committee, on the other hand, has the difficult task to decide whether the measures taken by the state are sufficient to comply with a Court's judgment and to eventually indicate which further measures should be taken. It is, however, always exposed to possible rejections by the state concerned, arguing that the Committee's demands exceed the requirements of full reparation in the specific case or that the state would consider other means

[10] *VgT v. Switzerland (No. 2)* [GC], ECtHR, no. 32772/02, 30 June 2009, paras. 25ff.
[11] Cf. Sundberg, "Control of Execution", p. 584.

of reparation more appropriate.[12] There is consequently a natural conflict of interests between the responding state which may insist on its freedom under Article 1(1) of the ECHR to choose the means of reparation, and the Committee's task to supervise the execution of judgments under Article 46(2) of the ECHR.

Finally, more detailed reparation orders by the Court may help to limit its growing caseload. Without indicating to the states how to respond to the often systemic human rights problems, it will continue to be flooded by repetitive applications. Faltering compliance by the states may also lead to less acceptance of the Court in the public opinion, making it seem to be a blunt instrument.

In order to procure effective protection, the Court has to ensure that effective reparation is offered to the victims. To achieve this, more specific reparation measures should be made an essential element of the European human rights system. At least in grave cases judgments should include in the operative paragraphs specifications concerning the obligations resulting from a breach of the Convention, i.e. at least the obligation for the state to end a continuing violation.[13] Consequently, the Court would have to extend the practice of indicating specific measures to other cases than those where there is no real choice of means left to the state. Especially complex cases such as the politically motivated violations in countries like Turkey or Russia call much more urgently for specific indications by the Court to support the work of the Committee of Ministers and help the victims obtain *restitutio in integrum*. Here the Court should put its focus on measures similar to those applied by the IACtHR. The competence of an international court to rule such effects as a corollary of the competence to adjudicate violations of an international treaty has been recognized by several other courts un-

[12]See in more detail on the difficulties faced by the organs of the CoE: European Commission for Democracy Through Law, *Opinion on the Implementation of the Judgments of the European Court of Human Rights*, in particular nos. 34ff.; and, as an intent to resolve the issue, the introduction in Protocol no. 14 of the right of the Committee to refer a case for interpretation to the Court, if it considers that its execution is hindered by a problem of interpretation, Article 46(3) of the ECHR and Council of Europe, *Protocol No. 14 – Explanatory Report*, URL: http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm, No. 96.

[13]Cf. Frowein/Peukert, *EMRK-Kommentar 2009*, pp. 538f.

der international law.[14] Furthermore, under Article 46 of the ECHR the Court could make more detailed indications as to what a state has to achieve in order to provide *restitutio in integrum*, just as it has already begun to do under the pilot judgment procedure. Although this would further limit the principle of subsidiarity and restrict the freedom of the states to choose the means by which they discharge the obligations emanating from the Court's rulings, it would finally serve the overall goal to improve human rights protection in Europe by helping the victims obtain reparation and adapt the historically motivated concept that the violating state is called upon in the first place to determine how to make good the damage caused by itself.[15]

It must be borne in mind that subsidiarity not only gives the states the right to choose the reparation measure they deem most appropriate, but also imposes on them the obligation to effectively implement these measures. It should therefore not only be understood in the sense that the Court has to refrain from deciding reparation measures, but more in the sense that the less a state complies with its obligations emanating from a judgment, the more detailed orders have to be handed down by the Court in subsequent similar cases. In fact, clearer orders of the Court had been expected in several cases already. Thus, in one of the most publicly followed cases, *Öcalan v. Turkey*, the Court backed away from holding that a condemnation following an unfair trial would have to be revoked, applying instead the *Gençel formula* which says that "a retrial or a reopening of the case, if requested, represents in principle an appropriate way of redressing the violation".[16] Although it may be ascertained that it would not be convenient to order the reopening of a case, such as the IACtHR would have done, as this would cut off the application of other measures to achieve reparation for the victim, there is no apparent reason why the Court should not at least hold that the results of an unfair trial have to be erased by the state, thus leaving

[14] See *Factory at Chorzów* (Merits), PCIJ, 13 September 1928, Series A no. 17, p. 27; *Brasserie du Pêcheur and Factortame (Brasserie du Pêcheur v. Germany and The Queen v. Secretary of State for Transport)*, ECJ, C-46/93 and C-48/93, 5 March 1996, European Court Reports 1996, I–01029, para. 22.

[15] Cf. Antkowiak, "Remedial Approaches to Human Rights Violations", *Colum. J. Transnat'l L.* 46 (2008), p. 384.

[16] *Öcalan v. Turkey* [GC], ECtHR, no. 46221/99, 12 May 2005, 2005-IV, para. 210; *Gençel v. Turkey*, ECtHR, no. 53431/99, 23 October 2003, para. 27.

it the choice of means of how to achieve this goal.[17] Warnings that specific Court orders to reopen proceedings might cause problems on the execution stage because not all states have the appropriate legislation to limit the *res judicata* effects of domestic judgments can only be seen as counterproductive to the overall goal of improving the European human rights situation and to press states to bring their laws in line with the requirements of the ECHR.[18] Examples such as the *Tristán-Donoso v. Panama* or the *Castillo-Petruzzi et al. v. Peru* decisions show that different attitudes are possible if the national authorities are willing to really implement their international human rights obligations.[19] Finally, determination of reparation is a fundamental judicial function and should be considered as such by the ECtHR.

Leaving the states leeway as to how they comply with their obligation to provide full reparation however also has certain undeniable advantages. The most obvious one is that states and victims have almost absolute freedom to agree on individual reparation measures. This solution favours the idea of agreements between victim and state on reparation, an idea that is also expressed in Rule 75(4) of the Rules of the ECtHR. This though requires that victims have a possibility to effectively submit their claims to the state, which presupposes that the state recognizes its obligation to fully repair the consequences of the violation. If, however, state actors have decisively participated in a grave human rights violation or if the representatives of these actors occupy important positions in a state, its compromise with the reparation of victims may legitimately be called into doubt. Unspecified reparation orders consequently require a strong, independent and impartial supervisory

[17] Cf. Ress, "Wirkung und Beachtung", *EuGRZ* (1996), p. 352, criticising that the Committee of Ministers had closed monitoring in cases of unfair trials as soon as the state had paid the just satisfaction awarded by the Court instead of supervising that new proceedings were opened or the victims were liberated from prison under other legal dispositions.

[18] See in this sense Papier, "Execution and Effects of the Judgments of the European Court of Human Rights from the Perspective of German National Courts", 1–4 *HRLJ* 27 (2006), p. 54.

[19] *Tristán-Donoso v. Panama* (Monitoring of Compliance), IACtHR, 1 September 2010, paras. 12ff., *Castillo-Petruzzi et al. v. Peru* (Compliance with Judgment), IACtHR, 1 July 2011, paras. 26ff.; in detail p.103 *supra*.

body that can mediate or verify agreements or, if required, effectively define the state's obligations towards the victim. When determining the leeway left to the state, the ECtHR might therefore take into account the compliance record of the state and the effectivity of its domestic compliance organs.

Experience from the IACtHR has also shown that a detailed reparation practice demands more time to be spent on each case as it requires the Court to understand not only the origins of the violation but also all of its consequences. The complexity of reparation orders affects the level of compliance and the requirements a supervision system has to fulfil. While a very detailed reparation order provides the parties of a process and the organs in charge of supervising execution with clear guidelines as to what has to be achieved by the state in order to make good the damage caused, such orders at the same time leave little flexibility to the supervising organ to react to changing circumstances, unforeseen difficulties, or eventual agreements between the state and the victim. Ordering broad and detailed reparation also entails that the supervising organ will have to spend more time on evaluating reports by the state, the victims, or external experts, thus limiting the number of cases it can deal with. Basically, for each reparation measure ordered, the supervising organ will have to check whether the state has complied with all details or if there are consistent reasons hindering compliance. Judgments demanding the investigation and sentencing of perpetrators of massacres or the localization of disappeared persons are of particular difficulty when the underlying events have either happened a long time ago or were actively facilitated or even committed by state representatives such as the police or military forces. Such orders often require lengthy domestic procedures due to lost or poorly documented evidence or obstruction by parts of the public administration.[20] This results in an execution phase that often takes years to complete. Supervising orders like adapting the national prison system and the underlying legislation to international standards, as can be found in IACtHR judgments, would also take years to implement and depend in large parts on elements the responding state cannot

[20]Based on personal interviews with judges, lawyers, victim representatives and NGOs at the IACtHR and in Colombia in 2010.

entirely control, such as the availability of funds for the training of staff and refurbishment of buildings. Furthermore, legislative or constitutional amendments may be stalled in national parliaments if decisive parts of the legislative do not want to comply with international obligations the state has contracted. The ECtHR should hence have to find a good equilibrium between the negative and positive aspects of a more specific reparation practice. Here the experiences of the Committee of Ministers and of the IACtHR may be helpful.

Although the IACtHR complies with almost all of the aforementioned criteria of a good reparation practice under the standards of international law, its jurisprudence on reparation is not free from criticism either. Most commentators consider certain of the Court's orders to be excessive and not practicable. In one of the crucial cases in this sense, Haiti was ordered "to ensure that prison conditions comply with international human rights norms; in particular, to alleviate the problems of overcrowding, shortcomings in the physical and sanitary infrastructure, deficient security systems and the lack of contingency plans".[21] Critics claim that this decision was not adapted to the realities of Haiti which, being one of the poorest countries in the world, would not be in a position to ever comply with these orders. Further issues could arise from the fact that the Court's judgments tend to be excessively detailed, causing problems during the executions phase as its orders not necessarily coincide with the victims' expectations,[22] or because the measures ordered were too complex and took years to be implemented, extending the supervision almost *ad infinitum*.[23]

The IACtHR, though, is aware of its limitations, particularly when it comes to ordering guarantees of non-repetition.[24] Its decisions cannot be condemned *per se* as being excessive. Bearing in mind that the states are under the obligation to provide the victim with

[21] *Yvon Neptune v. Haiti* (Merits, Reparations and Costs), IACtHR, 6 May 2008, Series C no. 180, para. 183.

[22] See Acosta López and Bravo Rubio, "El cumplimiento de los fines de reparación integral de las medidas ordenadas por la Corte Interamericana de Derechos Humanos", *Rev. Colomb. Derecho Int.* 13 (2008), pp. 346ff.

[23] See for such measures: *Xákmok Kásek Indigenous Community v. Paraguay*, paras. 300ff. and a general critique at Antkowiak, "Remedial Approaches to Human Rights Violations", *Colum. J. Transnat'l L.* 46 (2008), p. 394.

[24] See Beristain, *Diálogo sobre la reparación, Vol. 2*, pp. 463ff.

restitutio in integrum, i.e. to wipe out the consequences of the violation as far as possible and to prevent similar violations in the future, and that the IACtHR's reparation power is not subject to similar restraints as the ECtHR's, it has to order all that is necessary to repair the consequences of the violation suffered. According to the extent of the violation or the underlying shortcomings, such reparation may require costly measures that might even exceed the possibilities of the responsible state. Nevertheless, it would be wrong to take this into account during the reparation stage and to apply a principle similar to national civil procedures according to which nobody can be obliged to perform an obligation that is objectively or subjectively impossible.[25] Such considerations would leave out of the account in particular that the determination of the exact reparation due is important because human rights judgments shall have deterring effects on other possible human rights violators.[26] This effect can only be achieved if the Court clearly identifies the consequences of a human rights violation and thus points out the damages caused by the violation, but also the efforts a state would have to undertake in order to make good the damage done. Deals between the victim and the state concerning compliance with the reparation or unilateral motions for partial waivers of certain obligations due to their objective or subjective impossibility can better be presented to the Court during the executions phase.

Overall, an excessive reparation practice seems to be useful for effective human rights protection, providing afterwards a sufficient amount of flexibility on the execution stage to react to particular developments or circumstances of each case.

[25] Article 275 of the German Civil Code (hereinafter "BGB"), 2 January 2002, BGBl. I p. 42.

[26] See on the effects of judgments on other states Cohen-Jonathan, "Quelques considérations sur l'autorité des arrêts de la Court européenne des droits de l'homme", pp. 53ff. and Buergenthal, "Implementation of the judgments of the Court", pp. 191ff.

Part III

Execution of Judgments

Overview

The ECtHR's and IACtHR's supranational character makes them largely independent from direct influence by the states and their domestic politics. Nevertheless, this supranational character can at the same time turn into a major limitation of the courts' powers and the protection they offer. The subjects of their jurisdiction are independent states which, if necessary, can be forced only with difficulty to comply with the obligations arising from judgments.

All human rights Conventions contain a specific obligation for the states to comply with the judgments,[1] built on the underlying principle of *pacta sunt servanda* as stated in Article 26 of the Vienna Treaty Convention, completed by Article 27.[2] If a state fails to comply with a judgment of a human rights court, it therefore commits a breach of the respective Convention and as such a breach of international law. Therefore, judgments of human rights courts basically face the same implementation limits as other decisions of organs of international law. In order to improve this situation, the Conventions contain special compliance procedures. These procedures rely on two tiers. On the international level there are political institutions of the CoE or the OAS that can take resolutions to ensure state compliance, whereat on the national level legislative and administrative measures such as laws on the enforceability of international judgments by national courts or special government offices to coordinate implementation measures exist. The domestic aspect though will only be of minor interest in this thesis, as it would require an investigation of the domestic legal systems of each member state of the Conventions.

[1] Article 46 of the ECHR; Article 68 of the ACHR; Article 30 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter "Protocol to the ACHPR"), 10 June 1998 (entry into force: 25 January 2004), URL: http://www.achpr.org/instruments/court-establishment/.

[2] Ramcharan, *Contemporary human rights ideas*, pp. 46ff.

This work will also spare out the question of compliance with provisional measures. The legal quality of provisional measures, the obligations arising from them for the states, as well as the question of consequences for non-compliance are highly controversial and would exceed the scope of this research.[3]

Before dealing with the procedure of execution (9), it is necessary to define which parts of a judgment are enforceable under the respective Convention (8). The last chapter will conclude with an assessment and outlook (10).

[3]See on this subject, among others, Rieter, *Preventing irreparable harm: provisional measures in international human rights adjudication*, pp. 144ff.; Burbano Herrera, *Provisional Measures in the Case Law of the Inter-American Court of Human Rights* ; Padilla, "FS Fix-Zamudio, vol. 2" ; Faúndez Ledesma, *The Inter-American System for the Protection of Human Rights*, pp. 483ff. for the IACtHR and Rieter, *Preventing irreparable harm: provisional measures in international human rights adjudication*, pp. 170ff. for the ECtHR.

8 Binding Force

There is no autonomous concept of binding force of final judgments (*res judicata*) in international law. The effects of *res judicata* are derived from the national legal orders.[1] Consequently, both human rights Conventions had to expressly define the binding effects of the courts' judgments, including an obligation for the states to comply with them. For the member states of the CoE, Article 46(1) of the ECHR stipulates that "[t]he High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties". A similar rule is contained in Article 68(1) of the ACHR: "The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties". Paragraph 2 of the same norm further details: "That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state". As the Conventions are common international treaties, the rules on the execution of judgments, just like the rest of the Conventions, are binding for the member states according to the general rules of international law. These general rules are in particular the principle of *pacta sunt servanda* under customary international law, codified in Article 26 of the Vienna Treaty Convention.[2] The rule is completed by Article 27 of the Vienna Treaty Convention, also a codification of customary international law, laying down that no state may recur to rules of its internal law to excuse the failure to comply with international treaty obligations.[3]

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[1] Polakiewicz, *Die Verpflichtungen der Staaten*, p. 26.

[2] The Vienna Treaty Convention does not directly apply to the Conventions as they are prior to its entry into force. The principles laid down therein nonetheless apply as customary rules of international law.

[3] Cf. *The Greco-Bulgarian "Communities"*, PCIJ, 31 July 1930, Series B no. 17, p. 32; *The Free Zones of Upper Savoy and the District of Gex*, PCIJ, 7 June 1932, Series AB no. 46, p. 167.

The states' obligation to comply with international law also extends to Article 46 of the ECHR and Article 68 of the ACHR, which procure that the member states have to abide by the judgments the courts have handed down in their respect. This implies that member states may not refer to rules of their internal law to excuse the failure to abide by a judgment.

Before turning to execution, it is necessary to establish to which extent states are obliged by the courts' judgments. Binding force can be subdivided into two categories: formal binding force and material binding force. Formal binding force means that there are no further ordinary appeals possible against a decision by a court.[4] Material binding force on the other hand refers to the binding force of the content of a decision between the parties, i.e. the court's decision becomes binding as to the matter of the decision and the case cannot be brought before a court again.[5] In the terms of this investigation, only the question of material binding force is of the essence, as this is the issue according to which the obligations of the states under public international law are determined. Formal binding force is governed by Article 44 of the ECHR and Article 67 of the ACHR. The issue of material binding force has to be investigated under two aspects: its personal (8.1) and its material extent (8.2).

8.1 Binding Force *ratione personae*

Judgments in contentious cases under both Conventions only oblige the parties to the case, i.e. their binding force is *inter partes*. This results from the wording of the Conventions themselves, which in Article 46(1) of the ECHR and Article 68(1) of the ACHR stipulate that the member states have to abide by final judgments "in any case to which they are parties".

According to Articles 1 and 52 of the ECHR, all member states are under the obligation to maintain their domestic law and practice in accordance with the Convention as it is interpreted by the Court. This is, though, a general obligation that does not entail the

[4]See e.g. Article 705 of the German Code of Civil Procedure (hereinafter "ZPO"), 5 December 2005, BGBl. I p. 3202; Gottwald, "MüKo, §322".

[5]Ibid., Lateral Number 1; Verzijl, "Observations additionelles à l'avis de M. le Dr. J. H. W. Verzijl du 10 avril 1925", p. 438.

direct consequence for all member states to abide by judgments of the Court in cases to which they were not a party.[6] Nevertheless, it is in the interest of all states to maintain their domestic legislation in line with the Court's jurisprudence in order to prevent future cases on the same issue from being raised against them.[7]

Under the ACHR, in the terms of Article 68 of the ACHR, only the state party to the case that has been found responsible for a breach of the Convention has to comply with the orders on reparation.[8] It is, however, not evident whether each judgment also creates an obligation for all other states parties to the ACHR to maintain their legislation in accordance with the IACtHR's jurisprudence. The obligation to adapt domestic legislation to the rights and freedoms of the Convention originates in Article 2 of the ACHR. Nevertheless, this does not necessarily entail an obligation for other states to abide by the jurisprudence of the Court, because the IACtHR, unlike the ECtHR, does not *per se* have jurisdiction over all states. Its jurisdiction is only obligatory for the states under the Convention that have made a general declaration in terms of Article 62(1) of the ACHR or have entered into a special agreement for a particular case. It is only by those means, according to Article 62(1) of the ACHR, that a state "declare[s] that it recognizes as binding, *ipso facto*, [...], the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention". In consequence, as long as a state has not made the corresponding declaration, the IACtHR's jurisprudence – advisory or contentious – does not have binding effect on it. Hence, the Court's interpretation of the Convention rights and freedoms is only effective for the states that have filed a declaration according to Article 62(1) of the ACHR, but does not affect the way in which other states construe the Convention for the effects of internal application in terms of Article 2 of the ACHR. In states that have recognized the Court's jurisdiction, domestic organs should though

[6] See Polakiewicz, *Die Verpflichtungen der Staaten*, p. 33; Mahoney and Prebensen, "The European Court of Human Rights", pp. 634, 636f.; Cohen-Jonathan, "Quelques considérations sur l'autorité des arrêts de la Court européenne des droits de l'homme", pp. 41f.; Haß, *Die Urteile*, p. 61.

[7] Callewaert, "The Judgments of the Court: Background and Content", p. 792.

[8] *Loayza Tamayo v. Peru* (Compliance with Judgment), IACtHR, 17 November 1999, Series C no. 60, paras. 5–7.

follow the interpretation the IACtHR gives to the ACHR, not only because the IACtHR has the final authority to interpret the Convention, but also because a domestic decision that does not respect this interpretation is susceptible of being accused of arbitrarily declining a person a Convention right.[9] A direct binding effect of judgments on any other state though does not exist under the ACHR either.

8.2 Binding Force *ratione materiae*

There is no unique jurisprudence on the question of which parts of an international tribunal's judgments are binding. While according to some courts binding force is limited to the operative part of the judgment, others include the underlying reasoning. Although the question usually surges in relation to the interpretation of judgments by international courts, i.e. in order to know whether questions of interpretation may only refer to the operative part of the judgment or may extend to the court's reasoning, it is of equal importance for the determination of state responsibility for the execution of judgments under international law, in particular for the determination if only the operative part is executable or if the court's reasoning may contain obligatory provisions, too.

8.2.1 Binding Force *ratione materiae* in Public International Law

International tribunals, such as arbitral tribunals or the PCIJ, have never applied a strict separation between the operative part of a judgment and the reasoning. The tribunal in the *Pious Fund Case* for example held:

> Considérant que toutes les parties d'un jugement ou d'un arrêt concernant les points débattus au litige s'éclairent et se complètent mutuellement et qu'elles servent toutes à préciser le sens et la portée du disposi-

[9] Buergenthal, "Implementation of the judgments of the Court", p. 192.

> tif, à déterminer les points sur lesquels il y a chose jugée et qui partant ne peuvent être remis en question.[10]

This does not mean that the reasoning of a court necessarily has binding force, but it underlines the unity of the judgment so that the operative part cannot be read separately from the reasoning. The PCIJ in its 1925 *Polish Postal Service in Danzig* decision did not make clear if the reasoning could have binding force, limiting itself to note that "the reasons contained in a decision, at least in so far as they go beyond the scope of the operative part, have no binding force as between the Parties concerned", thus leaving unanswered the question if the reasoning as far as it does not exceed the operative part has binding force.[11] It resolved this point in its 1927 decision on the *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, holding that those parts of the reasoning have binding force that "constitute a condition essential to the Court's decision".[12] This finding was contested by Judge Anzilotti in his dissenting opinion, who argued that binding force is limited to the operative part of a judgment and not the statement of the reasons.[13]

The ICJ has pronounced itself on the issue in relation to Article 60 of Statute of the ICJ and Article 98 of Rules of Court of the ICJ, which establish the possibility that states request an interpretation of the Court's judgments in cases to which they are parties. The Court has held that interpretation is limited to the part of the judgment which is binding.[14] In accordance with the PCIJ it has made clear that only the operative part of a judgment contains binding provisions, ex-

[10] *Pious Fund Case (United States of America v. Mexico)*, Arbitration Tribunal, 14 October 1902, RIAA, Volume IX, pp. 11–14, p. 12.

[11] *Polish Postal Service in Danzig* (Advisory Opinion), PCIJ, 16 May 1925, Series B no. 11, pp. 29f.

[12] *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)* (Interpretation), PCIJ, 16 December 1927, Series A no. 13, p. 20.

[13] Ibid., Dissenting Opinion by M. Anzilotti, p. 23f.; see in the same sense *South West Africa (Liberia and Ethiopia v. South Africa)* (Second Phase), ICJ, 18 July 1966, ICJ Reports 1966, p. 6, Separate Opinion of Judge Morelli, p. 59.

[14] *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia v. Peru)*, ICJ, 27 November 1950, ICJ Reports 1950, p. 395, p. 402.

cluding the considerations, as long as they are not inseparable from the operative part.[15]

The Court of Arbitration in the *Delimitation of the Continental Shelf* case decided in the same way. Making reference to the *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)* decision of the PCIJ it found that

> [t]he Court of Arbitration considers it to be well settled that in international proceedings the authority of *res judicata*, that is the binding force of the decision, attaches in principle only to the provisions of its *dispositif* and not to its reasoning. In the opinion of the Court, it is equally clear that, having regard to the close links that exist between the reasoning of a decision and the provisions of its *dispositif*, recourse may in principle be had to the reasoning in order to elucidate the meaning and scope of the *dispositif*. From this it follows that under certain conditions and within certain limits, the reasoning in a decision may properly be invoked as a ground for requesting an interpretation of provisions of its *dispositif* [...] Furthermore, if findings in the reasoning constitute a condition essential to the decision given in the *dispositif*, these findings are to be considered as included amongst the points settled with binding force in the decision.[16]

In the 1988 *AMCO v. Republic of Indonesia* case, the Tribunal of the International Centre for Settlement of Investment Disputes (ICSID) did an extensive research on the issue of binding force under international law.[17] In this case the Tribunal had to find which parts

[15] *Request for Interpretation of the Judgment of 11 June 1998 (Cameroon v. Nigeria)*, ICJ, 25 March 1999, ICJ Reports 1999, p. 31, p. 35; see also *Affaire Junghans* (Deuxième Partie), Arbitration Tribunal, 21 October 1940, RIAA, Volume III, pp. 1883–1891, p. 1889, according to which a reasoning cannot have binding force as long as it has not been translated into an operative disposition; Schulte, *Compliance with Decisions of the ICJ*, p. 30; Mosler/Simma, "The Charter of the UN, Article 94", No. 1.

[16] *Delimitation of the Continental Shelf*, Arbitration Tribunal, 14 March 1978, RIAA, Volume XVIII, pp. 3–413, p. 295.

[17] *AMCO v. Republic of Indonesia* (Resubmitted Case), ICSID, 10 May 1988, 5 ILM 27, p. 1281.

of an original judgment it had handed down earlier had been annulled by a later judgment of an *ad hoc* Committee under ICSID rules. The question was raised because Indonesia alleged in this new case that not only the operative part ("*dispositif*") but also certain parts of the annulment decision itself were binding upon the subsequent Tribunal.[18] Consulting different sources in doctrine and jurisprudence, the Tribunal found that "[i]t is by no means clear that the basic trend in international law is to accept reasoning, preliminary or incidental determinations as part of what constitutes *res judicata*".[19] The Tribunal nevertheless did not resolve the question either but determined its resolution only for the particular case of the ICSID Convention, maintaining that the full reasoning of the *ad hoc* Committee cannot have binding effect.[20]

We must therefore conclude that under international law the question of which parts of a judgment have binding force remains unsettled, although the majority of opinions and judgments tend towards limiting binding force to the operative parts of a judgment and those parts of the reasoning that specify the operative provisions. There is definitely no rule, nor has it ever been alleged, that binding force would emanate indiscriminately from all parts of a judgment, i.e. from the operative part as well as from the entire reasoning.

8.2.2 Binding Force *ratione materiae* of IACtHR Judgments

The IACtHR, only one year after the ICSID Tribunal had handed down the decision in *AMCO v. Republic of Indonesia*, pronounced itself on the issue of binding force in one of its first judgments. In the *Velásquez Rodríguez v. Honduras* (Reparations and Costs) decision, the Court had to decide reparation for several human rights violations in relation to the disappearance of a person by state forces. One of the IACommHR's claims was to order the state to undertake investigations of the facts of the case and to punish those responsible. The Court, referring to its deliberations in the sentence on the merits, stated that it had "already pointed out the Government's

[18]Ibid., para. 22.
[19]Ibid., para. 32.
[20]Ibid., para. 44.

continuing duty to investigate so long as the fate of a disappeared person is unknown" and that "[t]he duty to investigate is in addition to the duties to prevent involuntary disappearances and to punish those directly responsible".[21] It concluded, without mentioning the discussion in other international courts or motivating its point of view, that "[a]lthough these obligations were not expressly incorporated into the resolutory part of the judgment on the merits, it is a principle of procedural law that the bases of a judicial decision are a part of the same".[22] The responding state is thus under an obligation to comply with the Court's direct orders emanating from the operative paragraphs or the deliberations.

It remains unresolved though whether the state's responsibilities are limited to the express Court orders or if more far-reaching obligations can emanate from a judgment, i.e. whether the Court's judgments are final also in terms of reparation due. Such situations can occur if, for instance, in a big massacre case more victims appear than had been known at the time of the judgment or if the situation emanating from a human rights violation determined by the Court shows to require other ways of reparation than the ones ordered, e.g. the application of other types of treatments for the victims.

In the *Mapiripán Massacre v. Colombia* decision – dealing with a massacre caused by Paramilitary groups that had invaded a small town and tortured, killed and made disappear several inhabitants – the Court resolved that the number of victims identified before it was incomplete due to shortcomings in the official investigation of the facts by the state authorities. Not knowing the particular situation of the unidentified victims and their next of kin, it excluded them from its orders on pecuniary damages, referring them to the national authorities where they could make the pertinent claims. The Court specifically underlined that these unidentified victims

[21] *Velásquez Rodríguez v. Honduras* (Reparations and Costs), IACtHR, 21 July 1989, Series C no. 7, para. 34; citing *Velásquez Rodríguez v. Honduras* (Merits), IACtHR, 29 July 1988, Series C no. 4, paras. 174 and 181.

[22] *Velásquez Rodríguez v. Honduras* (Reparations and Costs), IACtHR, 21 July 1989, Series C no. 7, para. 35. See also *Gelman v. Uruguay* (Supervisión de Cumplimiento), IACtHR, 20 March 2013, paras. 102, 104, and ibid., paras. 35ff. of the reasoned concurring vote of Judge Ferrer Mac-Gregor Poisot, citing a decision by the Mexican Supreme Court of Justice of the Nation.

were to be identified by the means ordered in its judgment.[23] The judgment thus applies to these victims on two levels: the means ordered for the sake of identification are directly applicable to everyone who claims to be a victim and directly bind the state, while the compensatory orders find only indirect application through proceedings before national organs. Nevertheless, the state is legally bound not only in relation to the victims named in the Court's judgment but also to all other victims unknown at the time of the judgment. This makes clear that the subject matter of the case, and the same goes for other large scale violations, were not the violations inflicted upon the particular victims appearing before the Court, but the situation underlying the specific violations – in this case the Paramilitary attack as such. This is a significant conceptual difference to the way the ECtHR approaches large scale violations which are generally decided on an individual case-to-case basis.[24]

Why was it necessary then to specifically mention the unidentified victims in the original judgment? Apart from the sake of clarifying their rights, this would not have been the case if it could be assumed that the state's obligation to provide *restitutio in integrum* went beyond the specific reparation orders of the Court and comprised all measures that were necessary to obtain full reparation. The Court's orders would then be mere punctual specifications of a general obligation deriving from the declaration of a breach of the Convention. The binding effect of the judgment would extend beyond these specific indications and comprise everything that is necessary to return the victims, as far as possible, to the situation before the violation had occurred. Thus, all measures necessary to attain this goal would be imposed on the state even if the Court had

[23] *Mapiripán Massacre v. Colombia* (Merits, Reparations and Costs), IACtHR, 15 September 2005, Series C no. 134, para. 247. The means ordered were a genetic information system and an official mechanism where unidentified victims or next of kin could file their claims that were to be treated according to the guidelines laid down in the judgment.

[24] Even in the pilot judgment cases the Court does not adjudicate the situation underlying a large scale violation but identifies an underlying problem parting from an individual case and afterwards, if the state does not resolve the systemic problem, decides all other cases separately. See *Lukenda v. Slovenia*, ECtHR, no. 23032/02, 6 October 2005 and subsequent cases and *E.G. v. Poland* (dec.), ECtHR, no. 50425/99, 23 September 2008, both presented in section 5.2.2.

not specifically mentioned each one of them. Such an effect has been recognized by the ECtHR for its judgments. The ECtHR specifically mentioned the states' obligation to provide *restitutio in integrum* deriving directly from the declaration of a breach of the ECHR. It has made clear that there may exist obligations for the state to choose general and individual measures that exceed the effects obtained of the payment of just satisfaction.[25] Consequently, in Europe the award of just satisfaction does not replace the state's obligation to award *restitutio in integrum* but, depending on the case, may only cover part of the state's obligations.[26] Would a similar practice exist under the ACHR, the necessary reparation means that were not mentioned in the IACtHR's judgment could then – similar to the proceeding before the Committee of Ministers in the European System – be further specified by the Court in cooperation with the parties during the reparation phase.

The concept of binding force under the ACHR though is different from that applied under the ECHR. The IACtHR's decisions are not essentially of a declaratory nature: they declare the breach of the ACHR, but they also specify the state's obligations deriving from that breach. The part on reparation is so detailed in comparison to ECtHR judgments because the underlying idea is that the Court specifies the states' obligations deriving from the breach in their entirety. Where the ECtHR leaves a broad margin of appreciation to the state, the IACtHR reduces it almost to zero, indicating a high number of specific measures to be taken. Finality of the Court's reparation orders is implied by Article 63(1) read together with Article 68 of the ACHR. The measures to be ordered by the Court under Article 63(1) of the ACHR accrue to full reparation. This negatively implies that where there are no such orders, no further obligations for the state exist under Article 68 of the ACHR.[27] The determination of what is necessary to obtain full reparation in the specific case

[25] *Scozzari and Giunta v. Italy*, ECtHR, nos. 39221/98 et al., 3 July 2000, *Reports* 2000-VIII, para. 249.

[26] See Sundberg, "Control of Execution", p. 571; critical: Ruedin, *Exécution des arrêts*, pp. 180f.

[27] Cf. *Baena-Ricardo y otros Vs. Panama* (Competencia), IACtHR, 28 November 2003, Series C no. 104, para. 64 and *Caballero Delgado v. Colombia* (Reparations and Costs), IACtHR, 29 January 1997, Series C no. 31, para. 13 of the dissenting opinion of Judge Cançado Trindade.

is hence not laid into the hands of the state but is one of the Court's own tasks. A principle of subsidiarity on the reparation stage is not known to the inter-American system. If the state shall determine the scope of reparation measures itself, the Court has to specifically order this. This is often the case for general measures to prevent the recurrence of similar violations, when the state shall "take the appropriate legal or administrative measures". In the judgment on reparation the Court hence finally settles the question of reparation. It has held: "Una vez determinada la responsabilidad internacional del Estado por la violación de la Convención Americana, la Corte procede a ordenar *las* medidas destinadas a reparar dicha violación [our emphasis]."[28] This finding is underlined by the fact that in the Court's orders on monitoring of compliance with judgments the question of obligations reaching beyond the measures ordered has never been raised. This means that a state's margin of appreciation on how to discharge its obligation of reparation is reduced to the narrow framework set by the Court. The state may not provide reparation in other ways without the Court's authorization.[29]

The binding force of the IACtHR's judgments hence does not go beyond what has been expressly mandated in the judgment. However, even complex reparation orders in a specific case do not affect the state's general obligation under Articles 1 and 2 of the ACHR to give full effect to the rights enshrined in the Convention. This obligation, as well as that of other states who were not a party to the original case, to respect the Court's interpretation of the ACHR is however not enforceable as a consequence of a specific judgment but exists independently from it.[30]

[28] *Baena-Ricardo y otros Vs. Panama* (Competencia), IACtHR, 28 November 2003, Series C no. 104, para. 72; the English translation reads "[…] orders measures designed to remedy this violation", but the authentic Spanish version is clearer on the finality of the reparation order, putting the definite article before "medidas".

[29] Cf. Article 63 of the Rules of Procedure of the IACtHR.

[30] Cf. *Caballero Delgado v. Colombia* (Reparations and Costs), IACtHR, 29 January 1997, Series C no. 31, para. 10 of the dissenting opinion of Judge Cançado Trindade and *Gelman v. Uruguay* (Supervisión de Cumplimiento), IACtHR, 20 March 2013, paras. 70f. Also ibid., paras. 43ff. of the reasoned concurring vote of Judge Ferrer Mac-Gregor Poisot. The obligation of other states to respect the IACtHR's interpretation of the ACHR and other human rights treaties is known as *res interpretata*.

8.2.3 Binding Force *ratione materiae* of ECtHR Judgments

The parties to a case are bound by the operative part of the judgment.[31] Due to the restrictive reparation practice of the Court, this part nevertheless usually only contains the determination of whether or not there has been a violation of a specific Convention norm, plus an eventual ruling on pecuniary just satisfaction or recently also other limited obligations to be complied with by the state. Specific orders in the operative part, like the payment of just satisfaction or more far-reaching orders in pilot judgments or in the cases the state has been ordered other specific measures, have to be complied with in the terms stipulated by the Court in the judgment.

Given its small explanatory value, it would make no sense to reduce the binding force of the Court's judgments to the operative part.[32] In fact, the Court itself has recognized that there are obligations emanating directly from a judgment that go beyond those eventually named in the operative paragraphs, namely the obligation to provide *restitutio in integrum* for the damage caused.[33] The scope of this obligation can only be determined taking into account the reasoning of the Court, because the operative part generally only provides minimal information about the details of the violation and how it may be remedied. Further necessary details are contained in the Court's reasoning. It defines and limits the subject matter and with it the extent of the state's obligations that derive from the determination of the Convention violation in a particular situation.[34] Material binding force of the Court's judgments consequently emanates from the operative paragraphs in line with the factual findings and the judicial evaluation made in the reasoning.[35] This reasoning is limited by the facts and the specific claim submitted by the

[31]Frowein/Peukert, *EMRK-Kommentar 2009*, Art. 46 no. 1; Ruedin, *Exécution des arrêts*, p. 111.

[32]Also Polakiewicz, *Die Verpflichtungen der Staaten*, p. 37.

[33]Cf. *Papamichalopoulos and others v. Greece* (Just Satisfaction), ECtHR, no. 14556/89, 31 October 1995, Series A no. 330-B, para. 34; Ress, "Die Einzelfallbezogenheit", p. 737; on the contrary: *Vladimir Romanov v. Russia*, ECtHR, no. 41461/02, 24 June 2008, para. 4 of the separate opinion of Judges Spielman and Malinverni.

[34]Ruedin, *Exécution des arrêts*, p. 112.

[35]Okresek, "Die Umsetzung der EGMR-Urteile und ihre Überwachung: Probleme der Vollstreckung und der Behandlung von Wiederholungsfällen", *EuGRZ* (2003), p. 171; Polakiewicz, *Die Verpflichtungen der Staaten*, p. 38.

applicant, the Court being barred from examining a situation *ultra petita*, e.g. by performing an abstract control of a law beyond those articles that have caused the violation suffered by the victim in the specific case.[36]

This though does not mean that the binding force of the judgment would only affect the relation between the state and the victim in the particular case. As has been shown *supra*, ECtHR judgments not only imply that the responding state adopts individual reparation measures in relation to the victim, but that it provides *restitutio in integrum*. This includes general measures to prevent similar cases in the future.[37] Almost all judgments of the Court are therefore not limited to the individual case under scrutiny but create, apart from the relation to the victim, a general binding effect on the responding state to bring its internal order in line with its international obligations concerning cases similar to the one judged.[38] The binding effect indirectly extends to the underlying legal or factual circumstances that have caused the specific violation.[39]

A Court judgment hence makes the general obligation under Article 1 of the ECHR to maintain the domestic laws and administrative practices in line with the Convention, as it is construed by the Court, enforceable under Article 46(2) of the ECHR in the specific situation that gave rise to the judgment.[40] For instance, a judgment in which the Court finds a violation of Article 6 of the ECHR due to excessive length of proceedings not only binds the state with respect to the elimination of the consequences of the specific proceeding in question, but also in terms of procuring that the victim – and in

[36] Legal dispositions *per se* may though be the subject matter of a case and thus be directly evaluated by the Court. See among others *Dudgeon v. United Kingdom* (Merits), ECtHR, no. 7525/76, 22 October 1981, Series A no. 45. In such cases, the obligation to modify the law is based on the state's obligation to cease a continuing violation. See in more detail: Ruedin, *Exécution des arrêts*, pp. 139ff.

[37] Cf. *Scozzari and Giunta v. Italy*, ECtHR, nos. 39221/98 et al., 3 July 2000, *Reports* 2000-VIII, para. 249; *VgT v. Switzerland (No. 2)* [GC], ECtHR, no. 32772/02, 30 June 2009, para. 85.

[38] Cf. Ruedin, *Exécution des arrêts*, pp. 118f. According to Lambert, *Les effets des arrêts*, pp. 111f., this obligation originates not only in the text (Articles 1 and 53 of the ECHR) but also in "the spirit" of the ECHR.

[39] Ress, "Die Einzelfallbezogenheit", p. 740.

[40] Cf. Lambert, *Les effets des arrêts*, 71p.; Ress, "The Effects of Judgments and Decisions in Domestic Law", p. 803.

so far the general measure gets an individual component – or any other person will not be exposed to similar shortcomings in the future. This may require administrative measures such as contracting more judges or legal ones such as adopting rules for swifter proceedings. The general assertion that binding force would only include the legal norm on which the specific act in question was based if the Court had expressly included this norm into its considerations is too restricted.[41] The subject matter of a Court's case is the specific violation described by the applicant. But, as has been seen *supra*, the obligation to provide *restitutio in integrum* incumbent on the responding state goes beyond the individual case and always comprehends the underlying legislative or regulatory circumstances that made the violation possible and may be the root for similar violations in the future.[42] The wide understanding of the binding force is caused by the particular function of an ECtHR judgment, which is "moins d'un recours de responsabilité que de 'conventionnalité', instauré pour contraindre l'État à respecter l'engagement pris à l'article 1 de la convention, à savoir la garantie des droits conventionnels aux individus résidant sur son territoire".[43]

The concept of broad binding force has indirectly been confirmed by the introduction of the pilot judgment procedure, which is based on this concept.[44] In a pilot judgment, the Court, in terms of Rule 61(3) of the Rules of the ECtHR, indicates the general measures the responding state has to adopt in order to counter a systemic shortcoming that has given or may give rise to a large number of similar violations – generally without specifying in its reasoning a specific legal norm as the cause of the systemic shortcoming. The fact that the Court specifies the consequence in the operative paragraphs that the responding state has to modify its domestic order does not mean that the subject matter of a pilot judgment would

[41] This position has been formulated by Polakiewicz, *Die Verpflichtungen der Staaten*, pp. 44, 46.

[42] This becomes explicit in Rule 6(2)(b) of the CM Rules for the Supervision of the Execution of Judgments.

[43] Lambert, *Les effets des arrêts*, p. 71.

[44] Cf. CM Resolution Res(2004)3 and *Hutten-Czapska v. Poland*, ECtHR, no. 35014/97, 22 February 2005, para. 151.

have changed in comparison to non-pilot judgments.[45] On the contrary, the Court's more specific indications shall only "assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments".[46] The introduction of pilot judgments was hence a mere procedural modification that does not modify a judgment's binding force – which is why they could be adopted without modifications to the Court's basic documents, a posterior regulation in the Rules of the ECtHR being sufficient. This was possible because already before the legal or administrative regulations underlying a violation were comprehended by a judgment's binding force.

A judgment's binding force is hence extensive independently from whether it was designated as a pilot judgment or not. Binding force includes the internal legal rules or administrative or judicial practices that have permitted the violation. Particularly in view of the Court's frequent recurrence to the obligation to provide *restitutio in integrum* in the last years, it is not justified to further assume that judgments produce only a limited binding effect excluding causes for the violation that do not originiate in legal provisions or cases where the Court has not specifically mentioned the underlying systemic problem.[47]

This, however, may not lead to the conclusion that the Court's judgments could have effects beyond the situation that was under scrutiny. If the Court does not proceed to examine parts of an application, its judgments cannot bind the state with respect to this part of the facts submitted. The Court's judgments have a horizontal effect, penetrating into the judicial or legal order beyond the situation decided, but there is no direct vertical effect in the sense of expan-

[45] Ruedin, *Exécution des arrêts*, pp. 114f., appears to suggest a difference but recognizes the practical insufficiency of this view on p. 118f. of the same book. See on the other hand Ress, "Die Einzelfallbezogenheit", p. 740 and Department of the Execution of Judgments of the European Court of Human Rights, *The Committee of Ministers' Supervision of Execution of the Judgments of the European Court of Human Rights*, p. 4, pointing to the general obligation of states to modify the situation underlying a specific violation already before the introduction of the pilot judgment procedure.

[46] Cf. CM Resolution Res(2004)3.

[47] Defending this opinion: Polakiewicz, *Die Verpflichtungen der Staaten*, pp. 44ff.; considering a broader conception of binding force in the sense developed herein: Ruedin, *Exécution des arrêts*, pp. 118f.

sion of the binding effect to situations not adjudicated or even to other states.[48]

[48]Lambert, *Les effets des arrêts*, p. 74.

9 Execution of Judgments under the Conventions

Despite the creation of regional organs to ensure human rights protection, together with the possibility to file individual complaints against states, participation in international human rights protection systems does not necessarily correlate with better human rights protection in the signatory states.[1] Compliance may though be improved by way of an effective system to adjudicate human rights violations and provide victims with just satisfaction. In particular in politically charged circumstances, international courts may provide a more objective of a situation. The possibilities of international courts though seem limited when it comes to implementing the domestic consequences required by a judgment, i.e. the individual and general measures the responding state has to take. Given the absence of effective international judicial coercion, the execution of judgments depends on the political will of the states. Lack of will to execute will become a major obstacle in every regional human rights protection system. Execution of such judgments by international organs hence has to follow other patterns.

Judgments of both human rights courts in principle have to be executed by the state without further intervention by any international organ.[2] The systems rely insofar on the principle of good will, common to public international law.[3] During the drafting of the ECHR, a significant role was also envisaged for public opinion

[1]It is being questioned if human rights treaties generally improve the human rights situation in the signatory states. See Hathaway, "Do Human Rights Treaties Make a Difference?", *Yale L.J.* 111 (2002), pp. 1935ff., suggesting that the human rights situation tends to worsen after the signature of human rights treaties, and Goodman and Jinks, "Measuring the Effects of Human Rights Treaties", *Eur J Int Law* 14(1) (2003), pp. 171ff., who contradict Hathaway's findings.

[2]Article 46(1) of the ECHR and Article 68(1) of the ACHR.

[3]Hereon *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (Judgment), ICJ, 13 July 2009, ICJ Reports 2009, p. 213, p. 267 indicating further sources.

which should exert pressure on the national states to comply with ECtHR judgments.[4] Among the American states the issue of execution was undisputed during the drafting of the ACHR, and the question of a supervisory organ was not even discussed.[5] The European states agreed to transfer the judgments of the Court to the Committee of Ministers, "which shall supervise its execution",[6] while the ACHR does not expressly provide supervision of execution at all. Consequently, the designation of powers in the phase of execution is much more ambiguous and has already been challenged in the Americas. The ACHR's silence on supervision has resulted in the IACtHR occupying a predominant role in the post-judgment process. The differences between the political execution system of the COE (9.1) and the judicial procedure under the ACHR (9.2) shall now be examined in detail.

9.1 Execution under the ECHR

Supervision of execution of ECtHR judgments, according to Article 46(2) of the ECHR lies in the hands of the Committee of Ministers, a political organ of the CoE (9.1.1). Nevertheless, other organs such as the Court itself (9.1.2) or the Parliamentary Assembly (9.1.3) are also interfering in the process of execution.

9.1.1 The Committee of Ministers

Execution of judgments is supervised principally by the Committee of Ministers. In its day to day business, the Committee is supported by the Execution Department of the Secretariat of the CoE, which prepares the meetings, accompanies the states during the execution phase and provides legal assessment to the Committee.[7]

The Committee was conceived by the authors of the ECHR as a collegiate organ in which the states sit together as peers. This prin-

[4] ECtHR, *Preparatory work on Articles 53 and 54 of the European Convention on Human Rights*, pp. 1ff.
[5] See OAS, "Antecedentes, Convocatoria, Sede y Fecha de la Conferencia Especializada Interamericana sobre Derechos Humanos".
[6] Article 46(2) of the ECHR.
[7] Von Staden, *Shaping human rights policy in liberal democracies*, p. 127.

ciple also applies to the human rights meetings where the state that has failed to observe its obligations under the Convention participates as a full member even in the sessions concerning itself. The concept of peer review presupposes that, in the spirit of Article 1(a) of the Statute of the CoE, states are generally in a disposition to comply with the Court's judgments.[8] In these circumstances, the peer states' task is to help the failing member to implement the necessary reparation measures and to resolve disputes on a solitary basis. Should a member be unwilling to implement a judgment, the others could mount political pressure to move it towards compliance without having to recur to official means of force such as suspension from the Council.

In consequence of the enormous throughput of cases at the Court, the number of cases pending supervision before the Committee has reached new heights as well. At the end of 2013, 11 018 cases were pending supervision. This was the first year that a slight reduction in the number of pending cases could be achieved by the Committee, after a continuous increase from 706 cases in 1996 to a peak of 11 099 in 2012.[9] Out of these cases, 9 521 were classified as clone or isolated, whereat 1 496 were leading cases, i.e.

> cases which have been identified as revealing a new structural/general problem in a respondent state and which thus require the adoption of new general measures [...] Leading cases include *a fortiori* pilot judgments [...].[10]

While the overall number of pending cases decreased slightly between 2012 and 2013, the number of leading cases continued to grow from 1 337 in 2011 to 1 496 by the end of 2013.[11] In the same period, the Committee could close supervision of 1 398 cases, 1 216 of which were clone or isolated and 182 leading cases.

Due to the high overall number of cases pending execution, the Committee focuses its work on the leading cases in which the adoption of general measures usually entails the execution of several

[8]Ruedin, *Exécution des arrêts*, p. 7.
[9]Committee of Ministers, *Supervision Annual Report 2013*, p. 36.
[10]Committee of Ministers, *Supervision Annual Report 2010*, p. 29.
[11]Committee of Ministers, *Supervision Annual Report 2013*, p. 37.

other clone cases and thus significantly reduces the number of pending cases. Priority treatment of these cases has therefore been introduced in 2006. In general, advances in the reform process of the treatment of cases by the European organs has been reflected in the continuous adoption of new working methods by the Committee for the supervision of execution of judgments.

A set of partly overlapping rules governs the execution process.

9.1.1.1 Procedure

Once a judgment of the Court has become final, it is transmitted to the Committee, which inscribes it in its agenda for special human rights meetings (DH/HR).[12] Cases are then treated according to their pertinence. The highest pertinence is given to pilot judgments.[13] On an equal level are treated "other important cases", especially if grave injuries have been caused.[14] All other judgments are of lesser pertinence.

9.1.1.1.1 2004 Working Methods Since the entry into force of Protocol no. 11 in 1998, the Committee of Ministers started to work intensely on the issue of effectiveness of the European human rights system, in particular regarding the new facility of individual complaints which caused a considerable rise in applications to the Court.[15] During this process of reflection and reform, documents were adopted on several practical issues such as the reopening of cases before national jurisdictions,[16] rules of procedure for the su-

[12] Article 46 of the ECHR, Rule 3 of the CM Rules for the Supervision of the Execution of Judgments.

[13] CM Resolution Res(2004)3.

[14] Rule 4(2) of the CM Rules for the Supervision of the Execution of Judgments.

[15] See a compendium of measures adopted in this process in Directorate General of Human Rights, *Guaranteeing the effectiveness*. The Committee's practice since the first contentious judgments has been reproduced in von Staden, *Shaping human rights policy in liberal democracies*, pp. 120ff.

[16] Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights (hereinafter "CM Recommendation No. R (2000) 2"), adopted by the Committee of Ministers at the 694th "Human Rights" Meeting, 19 January 2000.

pervision of execution,[17] the publication and dissemination of the text of the Convention and case-law by the Court,[18] and the already mentioned resolution on cases identifying an underlying structural problem,[19] among others. Additionally, in 2001 two working groups dedicated to the reform of the human rights protection system were established: an Evaluation Group set up by the Committee of Ministers and a Reflection Group within the Steering Committee on Human Rights.[20]

During this process the Committee adopted new working methods for the execution of judgments by the Ministers' Deputies.[21] These methods laid the basis for today's procedure by introducing execution time tables that "will provide reference points that will structure the execution process and allow for the development of adequate responses in cases where there is a potential of delays in execution."[22] Furthermore, status sheets were implemented to make the supervision process better revisable, introducing a set of steps every case would take. Thus, the debate on standard, uncontroversial measures was to be prevented.[23] Plenary debate should also not take place until a case fell into one out of a fixed set of categories, containing elements such as systemic cases, changes in case-law by the Court, cases presenting a particularly grave situation for the applicant or inter-state cases.[24]

[17] Rules Adopted by the Committee of Ministers for the Application of Article 46, Paragraph 2, of the European Convention on Human Rights, adopted by the Ministers' Deputies at their 736th meeting, 10 January 2001, reprinted in: Guaranteeing the effectiveness of the European Convention on Human Rights, pp. 82–84.

[18] Recommendation Rec (2002) 13, adopted by the Ministers' Deputies at their 822nd meeting, 18 December 2002, reprinted in: Guaranteeing the effectiveness of the European Convention on Human Rights, pp. 54–55.

[19] CM Resolution Res(2004)3.

[20] Eaton and Schokkenbroek, "Reforming the Human Rights Protection System", *HRLJ* 26 (2005), p. 2.

[21] CM/Inf(2004)8 Final – Human rights working methods (hereinafter "CM/Inf(2004)8 fin"), adopted by the Committee of Ministers at the 879th "Human Rights" Meeting, 7 April 2004.

[22] No. 2.1 of CM/Inf(2004)8 fin.

[23] Nos. 2.2ff. of CM/Inf(2004)8 fin.

[24] Appendix I no.1.1 of CM/Inf(2004)8 fin.

9.1.1.1.2 2006 Rules The supervision process today follows the 2006 CM Rules for the Supervision of the Execution of Judgments. These rules remain the basic document, although an important reform package has been adopted in the aftermaths of the Interlaken Conference of 2010. The 2006 rules were inspired by the adoption of Protocol no. 14 and the Committee's developing practice.[25]

The rules maintain the principle that states have to submit, upon inscription of a case in the Committee's agenda, information on the measures they have adopted or are planning to adopt with respect to a judgment. They have to justify delays or shortcomings in the execution of judgments before their peer states. Furthermore, the Committee examines on its own accounts the payment of just satisfaction and application of measures taken by the state to restore the victim to the enjoyment of the rights from the ECHR that were violated. Its powers also include the examination of general measures taken by the state to prevent future violations of the same kind and to end ongoing violations.[26] Rule 6(2) of the CM Rules for the Supervision of the Execution of Judgments distinguishes three types of reparation whose adoption the Committee shall supervise: just satisfaction, when awarded by the Court; individual measures "to ensure that the violation has ceased and that the injured party is put, as far as possible, in the same situation as that party enjoyed prior to the violation of the Convention"; and general measures "preventing new violations similar to that or those found or putting an end to continuing violations". Although two footnotes to this rule give examples for individual[27] and general[28] measures, the rules again underline the "discretion of the High Contracting Party concerned to choose the means necessary to comply with the judgment".

[25]Lambert Abdelgawad, *The execution of judgments, 2008*, p. 34.

[26]Rule 6(2) of the CM Rules for the Supervision of the Execution of Judgments.

[27]"For instance, the striking out of an unjustified criminal conviction from the criminal records, the granting of a residence permit or the reopening of impugned domestic proceedings [...]".

[28]"For instance, legislative or regulatory amendments, changes of case law or administrative practice or publication of the Court's judgment in the language of the respondent state and its dissemination to the authorities concerned".

With the 2006 reform, prioritization of cases, in line with CM Resolution Res(2004)3, was included in the standard set of instruments available to the Committee.[29]

Interim resolutions are the main instrument of communication of the Committee. It may adopt them at any stage of the proceedings, notably "in order to provide information on the state of progress of the execution or, where appropriate, to express concern and/or to make suggestions with respect to the execution".[30] Only after just satisfaction has been paid or sufficient other individual measures have been taken, is the case deleted from the Committee's agenda by way of a final resolution concluding that the Committee has exercised its functions under Article 46(2) of the ECHR. Otherwise the case will, in general, remain on the agenda for every future DH/HR meeting.[31] Corresponding resolutions are adopted by a two-thirds majority of all members on the Committee, including the affected state.[32]

The injured party does not directly participate in the supervision process, but it may send communications of any kind during the supervision phase to the Committee in order to inform it about the state of execution of the judgment in its respect. NGOs or national institutions have a broader possibility to make submissions on every aspect related to the execution of a judgment.[33] Apart from this possibility, the injured party may not participate in the Committee's sessions as the deliberations are held in private – as long as nothing else was decided unanimously – in line with Article 21 of the Statute of the CoE.

Certain documents, such as country information or information submitted to the Committee by the injured party or third-party interveners such as NGOs, will though be made available to the public. After each session, the annotated agenda of the Committee's supervision will be published. The Committee is furthermore publishing, since 2007, annual reports about its work. Nevertheless, any of the

[29]Rule 4 of the CM Rules for the Supervision of the Execution of Judgments.
[30]Rule 16 of the CM Rules for the Supervision of the Execution of Judgments.
[31]Rule 7 of the CM Rules for the Supervision of the Execution of Judgments.
[32]Article 20(c) of the Statute of the CoE.
[33]Rule 9 of the CM Rules for the Supervision of the Execution of Judgments.

aforementioned publications may be suppressed upon a decision by the Committee.

9.1.1.1.3 2010 Reform The latest revision of the working methods ensued the action plan adopted at the Interlaken Conference of 2010, which underlined the importance of the principle of subsidiarity and called the Committee to pay greater respect to the priorities each case requires.[34] The Committee reacted swiftly and adopted a roadmap for the implementation of the Interlaken Action Plan.[35] Following proposals made particularly by France, it adopted a twin-track approach to supervision.[36] While all unfinished cases continue to be considered technically on the agenda of each DH/HR meeting, they will now be dealt with according to a standard or an enhanced supervision procedure, depending on the importance of the case. Judgments requiring urgent individual measures, pilot judgments, judgments identifying major structural or complex problems, or interstate cases shall be treated under the enhanced procedure. The enhanced procedure may also be proposed by member states or the Secretariat in other specific cases.[37] The injured party has no influence on the procedure the Committee applies to a case.

The standard procedure implies little activity by the Committee. States are accompanied by the Secretariat during the process of implementation and the Committee intervenes only to approve action plans or reports and to eventually adopt a final resolution when all individual and general measures have been implemented.[38] Upon presentation of an action plan, the Execution Department of the

[34]"Interlaken Declaration", in: *High Level Conference on the Future of the European Court of Human Rights*, ed. by Directorate General of Human Rights and Legal Affairs, Strasbourg: Council of Europe, 19 February 2010, pp. 119–125, no. F.11; on the Conference: Mowbray, "The Interlaken Declaration", 3 *HRLR* 10 (2010); CM – Extract of decisions taken during 1100th CMDH meeting – Item e (hereinafter "Extract of decisions taken during 1100th CMDH meeting - Item e"), adopted by the Committee of Ministers at the 1100th "Human Rights" Meeting, 2 December 2010, URL: http://www.coe.int/t/dghl/monitoring/execution/Source/Documents/Interlaken/Item_e1100th_EN.pdf.

[35]Committee of Ministers, *CM/Inf(2010)28 rev.*

[36]Committee of Ministers, *CM/Inf/DH(2010)37*, no. 6.

[37]Committee of Ministers, *CM/Inf/DH(2010)37*, nos. 8 and 9, *CM/Inf/DH(2010)45*, no. 10.

[38]Committee of Ministers, *CM/Inf(2010)28 rev.* No. 7, *CM/Inf/DH(2010)37*, no. 12.

Secretary will evaluate it and the measures proposed therein, before the Committee, at the next DH/HR meeting or no later than six months after submission of the plan, decides whether to accept the plan and invites the state to keep it updated on the measures adopted in conformity to the plan. Once the state considers to have adopted all measures it presents a final action report and solicits the closure of the case.[39]

Under the enhanced procedure cases are looked at with more scrutiny by the Committee in order "to arrive at effective, speedy and long-term solutions to problems that are the root cause of violations found by the Court". The Execution Department is also working more closely with the state to adopt the measures required, and in particular provides assistance in the preparation and/or implementation of action plans, expertise assistance as regards the type of measures envisaged, and bilateral/multilateral cooperation programmes (e.g. seminars, round-tables) in the case of complex and substantive issues.[40] The Committee debates these cases only if the situation is apt to present developments or in order to outline shortcomings to the public. Such debates can be requested by any member of the Committee or the Secretariat.[41] Otherwise, decisions without debate can be adopted to demonstrate the developments in the execution process.[42]

Both supervision methods are not supposed to be exclusive but shall rather be applied in a flexible way, depending on the progress in the specific case. Enhanced supervision should thus be envisaged in cases where the state does not comply with its obligations to submit actions plans (after three months of transfer of the case to the Committee) or if there are differences of opinion between the state and the Department of Execution of the Secretariat General. Placing a case under enhanced supervision might serve as a first signal that the Committee is considering the case with higher priority and might ensue discussion of the case, particularly if slow implementation of action plans persists.[43]

[39] Committee of Ministers, *CM/Inf/DH(2010)37*, nos. 16f.
[40] Ibid., no. 20.
[41] Ibid., nos. 21f.
[42] Committee of Ministers, *CM/Inf/DH(2010)45*, no. 16.
[43] Committee of Ministers, *CM/Inf(2010)28 rev.* No. 11, *CM/Inf/DH(2010)37*, nos. 24ff.

Under either of the two supervision modalities, the Committee relies principally on the information provided by the state.[44] This information is to be contained in two forms: action plans and action reports. The Committee requires submission of such documents since 2009 within six months after a judgment has become final.[45] According to the official definition, an action plan is:

> A plan setting out the measures the respondent State intends to take to implement a judgment of the Court, including an indicative timetable. The plan shall, if possible, set out all measures necessary to implement the judgment. Alternatively, where it is not possible to determine all measures immediately, the plan shall set out the steps to be taken to determine the measures required, including an indicative timetable for such steps.[46]

Upon culmination of the state's efforts it submits an action report, which has been defined as:

> A report by the respondent State setting out all the measures taken to implement a judgment of the European Court of Human Rights, and/or an explanation of why no measures, or no further measures, are necessary.[47]

The states are expected to submit an action plan or, if they consider to have adopted all necessary measures, an action report as soon as possible, at latest within six months.

Supervision of payment of just satisfaction has also been modified, putting more responsibilities onto the applicant. Applicants are henceforth informed by the Court in letters accompanying the judgment that it is their responsibility to contest information submitted by the state to the Committee concerning payment of just satisfaction.[48] Once a payment has been effectuated, the state informs the Committee of this fact using a standard form. This information is

[44]Rule 6 of the CM Rules for the Supervision of the Execution of Judgments.
[45]Committee of Ministers, *CM/Inf/DH(2010)37*, no. 3.
[46]Ibid., Appendix I no. 5.
[47]Ibid., Appendix I no. 7.
[48]Committee of Ministers, *Supervision Annual Report 2010*, p. 19.

immediately published on the execution website of the CoE.[49] It is up to the applicant to verify the information submitted by the state to the Committee, because the Execution Department's activity is limited to registering and publishing payment notices. Once such a notice has been published, the applicant, within a term of two months, may contest the payment. Beyond this term they are supposed to have accepted the payment and the issue will be closed.[50]

The new working methods also imply more standardized information to be prepared for the delegates sitting on the Committee. They will receive a standard set of documents at least one month before each DH/HR meeting, containing information on all points mentioned above.[51] In this documentation, the delegates are also informed about the submissions made by the party to a case or NGOs according to Rule 9 of the CM Rules for the Supervision of the Execution of Judgments.

9.1.1.2 Implementation of Reparation

The Committee had been reluctant to seriously interfere with the states' domain when supervising implementation of judgments in the early years of the European system. It merely satisfied itself with information provided by the states that certain measures had been adopted, but it did not assess their effectiveness.[52] Nowadays, the Committee takes a bolder stand on compliance, verifying e.g. that a change in case-law in fact remedies the situation.[53] The Execution Department plays a crucial role in this task by assessing the states' reports for effectivity and alignment to the standards established by the ECourtHR in its overall jurisdiction.[54]

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[49] http://www.coe.int/t/dghl/monitoring/execution/Themes/Satisfaction_equitable/SE_EN.asp.

[50] Committee of Ministers, *Supervision Annual Report 2010*, p. 19; the Committee nevertheless reserves the right to reopen cases "if necessary": Committee of Ministers, *CM/Inf/DH(2010)37*, Appendix II no. 11.

[51] Ibid., nos. 31f.

[52] Von Staden, "Rational Choice within Normative Constraints: Compliance by Liberal Democracies with the Judgments of the European Court of Human Rights", *SSRN eLibrary* (2012), p. 16.

[53] Lambert Abdelgawad, *The execution of judgments, 2008*, pp. 37f.

[54] Eg. Committee of Ministers, *Violations of the ECHR in the Chechen Republic (rev. 2)*, nos. 39ff.

The Committee verifies implementation under three heads: just satisfaction, individual and general measures.

9.1.1.2.1 Just Satisfaction The ECHR does not contain a norm similar to Article 68(2) of the ACHR, which stipulates that compensatory damages are to be executed according to the countries' national proceedings concerning judgments against the state. While compensatory orders by the IACtHR are thus treated like national judgments, their character under the ECHR is purely international and it is up to the states to determine the procedures of compliance. Victims in Europe do not necessarily have an established procedure to claim just satisfaction awarded by the Court from the state. Although the state does not have a choice concerning the means of compliance with the obligation to pay compensatory damages, it may determine the internal claims procedure.

In its 2010 Working Methods the Committee has mostly relinquished control of the payment of just satisfaction and placed it into the hands of the applicants.[55] Issues concerning the payment of just satisfaction hover mainly around claims for payment of interests and set-off for compensation payments. After some uncertainties about the time limits for the payment of sums awarded and the consequences of untimely payments, the Court today establishes time limits for the payment (three months) plus interests determined by the marginal lending rate of the European Central Bank.

Practice for monitoring payment of just satisfaction has been laid down in CM/Inf/DH(2008)7.[56] This document details the modalities of supervision in different situations such as the determination of the moment of payment, problems relating to the identification of the beneficiary or currency-related questions. According to this practice, the Committee considers the obligation of compensation to be satisfied when the state shows that it has put the money, "by any method whatsoever", at the disposal of the applicant and that

[55]Committee of Ministers, *CM/Inf/DH(2010)45*, nos. 21ff.

[56]CM/Inf/DH(2008)7 Final – Monitoring of the payment of sums awarded by way of just satisfaction: an overview of the Committee of Ministers' present practice (hereinafter "CM/Inf/DH(2008)7"), adopted by the Ministers' Deputies, 15 January 2009.

the applicant has been informed thereof.[57] Read together with Committee of Ministers (*CM/Inf/DH(2010)45*, nos. 21ff.), which make supervision of payments depend on the intervention of the applicant within a specific period of time after the (unilateral) payment report by the state has been published on the Committee's website, it has to be feared that in case of applicants without access to the Internet, legal representation or knowledge of the languages in which the Committee's website is available, the suspension of pro-active supervision by the Committee might prove fatal to the execution of their compensation claims against the state.[58]

Although payment of just satisfaction should be the easiest form of reparation to be complied with, the Committee's Annual Report on Execution for 2010 indicates that payments were made on time only in 28% of all judgments pending execution (a decrease from 37% in 2009) and in 13% of all judgments after the deadline. The number of cases pending execution for more than six months had increased by 20% from 29% in 2009 to 35% in 2010.[59] It remains to be seen whether the new Committee procedure on supervision will improve or worsen these numbers.

Cases in which payment of just satisfaction was outrightly rejected by the state have been rare though. An exemplary one is *Loizidou v. Turkey* in which the Court had ordered the state to pay compensation to a Greek Cypriot applicant for the loss of peaceful enjoyment of her property after the Turkish invasion of the island in 1974.[60] Turkey refused to pay arguing that a global solution for all property related cases in Cyprus had to be found – the first time ever that a state refused to comply with a judgment.[61] It was only after increased pressure by the Committee and the member states that Turkey finally paid the amount due on 2 December 2003 and super-

[57] No. 10 of CM/Inf/DH(2008)7.

[58] Cf. the controversial payment orders in *Hirsi Jamaa and others v. Italy*, commented in section 5.3 *supra*.

[59] Committee of Ministers, *Supervision Annual Report 2010*, p. 49. In 2012 the Committee changed its statistics and now discriminates amoung the cases where a payment was received in the corresponding year. Information on the overall number of cases where payments are overdue is hence no longer available.

[60] *Loizidou v. Turkey* (Article 50) [GC], ECtHR, no. 15318/89, 28 July 1998, 1998-IV.

[61] *Loizidou v. Turkey*, CM, 15318/89, 6 October 1999, DH (99) 680.

vision on this issue was closed.[62] The issue of individual measures, i.e. restitution of Ms Loizidou's property or compensation for the loss thereof remained though unresolved. The Committee therefore decided on the same day that it would reopen supervision in 2005 and, until today, continues to supervise the discussion on compensation. On 1 March 2010 the ECtHR approved a Turkish law on compensation, exchange or restitution of immovable property.[63] This law had been passed in 2005 in consequence of a pilot judgment on the question of restitution.[64] The law contains an offer by Turkey to compensate for lands lost by Greek Cypriots. Ms Loizidou nevertheless rejected this offer. Further decisions by the Committee are due, although they are unlikely to push the case any further, since the Court had held that, if the applicants chose not to make use of the Turkish law, they would have to await a political solution of the issue.[65]

This case is exemplary for the European human rights organs' general attitude to back away from politically charged decisions and to return contradictory questions to be resolved unilaterally by the states, without giving directives or setting time limits for a satisfactory resolution of at least the specific case before them, nor ensuring the applicant's participation in the ensuing discussions. The case though not only had the Committee face a new reality of recalcitrant states, it also caused the Parliamentary Assembly to take a direct interest in the supervision of execution of judgments, which will be discussed below.[66]

9.1.1.2.2 Individual Measures It would be false to suppose that cases before the European Human Rights System were generally less grave than cases before the Inter-American System and consequently required less reparation measures, just because the Court does not pronounce itself on this question in the majority of its judgments. While it is certain that most cases affect rather limited vio-

[62] *Loizidou v. Turkey*, CM, 15318/89, 2 December 2003, DH(2003)190.
[63] *Demopoulos v. Turkey* (dec.) [GC], ECtHR, nos. 46113/99 et al., 1 March 2010.
[64] *Xenides-Arestis v. Turkey*, ECtHR, no. 46347/99, 22 December 2005.
[65] *Demopoulos v. Turkey* (dec.) [GC], ECtHR, nos. 46113/99 et al., 1 March 2010, para. 128.
[66] See Jurgens, *Execution of Judgments of the European Court of Human Rights.*

lations that do not require broad individual answers, a considerable number of other cases originate from severe violations that have to be repaired by a variety of measures and consequently require more attention by the Committee.

The scope of measures that, depending on the circumstances of the individual case, may be necessary to obtain complete restitution for the individual in the jurisprudence of the IACtHR, has already been shown. As, due to the principle of subsidiarity, the European human rights organs usually do not impose specific measures on the states, the Committee tends to act very cautiously on the supervising stage. Nevertheless, if the monetary compensation awarded is insufficient to remedy the violation, it insists that the state take further measures.[67]

The group of cases concerning human rights violations during the Chechen wars (managed by the Committee as the "Khashiyev group") are a good example for the Committee's procedure. In this group of cases the Court had found violations such as unjustified killings, forced disappearances, torture, failure to conduct an effective criminal investigation, lack of effective domestic remedies and unjustified destruction of properties. As could be expected for a situation concerning a considerable number of cases, the Committee's work focused on general measures.[68] It established three lines along which the general measures to prevent repetition of similar cases should be achieved: improvement of legal and regulatory framework governing the security forces, awareness raising and training of security forces, and improvement of domestic remedies. On the individual side, effective investigations into deaths and disappearances were required.[69] Remarkably, several measures the IACtHR treats as individual measures are classified as general measures by the Committee, particularly guarantees of non-repetition that also have an individual reparatory effect, assuring the victim that in the

[67] See examples of measures adopted by different states at Directorate General of Human Rights and Legal Affairs, *Practical impact*, pp. 22ff.

[68] Since the first cases were resolved by the ECtHR in 2005, the Execution Department referred to individual measures only in its first memorandum of 2006. All three subsequent memoranda were dedicated exclusively to general measures.

[69] Committee of Ministers, *Violations of the ECHR in the Chechen Republic (rev. 2)*, nos. 7ff.

future others will not suffer the same fate. The unclear distinction becomes more evident where the obligation to publish the Court's judgments is concerned. While the Committee classifies this as a general preventive measure, the IACourtHR usually puts the individual component of restitution of the victim's honour into the foreground.[70] Improvement of criminal investigations, sanctions for responsible persons and redress for victims also concern both individual redress and general prevention. Classified by the Committee as a general measure, individual victims also profit from such improvements as they also affect their cases.[71]

The Committee's work during the DH/HR meetings on this group of cases was accompanied by memoranda from the Execution Department, summarizing the state of execution and assessing the measures adopted by the state. Once the first case had been transmitted by the Court, the Department invited the Russian authorities to "provide information on the measures envisaged or being taken to remedy the shortcomings in the investigations [...], and to ensure the availability of effective domestic remedies".[72] Consequently, Russia ordered new investigations into the cases based on CM Recommendation No. R (2000) 2 and informed the Committee of this fact. The Department further "encouraged" the authorities to make rapid and visible progress on the cases and "urgently expected" information on the progress achieved to date since the authorities had not communicated themselves in more than a year.[73] The Execution Department also pointed out prior similar cases against other states and the measures adopted by the Committee.[74] By doing so, it not only secured continuity in its activities, but also applied a "good practice" approach. Russia subsequently submitted additional information on the progress of the investigations and the recognition of victim status to a number of people affected by the actions of the military that gave rise to the cases before the

[70]Cf. Committee of Ministers, *Violations of the ECHR in the Chechen Republic (rev. 2)*, nos. 57ff.
[71]Cf. ibid., nos. 74ff.
[72]Committee of Ministers, *Violations of the ECHR in the Chechen Republic.*
[73]Committee of Ministers, *Violations of the ECHR in the Chechen Republic (rev.)*
[74]Committee of Ministers, *Violations of the ECHR in the Chechen Republic (rev. 2)*, no. 16.

ECtHR, but refrained from disclosing the entire investigation file to the Committee.[75] Further delays occurred, Russia established an "Investigating Committee" consisting of a military and a civil branch in charge of the cases decided by the Court, until the CoE's Secretariat finally met with representatives of the Russian authorities for bilateral consultations in 2009 on the state of execution and linked the Russian investigating unit with a similar unit investigating cases in the UK that had emerged from the Northern Ireland conflict. Nonetheless, although there seems to be certain progress, the victims still complain of not being properly informed of the investigation measures undertaken.[76] None of the perpetrators has hitherto been held responsible by Russia in any of the cases. This recalcitrant behaviour finally exasperated the Court which, in a 2010 decision on an aerial attack that had already been the subject of another case decided in 2005,[77] condemned Russia in rather bold language ("notes with great dismay") and found that it could no longer apply the principle of subsidiarity as "the respondent Government manifestly disregarded the specific findings of a binding judgment".[78] Apart from underlining the Committee's responsibility to address the issue of compliance, it ordered Russia for the first time directly to conduct a new, independent investigation into the issues.[79] Again, though, it did not include this order into the operative paragraph of the judgment but merely declared it as an *obiter dictum*, despite constant efforts by the applicants to achieve a stronger order by the Court.[80] In 2011, another visit by the Secretariat to the Chechen Republic took place. Thereupon, the Committee adopted its first interim resolution in the affair, assessing the progress made, outlining shortcomings in the implementation of measures and indicating which measures should be adopted most urgently. In accordance with the Court's

[75] Ibid.

[76] Committee of Ministers, *Action of the security forces in the Chechen Republic of the Russian Federation*, nos. 49ff. and communication DH - DD(2011)422, available at https://www.coe.int/t/dghl/monitoring/execution; also see Human Rights Watch, *"Who will tell me what happened to my son?"*

[77] *Isayeva v. Russia*, ECtHR, no. 57950/00, 24 February 2005.

[78] *Abuyeva et al. v. Russia*, ECtHR, no. 27065/05, 2 December 2010, paras. 238–241.

[79] Ibid., para. 243.

[80] Leach, "Redress and implementation in the Chechen cases", *EHRAC Bulletin* 15 (2011), p. 3.

recent decisions, it announced to focus its attention on individual measures, particularly the investigation into the deaths and disappearances and criminal investigations against those responsible.[81] It stepped up the monitoring intensity and adopted two further decisions at its June and September 2012 DH/HR meetings, underlining in particular the urgency to make progress in the search for disappeared persons, investigations and prevention of destruction of evidence.[82] Finally, in December 2012, the Court recognized, against Russia's opposing view, the systemic character of the human rights violations in the Chechen Republic.[83]

These cases show how the Court and the Committee interact, the latter adapting its focus to the Court's jurisprudence. Also, victims' desires to participate more closely in the investigations are taken into account. The major burden of accompanying the implementation of the decision by the Russian authorities, though, lies with the Execution Department.[84]

The determination of specific reparation measures by the Court shall facilitate the Committee's work by limiting the states' leeway to determine how to discharge their obligation to provide *restitutio in integrum*. The Committee's supervisory responsibilities are consequently also reduced to only discussing measures that fall into the scope determined by the Court. Thus, in the first ever case where the Court ordered a specific individual reparation measure, *Assanidze v. Georgia* of 8 April 2004, concerning the illegal detention of a prisoner, the Committee only had to verify the prisoner's release. During the supervisory phase, the state informed it of the immediate execution of this measure.[85]

[81] *154 cases against the Russian Federation* (Interim Resolution), CM, 57942/00, 2 December 2011, ResDH(2011)292.

[82] *154 cases against the Russian Federation* (Decision), CM, 57942/00, 6 June 2012, CM/Del/Dec(2012)1144/19 and *154 cases against the Russian Federation* (Decision), CM, 57942/00, 12 September 2012, CM/Del/Dec(2012)1150/19.

[83] *Aslakhanova et al. v. Russia*, ECtHR, nos. 2944/06 et al., 18 December 2012, paras. 179ff., 216ff.; see *supra* section 5.2.2.

[84] A more detailed recount of the implementation measures in the Chechen cases can be found at Human Rights Watch, *"Who will tell me what happened to my son?"*, pp. 8ff.

[85] *Assanidze v. Georgia*, CM, 71503/01, 2 November 2006, DH(2006)53.

Ordering direct individual measures however is not always a guarantee for compliance by the state. In *Ilaşcu and others v. Moldova and Russia*, another case of irregular detention in a territory not under effective control of the state, two of the four applicants were still not released when the Committee adopted its first interim resolution eight months after the judgment had been published. The Committee reacted by mounting political pressure against the recalcitrant state. In its first resolution, adopted on 22 April 2005, the Committee

> not[es] the fact that two of the applicants, [...], are still imprisoned in the territory of the "MRT" [Moldavian Republic of Transdniestria] [...], stress[es] that it is evident that the continuation of the unlawful and arbitrary detention of the applicants for more than 9 months after the Court's judgment fails to satisfy the Court's demand for their immediate release [...and] urgently invites [...]

Russia, which had effective control in the MRT, to comply with the judgment.[86] Three further interim resolutions by the Committee of 13 July 2005, 1 March 2006 and 10 May 2006 were necessary until the two remaining applicants were finally released on 2 and 4 June 2007.[87] In the course of the proceedings, the Committee had constantly sharpened the wording of its resolutions, until, in its interim resolution of 10 May 2006 it went to the utmost, stressing "the Committee's resolve to ensure, with all means available to the Organisation, the compliance by the Russian Federation with its obligations under this judgment" and calling "upon the authorities of the member states to take such action as they deem appropriate to this end".[88] As a consequence of this call, the European Parliament

[86] *Ilaşcu and others v. Moldova and Russia*, CM, 48787/99, 22 April 2005, ResDH(2005)42.

[87] *Ilaşcu and others v. Moldova and Russia*, CM, 48787/99, 12 July 2007, CM/ResDH(2007)106.

[88] *Ilaşcu and others v. Moldova and Russia*, CM, 48787/99, 10 May 2006, ResDH(2006)26.

adopted a resolution on human rights violations in Transnistira,[89] and several other states took action as well.[90]

Another particularly controversial individual reparation measure is the reopening of proceedings in cases that were concluded in violation of fundamental rights, particularly Article 6 of the ECHR. This measure has its limitations because the organs of the European human rights system, like their inter-American counterparts, do not have the function of a supranational appellations court and do not have the power to quash national legal or judicial acts. Nevertheless, reopening judicial proceedings in certain cases may be the only possibility to restitute the applicant to the position before the violation had occurred.[91] States however cannot simply be ordered to reopen proceedings in all cases. Re-trying civil law suits may, for instance, prejudice the rights of other parties to the original process. Here, monetary compensation may be a more appropriate solution.[92] Criminal cases also depend on a diligent consideration of individual interests. On the one hand, reopening a procedure with several accused persons may affect the rights of those who, despite a possible violation of their rights, had decided not to take their case to Strasbourg. It is also imaginable that the applicants themselves do not want to be re-tried despite the violation, either because their sanction is already purged, because they feel that the judgment is favourable to them and a new trial might conclude with a stricter judgment, or out of other personal reasons to leave the subject that gave rise to the case closed.[93] A further obstacle is that not all procedural laws in the member states provide rules for the reopening of cases after ECtHR judgments, making it legally impossible to re-try applicants.[94] The Committee became aware of this situation and is-

[89]European Parliament resolution of 12 July 2007 on human rights violations in Transnistria (Republic of Moldova), adopted by the European Parliament, P6_TA(2007)0358, 12 July 2007.

[90]See *Ilaşcu and others v. Moldova and Russia*, CM, 48787/99, 12 July 2007, CM/ResDH(2007)106.

[91]Preambule of CM Recommendation No. R (2000) 2.

[92]Lambert Abdelgawad, *The execution of judgments, 2008*, p. 18.

[93]See *Saunders v. The United Kingdom and I.J.L., G.M.R. and A.K.P. v. The United Kingdom*, CM, 19187/91 et al., 21 December 2004, DH(2004)88, where proceedings were not to be reopened due to the age and state of health of the applicants.

[94]*Hulki Güneş v. Turkey*, CM, 28490/95, 4 April 2007, DH(2007)26.

sued CM Recommendation No. R (2000) 2, inviting the states to procure for a domestic remedy to reopen proceedings upon judgments by the Court. Most domestic laws now provide this possibility.[95] In other cases the Committee has urged states to introduce legislation to allow the reopening of cases.[96] States have also erased, by way of clemency, the consequences of convictions in criminal cases criticised by the Court.[97] As these acts do not entail the judicial declaration that the victim in fact is not a criminal but merely levy the sanction imposed, they are inappropriate to eliminate all consequences of a criminal proceeding and procure *restitutio in integrum*.[98]

9.1.1.2.3 General Measures While individual measures ensure relief in the specific case, general measures are paramount to prevent the recurrence of similar cases and are an important instrument in the European System's fight against suffocation. It is therefore in this area that Court and Committee are most effectively exerting pressure on the states. Systemic problems are nowadays being tackled under the pilot judgment procedure, but also in other cases the adoption of general measures is of great concern to the Committee.

Typical general measures are legislative modifications, adaptations in the domestic courts' interpretation of the laws, allocation of funds to improve the functioning of the public or judicial administration, training of public servants, etc. Most of these measures require complex processes and political discussions, thus postponing their adoption and extending the Committee's supervisory activities.[99]

In most cases the addressee of general measures is the legislature, whose task it is to bring domestic laws in line with the Convention. Improper interpretation of judgments, political quarrels or elections may however complicate legislative processes. This was the case when the UK had to modify its domestic laws following two Court judgments concerning prisoner voting rights. According to

[95] Lambert Abdelgawad, *The execution of judgments, 2008*, p. 19.
[96] *Dorigo Paolo v. Italy*, CM, 33286/96, 12 October 2005, ResDH(2005)85.
[97] *Stefanov v. Bulgaria*, CM, 32438/96, 15 June 2004, DH(2004)32.
[98] Lambert Abdelgawad, *The execution of judgments, 2008*, pp. 24f.
[99] See more examples at Directorate General of Human Rights and Legal Affairs, *Practical impact*, pp. 17ff.

UK election laws, prisoners, independently from the length of their sentences or the type and gravity of the crime, are excluded from voting. This was held disproportionate by the ECtHR.[100] Thereupon, the government launched a two-stage consultation process on the necessary legislative changes in 2006, which ended in 2009. As the next general elections in the UK were to take place in June 2010, the Committee strongly reproached the UK, expressing its "serious concerns" about the substantial delay in the implementation of the judgment in view of the imminent general elections, "urg[ing]" it to adopt the necessary measures.[101] Following a judicial decision rejecting the registration of detainees in the voting register for Scottish elections and the lack of progress in view of the imminent general elections, the Committee, on 4 March 2010, warned that a failure to implement the judgment before the elections would result in the elections to be in violation of the Convention and, given the large number of persons affected by the general ban, give rise to a high number of similar cases before the Court.[102] As all warnings were to no avail and the elections were held with the ban still in force, the Committee immediately after the elections, on 4 June 2010, released another decision "expressing confidence" that the government would implement the measures before the next regional elections in 2011.[103] The Court subsequently received, by September 2010, 1 340 similar applications. Knowing that there were some 70 000 convicted prisoners in the UK – all potential applicants – had it apply the pilot judgment procedure in one exemplary case.[104] In the ensuing judgment, the Court considered "whether it is now appropriate for the Court to provide the respondent Government with some guidance as to what is required for the proper execution of the present judgment".[105] In respect of the wide margin in which the UK could resolve the situation of prisoner voting rights, it did not make any specific orders as to the content of the legislative

[100] *Hirst v. United Kingdom (No. 2)* [GC], ECtHR, no. 74025/01, 6 October 2005, 2005-IX, para. 82.
[101] *Hirst v. United Kingdom (No. 2)*, CM, 74025/01, 3 December 2009, ResDH(2009)160.
[102] Available at https://www.coe.int/t/dghl/monitoring/execution.
[103] Available at https://www.coe.int/t/dghl/monitoring/execution.
[104] *Greens and M.T. v. The United Kingdom*, ECtHR, nos. 60041/08 et al., 23 November 2010, para. 114.
[105] Ibid., para. 112.

proposal, but set a period of six months within which a corresponding proposal had to be submitted. It furthermore made, for the first time ever, an indirect allusion to its new supervisory functions under Article 46(4) of the ECHR, introduced by Protocol no. 14.[106] This deadline was extended upon request by the UK to a date six months after the delivery of the judgment in the similar case of *Scoppola v. Italy (No. 3)*, i.e. until 23 November 2012.[107] In comparison to UK laws, Italian law does not impose a blanket ban of voting rights for all prisoners, but takes into account the particularities of the case under scrutiny, the gravity of the crime committed and the length of the sentence imposed. While in *Hirst v. United Kingdom (No. 2)* the Court had not given guidelines under which a ban on voting rights would be in accordance with the ECHR, the *Scoppola v. Italy (No. 3)* decision contained the corresponding details.[108] At the end of the deadline, the government of the UK introduced corresponding legislation to Parliament on 22 November 2012. It informed the Committee thereof in an Action Plan. The Committee took note of this fact and decided at its 1157th meeting to remain pending of the outcome of the legislative process and decided to resume the case at latest at its 1179th meeting in September 2013.[109] On 26 March 2013, the Court decided to adjourn 2 354 prisoner voting right cases brought before it from Great Britain until the expiry of the Committee's deadline.[110]

The *Hirst v. United Kingdom (No. 2)* jurisprudence of the ECtHR evidences two things. First, that, despite a strong warning by the Court, the responding state could hold elections in violation of the ECHR again after the Court's judgment. The organs of the European human rights protection system could not effectively impose the consequences from the Court's judgment onto the state. Secondly, that Court and Committee have articulated their procedures so that one organ can effectively react to the work of the other.

[106] Ibid., para. 114.

[107] Decision of 26 September 2012, adopted at the Committee of Ministers' 1150th meeting, available at https://www.coe.int/t/dghl/monitoring/execution; *Scoppola v. Italy (No. 3)* [GC], ECtHR, no. 126/05, 22 May 2012.

[108] Ibid., paras. 103ff.

[109] Decision of 4 December 2012, adopted at the Committee of Ministers' 1157th meeting, available at https://www.coe.int/t/dghl/monitoring/execution.

[110] ECtHR, *Press Release ECHR 091 (2013)*, 26 March 2013, URL: www.echr.coe.int.

More diverse general measures were required in the Chechen cases. Already before the Court's pilot judgment of 2012 in *Aslakhanova et al. v. Russia*, the Committee had required Russia to adopt new legislation on the fight against terrorism that is in line with the Court's requirements. It furthermore requested the publication of the Court's judgments in Russian for the members of the armed forces. Russia should also introduce the Court's jurisprudence and domestic and international legislation concerning international humanitarian law to the training of members of the armed services. These measures were monitored closely by the Committee, which required copies of publications and asked Russia to confirm that dissemination of the judgment was accompanied by explanatory documents. The authorities were particularly invited to align the professional training measures to Recommendation Rec (2004) 4.[111] In addition to these orders, the Court had established the aforementioned measures concerning effective investigations and punishment of responsible persons, which, apart from bringing relief in the individual case, also have a general character as their application would prevent further cases from reaching the Court.[112]

9.1.1.3 Instruments

The Committee can apply a variety of formal (9.1.1.3.1–9.1.1.3.4) and informal (9.1.1.3.5) instruments during the phase of supervision of execution.

9.1.1.3.1 Resolutions The working methods of 2006 provide interim and final resolutions as the Committee's means of communication. Interim resolutions shall be adopted, according to Rule 16 of the CM Rules for the Supervision of the Execution of Judgments, "notably in order to provide information on the state of progress of the execution or, where appropriate, to express concern and/or to make suggestions with respect to the execution", whereat final resolutions, according to Rule 17 of the CM Rules for the Supervision of

[111] Committee of Ministers, *Violations of the ECHR in the Chechen Republic: Russia's compliance with the European Court's judgments*, Memorandum CM/Inf/DH(2006)32 revised 2, 12 June 2007.

[112] *Supra* p. 169.

the Execution of Judgments, formally finish the Committee's monitoring. Interim resolutions were introduced in 1988.[113] The Committee makes use of them to give public notice of advances and shortcomings in the execution of judgments, thus encouraging the state to continue its efforts on outstanding issues. In the case of recalcitrant states, interim resolutions may also be used to threaten with further measures, particularly suspension from the Council according to Article 8 of the Statute of the CoE. This threat usually comes accompanied by a call to the other members to take all measures against the state as they deem appropriate.[114] By way of interim resolution the Committee, like the IACtHR, may close supervision on parts of a judgment if it considers all necessary measures to be taken.[115]

9.1.1.3.2 Infringement Proceedings Protocol no. 14 has introduced two new instruments for the Committee: a request for interpretation and infringement proceedings in case of non-execution of a judgment.[116] Both procedures shall have an extraordinary character. Therefore, the Committee may launch them only if two-thirds of its members are in favour. This is logical given that the aim of Protocol no. 14 is to resolve the problem of the Court's caseload, not to add new cases to it.

The Committee may, "if [it] considers that supervision is hindered by a problem of interpretation, refer the case to the Court for a ruling on the question of interpretation". The particularity of the request for interpretation is that, unlike the request for interpretation a party to the case may lodge under Rule 79 of the Rules of the ECtHR, the Committee's power is not subject to a temporal limitation. Interpretation shall facilitate supervision by finally settling differences between the State and the Committee as to the obliga-

[113] Lambert Abdelgawad, *The execution of judgments, 2008*, p. 40.

[114] *Loizidou v. Turkey*, CM, 15318/89, 26 June 2001, ResDH(2001)80; *Ilaşcu and others v. Moldova and Russia*, CM, 48787/99, 12 July 2007, CM/ResDH(2007)106.

[115] Cf. *Cyprus v. Turkey*, CM, 25781/94, 10 May 2001, ResDH(2005)44.

[116] Article 46(3)–(5) of the ECHR.

tions arising from the judgment.[117] It shall explicitly not be used to evaluate measures already taken by the state.[118] The Court's Rules exclude contradictory oral or written argumentation on the question submitted, limiting interventions to the Committee's right to give explanations. The decision on interpretation shall, whenever possible, be taken by the same organ that had taken the original decision. In order to render the proceedings swifter, no separate opinions are permitted.[119]

Under the infringement proceedings, upon serving the recalcitrant state a formal notice as a last warning, the Committee may "refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1". This possibility was introduced as a reaction to the cases where states consistently refuse to implement a judgment and, hitherto, the only possibility available to the Committee was suspension or exclusion from the Council – an undesired consequence given its exclusive character.[120] The infringement proceedings, which are held before the Grand Chamber,[121] shall cause additional publicity to the case and thus press the state to implement the judgment. The member states assumed that its mere existence and the threat of application should be sufficient to make states comply with their obligations.[122] The infringement proceedings are usually written, the Committee and the parties (state and original applicant) having the right to submit observations.[123] The Court's decision shall take the form of a judgment which is transmitted to the Committee, the parties and the Human Rights Commissioner.

[117] Lack of clarity had been identified as a major obstacle to effective execution: Council of Europe, *High Level Conference on the Future of the European Court of Human Rights*, 19 April 2012, URL: https://hub.coe.int/20120419-brighton-declaration, no. 23; Lambert Abdelgawad, *The execution of judgments, 2008*, p. 54; cfr. also Staton and Romero, *Clarity and Compliance in the Inter-American Human Rights System*, p. 128.

[118] "The 2004 Reform Package", *HRLJ* 26 (2005), p. 100.

[119] Rules 91–93 of the Rules of the ECtHR.

[120] See *infra* p. 182.

[121] Article 31(b) of the ECHR.

[122] "The 2004 Reform Package", *HRLJ* 26 (2005), p. 100; see also the Court's allusion to its supervisory role in *Greens and M.T v. The United Kingdom*, para. 114.

[123] Rule 97 of the Rules of the ECtHR.

None of the two proceedings had been applied at the time of writing, so that their use remains to be seen. While there is little doubt about the fact that the interpretation of a judgment by the Court will improve execution, the use of the infringement proceedings will depend on consistent parallel action by the member states, e.g. by ousting the state, making the conclusion of economic treaties depend on execution or exertion of other means of political pressure.[124] If state politics are less focused on European integration, as may be assumed for Turkey or Russia, and if the states had already before been subject to increased scrutiny by the Committee and eventually also in the Parliamentary Assembly, it may be doubted that a judgment on missing implementation will be the decisive element to change the state's opinion on the necessity to implement the original Court decision and obey its international human rights obligations. This will be even more so the more politically sensitive issues depend on the question, as is the case for Turkey in the Northern Cyprus question or for Russia concerning the northern Caucasus, and probably even the UK in its general aversion against increased influence by the Court on its internal policy, as the prisoner voting rights question has shown.

The effectiveness of the infringement proceedings is questionable for other reasons, too. Article 46(4) of the ECHR and the procedural specifications in Rules 94ff. of the Rules of the ECtHR are not clear as to whether the Committee may submit specific reparation measures to the Court or whether it must always submit the entire case, obliging it to interrupt its procedure even for measures the state is complying with.[125] Another unknown factor is the outcome of the proceeding. Is the Court's role limited to merely holding that a state has or has not complied with a judgment? Will it specify which reparation measures have been complied with and which not? Or will it even make more specific indications to the state on the measures it has not complied with? The last option is the least likely to happen. The Court's powers in the infringement proceeding are limited in two ways. On the one hand the text of Article 46(4) of the ECHR does

[124] In the same sense Marmo, "The Execution of Judgments of the European Court of Human Rights: A Political Battle", 2 *MJ* 15 (2008), pp. 248ff., particularly p. 249.

[125] This point was raised by Lambert Abdelgawad, *The execution of judgments, 2008*, p. 58.

not mention a power to alter or specify its original judgment. On the other hand, in the past it has strictly insisted on the separation of its judicial functions and the Committee's more political monitoring procedure. Also, hovering above the entire European human rights procedure, the principle of subsidiarity continues to limit the Court's influence on the reparation procedure. The rationale behind the introduction of the infringement proceedings was to resolve differences between the Committee and a member state on whether this state had complied with a judgment or not. Compliance should be improved by the additional political pressure infringement proceedings will cause.[126] However, experience from the infringement proceedings before the Court of Justice of the European Union supports the expectation that the mere existence of infringement proceedings may have an overall positive effect on state compliance.[127] Marmo, though, takes a more pessimistic position, concluding that

> Protocol 14 has not been as persuasive and influential as the Explanatory Report may lead one to expect. Protocol 14, and specifically the modified Article 46, has become partially outdated by other internal mechanisms, and, in the area of the control system, may have already exhausted its most positive function of eliciting a comprehensive debate on execution.[128]

9.1.1.3.3 Expulsion from the Council of Europe The Committee's last remedy against states that constantly deny to execute judgments is expulsion. In the terms of Article 8 of the Statute of the CoE, the Committee may suspend any member state that has seriously violated Article 3 of the Statute of the CoE from being represented on the Council and ask it to withdraw from the Council in the terms of Article 7 of the Statute of the CoE. Article 3 stipulates the obligation to "accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental

[126] Eaton and Schokkenbroek, "Reforming the Human Rights Protection System", *HRLJ* 26 (2005), p. 15; Council of Europe, *Protocol No. 14 – Explanatory Report*, URL: http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm, Nos. 99ff.

[127] Lambert Abdelgawad, *The execution of judgments, 2008*, pp. 58f.

[128] Marmo, "The Execution of Judgments of the European Court of Human Rights: A Political Battle", 2 *MJ* 15 (2008), pp. 252f.

freedoms". If the member state concerned does not withdraw by itself, the Committee may, as an *ultima ratio*, expel it from the Council. Although the application of Article 46(3)–(5) of the ECHR has not been made a prerequisite for expulsion, the *ratio* behind these new rules expresses this idea. The Committee should therefore only recur to Article 8 of the ECHR when the state does not obey the infringement judgment either. Under special circumstances, though, immediate expulsion or suspension remains possible.

Article 8 has never been applied, but was at issue within the context of the Greek coup d'état in 1967. After the European Commission of Human Rights had concluded that Greece was seriously violating several of the rights protected under the ECHR,[129] the applying states prepared a draft decision for the Committee of Ministers on 28 November 1969 proposing the suspension of Greece's representation under Article 8 of the Statute of the CoE.[130] The Greek Government preceded its exclusion from the Council by denouncing the Statute and the Convention and withdrew from the Council itself.[131] In another case, *Loizidou v. Turkey*, the Committee indirectly menaced Turkey with expulsion, declaring "the Committee's resolve to ensure, with all means available to the Organisation, Turkey's compliance with its obligations under this judgment".[132]

The practical use of Article 8 is doubtful. While expulsion surely puts a stain on the face of the state, it also means that the Council loses an important lever of influence, as expulsion implies that the state, for the future, is no longer bound by its obligations under the Convention according to Article 58(3) of the ECHR, and no longer participates in meetings of the Council's organs. Expulsion, therefore, always implies the confession that the concerned state is "lost" for the objectives of the Council of Europe and the Convention, i.e. that the member states of the Council no longer see any possibility to enforce the ideals of the Council. On the other hand,

[129] *The Greek Case* (Report), ECommHR, nos. 3321/67 et al., 5 November 1969, YB 11, Vol. II, 690 and 730.

[130] See Institut für Zeitgeschichte, *Akten zur auswärtigen Politik der Bundesrepublik Deutschland 1969*, pp. 1418f.

[131] Government of Greece, "Note Verbale dated 12 December 1969 from the Government of Greece informing the Secretary General of Greece's denunciation of the Statute and of its withdrawal from the Council of Europe", 2 *ILM* 9 (1970).

[132] *Loizidou v. Turkey*, CM, 15318/89, 26 June 2001, ResDH(2001)80.

membership of a state that constantly violates its obligations under the Convention may become unbearable to the Council, as it affects its credibility for constantly being unable to enforce the basic principles of the Council against that state.[133]

Nonetheless, the fact that the state is liberated from its obligations under the Convention would most probably not improve the situation of the persons affected by that state's actions. It would therefore seem more appropriate not to go beyond suspension, as this measure takes the rights to participation from the member while maintaining it bound to its obligations. Suspension could be extended or limited according to the state's behaviour.[134]

On the other hand, expulsion might work if it had overwhelming negative effects on the state's situation. These effects may concern its economic prospect, e.g. if its possibilities to enter into economic treaties or its participation in a free trade area end. Political isolation is another element a state will consider: is it going to be politically more isolated after the expulsion, thus running the danger to become a pariah?[135] The isolating effect of an expulsion from the Council exists, as all European States, with the exception of Belarus, are members of the Council and a majority of them are also members of the European Union. In particular due to the EU's human rights policy, which would become even stronger once it has become a member of the ECHR, expulsion from the Council would make it presumably more difficult for a state to make business with the EU members, arguably the economically strongest block in Europe. If an EU member state is affected by expulsion or the mere threat of expulsion from the Council, this might also result in additional EU measures against this state.

The consequences of the application of Article 8 of the Statute of the CoE therefore have to be very diligently measured in each par-

[133] Cf. the argumentation in the League of Nations in favour and against the expulsion of the USSR following its attack on Finland: Sohn, "Expulsion or Forced Withdrawal from an International Organization", 8 *Harv. L. Rev.* 77 (1964), pp. 1387f.

[134] Cf. the application of suspension by the OAS against Cuba, *infra* 9.2.1.

[135] The effectiveness of expulsion from the League of Nations was doubted as the state did not become isolated but joined a large group of states that had never been members of the League like for instance the United States. See Sohn, "Expulsion or Forced Withdrawal from an International Organization", 8 *Harv. L. Rev.* 77 (1964), p. 1397.

ticular case, bearing in mind that the probability that the advantages excel the disadvantages is very limited.[136]

9.1.1.3.4 Recommendations On a general level the Committee can issue recommendations to the member states on better implementation of the Court's judgments.[137] These recommendations do not have binding force, nonetheless the Committee frequently refers to them in resolutions concerning specific cases. Recommendations have hitherto been issued on some of the most pressing shortcomings that gave rise to large numbers of cases before the Court, in particular on subjects such as effective remedies for excessive length of proceedings, efficient domestic capacity for rapid execution of ECtHR judgments, improvement of domestic remedies, verification of the compatibility of draft laws, existing laws and administrative practice with standards laid down in the ECHR, university education and professional training, publication and dissemination in the member states of the text of the ECHR and the case-law of the ECtHR, and re-examination or reopening of certain cases at domestic level. According to the Committee, these recommendations may have positive effects on the development of the issue they address in the states and serve as a basis for bilateral relations maintained between the Department of Execution and the states.[138]

9.1.1.3.5 Non-formalized Measures On a lower scale, the Committee has also acted through non-official means such as communications by its President to the respondent state. This has the advantage that issues can be addressed informally on a bilateral level without raising public attention, so that the ground for viable solutions can be probed or the particular determination of the Committee be stressed.[139] Applying other means than resolutions also has the advantage that the Committee can react quickly and very selectively to specific problems or positive aspects in the execution pro-

[136] Cf. "The 2004 Reform Package", *HRLJ* 26 (2005), p. 100.
[137] Article 15(b) of the Statute of the CoE. Recommendations are available at https://www.coe.int/t/dghl/monitoring/execution/Documents/CMRec_en.asp.
[138] Committee of Ministers, *Supervision Annual Report 2011*, p. 28.
[139] Cf. *Loizidou v. Turkey*, CM, 15318/89, 24 July 2000, DH (2000) 105.

cess. In such cases, a simple decision can be adopted in the DH/HR meeting, accompanied by a subsequent press release.[140]

The presentation of the status of pending cases on the website of the Department of Execution is another way to make the execution process more transparent.[141] The website was set up following the adoption of the 2006 CM Rules for the Supervision of the Execution of Judgments, which introduced the principle of public access to data concerning execution. The publication of the DH/HR meetings' annotated agendas, which contain information not cast into resolutions, information received by the state (action plans, action reports) and by the party, reports elaborated by the Department of Execution, as well as summaries of the current status of execution for each case, make it easy for the interested public, press and the party to quickly get an overview of the progress of each case or group of cases. Additionally, each year in April the Committee publishes an Annual Report, providing statistical information about the development of its workload, summaries of the most important events and a very condensed version of the individual and general measures required for each pending case, ordered by types of violations.

9.1.2 The ECtHR

Apart from the aforementioned applications by the Committee under Article 46(3)–(5) of the ECHR, the Court does not have an original power to review cases on the execution stage for failure to execute them.[142]

The question though persists whether in cases where the violation continues after a judgment has been handed down because no or insufficient individual measures have been adopted, the situation may be brought before the Court again in a new application or whether it has to be rejected for being repetitive. According to Article 35(2)(b) of the ECHR, an application is inadmissible if it "is

[140] *Information Document CM/Inf(2006)9 revised 3*, no. III.2.

[141] http://www.coe.int/t/dghl/monitoring/execution.

[142] See *VgT v. Switzerland (No. 2)*, ECtHR, no. 32772/02, 4 October 2007, para. 43; *Burdov v. Russia (No. 2)*, ECtHR, no. 33509/04, 15 January 2009, para. 121 concerning delayed payment of just satisfaction.

substantially the same as a matter that has already been examined by the Court [...]".

The Court had to answer this question in *VgT Verein gegen Tierfabriken v. Switzerland*. In this case, the applicant organization had complained about a refusal by public Swiss television to air a commercial against industrial meat production.[143] Despite the Court's judgment finding a violation of Article 10 of the ECHR, the Swiss Federal Court upheld its decision that the commercial should not be aired, arguing that the organization had not shown how redress would be possible through reopening of proceedings and in what originated its continuing interest to have the original commercial aired.[144] A rather delicate particularity of the case was that the Committee, while supervising the execution of the first judgment, had satisfied itself with the mere reopening of proceedings by the Swiss authorities as *restitutio in integrum*, instead of awaiting their outcome.[145] As with that decision the Committee had officially terminated its supervision of the case, the Court had two options when receiving the renewed application: either to conclude that the application was inadmissible for being repetitive according to Article 35(2)(b) of the ECHR and to invite the Committee to reopen supervision,[146] or to admit the case itself, finding that the matter was sufficiently different from the original case. It voted for the second option, holding that a case was sufficiently different if it originated in facts that had occurred after the Committee had adopted a final resolution, because otherwise there would be no opportunity to scrutinize such facts under the Convention.[147] Although this solution certainly is not ideal, taking into account the repartition of powers under the Convention, it is correct insofar as a primordial

[143] *VgT Verein gegen Tierfabriken v. Switzerland*, ECtHR, no. 24699/94, 28 July 2001, 2001-VI.

[144] *VgT v. Switzerland (No. 2)*, ECtHR, no. 32772/02, 4 October 2007, para. 14.

[145] *VGT Verein gegen Tierfabriken v. Switzerland*, CM, 24699/94, 22 June 2003, ResDH(2003)125.

[146] Judge Malinverni considered this the correct solution, denying the Court's competence *ratione materiae* when a case is already on the execution stage: *VgT v. Switzerland (No. 2)* [GC], ECtHR, no. 32772/02, 30 June 2009, dissenting opinion of Judge Malinverni, para. 7.

[147] Ibid., para. 67.

closure of supervision by the Committee must not result in a gap of control in execution.[148]

The question, however, is when a piece of information is considered to be new in the sense of Article 35(2)(b) of the ECHR in the context of supervision. The Court appears to follow a two-track approach to this issue: either the domestic authorities take action to change the applicant's situation following a judgment or they remain inactive. In the first case, the modification of the applicant's situation may constitute new information to justify a new case before the Court, while in the second case there may only be a failure to execute the judgment, which in strict application of the principle of subsidiarity and respect for the repartition of tasks within the Council is an issue exclusively for the Committee.[149] This led to the absurd situation that a state would be better off if it did not take any action at all than if it took insufficient or the wrong action, because only in the second situation would it be exposed to the risk of being sued again before the Court.[150]

The Court's approach in *VgT v. Switzerland (No. 2)* no longer follows this pattern of admissibility of applications concerning cases where execution was still pending or had even already been closed by the Committee. It confirmed this reasoning in *Ivanţoc et al. v. Moldova and Russia*, which concerns two of the applicants of the former case of *Ilaşcu and others v. Moldova and Russia*, who despite the Court finding that their detention violated the Convention and continuing efforts by the Committee to procure their liberation were not liberated from detention.[151] This case is insofar comparable to *VgT v. Switzerland (No. 2)* as the responding state had not taken any action at all towards the termination of the violation. The Court underlined that its assessment of a new application presenting new information would not "encroach" the Committee's authority on the

[148] The Swiss Government had claimed just this, assuming that the Court did not have jurisdiction *ratione materiae* after the Committee had adopted a final resolution: *VgT v. Switzerland (No. 2)* [GC], ECtHR, no. 32772/02, 30 June 2009, para. 66.

[149] See in more detail ibid., dissenting opinion of Judge Malinverni, para. 12; also Hertig Randall and Ruedin, "Exécution des arrêts de la CourEDH", *AJP/PJA* 6 (2008), pp. 654ff.

[150] See in detail on the Court's approach to these cases: ibid., pp. 655f.

[151] *Ivanţoc et al. v. Moldova and Russia*, ECtHR, no. 23687/05, 15 November 2011, para. 84.

execution phase. It furthermore confirmed that in case of continuing violations the part of the violation that occurred after a first judgment had been handed down, gives rise to new applications.[152] It consequently held that, although it had no jurisdiction to review measures taken by the state in response to a judgment, its powers extended to the continuing effects of an ongoing violation.[153] It may hence be concluded that the Court assumes competence *ratione materiae* for cases presenting continuing violations. Such situations may stem from the failure to reopen domestic proceedings, thus maintaining a prohibition to enjoy a right protected by the Convention, or other state acts that have the same effects. A differentiation according to whether the state has taken (probably insufficient) action or has not acted at all, as it existed before *VgT v. Switzerland (No. 2)*, is apparently no longer applied, although persistence of this new jurisprudence will have to be evaluated at a later moment.

It would require a detailed analysis of reception of renewed applications in the CoE member states in order to know whether they have a particularly positive effect on state compliance or whether they are just taken as any other case. This task would exceed the scope of this investigation. At least in *VgT v. Switzerland (No. 2)*, the Swiss Federal Court accepted a renewed application by the applicant association, quashed its previous decisions and granted the broadcasting of the commercial spot in question.[154]

The situation is different when a state does not implement general measures. These situations may give rise to high numbers of parallel similar applications by different applicants in the same situation as the original applicant. As these situations are never exactly the same, they do not fall under Article 35(2)(b) of the ECHR, but must be treated by the Court in any case. The measure of choice introduced for these cases is the pilot judgment procedure that has already been explained *supra*.

[152] Ibid., paras. 86–87.
[153] Ibid., paras. 91–92.
[154] *VgT v. Switzerland (No. 2)*, CM, 32772/02, 15 September 2010.

9.1.3 The Parliamentary Assembly

The Parliamentary Assembly is a relatively new player in the field of supervision of compliance. While not being mentioned in the ECHR, its role under Article 23(1) of the Statute of the CoE embraces "any matter within the aim and scope of the Council of Europe" plus "any matter referred to it by the Committee of Ministers". As the protection of human rights is an instrument for the achievement of the general aims of the Council as they were defined in Article 1 of the Statute of the CoE, it has the authority to occupy itself with any issue concerning the European human rights protection system.

The Assembly entered the monitoring stage in 1993, when, in the scope of accession of the new member states from Eastern Europe, it instructed the Committee on Legal Affairs and Human Rights (AS/Jur) "to report to it when problems arise on the situation of human rights in member States, including their compliance with judgments by the European Court of Human Rights".[155] Monitoring of execution by the Assembly was further developed due to a group of cases in which states did not execute judgments, causing the Assembly to direct written questions to the Committee of Ministers. This new activism by the Assembly coincided with the general overhaul of the Human Rights System following the entry into force of Protocol no. 11 in 1998.[156] In 2000, Rapporteur Erik Jurgens submitted his first report on the execution of judgments of the Court to AS/Jur, proposing that the Assembly and national delegations should play a bigger role in this context. He saw the Assembly's function mainly as a link between the Council and the states. Its members could, for example, exert pressure in their national parliaments if there are problems with the execution of judgments concerning their country. He therefore proposed that the Directorate of Human Rights should inform the Assembly of such cases.[157] Another instrument proposed was the invitation of the respective state's minister of justice before the Assembly to raise public awareness to the case.[158]

[155] Order no. 485, adopted by the Parliamentary Assembly, 1993.
[156] Jurgens, *Execution of Judgments of the European Court of Human Rights*, Explanatory Memorandum no. 8.
[157] Ibid., Explanatory Memorandum no. 79.
[158] Ibid., Explanatory Memorandum no. 91.

It could eventually also sanction a state according to its own rules of participation.[159] These proposals were cast into a resolution in the same year.[160] PACE also established its own record of execution of judgments,[161] holds regular debates on the cases in the database, and adopts recommendations to the Committee and through it to the relevant states if they "abnormal[ly]" delay, neglect or deliberately refrain from execution. It can, if necessary, organize an urgent debate, take further measures according to its own rules or propose the application of Article 8 of the ECHR to the Committee. In 2002, AS/Jur was given a permanent authorization[162] to monitor the implementation of judgments and report to the Assembly when considered appropriate.[163]

AS/Jur's activity has resulted in a number of reports, resolutions and recommendations, which focus on specific states where the most serious execution-related problems persist.[164] Its means of ac-

[159]Ibid., Explanatory Memorandum no. 92.

[160]Execution of judgments of the European Court of Human Rights (hereinafter "PACE Resolution 1226 (2000)"), adopted by the Parliamentary Assembly, PACE Resolution 1226 (2000), 2000.

[161]Cases are chosen by time elapsed since the judgment was rendered and importance attached to execution: Lambert Abdelgawad, "The Execution of Judgments of the European Court of Human Rights", 3 *ZaöRV* 69 (2009), p. 484.

[162]According to Rule 25(3) of the Rules of Procedure of the Assembly, committees are usually occupied with a subject not longer than two years. The open-ended monitoring task is therefore seen as underlining the particular importance of the subject. Drzemczewski, "The Parliamentary Assembly's Involvement", 2 *NQHR* 28 (2010), p. 170.

[163]Resolution 1268 (2002), adopted by the Parliamentary Assembly, Resolution 1268 (2002), 2002.

[164]See Drzemczewski, "The Parliamentary Assembly's Involvement", 2 *NQHR* 28 (2010), p. 170 and PACE's homepage at http://assembly.coe.int. The problems that were identified are deaths and ill-treatments caused by law enforcement personnel and excessive length of proceedings in Bulgaria, excessive length of proceedings in Greece and Italy, execution of court judgments and avoiding of ill-treatment in custody in Moldova, excessive court and administrative proceedings and detention on remand in Poland, restitution for nationalized property, length and execution of domestic judgments and misuse of information by intelligence agencies in Romania, ill-treatment and inhumane conditions in detention facilities and the Chechen situation in Russia, reopening of court proceedings and detention for conscientious objection in Turkey, enforcement of domestic judgments and independence of judicial personnel in Ukraine, and implementation of politically sensitive judgments (prisoner voting rights) in the UK. No. 7 of Resolution 1787 (2011), adopted by the Parliamentary Assembly, 26 January 2011.

tion, in addition to those mentioned *supra*, are *in situ* visits by the chairperson of AS/Jur to states with particularly grave problems and a continuing dialogue with the parliaments there on the problems encountered, cooperation with national parliaments through the national delegations to install the legal conditions for an effective implementation of Court judgments, and eventual sanctioning of the state.[165] Furthermore, it can pose oral or written questions to the Committee either on specific cases or in relation to more general matters such as the execution of judgments in a certain country or area or the state of compliance with certain measures such as the payment of just satisfaction.[166]

Particularly the practice of state visits appears to be a promising approach. The Committee or the Directorate General, which are bound to a more formalized procedure, cannot easily conduct such visits without exposing themselves to the risk of unjust treatment of the states, particularly if they visit only certain states. Nevertheless, the Directorate General has held discussions with representatives of national governments in some capitals.[167] As the Assembly is not bound by such rules but is acting principally out of its own motion, it can act much more freely. Discussions with deputies in certain countries may raise awareness in national parliaments to the problems posed by the domestic situation and provide entry points for discussions on how a stronger inclusion of national delegations might render the execution process swifter.[168]

Although PACE's intervention in the monitoring process was not taken serious by the states at the beginning and was met with rejection by the Committee as an interference with its dominion, a viable practice of support for monitoring has since evolved.[169] It is based on the one hand on the fact that the Assembly is tackling the issue of

[165]No. 10 of Resolution 1787 (2011) and Jurgens, *Execution of Judgments of the European Court of Human Rights*, Explanatory Memorandum no. 18ff.

[166]Cf. Doc. 7457, adopted by the Parliamentary Assembly, 17 November 1995 and Lambert Abdelgawad, "The Execution of Judgments of the European Court of Human Rights", 3 *ZaöRV* 69 (2009), pp. 483f.

[167]Drzemczewski, "The Parliamentary Assembly's Involvement", 2 *NQHR* 28 (2010), p. 171.

[168]Ibid., pp. 171f.

[169]See the vivid description of his first years as rapporteur of AS/Jur: Jurgens, "De rol van de parlementaire assemblee", 7 *NTM/NJCM-Bulletin* 35 (2010), pp. 844f.

non-execution on the parliamentary level, while the Committee is working on the governmental level, and that the deputies in the Assembly, due to their liberties as members of parliament, can act with less restrictions. Thus, an essential axis of the Assembly's work is "naming and shaming", a practice unthinkable for the diplomats on the Committee of Ministers.[170] But also the rapporteur's influence on the national parliaments either directly or through the national delegation in PACE may (and has) taken execution in several cases decisive steps forward.[171]

9.1.4 The Commissioner for Human Rights

The Group of Wise Persons in its 2006 report on the improvement of the ECHR mechanisms proposed a more active participation for the Commissioner for Human Rights in the ECHR's control system.[172] Commenting on this proposal, the Commissioner laid out his possible participation in the execution process as offering his good offices to the member states upon being informed of a general problem underlying a case (either pilot judgments or other cases), using his relation to the national human rights institutions and ombudsmen, interacting between the Court, the Committee of Ministers and these national organs to suggest and validate the means required to comply with a judgment.[173] In 2006 the Committee initiated annual tripartite meetings with the Commissioner and PACE to "promote stronger interaction with regard to the execution of judgments".[174] As a result the Commissioner started consultations with national human rights institutions, established contact points and launched a peer to peer project on implementation.[175] In 2008, in the framework of the peer to peer project, the Commissioner pro-

[170] Ibid., p. 843.

[171] See examples at ibid., pp. 847ff.

[172] Group of Wise Persons, *Interim report of the Group of Wise Persons to the Committee of Ministers*, Committee of Ministers at its 116th Session, 18 May 2006, no. 43.

[173] Commissioner for Human Rights, *Comments by Mr. Thomas Hammarberg, Commissioner for Human Rights, on the interim report of the Group of Wise Persons to the Committee of Ministers*, 12 June 2006, nos. 13–14.

[174] Committee of Ministers, *Reform of the European Convention on Human Rights*, CM(2006)65, Committee of Ministers at its 116th Session, 18 May 2006, no. X(c).

[175] Commissioner for Human Rights, *CommDH(2006)18 revDH(2008)10REV*, para. 2.

vided ten national human rights institutions with information on cases decided by the Court against their countries in order for them to discuss effective participation in the Committee of Ministers' execution process.[176] Subsequently, the Commissioner continued his work, cooperating during his field visits with national human rights institutions to elaborate their role in the prevention of human rights violations, but has not elaborated further activity in this field.

9.1.5 The Secretary General

Another often overlooked participant in the supervision of execution of judgments is the Secretary General of the Council of Europe. He is appointed, according to Article 36(b) of the Statute of the CoE, by PACE on recommendation of the Committee of Ministers.

Article 52 of the ECHR provides the Secretary General with a generic monitoring power, allowing him to request each Council state to "furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention." He has made use of this power only a few times until now, requesting on six occasions (1964, 1970, 1975, 1983, 1988 and 2005) information from all member states on the implementation. On two occasions, though, did he request specific member states on current issues: in December 1999 he invited Russia to "furnish, in the light of the case-law of the European Court of Human Rights, explanations concerning the manner in which the Convention is currently being implemented in Chechnya, and the risks of violation which may result therefrom". In February 2002, Moldova was asked to report on the implementation of the Convention in the light of certain recent developments, particularly the suspension of the activities of an opposition party for one month and the lift of the parliamentary immunity of three of its leaders.[177]

The Secretary General is exercising his monitoring power in a discretionary way, a practice that has never been contested by the states.[178] His discretionary power is not complete, though, but lim-

[176] Commissioner for Human Rights, *CommDH(2009)12*, para. 2.4.
[177] Schokkenbroek, "The Supervisory Function of the Secretary General of the Council of Europe", p. 326.
[178] Ibid., p. 327.

ited by certain elements: the choice of the state has to be based on sound arguments, the request must be specific, the procedure must be objective, the answers have to be adequate and sufficient, channels for dialogue must be open and conclusions must be drawn from the outcome of the procedure.[179]

Results of the Secretary's inquiry are published and sent, *inter alia*, to PACE, all member states and the Court.[180] This is the only "sanction" at his disposal. While publication might expose the state to criticism from the peer states and public opinion, the effect in cases where the Court has already been active may be limited. A judgment by the Court will always cause more public attention than any instrument at the disposal of the Committee or any other organ. The Secretary's action can therefore only be seen as an additional screw to fasten in order to multiply pressure on a recalcitrant state. Given its limited impact compared to Court decisions, the Secretary should reserve his facility in these circumstances to exceptional cases so as to underline the outstanding gravity of the situation that made him interfere.

9.1.6 The Human Rights Trust Fund

The Human Rights Trust Fund was set up in 2008 following a Norwegian initiative. It was initially supported by the Council of Europe and the European Development Bank, Norway, Germany, the Netherlands, Finland and Switzerland making contributions. Its main task lies in the support of cooperation in areas that were identified by the Committee in its recommendations on better national execution of judgments. Projects started in 2009, dealing with the issues of non-execution of domestic court decisions (HRTF 1) and actions by security forces (HRTF 2). Each project focuses on specific areas: Albania, Azerbaijan, Bosnia and Herzegovina, the Republic of Moldova, Serbia and Ukraine participate in HRTF 1, while HRTF 2 aims at alleviating the problems resulting from the actions of Russian armed forces in Chechnya. The Fund subsequently started two new projects, HRTF 22 with Turkey on freedom of expression, par-

[179] Ban, Sudre, and van Dijk, *Report on Art. 52 Procedure*, para. 7.

[180] Schokkenbroek, "The Supervisory Function of the Secretary General of the Council of Europe", p. 330.

ticularly to bring domestic jurisdiction in line with the Convention, and HRTF 18 concerning remand and effective remedies to challenge detention conditions.[181] All projects were still ongoing at the time of writing.

9.2 Execution under the ACHR

In the inter-American system the principle of subsidiarity does not apply on the reparation stage. Consequently, the IACtHR can resolve, already during the judicial phase, some of the issues the Committee of Ministers has to deal with in cooperation with the states during the monitoring process in Europe. This principally concerns the determination of reparation modalities and beneficiaries. Furthermore, the absence of subsidiarity on the reparation stage and the IACtHR's detailed reparation practice leave almost no margin of appreciation to the states when executing judgments. Despite this apparent facilitation, monitoring in the inter-American system tends to be a long and controversial process. At the end of 2014 there were 158 cases pending full compliance by the state, the most ancient one dating back to 1996.[182] Questions hover mainly around issues like at which moment all measures can be considered to be fully complied with or impossibilities to comply with specific measures for a variety of reasons put forward by the states.

Interestingly, the broad power to order reparation the ACHR puts into the hands of the IACtHR does not correlate with a dedicated monitoring system. Article 65 of the ACHR is the only rule that makes an allusion to non-compliance, stipulating that the Court, in its annual reports to the regular sessions of the General Assembly, shall specify "the cases in which a state has not complied with its judgments, making pertinent recommendations" (9.2.1). The Assembly though has on several occasions failed to draw consequences from the Court's reports. This induced the latter to derive from the ACHR a proper monitoring power that, despite having been challenged by Panama, is nowadays a generally accepted practice and

[181] Committee of Ministers, *Supervision Annual Report 2011*, pp. 28f.

[182] IACtHR, *Annual Report of the Inter-American Court of Human Rights 2014*, pp. 72ff., including the case of *Neira Alegría et al. v. Peru* (Reparations and Costs), IACtHR, 19 September 1996, Series C no. 29.

has even been introduced into the Rules of Procedure of the IACtHR (9.2.2).

It should not remain unmentioned that, unlike in Europe, the judgments of the IACtHR are notified to all states parties to the ACHR. They could then exercise a peer control of implementation and even sue resilient states again before the Court.[183] The Court's authority to hear such cases results from Articles 61 and 62 of the ACHR. Article 61 of the ACHR makes clear that inter-state applications may be lodged, and Article 62(3) of the ACHR authorizes the Court to decide the interpretation and application of "the provisions of this Convention" that are submitted to it, without any further restriction. In consequence, this includes alleged violations by a state of its obligation to comply with the judgments under Article 68 of the ACHR.[184] But as the states are not even taking steps within the General Assembly to urge their peers to comply with their obligations, a multilateral influence outside of this forum or even before the Court has never even been considered until now.

9.2.1 The General Assembly

There is no dedicated monitoring mechanism for the implementation of reparation decisions by the Court. Particularly, Article 65 of the ACHR does not entail an obligation of action by the General Assembly upon having been informed by the Court of cases of non-compliance.[185] Although the execution of judgments was discussed during the drafting of the Convention, it was never envisaged to introduce a formalized mechanism comparable to that of the Council of Europe. Proposals hovered around the formulation that judgments should be transmitted to the deliberative organ of the OAS which, by the time the ACHR was adopted, had become the General Assembly of the OAS.[186]

In practice, though, it is not the Assembly itself but the Permanent Council that takes notice of the reports and submits a proposal reso-

[183] See Article 69 of the ACHR.

[184] Buergenthal, "Implementation of the judgments of the Court", p. 187. The same faculty exists according to Article 33 of the ECHR in Europe.

[185] Ventura Robles, "Supervisión del cumplimiento", p. 6.

[186] Ibid., p. 8.

lution to the Assembly at its following session. The Court submits its annual reports to the Permanent Council according to Article 91(f) of the Charter of the OAS. The Council passes the report on and discussions thereon take place before its Committee of Judicial and Political Affairs (CJPA), including an oral presentation by the President of the Court. To this end, the President, Vice-President and Secretary of the Court travel to the seat of the OAS once a year.[187] The states subsequently submit their comments on the report[188] and the CJPA adopts a draft resolution.[189] The draft resolution, together with the comments by the states, is presented to the annual General Assembly. At the General Assembly, the President of the Court presents the annual report again, usually pointing out the most pressing issues for the Court's work.[190] The Assembly then adopts the resolution proposed by the CJPA.[191]

Although Article 65 of the ACHR mentions only "regular sessions" of the Assembly to which the Court shall submit its reports, it could also, in cases of particular emergency, submit a case to the Permanent Council outside of the regular schedule. Each member state could then summon a special General Assembly to discuss the case.[192] However, the expenses to summon a General Assembly and the states' attitude to enforcing compliance make this a rather unlikely scenario.

[187] Cf. IACtHR, *Annual Report of the Inter-American Court of Human Rights 2014*, pp. 91f.

[188] Written interventions are available at http://www.oas.org/consejo/sp/CAJP/informes%20anuales.asp, while the comments of the member states on the annual report for 2011 were published in document OEA/Ser.G CP/CAJP-3077/12 of 19 April 2012, available at http://scm.oas.org/IDMS/Redirectpage.aspx?class=CP/CAJP&classNum=3077&lang=s.

[189] For 2012 see OEA/Ser.G CP/CAJP-3070/12 rev. 4 of 24 May 2012, available at http://scm.oas.org/IDMS/Redirectpage.aspx?class=CP/CAJP&classNum=3070&lang=s.

[190] Cf. IACtHR, *Annual Report of the Inter-American Court of Human Rights 2011*, p. 78.

[191] Cf. *AG/RES. 2759 (XLII-O/12)*; Ventura Robles, "Supervisión del cumplimiento", p. 15. The General Assembly is not bound by the CJPA's proposal.Nevertheless, during its yearly three-day session it adopts around 80 resolutions on all types of matters. This schedule leaves no time for discussions, so that in practice the CJPA's proposal has always been adopted without modifications.

[192] Buergenthal, "The Inter-American Court of Human Rights", 2 *AJIL* 76 (April 1982), pp. 241f.

The powers of the General Assembly regarding recalcitrant states are not clearly defined in the ACHR, and there is no corresponding practice either. This had scholars assume that political organs could not exercise powers that are not clearly founded in the Charter, in particular in an organ that adheres to the principle of non-intervention as a cornerstone. The OAS has though watered down the strict concept of non-intervention, allowing its political organs to take action in response to the internal situation of states.[193] The General Assembly executed this power in the Cuban affair in 1962, well before the possibility to suspend a member was introduced into Article 9 of the Charter of the OAS in 1992.[194] It can therefore be assumed that, being the supreme political body of the OAS, the General Assembly's political appreciation of a case is wide and, under its power to authoritatively interpret the Charter of the OAS, it may take the decision it deems appropriate in a specific case. Thus, the suspension, similar to the case of Cuba, or even the rejection of a state that persistently does not comply with its obligations from IACtHR judgments could be envisaged, taking into account that law and good faith are basic principles of the relations of the American states (Article 3 of the Charter of the OAS) and that each state shall respect the individual rights of the person (Article 17 of the Charter of the OAS).[195] Nevertheless, the Assembly hitherto only once requested a state to inform the Court of actions taken in pursuance to a judgment, so that the question of the limits of the Assembly's powers has never been at issue.

The Court's first submission under Article 65 of the ACHR concerned two cases against Suriname. In its annual report for 1994 it complained that it had not received any information from the state since the adoption of the decisions on reparation in September 1993 and January 1994 respectively and requested the Assembly to "urge"

[193] Gómez, "The Interaction between the Political Actors of the OAS, the Commission and the Court", p. 191.

[194] Resolution VI: "Exclusion of the Present Government of Cuba from Participation in the Inter-American System" (hereinafter "Resolution VI"), adopted by the Eighth Meeting of Consultation of Ministers of Foreign Affairs, OEA Official Documents OEA/Ser. C/II.8, 31 January 1962; Jiménez, "Organization of American States", 4 *ILM* 33 (1994), p. 983.

[195] Faúndez Ledesma, *The Inter-American System for the Protection of Human Rights*, p. 856.

the state to submit the required information.[196] The Assembly did as requested and included a respective passage into its resolution on the Court's annual report.[197] Suriname reacted and the cases could be closed in 1997 (*Aloeboetoe*) and 1998 (*Gangaram Panday*).

In the following years, much to the distress of the Court, though, even in severe situations that put its authority under threat, the General Assembly did not react when the Court reported cases of non-compliance. The first such situation was caused by Trinidad and Tobago. On 22 May 1998, the IACommHR had requested the Court to order provisional measures in the cases of several persons who had been sentenced to death in proceedings that were considered to violate several guarantees of the ACHR.[198] As a consequence, Trinidad denounced the ACHR on 26 May 1998, the denunciation becoming effective one year later according to Article 78(1) of the ACHR.[199] On 27 May 1998, the President of the Court ordered provisional measures in the case of *James et al. v. Trinidad and Tobago*, extending them in the following months to several other persons in similar circumstances. When the Court summoned the IACommHR and Trinidad for an audience on the measures, the state declared that it would not respect the Court's orders and would not refer to the Court on this as well as any other case. Nonetheless, it did not refer to its denunciation (which did not cover the cases in question), but relied on supposed procedural errors by the IACommHR.[200] Thereupon the Court informed the General Assembly in its annual report for 1998 under Article 65 of the ACHR of Trinidad's attitude and expressed its serious concerns about the repercussions of the denunciation for the protection of human rights and called the Assembly to exert influence on Trinidad to reconsider its decision.[201] Despite the clear advices from the Court, the CAJP did not include any reference to the issue in its resolution on the Court's annual report. The Court consequently sent notes to the Secretary of the Permanent Council

[196] IACtHR, *Annual Report of the Inter-American Court of Human Rights 1994*, pp. 17f.
[197] IACtHR, *Annual Report of the Inter-American Court of Human Rights 1995*, p. 15.
[198] IACtHR, *Annual Report of the Inter-American Court of Human Rights 1998*, pp. 33ff.
[199] Hereon: *Hilaire v. Trinidad and Tobago* (Preliminary Objections), IACtHR, 1 September 2001, Series C no. 80, para. 28.
[200] IACtHR, *Annual Report of the Inter-American Court of Human Rights 1998*, p. 34.
[201] Ibid., pp. 34f.

and, as he neither showed any willingness to include the issue in the proposal resolution for the General Assembly, also urged the Secretary General of the OAS to refer the issue to the General Assembly, again to no avail.[202] In the summer of 1999, in flagrant disrespect of the provisional measures ordered by the Court to protect the life of the presumed victims, Trinidad executed two of them without causing any reaction by the other American states.[203]

In the same year the Court found severe violations in several cases related to the internal conflict between the Government of Peru and a guerrilla group called Movimiento Revolucionario Tupac Amaru and, in particular, had declared the trials of civilians before military tribunals a violation of the Convention and required Peru to annul the decisions.[204] Peru's reaction – probably influenced by the OAS's absolute silence on Trinidad's denunciation – was to withdraw its recognition of the Court's contentious jurisdiction with immediate effect on 9 July 1999 for all cases in which Peru had not yet replied to the application.[205] On 16 July 1999, the Ambassador of Peru appeared at the Court's premises in San José and returned the application in the *Constitutional Court v. Peru* case.[206] The Court, performing a thorough interpretation of the ACHR, resolved that the denunciation of the recognition of competence was not possible and that a state could only denounce the Convention as a whole in the terms of Article 78 of the ACHR, giving one year prior notice and thus decided to remain seised of the case.[207] Furthermore, in the already resolved cases of *Castillo-Petruzzi et al. v. Peru* and *Loayza Tamayo v. Peru*, the Peruvian Supreme Court decided that those were "unexecutable" and returned them to the Court on 25 June 1999. The

[202] IACtHR, *Annual Report of the Inter-American Court of Human Rights 1999*, pp. 46f.
[203] Ibid., pp. 39f.
[204] *Loayza Tamayo v. Peru* (Merits), IACtHR, 17 September 1997, Series C no. 33 and subsequently *Loayza Tamayo v. Peru* (Reparations and Costs), IACtHR, 27 November 1998, Series C no. 42 and *Castillo-Petruzzi et al. v. Peru* (Merits, Reparations and Costs), IACtHR, 30 May 1999, Series C no. 52.
[205] *Constitutional Court v. Peru* (Competence), IACtHR, 24 September 1999, Series C no. 55, para. 23; the denunciation would also affect the case of Ivcher Bronstein.
[206] On the reasons for the withdrawal: Cassel, "Perú se retira del SIDH", *Revista IIDH* 29 (1999), pp. 73ff.
[207] *Constitutional Court v. Peru* (Competence), IACtHR, 24 September 1999, Series C no. 55, paras. 38ff.and 54.

Court stressed Peru's continuing obligation to fulfil the decisions in November 1999.[208] Again, it reported these incidents under Article 65 of the ACHR to the General Assembly.[209]

The Assembly, with respect to both situations, did not take any concise decision to urge either state to comply with its obligations under the ACHR. The only reference in its resolution on the Court's annual report to its session in 2000 was to reiterate that the Court's judgments were final and not subject to appeal, and to call upon the states that had denounced the ACHR to reconsider their decisions.[210] After the destitution of the Fujimori government, Peru reassumed the Court's jurisdiction in 2001 and the Minister of Justice and later president of the Court, Diego García-Sayán, visited the Court in order to personally hand over a note to the Court's president in which the state "expressly acknowledged the responsibility that corresponds [to it ...] for the violation of the rights".[211]

While that year's General Assembly recognized Peru's return to the inter-American human rights system, it had apparently considered Trinidad a lost state and did not refer to the issue ever after.[212] It nevertheless, in a resolution on the perfection and strengthening of the inter-American system, invited the Court to continue to include information on compliance in its annual reports, which would be analysed by the Assembly.[213]

The Court once more brought several cases and decisions on provisional measures, which the respective states had either not complied with or had not informed the Court correspondingly, to the Assembly's knowledge and asked it to urge the responding states to comply with their obligations.[214] Again, despite the general reiteration

> that the judgments of the Inter-American Court of Human Rights are final and may not be appealed and that

[208] *Castillo-Petruzzi et al. v. Peru* (Compliance with Judgment), IACtHR, 17 November 1999, paras. 1ff.
[209] IACtHR, *Annual Report of the Inter-American Court of Human Rights 1999*, pp. 42ff.
[210] Nos. 3 and 4 of AG/RES. 1716 (XXX-O/00), 5 June 2000.
[211] IACtHR, *Annual Report of the Inter-American Court of Human Rights 2001*, p. 52.
[212] AG/RES. 1827 (XXXI-O/01), 4 June 2001.
[213] No. 5(a) of AG/RES. 1828 (XXXI-O/01), 4 June 2001.
[214] IACtHR, *Annual Report of the Inter-American Court of Human Rights 2003*, pp. 42f.

> the States Parties to the Convention undertake to comply with the rulings of the Court in all cases to which they are party,

no specific reference to these situations was included in the Assembly's resolution.[215]

The Court, under the Presidency of Judge Cançado Trindade, in reaction to the negative effects the failing political support by the member states in the General Assembly had caused in the early 2000s, developed a proposal for an amendment of the ACHR in order to ensure better supervision of compliance. The proposal focused on the introduction of a permanent political monitoring body, namely a working group within the CJPA.[216] To this end, Article 65 of the ACHR should be amended by an additional sentence, stating:

> La Asamblea General [...] remitirá [los casos donde un Estado no ha cumplido con sus obligaciones] al Consejo Permanente, para estudiar la materia y rendir un informe, para que la Asamblea General delibere al respecto.[217]

The OAS though did not adopt this solution but maintained the way in which it dealt with the Court's reports unchanged.

Given the improbability to solve the systemic problem of supervision, Judge Ventura Robles made another proposal in his separate opinion to the case of *Caesar v. Trinidad and Tobago*. In his view, immediate improvement could be obtained by establishing a permanent working group in the CJPA to properly discuss the Court's reports, instead of having the states file their observations and then propose a resolution that is then passed up to the General Assem-

[215] No. 3 of AG/RES. 1913 (XXXIII-O/03), 10 June 2003.

[216] Cançado Trindade, "Presentación ante CAJP, 19 de abril de 2002", p. 795.

[217] "The General Assembly [...] will submit [the cases where a State has not complied with its obligations] to the Permanent Council in order to study the matter and render a report for the General Assembly to deliberate thereon [our translation]". Cançado Trindade, "Informe: Bases para un Proyecto", pp. 369f.; a complete recount of the development of these proposals can be found at *Caesar v. Trinidad and Tobago* (Merits, Reparations and Costs), IACtHR, 11 March 2005, Series C no. 123, Separate opinion of Judge Manuel E. Ventura Robles, para 19.

bly.[218] This solution would not have required an amendment to the ACHR.

Again, the OAS did not make any modification whatsoever to its organs or their functioning with respect to the Court. The Court thus finally gave up and began to find solutions within its own margin of powers. In 2005 it adopted a resolution wherein it decided – and to this end informed the General Assembly and the Secretary General of the OAS – to relinquish its monitoring activities for cases submitted to the Assembly under Article 65 of the ACHR. In the future it would only receive notifications of compliance from the state and, in the opposite case, continue to include the case in each annual report.[219] Thus, the Court drew a clear line between its monitoring competence, which is limited to the preparation of reports to the General Assembly, and the transfer to the Assembly as an "ultima ratio" in cases of recalcitrant states.

The Court could indeed successfully push compliance forward in many cases.[220] However, towards the end of the decade of the 2010s, tensions rose between Venezuela and the organs of the inter-American human rights protection system. Venezuela accused the OAS and its organs of being agents of the United States against the government of Hugo Chávez. As a consequence, the state did not implement the measures ordered in several IACtHR judgments. When the Venezulean Supreme Court had declared that the implementation of measures benefitting several judges who had been removed from office out of political reasons could not be executed, and Venezuela denounced the ACHR, the Court, for the first time since 2003, decided to submit the case of *Apitz-Barbera et al. v. Venezuela* under Article 65 of the ACHR to the General Assembly.[221] Before this politically charged background, neither in the General Assembly nor in any of the preceding debates in the CJPA or the Permanent

[218] *Caesar v. Trinidad and Tobago* (Merits, Reparations and Costs), IACtHR, 11 March 2005, Series C no. 123, Separate opinion of Judge Manuel E. Ventura Robles, para 32ff.

[219] *Supervisión de cumplimiento de sentencias (Aplicabilidad del artículo 65 de la Convención Americana sobre Derechos Humanos)* (Resolución de la Corte), IACtHR, 29 June 2005.

[220] See *infra* section 9.2.2.

[221] IACtHR, *Annual Report of the Inter-American Court of Human Rights 2012*, p. 62. See on the Venezuelan situation *infra* p. 220.

Council, any mention whatsoever was made to the issue of compliance with the Venezuelan cases before the Court.[222]

9.2.2 The IACtHR

The Court currently bears the main burden of supervising compliance with its own judgments. It has developed a specific procedure (9.2.2.1), but its possibilities are nevertheless limited (9.2.2.2). The development of the Court's supervision procedures will be evaluated at the end of this section (9.2.2.3).

9.2.2.1 The Procedure of Monitoring Compliance

The IACtHR had assumed the power to monitor compliance with its orders already in the first cases it closed with a sentence on reparation.[223] In the original judgment in *Velásquez Rodríguez v. Honduras* it had ordered Honduras to pay monetary compensation to the victims and had settled the amount in Lempiras. As Honduras did not effectuate the payment within the time limit established and the Lempira had been severely devaluated since the day of the judgment, the Court, recurring to its power to supervise compliance, ruled that the state had to compensate the victim for the loss caused by the devaluation since the moment the original payment was due.[224]

Originally, the monitoring procedure was not formalized in the Court's rules but was developed from practice. It relies on the submission of reports by all parties on compliance with the measures ordered. The Court usually orders the states to submit every six

[222] Consejo Permanente de la Organización de los Estados Americanos - Comisión de Asuntos Jurídicos y Políticos, *Informe de la Comisión de Asuntos Jurídicos y Políticos sobre las Observaciones y Recomendaciones de los Estados Miembros al Informe Anual de la Corte Interamericana de Derechos Humanos Correspondiente al Año 2012*, OEA/Ser.G CP/CAJP-3181/13, 20 May 2013 and AG/RES. 2797 (XLIII-O/13), adopted by the General Assembly of the OAS, 5 June 2013.

[223] *Velásquez Rodríguez v. Honduras* (Reparations and Costs), IACtHR, 21 July 1989, Series C no. 7, oper. para. 5.

[224] *Velásquez Rodríguez v. Honduras* (Interpretation), IACtHR, 17 August 1990, Series C no. 9, oper. para. 4.

months a report on measures taken to comply with the judgment.[225] Upon submission, it evaluates these reports and issues, when the situation so requires, orders on compliance. In these orders it repeats the operative paragraphs of the original judgment, recounts the events that were reported by the parties concerning compliance, points out advances and demands further steps to be taken in case of non-compliance.[226]

While most Court orders on compliance merely recognize the advances and repeat the state's obligation to comply with the open points, the Court has also assumed that it can further specify reparation orders on the monitoring stage without recurring to the interpretation procedure. Thus, in the case of *Caballero Delgado v. Colombia*, it decided in an order on compliance that the state should deposit the compensatory reparation for the victims, who were minors at the time of judgment, in certificates of deposit instead of the originally ordered trust fund, whenever the first option was more favourable for them.[227] In *Barrios Altos v. Peru*, upon an inquiry by the state about whether the administrative and financial expenses for the trust fund set up as payment of reparation to minor victims could be deducted from the value of the reparation, the Court held, on the monitoring stage, that no deductions from the reparation were permissible.[228]

The Court's monitoring competence was challenged once in 2003. It had handed down its sentence in *Baena-Ricardo et al. v. Panama* on 2 February 2001. The state, as well as the Commission and the victims, subsequently submitted various briefs on compliance and even participated in meetings held at the seat of the Court.[229] Despite this, on 27 February 2003 Panama submitted a brief alleging "that the

[225] Eg. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Merits, Reparations and Costs), IACtHR, 31 August 2001, Series C no. 79, oper. para. 8.

[226] In general: *Baena-Ricardo et al. v. Panama* (Competence), IACtHR, 28 November 2003, Series C no. 104, para. 105, and in practice: *Loayza Tamayo v. Peru* (Compliance with Judgment), IACtHR, 17 November 1999, Series C no. 60.

[227] *Caballero Delgado v. Colombia* (Compliance with Judgment), IACtHR, 27 November 2002, para. 14.

[228] *Barrios Altos v. Peru* (Compliance with Judgment), IACtHR, 28 November 2003, paras. 11ff.

[229] *Baena-Ricardo et al. v. Panama* (Competence), IACtHR, 28 November 2003, Series C no. 104, paras. 5–26.

stage of monitoring compliance with judgment is a 'post-judgment' stage that 'is not included in the norms that regulate the jurisdiction and the procedure of the Court'".[230] Nevertheless, it continued to participate in the proceedings and announced to the Court on 11 July 2003 that it "would soon make the pending payment",[231] only to reiterate on 30 July 2003 that it considered the monitoring activity of the Court to be *ultra vires*.[232] It argued that monitoring execution was not a judicial but a political task and, as such, exclusive to the General Assembly. This would also result from Article 65 of the ACHR. The Court could not extend its competence assuming that it had a *compétence de compétence*. Panama also made reference to the situation under the UN Charter, which assigned the monitoring of execution of ICJ judgments to the UN Security Council. The ECtHR neither had a monitoring competence but only the Committee of Ministers. Furthermore, the then 14 years old monitoring practice of the Court could not be considered jurisprudential practice. Any submission by the states had hence been made on a voluntary basis. Finally it accused the Court of having exceeded its powers also because it had interpreted its judgment outside of the official interpretation procedure.

This challenged the Court to adopt a fundamental decision on its monitoring competence, proceeding to a rigorous interpretation of the Convention. Its reasoning principally relied on the question of effectivity of its decisions. It argued that monitoring compliance was part of its judicial functions because otherwise its decisions would not be effective but merely of a declaratory nature.[233] This would not coincide with the right to a fair trial and that of an effective remedy stipulated in Articles 8 and 25 of the ACHR. Both the IACtHR and the ECtHR had decided in several cases that an effective remedy presupposed that judicial decisions were effectively implemented by the state.[234] The Court elaborated the specific role and function of the European Committee of Ministers and pointed out that the OAS member states had not set up a similar organ, stating that

[230] Ibid., para. 26.
[231] Ibid., para. 39.
[232] Ibid., para. 54.
[233] Ibid., para. 72.
[234] Ibid., paras. 77–82.

> it is clear that, when regulating monitoring compliance with the judgments of the Inter-American Court, it was not envisaged that the OAS General Assembly or the OAS Permanent Council would carry out a similar function to the Committee of Ministers in the European system.[235]

Then it interpreted the *travaux préparatoires*, finding that the states intended to endow it with a veritable monitoring competence, by not only establishing in Article 65 of the ACHR that the Court should submit a report to the General Assembly, but also by introducing the concept that it must indicate the cases of non-compliance and make pertinent recommendations.[236] If it did not monitor compliance it could not know in which cases states did not comply and thus select these cases to present them to the General Assembly and make the pertinent recommendations.[237] The same would result from Article 62(1) of the ACHR, which extended the Court's jurisdiction to "all matters relating to the interpretation or application of the Convention." Also, Article 29(a) of the ACHR provided that the Convention should not be interpreted in such a way that the rights and freedoms could be "restricted to a greater extent than is provided for therein". Should none of the OAS bodies be enabled to monitor compliance with the Court's judgments, this principle would remain void.[238] Finally it made reference to the tacit agreement of the states which had accepted the Court's monitoring in all previous cases, revealing an *opinio juris communis*.[239] It repealed the Panamanian argument that such an *opinio juris* could only be assumed after a lapse of time of more than 14 years. Lastly it made reference to the General Assembly's attitude towards the monitoring practice, stating that the Assembly was informed about the Court's monitoring practice since the first cases it had decided and that it had never objected to it. On the contrary, on several occasions the Assembly had requested states to submit the information required by the Court on

[235] *Baena-Ricardo et al. v. Panama* (Competence), IACtHR, 28 November 2003, Series C no. 104, para. 88.
[236] Ibid., paras. 89f.
[237] Ibid., para. 134.
[238] Ibid., para. 95.
[239] Ibid., para. 102.

the monitoring stage.[240] It finally rejected Panama's claim, pointing out, among others, that the state had provided the Court with information on compliance even while putting into doubt its monitoring competence.[241]

This decision by the Court received support by the General Assembly, which nowadays in its resolutions expressly welcomes the progress made by the Court concerning its monitoring procedure, thus expressing the states' agreement with it. Afterwards, states have never again challenged this part of the Court's functions and have generally submitted the required reports.

The decision is in line with the Court's general wide interpretation of the ACHR and its own competences. It takes the broadest possible approach to Article 65 of the ACHR, reading it not only as a mere obligation to report to the General Assembly when the parties to a case complain about non-compliance, but as endowing it with a proper right to enquire about the state of compliance. This is consistent as Article 65 of the ACHR not only requires the Court to report cases of non-compliance to the Assembly, but to also make pertinent recommendations. To this end the Court has to gather knowledge on the state of execution and the obstacles to full compliance.

In *Baena-Ricardo et al. v. Panama* (Competence) the Court confirmed that its monitoring serves the final aim of reporting cases of non-compliance to the General Assembly together with the pertinent recommendations. It may therefore be doubted whether it was the intention of the states that the Court conducts year long monitoring procedures without producing a corresponding report. Through their subsequent participation in cases before the Court as well as through the resolutions of the General Assembly on the Court's annual reports and the modifications introduced to its Rules of Procedure, which gradually solidified and amplified the monitoring procedure, the states though showed their agreement with this practice.

This became evident in particular in relation to another important development of the procedure the Court had mentioned for the first time in 2000: the introduction of hearings on compliance. In the

[240] Ibid., paras. 110ff.
[241] Ibid., para. 126.

El Amparo v. Venezuela case, the Court noticed that the party and the state disagreed about the modalities of compliance, in particular the exchange rate to be applied for monetary satisfaction, validity of the final discharge, interests on arrears, and the implication of the judgment for the jurisdiction of the national courts.[242] The Court urged the parties to settle their dispute and announced that it would evaluate the general compliance once it had received information on the measures to be taken. If it should consider it necessary, it would summon the parties to a public audience on compliance.[243] It repeated this announcement in *Baena-Ricardo et al. v. Panama* (Competence).[244] The reason behind this movement purportedly lies in the Court's dissatisfaction with the outcome of the cases it had submitted to the General Assembly, which had the Court adopt a more prominent role in the execution process itself.[245] The first private hearings on compliance were conducted in 2007 in order to obtain the information required to assess whether the state had complied with its obligations.[246]

In 2009 the Court formalized its monitoring procedure in a new Article 63 of the Rules of Procedure of the IACtHR. This measure was preceded by a modification of the Rules of Procedure in the same year, which implemented a new Article 63 on the process of monitoring compliance.[247] According to this new article, monitoring principally relies on the submission of written reports by the state and observations by the victims and their legal representatives. The IACommHR may make observations on both documents. Furthermore, the Court may require information from any other source including expert witnesses and reports. The written procedure may be accompanied by hearings on monitoring compliance. There is no

[242] *El Amparo v. Venezuela* (Cumplimiento de Sentencia), IACtHR, 20 November 2000, considerando para. 1.

[243] Ibid., considerando paras. 2 and 5.

[244] *Baena-Ricardo et al. v. Panama* (Competence), IACtHR, 28 November 2003, Series C no. 104, para. 106.

[245] These reasons were expressed by lawyers at the Court's registry during personal interviews conducted in September 2010.

[246] *Garrido and Baigorria v. Argentina* (Monitoring of Compliance), IACtHR, 27 November 2007, para. 11 and IACtHR, *Annual Report of the Inter-American Court of Human Rights 2007*, p. 23.

[247] Today Article 69 of the Rules of Procedure of the IACtHR.

restriction as to the type of hearing, so that private as well as public hearings may be convened. There is no escalation either, i.e. a public hearing does not necessarily have to be preceded by a private one, although this is generally the case in practice.

In the same year, the Court convened the first public hearing on compliance in *Sawhoyamaxa Indigenous Community v. Paraguay*, because, even after a private hearing, the state had not progressed on several crucial reparation measures concerning an indigenous community that was living in conditions that affected the lifes of its members due to an eviction from their traditional lands. The Court had ordered the state to title determined areas for the community. As several members of the community had died due to the failing support by the state and education for children was not possible, the Court decided to summon the parties to a public hearing in which the state should inform about the measures it planned to adopt.[248]

Nowadays, private and public hearings take place regularly. The Court has even further developed the system of hearings by grouping cases from one country that suffer from the same problem of compliance, e.g. medical and psychological assistance to massacre victims in several Colombian cases.[249] This new practice, introduced on the basis of the also newly introduced Article 30(5) of the Rules of Procedure of the IACtHR on joinder of proceedings for the monitoring of compliance, may serve as the foundation for grouping the information on compliance to the General Assembly by systemic problems as described *infra* in section 10.2. It would be essential, however, that the Commission provided the Court with additional information on similar cases that have been submitted to it in order to complement the big picture of the situation concerning a specific set of situations in one state.

Another, more controversial, modification by the Court on the monitoring stage was the partial closure of cases according to the state of compliance. Instead of merely recognizing in the deliberative part of the judgment which measures had been complied with, in 2009 it began to expressly maintain cases open for supervision

[248] *Sawhoyamaxa Indigenous Community v. Paraguay* (Monitoring of Compliance), IACtHR, 20 May 2009.

[249] IACtHR, *Annual Report of the Inter-American Court of Human Rights 2010*, p. 10.

only for the parts that have not been complied with.[250] It stresses in its annual reports that, despite the huge number of cases under supervision of compliance, in most of them the majority of measures had been complied with.[251] This differentiation makes sense given the variety of measures ordered by the Court. Payment of reparation or symbolic measures and restitution are usually easier to be achieved than complicated investigations into the whereabouts of massacre victims, legislative changes or large-scale modernization measures of parts of public administration.[252] Nonetheless, partial closure of cases met objection by former President of the Court Cançado Trindade, who argues that partial closing was misleading as it concealed the fact that parts of a judgment remain unfulfilled.[253] Following this discussion, the Court modified its orders on compliance, mentioning the parts of the judgment that have been fulfilled as well as the parts in which monitoring remains open, thus preventing to give a false picture of the situation in the case.[254]

The developments in the monitoring procedure coincide with a generally elevated activity and presence of the Court since 2005. This was made possible mainly by agreements on financial support with the European Union in 2004 over USD 800 000 and in 2006 with Norway over USD 3 319 390.25. These additional financial resources permitted the employment of more lawyers in the Court's secretary and an increase in the number of sessions. The Court could thus also begin to hold sessions away from its seat.[255] In 2007, the agreement

[250] See e.g. *Almonacid-Arellano et al. v. Chile* (Monitoring of Compliance), IACtHR, 18 November 2010, oper. paras. and Ventura Robles, "Conference: Advocacy before Regional Human Rights Bodies: A Cross-Regional Agenda", *Am. U. Int'l L. Rev.* 59 (2009), p. 192.

[251] IACtHR, *Annual Report of the Inter-American Court of Human Rights 2011*, pp. 13f.

[252] See also ibid., p. 14 and EFE, "Sólo el 12% de las sentencias de la Corte Interamericana se ha cumplido", in: *El Mundo* (3 April 2009), URL: http://www.elmundo.es/accesible/elmundo/2009/03/31/solidaridad/1238495954.html.

[253] Tanner, "Interview with Judge Antônio A. Cançado Trindade, Inter-American Court of Human Rights", 4 *HRQ* 31 (2009), p. 994.

[254] See e.g. *Almonacid-Arellano et al. v. Chile* (Monitoring of Compliance), IACtHR, 18 November 2010.

[255] IACtHR, *Annual Report of the Inter-American Court of Human Rights 2005*, pp. 12f. The itinerant sessions in 2007 and 2008 were financed from funds provided by Spain: IACtHR, *Annual Report of the Inter-American Court of Human Rights 2007*, p. 58.

with Norway was expanded by an additional USD 120 000.[256] The increased number of lawyers working in the Court's secretary and the higher frequency of sessions allowed the Court to dedicate more time to the treatment of cases and finally permitted the introduction of audiences on monitoring since 2007, beginning with the most ancient cases that had shown none or only little progress.

9.2.2.2 The Scope of the Court's Monitoring Competence

The Court sees its function on the monitoring stage as going beyond the strict supervision of compliance but defines its aim as to "ensure that the reparations ordered by the Court in each specific case are implemented and fulfilled".[257] Consistent with the observation that implementation in many cases fails due to internal obstacles such as missing legal prerequisites to reopen cases, political conflicts between different interest groups or funding issues, the Court may give "very clear and detailed" directions to the states on how compliance may the obtained, driven by an "intention to support the states to effectuate compliance".[258] Hearings play a special role according to this understanding. The oral presentation and in particular the contradictory nature of the hearings allow the Court to get a better idea of why implementation is not progressing. The Court underlines its conciliatory approach in these sessions, which

> does not limit itself to take note of the information presented by the parties, but, under the principles to which it is adhered as a human rights court, among other aspects, suggests some alternatives to solve the case, calls the attention towards non-compliances that are defined by lack of willingness, promotes the preparation of compliance schedules for the parties involved and even, offers its premises for the parties to hold conversations, which, on many occasions, are very difficult to arrange with the State involved.[259]

[256] Ibid., p. 57.
[257] IACtHR, *Annual Report of the Inter-American Court of Human Rights 2011*, p. 13.
[258] IACtHR, *Annual Report of the Inter-American Court of Human Rights 2010*, pp. 4f., our translation.
[259] Ibid., p. 5.

The Court construes its monitoring competences widely. It does not limit itself to merely collecting information on the status of execution and eventually other facts it requires to make pertinent recommendations to the General Assembly. The states in the General Assembly have nonetheless welcomed this development in their 2009 resolution on the Court's annual report.[260] Although their intentions are not made evident, it is well imaginable that the states, who have never shown big interest in the Court's issues, consider the monitoring practice a good way to achieve better execution results without having to deal with the cases themselves. The parties and the Court also recognized hearings as a good way to evaluate the state's willingness to comply with the Court's orders.[261]

Despite these developments and their positive reception by the states, the limits of the monitoring proceedings remain unclear. This concerns the question of when monitoring of compliance becomes a revision of the judgment. This question surged in the *Mapiripán Massacre v. Colombia* case, where new evidence, which had become known during state investigations ordered by the Court in its judgment on merits and reparation, revealed that several of the originally recognized victims in fact had not been victims of the massacre at issue. Colombia therefore asked the Court to hand down a judgment that substituted the original one, replacing the considerations, declarations and condemnations that rooted in the fraudulent evidence.[262] This posed for the first time the question of admissibility of requests for revision of the reparation related parts of a judgment. The Court however evaded the issue, holding that the question of the victims' condition did not "touch the merits of what was resolved in the sentence". Therefore, it argued, its resolution on Colombia's request could not be a revision of the sentence, which would remain final and without appeal according to Article 67 of the ACHR. It continued that it would merely evaluate the information submitted by the state concerning some persons who had

[260] No. 5(d) of AG/RES. 2500 (XXXIX-O/09), adopted by the General Assembly of the OAS at the fourth plenary session, 4 June 2012.

[261] *Blake v. Guatemala* (Monitoring of Compliance), IACtHR, 27 November 2007, para. 12.

[262] *Masacre de Mapiripán v. Colombia* (Supervisión de Cumplimiento), IACtHR, 23 November 2012, Considerando para. 2.

been declared victims.[263] As the state had been ordered to investigate and identify all victims of the massacre, "new facts could have come up when the internal investigations were activated that were not known to the parties or the Court at the moment of the deliberation". It argued that its judgment had neither terminated nor closed the determination of all circumstances of the facts of the massacre. Thus, the new findings or doubts about the victims who were executed or made disappear would not imply a variation in the occurrence or magnitude of the facts of the massacre nor in the scope of the state's responsibility. It would therefore be possible that during the execution of the obligation to investigate the state could raise doubts about the condition of victim of some persons who had been identified as such in the judgment. This issue could be resolved on the stage of monitoring compliance.[264]

This contradicts the former position of the Court adopted in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Monitoring of Compliance) of 7 May 2008. In this case, the victims' representatives had requested the Court to order new reparation for damages caused by the state's failure to implement the decision on merits and reparation. The Court rejected this request, stating that its monitoring competence was limited to "giv[ing] instructions at the request of a party or *motu proprio* relating to compliance with or implementation of the measures of reparation ordered", but that it could not "order measures of reparation that differ from those it has already ordered so as to modify the Judgment". The limit of its monitoring competence were "new facts and claims that are not part of the measures of reparation that have already been ordered".[265] This was reconfirmed in the later introduced Article 69(4) of the Rules of Procedure of the IACtHR, which states that the Court's decisions on the monitoring stage shall be only on "the state of compliance". This means that its competence ends when a decision not only affects the status of execution of a reparation measure that had been defined in the judgment, but the quality of the measure itself.

[263] Ibid., Considerando para. 7, our translation.
[264] Ibid., Considerando para. 11, our translation.
[265] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Monitoring of Compliance), IACtHR, 7 May 2008, para. 46.

The Court's order of 2012 on compliance in *Mapiripán Massacre v. Colombia* exceeded this limit. The five persons, whose condition as victim was called into doubt on the basis of new facts, had been specifically determined and named in the judgment on merits and reparation, based on the evidence presented to the Court.[266] They were not part of the group of unidentified persons who had also suffered damages in the massacre at issue. A modification of their condition as victim thus not affected the mere status of compliance, but the reparation measure in itself. The issue should therefore not have been corrected in an order on monitoring compliance.

This nevertheless does not mean that a manifestly wrong decision on reparation must inevitably prevail. Although neither the ACHR nor the Rules of Procedure of the IACtHR provide a revision procedure, it is a general rule of law that a judgment cannot prevail if posterior new evidence shows that it is manifestly incorrect and therefore unjust. This fact has been recognized in the rules of other major international tribunals.[267] Furthermore, already in 1997, based on this circumstance, the Court had admitted a motion for revision by the IACommHR in *Genie-Lacayo v. Nicaragua.* In this decision it established the foundations for judicial review of judgments in the inter-American system. The Court held that a motion for revision had to be submitted within a reasonable time and was not to be based on merely formal considerations. Citing the corresponding rules of the Statute of the ICJ and the Rules of the ECtHR, it found that judicial review was not incompatible with the decisive and unappealable character of a judgment.[268] Only decisions having acquired the effect of *res judicata* would be susceptible of review, i.e. judgments of a decisive nature or interlocutory judgments that are passed and put an end to the proceedings.[269] It further specified the cases in which motions for judicial review could be admissible:

[266] *Mapiripán Massacre v. Colombia* (Merits, Reparations and Costs), IACtHR, 15 September 2005, Series C no. 134, para. 253.

[267] Rule 80 of the Rules of the ECtHR; Article 61 of Statute of the ICJ; Article 44 of the Statute of the Court of Justice of the European Union.

[268] *Genie-Lacayo v. Nicaragua* (Application for Judicial Review of the Judgment of Merits, Reparations and Costs), IACtHR, 13 September 1997, Series C no. 45, paras. 6ff.

[269] Ibid., para. 11.

> The applications for judicial review must be based on important facts or situations that were unknown at the time the judgment was delivered. The judgment may therefore be impugned for exceptional reasons, such as those involving documents the existence of which was unknown at the time the judgment was delivered; documentary or testimonial evidence or confessions in a judgment that has acquired the effect of a final judgment and is later found to be false; when there has been prevarication, bribery, violence or fraud, and facts subsequently proven to be false, such as a person having been declared missing and found to be alive.[270]

According to Article 65 of the Rules of Procedure of the IACtHR, the decision on reparation and costs is part of the judgment. The unity of the Court's decisions on the merits and on reparation also results from Article 68(2) of the ACHR, which presupposes that the stipulation of compensatory damages is part of *the* judgment and not contained in a different type of decision to which other rules apply than to the judgment on the merits. *Res judicata* therefore extends to the orders on reparation. They can hence be subject to revision.[271]

Applying the revision procedure to the *Mapiripán Massacre v. Colombia* case the Court would have had to ask whether the new facts concerning the condition of victim of the five persons mentioned fell into any of the categories established in *Genie-Lacayo v. Nicaragua* (Application for Judicial Review of the Judgment of Merits, Reparations and Costs). Taking into account the rules of other international tribunals cited by the IACtHR as the basis for the revision procedure it would also have been appropriate to evaluate whether the interested party, in this case the state, could not reasonably have known the new fact at the time of the original judgment. This would have been of particular interest given that the state had

[270] Ibid., para. 12. See also Faúndez Ledesma, *The Inter-American System for the Protection of Human Rights*, pp. 879f. and Pasqualucci, *The Practice and Procedure of the IACtHR*, pp. 218f.

[271] See on *res judicata supra* 8.2.2.

been found responsible, among other things, for not having applied due diligence in the investigation of the facts of the case.

9.2.2.3 Evaluation

The expansion of the Court's monitoring instruments has shown positive effects. In the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* case, for example, the state, despite repeated declarations of commitment, had not adopted coherent measures to title lands for the affected community in six years after the judgment.[272] The Court therefore decided to convene a private hearing in 2008 during which it recommended the parties to hold a meeting to reach an agreement on the outstanding issues in the case. The parties came together immediately after the session and reached the recommended agreement, establishing a precise timetable to resolve the issue of the titling of lands.[273] In the hearing, the state also had the opportunity to explain the causes of the delays, in particular that a judicial process had been launched before domestic courts by ten other indigenous communities.[274] Nicaragua in the end complied with its commitments so that the case could be finally closed in 2009.[275]

Private, and even more so public audiences on compliance are a double-edged sword, though. Apart from improving the Court's resolutions because it can gather better knowledge of the circumstances of the case, they may be advantageous for the victims because they put the case back on the table and usually raise public interest, increasing domestic pressure on the state. For the government they may have advantages, too, particularly when there are quarrels between different branches of public power about the implementation of the reparation measures ordered. Hearings may, for instance, allow the government to explain why titling of land is not possible due to opposition by the legislature. In such cases hearings

[272] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Monitoring of Compliance), IACtHR, 14 March 2008, Considering paras. 7 and 9.

[273] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Monitoring of Compliance), IACtHR, 7 May 2008, para. 28.

[274] Ibid., para. 30.

[275] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Monitoring of Compliance), IACtHR, 3 April 2009, considering paras. 14ff.

may become instruments of domestic policy-making and therefore be required even by the state itself.[276]

These examples show that the Court has to pay close attention that the new procedural instruments will really serve their intended aim of improving its knowledge on the status of compliance, and that they are not turned into a stage for the states to fight internal struggles or discredit the inter-American human rights system or the victims. This task requires well pondered acting by the president of the Court when deciding in which cases and on which subjects to convoke audiences.

An exhaustive monitoring procedure binds a significant part of the Court's already sparse funds. Although there are no statistics on the workload of the Court's registry, lawyers there estimated in 2010 that about half of their working time was dedicated to monitoring compliance and to the adoption of provisional measures. In each session the Court had to monitor compliance in 15 to 20 cases, holding five to six sessions thereon, while only two to three sessions were dedicated to the – more extensive – deliberations on the merits.[277] The Court's dilemma is that it has to choose whether to ensure, as good as possible, compliance with its decisions, which limits the throughput of cases and probably leaves situations that would merit to be judged out of its reach, or to limit its monitoring activity, thus risking that its decisions will not be effectively com-

[276] In the *Sawhoyamaxa Indigenous Community v. Paraguay* case, the titling of land for the indigenous community was opposed by the German big landowner who possesses the land in dispute. Landowners had the support of the conservative majority in the Paraguayan Senate and Parliament. Left-leaning President Lugo, although his government was sustained by a coalition with the liberal party, started to promote a land reform. The government explained the conflictive situation with the legislative branch in a private hearing before the Court, thus giving evidence of its good intentions: *Sawhoyamaxa Indigenous Community v. Paraguay* (Monitoring of Compliance), IACtHR, 8 February 2008, considering para. 9. On this: Fabio Ghelli, "Deutschlands unrühmliche Rolle in Paraguay", in: *Die Zeit* (6 July 2012), URL: www.diezeit.de. At the time of writing the problem continued and the Court, on 21 May 2014, held another public hearing on three cases against Paraguay concerning indigenous communities, among them the aforementioned one, all suffering from similar implementation defects: IACtHR, *Annual Report of the Inter-American Court of Human Rights 2014*, p. 35. See further examples at Parra Vera, "El impacto de las decisiones interamericanas".

[277] Statements gathered in personal conversations in September 2010.

plied with and that it will become a "toothless tiger". This dilemma cannot be solved by the Court itself but requires dedication of the member states, who will have to act in correspondence with their obligations under the ACHR and consistently within the General Assembly when discussing the Court's report. This, however, also presupposes that the Court no longer evades the Assembly and respects the shared responsibilities established by the ACHR.

The need for more political solutions to problems of implementation resurged with the rising opposition to the inter-American system in the early 2010s, in particular by Venezuela. The Court had handed down several judgments concerning the country's domestic political order, in particular the independence of justice and the conditions of detention of a convicted terrorist.[278] The first case affected judges of an administrative tribunal who were accused by the government of being members of the political opposition planning a coup d'état against President Chávez. After a constitutional reform at the beginning of the 2000s, most Venezuelan judges were appointed temporally and could be removed easily. This had happened to the affected judges who had been appointed to the tribunal in charge of judicial control of most political decisions by the government. After the IACtHR had handed down its decision ordering Venezuela to reinstate these judges, the Venezuelan Supreme Court held that the sentence could not be executed as this would result in the violation of the Venezuelan constitution and called the government to denounce the ACHR.[279] Although the government did not react immediately to this request, the *Usón-Ramírez v. Venezuela* decision, in which the Court found that a convicted terrorist had been detained under inhuman conditions, gave President Chávez the reason to announce Venezuela's retreat from the Convention.[280]

[278] *Apitz-Barbera et al. v. Venezuela*, IACtHR, 5 August 2008, Series C no. 182 and *Usón-Ramírez v. Venezuela* (Merits, Reparations and Costs), IACtHR, 20 November 2009, Series C no. 207.

[279] *Expediente No. 08-1572* [Sala Constitucional], Tribunal Supremo de Justicia, 18 December 2008, punto resolutivo 2.

[280] Minister of Popular Power for Foreign Affairs of the Bolivarian Republic of Venezuela, *Letter to the Secretary General of the OAS*, 6 September 2012, URL: http://www.oas.org/DIL/Nota_Rep%C3%BAblica_Bolivariana_Venezuela_to_SG.English.pdf.

This renewed episode of objection by a state to politically inconvenient decisions by the Court gives a clear example of the politically sensitive environment among the Latin-American states the IACtHR is acting in. Although its proactive jurisprudence of broad interpretation of the Convention rights has brought huge advances in the field of human rights protection in the affected countries and influenced other international courts, the IACtHR must bear in mind the unstable support it receives from several states in the region and be aware that missing support by influential domestic actors may render implementation of its judgments impossible. Only close respect of the limitations set by the ACHR can prevent too easy rejection of its judgments by the states. On the monitoring stage, this implies the application of Article 65 of the ACHR. Therefore, it may only be welcomed that in 2011 the judges began to discuss again the conditions under which to apply Article 65 of the ACHR to specific cases.

In *Blanco Romero et al. v. Venezuela*, a forced disappearance case, the Court had ordered in 2005 a set of measures to be adopted by the state. Nevertheless, even after a private hearing on compliance in 2009 in which the state and the victims had agreed to adopt a schedule for the implementation of measures, the state had again taken hardly any steps to comply with its obligations, including simple ones like the publication of the judgment or payment of compensation, which remained unfulfilled six years after the original judgment. Despite this apparent unwillingness by the state, the Court, on 22 November 2011, adopted another order on compliance in which it stressed the state's obligation to comply with the reparation orders. However, concurring opinions by Judges García Sayán and Vio Grossi to this and two other cases decided during the same session show that the question of Article 65 of the ACHR was discussed by the judges.[281]

García Sayán's opinion deals with the question of when the Court has to submit a case to the General Assembly. He repeats the Court's constant jurisprudence according to which its competence to monitor resulted from the fact that it first had to identify the cases in

[281] *Servellón García v. Honduras* (Compliance with Judgment), IACtHR, 22 November 2011 and *Saramaka People v. Suriname* (Compliance with Judgment), IACtHR, 23 November 2011, all with the same wording.

which states were persistently not complying in order to then report these cases to the Assembly. He concludes that the Court had to single out "exceptional cases in which a real reticence or refusal of the State concerned to comply with the provisions of the judgment has been verified". Reticence had to amount to the state "expressly indicat[ing] that it will not comply totally or partially with the decisions, added to the failure of all possible monitoring measures".[282] None of the cases had amounted to this level yet in his opinion.

Vio Grossi, for his part, underlines that Article 65 of the ACHR would not create an option but an obligation for the Court to submit cases to the General Assembly. Merely enumerating decisions on compliance in its annual report would not be sufficient, because it was not for the Assembly to pick cases from this list but for the Court to specify them. The Court could not sustain its own monitoring competence arguing that the General Assembly was not complying with its tasks under the Convention. He recognizes that the Court could not extend monitoring procedures into an uncertain future without setting the state specific deadlines to comply with its obligations. Otherwise, the Court would end up being in the situation of having to apply political pressure to induce states to compliance. He also opposes the argument that if the Court submitted one case to the Assembly, it would subsequently have to submit many more cases, which would amount to recognizing the inefficiency of the inter-American human rights system. Vio Grossi explicitly rules out that the respect for human rights or the *pro homine* principle could justify that the Court deviated from its legal basis and autonomously created procedures outside of the Convention. He opines that the best protection for human rights could be provided if the Court sticked closely to the rules, in particular the ACHR. Nonetheless, he underlines that his intention was not to undermine the Court's monitoring practice but that he wanted to make clear that the execution of this function should not eliminate the application of Article 65 of the ACHR. The Court's role on this stage of the proceedings was limited to supervision and did not entail imposing new obligations onto the states. If a state did not show progress in

[282] *Blanco Romero et al. v. Venezuela* (Compliance with Judgment), IACtHR, 22 November 2011, Separate opinion of Judge García Sayán, para. 8.

compliance, it corresponded to the General Assembly to draw the pertinent conclusions from this behaviour.[283]

Apart from a purely judicial role when deciding cases, the Court also has a political role to play when it supervises execution. Nonetheless, its possibilities in this area are limited. Besides offering a forum to the parties to discuss their opinions, make proposals and bring the case back to public awareness by organizing public or private hearings, it cannot apply any type of pressure. Therefore the rigid *ultima ratio* approach adopted by García Sayán appears to be too narrow. The Court has to accept its limitations and the General Assembly's primordial political role. It would be preferable for the Court not to select cases to submit to the Assembly according to formalistic criteria, but rather to make decisions on a case-to-case basis, taking into account the specific circumstances of each case. Insofar Vio Grossi is right when he points out the Assembly's role under the ACHR. Given the Court's limited possibilities to effectively exercise pressure on the states, the Assembly, despite its apparent shortcomings, should not be completely excluded from the execution process.

Vio Grossi's critics that the Court had created its monitoring competence outside of the ACHR, however, do not meet the point. The Court's competences in this area derive from Article 65 of the ACHR as described in *Baena-Ricardo et al. v. Panama*. This broad interpretation of the Convention has, apart from this case, never been doubted by any state as being *ultra vires*, but was explicitly accepted by the General Assembly which even invited the Court to maintain this practice. States have followed Court summonses and some have even solicited hearings on compliance themselves, evidencing support of these measures.

Concerning the aforementioned Venzeuelan cases though, the Judges coincided that the decision by the Venezuelan Supreme Court, which had held that the IACtHR's decision could not be fully executed as this would require measures that violated the Venezuelan domestic constitutional order,[284] had amounted to an absolute

[283] Ibid., concurring opinion of Judge Vio Grossi.

[284] *Apitz-Barbera et al. v. Venezuela* (Monitoring Compliance with Judgment), IACtHR, 23 November 2012, para. 43. The central parts of the Venezuelan Court's decision are reproduced in para. 13 of the order.

negation by the state to comply with the reparation ordered. The Court therefore decided to submit the case of *Apitz-Barbera et al. v. Venezuela* to the General Assembly.[285] In its order on monitoring compliance, it reiterates the basic concepts of compliance, in particular that a state may not invoke domestic law to justify noncompliance.[286] In addition, it refers to decisions of several constitutional courts from other member states that had held that the ACHR and its interpretation by the IACtHR had to be taken into account by domestic actors even beyond a specific case.[287] This would be inevitable, in its words, when a member state's highest court had "issued a ruling indicating the frank intention of not meeting the obligation to comply with a judgment of the Court". In such a situation, "the States Parties must make every effort to ensure that there is no evident failure to comply with the Court's judgments".[288] This obligation derived from the special character of the ACHR, which established a "real regional public order, the maintenance of which is in the interest of each and every State Party". Opposition by a state party to comply with a Court judgment would violate "the undertaking to comply with the Court's judgments made towards the other States". The Court concluded that

> [t]herefore, the task of the General Assembly of the Organization of American States, in the case of manifest noncompliance with a judgment delivered by the Inter-American Court by one of the States, is precisely that of protecting the practical effects of the American Convention and preventing inter-American justice from becoming illusory by being at the discretion of the internal decisions of a State.[289]

[285] *Apitz-Barbera et al. v. Venezuela* (Monitoring Compliance with Judgment), IACtHR, 23 November 2012. See on the result before the General Assembly *supra* section 9.2.1.
[286] Ibid., para. 22.
[287] Ibid., paras. 26ff.
[288] Ibid., para. 45.
[289] Ibid., para. 47.

9.2.2.4 Excursus: Provisional Measures on the Monitoring Stage

The IACtHR applies another instrument on the monitoring stage: the ordering of provisional measures according to Article 63(2) of the ACHR. This norm gives the Court the competence to issue provisional measures in order to avoid irreparable damage to persons in cases of gravity and urgency "in matters it has under its consideration". Article 27(1) of the Rules of Procedure of the IACtHR more specifically defines that this refers to "any stage of the proceedings". As the Court considers the stage of monitoring compliance a stage of the proceedings, it is frequently adopting provisional measures at this stage, typically ordering states to immediately protect human rights defenders, victims or their families while its reparation orders in the underlying case have not been complied with.[290] This practice had not been questioned neither by the states nor the parties until 2011, when Judge Vio Grossi discussed the practice in his dissenting opinion to the decision on provisional measures adopted by the IACtHR in *Gutiérrez-Soler v. Colombia.* This, at first, caused a ferocious rebuttal by his colleagues. The unusually harsh tone in which the remaining judges' answer was written evidenced deep ruptures among the judges and therefore merits to be mentioned here.

Judge Vio Grossi objected to the adoption of provisional measures on the monitoring stage out of formal reasons. He argued that the Court's contentious jurisdiction ended with the adoption of the judgment on reparation which replaced the provisional measures ordered during the contentious proceedings.[291] Provisional measures would specifically serve to maintain a juridical situation so that the Court was able to issue a judgment that adopted, in part, the protective character of the provisional measures.[292] The judgment "resolves [the case] in its entirety or completely and in the only and last instance".[293] With the adoption of the judgment the Court would terminate its consideration of the case, which was the precondition

[290] Cf. *Gutiérrez-Soler v. Colombia* (Medidas Provisionales), IACtHR, 30 June 2011, Considerando 5.

[291] Ibid., dissenting opinion Judge Vio Grossi, p 5.

[292] Ibid., dissenting opinion Judge Vio Grossi, p 6.

[293] Original: "resuelve en su totalidad o completamente y en única y última instancia", our translation.

for its competence to adopt provisional measures. The adoption of provisional measures after the adoption of the final judgment would therefore not be "provisional" and could even lead to a violation of the principle of *res judicata*. The only two actions at the Court's disposal after the adoption of the judgment were the interpretation according to Article 67 of the ACHR and the submission of the case to the General Assembly according to Article 65 of the ACHR.[294] The theory of implied powers would not provide the Court with the competence to order provisional measures on the monitoring stage either, as this was not absolutely necessary to comply with its functions.[295] The same consideration applied to the *pro homine* principle, which referred only to the rights laid down in the ACHR but not to the powers of the organs of the protection system. Finally, the mere fact that the states had accepted provisional measures ordered by the Court after the adoption of the final judgment in the past could not be interpreted as an expression of their will to create a new norm of soft law but would simply be an act of compliance with a judicial order. Other theories of international law such as *estoppel*, *acto proprio* or preclusion would not apply either.[296]

The other judges responded to this argumentation in a common concurring opinion to the same case.[297] They argued that the Court had, since the beginning of its work, adopted provisional measures and had constantly interpreted Article 62(2) of the ACHR as comprising all stages of the proceedings, including the monitoring stage. No state, and even less a judge of the Court, had ever doubted the Court's jurisdiction to do so. The fact that it was a judge of the very Court who was questioning its competence would be particularly grave and weakened the tribunal. They reproached Vio Grossi specifically for questioning the Court's competence in such a crucial area as the prevention of irreparable harm.[298] They constructed their reaffirmation of the Court's jurisprudence in four parts: com-

[294] *Gutiérrez-Soler v. Colombia* (Medidas Provisionales), IACtHR, 30 June 2011, dissenting opinion Judge Vio Grossi, p. 7.
[295] Ibid., dissenting opinion Judge Vio Grossi, p. 8.
[296] Ibid., dissenting opinion Judge Vio Grossi, p. 9f.
[297] Judge Alberto Pérez Pérez did not participate in the adoption of the decision and therefore did not give an opinion.
[298] Ibid., concurring vote of several Judges, para. 2.

parison with at the ECtHR, the IACtHR's competence to order provisional measures in general, at the stage of supervision in particular and finally an explication of the particular importance of such measures at this stage of the proceedings. Their comparative analysis was, however, limited to a general overview of the development of the ECtHR's competence to adopt provisional (or interim, as they are called in Rule 39 of the Rules of the ECtHR) measures. The issue of whether the ECtHR could also adopt provisional measures at the stage of execution was spared out. This question is, nonetheless, of interest, as supervision of compliance in the European and the Inter-American System differs. In fact, the ECtHR closes cases with the adoption of the judgment, so that a competence to order interim measures at this stage is doubtful given the fact that the case is no longer open before the Court but has been transferred to the Committee of Ministers.

The judges based their argumentation on recounting the jurisdictional history of the adoption of provisional measures, underlining that in a number of cases the IACtHR had maintained or even ordered such measures after the decisions on merits and reparation had been handed down.[299] Their fundamental argument though was that the monitoring stage was a part of the Court's jurisdiction, i.e. the consideration of a case in the terms of the ACHR did not end with the adoption of the decision on reparation. Therefore, the recurrent resolution in all judgments was that the Court monitors full compliance with the judgment and "shall consider the instant case closed upon full compliance by the State with the provisions therein."[300] As even at this stage situations could occur that put the rights concerned in peril and threatened compliance with the judgment, the need for immediate protection persisted and the Court consequently had to order provisional measures at this stage, too. In one case such measures had even been solicited not only by the victims, but also by the state itself.[301] The judges pointed out that since

[299] Ibid., concurring vote of several judges, para. 25.

[300] Ibid., concurring vote of several judges, para. 26; eg.: *Gutiérrez-Soler v. Colombia* (Merits, Reparations and Costs), IACtHR, 12 September 2005, Series C no. 132, oper. para. 11.

[301] *Gutiérrez-Soler v. Colombia* (Medidas Provisionales), IACtHR, 30 June 2011, concurring vote of several judges, para. 27.

the first adoption of provisional measures in 2000, the Court had adopted such measures in 26 cases until the decision at issue, without any state and even less a judge questioning its competence to do so.[302] Finally, the judges made reference to the Court's competence to determine its own competence, which would give it the competence to interpret the rules on its own jurisdiction in the ACHR.[303] It is noteworthy that the Court's practice to order provisional measures during the monitoring of compliance had not been questioned by doctrine either.[304]

Following this confrontation, Judge Vio Grossi proposed ways out of the impasse. First, he suggested that the Court should include the obligation to comply with the provisional measures ordered into the operative paragraphs of the judgment on the merits.[305] Then he argued that the provisional measures ordered before the adoption of the judgment on the merits had to be understood as having become part of the judgment and that the obligation to comply with them had become part of the state's general obligation to comply with the judgment (maintaining that they should have been expressly mentioned in the operative paragraphs). Compliance with these measures therefore had to be supervised as part of the monitoring procedure. Should the circumstances requiring these measures, i.e. the extreme gravity and urgency and the risk of irreparable harm to persons, have ended, the measures should be considered as complied with. In case of non-compliance, the Court had to submit the situation to the General Assembly under Article 65 of the ACHR.[306]

Finally, the Court accepted Vio Grossi's point in part and held that, in a case where the victims recognized in the judgment on merits and reparation were the same as the beneficiaries of the provisional measures, "the obligations of the State under the provisional measures will be replaced by what is ordered in the Judgment and, consequently, their execution and observance will be an object of

[302] *Gutiérrez-Soler v. Colombia* (Medidas Provisionales), IACtHR, 30 June 2011, concurring vote of several judges, para. 30.

[303] Ibid., concurring vote of several judges, paras. 31f.

[304] Cf. Pasqualucci, *The Practice and Procedure of the IACtHR*, pp. 315f.

[305] *Barrios Family v. Venezuela* (Merits, Reparations and Costs), IACtHR, 24 November 2011, Series C no. 237, concurring opinion of Judge Vio Grossi.

[306] *Fernández Ortega et al. v. Mexico* (Provisional Measures), IACtHR, 20 February 2012, concurring vote of Judge Vio Grossi.

the supervision of compliance of the Judgment and no longer of the provisional measures".[307] For the time being, it remained open whether it would apply this jurisprudence also in cases where it had ordered provisional measures in favour of third persons such as lawyers. It should be expected, though, that these measures must also be lifted, as in the decision on the merits the beneficiaries were not recognized as victims and thus can no longer be subject to protection by the Court in the specific case.

This development has to be welcomed. After the adoption of the judgment on merits and reparation, a provisional protection of interests is no longer possible and necessary. With the judgment on merits and reparation, the responding state is immediately under the obligation to procure to the victims the protection ordered. The protection that had been ordered through provisional measures is no longer provisional but final and as such covered by the judgment. While the implementation of protective reparation measures may take some time, the state in the meantime has to adopt all necessary measures to safeguard the victim from the infliction of further harm. This obligation can be supervised by the Court just as it supervised the implementation of protective measures before. It may specifically decide, in its decisions on the merits, that the state has to implement or maintain certain short-term protective measures immediately, until more far-reaching protection has been put into action. Thus, provisional measures may continue in the judgment on the merits.[308] Furthermore, when grave threats to the rights whose violation had been adjudicated in the final judgment become known only after the adoption of this judgment, the Court could call the state's attention to this situation in its decisions on monitoring compliance, for instance by underlining the state's obligation to ensure effective implementation of the reparation orders. Other-

[307] Our translation. Original: "[...] las obligaciones del Estado en el marco de las medidas provisionales quedan reemplazadas por lo ordenado en Sentencia y, consecuentemente, su ejecución y observancia será objeto de supervisión del cumplimiento de la misma y no ya de medidas provisionales". *Pueblo Indígena Kichwa de Sarayaku v. Ecuador* (Merits, Reparations and Costs), IACtHR, 27 June 2012, Series C no. 245, para. 340.

[308] Cf. *Pacheco-Teruel et al. v. Honduras* (Merits, Reparations and Costs), IACtHR, 27 April 2012, Series C no. 241, para. 97.

wise, posterior new violations would have to be considered in a new procedure by the IACommHR.

10 Assessment and Outlook

The typical scope of reparation orders for human rights violations as well as the instruments and procedures under the Conventions or developed otherwise to secure execution of these orders has been demonstrated. This leaves one last but central question: How effective are these undertakings? And how could they be further developed?

Measuring effectivity of both execution systems is not easy. The European system is particularly difficult due to the application of the principle of subsidiarity at the reparation and execution stages. The ECtHR mostly only finds whether a violation has happened, leaving the conclusions to be drawn from that fact to the appreciation of the states. Even the Committee of Ministers's task is generally limited to assessing the appropriateness of measures adopted by the state in response to a Court's judgment. Unlike in the inter-American human rights system, judgments do not contain a catalogue of measures the state has to work through and whose compliance can easily be ticked off. Furthermore, the sheer number of cases decided by the ECtHR means that an enormous amount of data has to be processed. Fortunately, this task has already been undertaken in one investigation which will be drawn on in section 10.1.

A common problem to both systems is the lack of data preparation.[1] Although the IACtHR and the Committee of Ministers publish annual reports containing their monitoring activities, data on compliance with different types of measures is not readily available. As measures are pre-classified by the IACtHR, it is easier to organize compliance according to categories of measures. Here, too, quantitative research on the IACtHR's orders done by others will be taken as a basis in section 10.2.

[1] Hillebrecht, "Rethinking Compliance", 3 *JHRP* 1 (2009) criticizes the bad data situation and proposes standardised indicators to make compliance comparable.

10.1 The European Monitoring System

As part of its efforts to increase transparency of its procedure, in 2007 the Committee of Ministers began to issue annual reports on its supervision activities, including numbers on cases that have become final at the Court for each year, the number of pending cases and the cases that were technically complied with,[2] and final resolutions adopted by the Committee.[3] These reports, however, concentrate on leading cases that require general measures and give no information on compliance with individual measures, except just satisfaction, at all.[4]

The report for the year 2014 indicated that, by 31 December 2014, 10 904 cases were pending before the Committee, including 1 389 cases that had become final at the Court during that year. While the number of cases that become final at the ECtHR each year has decreased since 2010, it was only in 2013 that the Committee could, for the first time in several years, close slightly more cases than the number of new cases that reached it from the Court.[5] Of the pending cases, 1 513 were classified as leading.[6] In a former report, the Committee had clarified that leading cases mainly concern actions of security forces (16%), poor detention conditions (16%), and excessive length of judicial proceedings (12%).[7] While the number of new cases had been more or less stable over the past six years, the number of cases for which a final resolution could be adopted, i.e. which could be closed by the Committee, has been constantly increasing from a mere 240 in 2009 to 1 502 in 2014. Of these final resolutions, about 208 concerned leading cases.[8]

[2] These are cases where the Committee assumes that no further monitoring is necessary but for which nonetheless, mainly for reasons of time, a final resolution is still pending.

[3] Cf. Committee of Ministers, *Supervision Annual Report 2007*, p. 9.

[4] The state of execution of individual measures can be consulted for each case on the Execution Department's homepage at https://www.coe.int/t/dghl/monitoring/execution. Generalized information, for instance on the average duration for individual measures to be implemented, is, however, unavailable.

[5] Committee of Ministers, *Supervision Annual Report 2014*, pp. 26f.

[6] Ibid., p. 29.

[7] Committee of Ministers, *Supervision Annual Report 2011*, p. 61.

[8] Committee of Ministers, *Supervision Annual Report 2014*, pp. 27, 30.

The vast majority of pending cases however are repetitive ones that are attached to one leading case, i.e. they stem from the same systemic or general domestic problem in a state. Finalization of the leading case should therefore resolve the depending repetitive cases, too.[9] This is confirmed by other statistics finding that the number of interim resolutions has severely diminished since the beginning of the 2000s, a fact that is to be explained by the increased number of closed leading cases.[10] Consequently, the Committee's work is concentrating on the resolution of these cases.

The Committee's statistics further reveal that a considerable number of cases take several years to be closed. Of the 1 337 leading cases that were pending at the end of 2011, roughly 20% were on the Committee's agenda for more than five years already. Around 40% were pending between two and five years, and only another 40% were pending for less than 2 years. Consistent with the overall distribution of issues under consideration, most old leading cases concern excessive length of judicial proceedings in several states, but also ineffective investigations into inhuman and degrading treatment or torture by the police in Bulgaria, pre-trial detention conditions in Russia, the Chechen conflict and freedom of expression in Turkey.[11] Even the supposedly simplest measure to be complied with – payment of just satisfaction – is often complied with only after the deadline set by the Court has expired. In 1 616 of the pending cases, payment remained due although the deadline had expired, while in 249 cases applicants had received the sums allocated by the Court in 2011, still after the deadline had expired. Only in 861 cases was payment made on time.[12]

[9] Cf. Committee of Ministers, *Supervision Annual Report 2011*, pp. 31f.

[10] Hawkins and Jacoby, "Partial Compliance", p. 38.

[11] See the list at Committee of Ministers, *Supervision Annual Report 2011*, pp. 40ff. and at Committee of Ministers, *Supervision Annual Report 2013*, pp. 42ff.

[12] Committee of Ministers, *Supervision Annual Report 2011*, p. 48; since 2012 the Committee no longer issues information on the cases for which payments deadlines have expired during the year, but bases its statistics on all payments made in the respective year. According to these numbers, 930 payments were made on time in 2014, while 164 had exceeded the deadline. In 1141 cases information on payment was still pending at 31 December 2014, in 765 it was overdue for more than six months: Committee of Ministers, *Supervision Annual Report 2014*, p. 45.

Von Staden's quantitative investigation on compliance with ECtHR judgments provides a more complete picture, as he takes into consideration all cases requiring some type of execution measure that were rendered by the Court from the moment it was established until 2010, counting 12 263 executable judgments in total.[13] According to this data, the ECtHR had a perfect compliance rate of 100% for all 343 judgments rendered until 1995 that required some type of execution measure.[14] Since 1996, when the hitherto not resolved issue of Italian length of procedure cases was first decided by the Court,[15] the quota of cases that could be closed by the Committee has been steadily declining, having dropped to well below 10% on 2 December 2011 for judgments rendered in 2010.[16] Despite this circumstance, in its first annual report of 2007 the Committee still claimed that full execution had always been achieved, admitting however that compliance in some cases took considerable time, including total standstill for some periods.[17] The skyrocketing numbers of cases decided by the Court following the entry into force of Protocol no. 11 put additional strains on the Committee. Since 2005, the Court issued more than 1 000 judgments requiring some type of execution measure each year, i.e. judgments ending up on the Committee's agenda.[18] The Committee's statistics also reveal another fact: 75% of judgments rendered between 1996 and 2005 which were still pending execution in 2010 were rendered against Italy, Turkey, Poland and Ukraine, while Germany and Switzerland, with also relatively high numbers of cases, had complied with all of

[13] Von Staden, "Rational Choice within Normative Constraints: Compliance by Liberal Democracies with the Judgments of the European Court of Human Rights", *SSRN eLibrary* (2012), pp. 14f.

[14] Von Staden, *Shaping human rights policy in liberal democracies*, p. 132.

[15] *Ceteroni v. Italy* [GC], ECtHR, nos. 22461/93 et al., 15 November 1996, *Reports* 1996-V.

[16] Von Staden, "Rational Choice within Normative Constraints: Compliance by Liberal Democracies with the Judgments of the European Court of Human Rights", *SSRN eLibrary* (2012), p. 17.

[17] Committee of Ministers, *Supervision Annual Report 2007*, pp. 9f. The limited interpretation of partial or non-compliance as a matter of timing was criticised by Hawkins and Jacoby, "Partial Compliance", p. 7.

[18] Von Staden, "Rational Choice within Normative Constraints: Compliance by Liberal Democracies with the Judgments of the European Court of Human Rights", *SSRN eLibrary* (2012), p. 17.

their judgments. There is thus apparently no correlation between the number of judgments and execution results.[19]

Still today, it is a relatively small group of states that is responsible for the majority of the Committee's workload. The largest number of pending cases, 2 067 as of 2014, concern Italy's defective judicial system. This, however, is an isolated fact in a country that in general respects the Convention rights.[20] Other states require more attention. Turkey and Russia for example, with 1 500 and 1 474 cases respectively, present a variety and amount of Convention violations that evidences that fundamental standards of liberal democracies are not met.[21] These states have to resolve a variety of different problems, thus demanding much more attention by the Committee and the Execution Department. This is also reflected by the fact that specific projects financed by the Human Rights Trust Fund have been implemented in relation to these countries.[22] Still, in particular Russia continues to implement judgments only very slowly, having even had the ECtHR openly critizise this circumstance in relation to the Chechen cases.[23]

All this paints an ambivalent picture of the Committee's balance. The Committee, together with the Court, is consistently tackling the issue of the rising number of applications and has developed a variety of activities to improve the states' capacity to domestically resolve situations. The increase in cases that could be resolved and the decrease in new repetitive cases are also signs of progress. The Committee accredits this to its new working methods and to the effect of the pilot judgment procedure, which allow it to send many cases back to the domestic level.[24] Thus, in particular individual reparation measures can be closed, seen that most pending cases concern defective judicial proceedings. These cases can be redressed on the individual level by reopening domestic proceedings or, alternatively, compensation awarded by the ECtHR or domestic

[19] Von Staden, *Shaping human rights policy in liberal democracies*, p. 137.
[20] Committee of Ministers, *Supervision Annual Report 2014*, p. 66.
[21] Cfr.: ibid., pp. 54f.
[22] See *supra*, 9.1.6, and ibid., pp. 22f.
[23] See hereon *supra* p. 169.
[24] Committee of Ministers, *Supervision Annual Report 2011*, p. 10.

instances. Other situations also offer the possibility to obtain redress through domestic review.[25]

Implementation time, like in the inter-American system, is the other big problem of the Committee's procedure. It is not only a concern to the Committee in terms of workload,[26] but also to the applicants who, depending on the gravity of the situation, not only expect individual redress, but are also looking for general measures that guarantee non-repetition.[27] Execution time is linked to the phenomenon of partial compliance. The majority of pending cases do not suffer from complete inactivity by the responding state, but are complied with in part, while only certain measures remain unfulfilled. The Committee can react to such situations with interim resolutions to welcome progress but also to express concern or to make suggestions.[28] One such resolution often affects several cases, as it is issued on the corresponding leading case, naming all depending cases. The number of these resolutions thus indicates at least the level of partial compliance. As of 2008 2 675 interim resolutions had been issued concerning 6 022 pending cases.[29] Under the reformed working methods interim resolutions were mainly replaced by interim decisions and the Committee now principally recurs to them to present shortcomings or advances. It applied the reformed working methods for the first time in 2011. In that year it adopted 89 decisions concerning 4 219 cases.[30] Partial compliance thus remains a widespread issue.

The Committee's amended working methods, adopted after the Interlaken Conference, alleviated but did not resolve the problem of slow execution and the overload of cases. Therefore, at the 2012

[25]Committee of Ministers, *Supervision Annual Report 2011*, p. 51.

[26]Ibid., p. 11.

[27]This issue has been investigated particularly in the inter-American system: Salvioli, "Que veulent les victimes de violations graves des droits de l'homme?" and Beristain, *Diálogo sobre la reparación, Vol. 1*, pp. 87ff.

[28]Rule 16 of the CM Rules for the Supervision of the Execution of Judgments.

[29]Hawkins and Jacoby, "Partial Compliance", pp. 36f.

[30]Data collected from the records of DH/HR meetings, available on the Execution of Judgments homepage at https://www.coe.int/t/dghl/monitoring/execution/WCD/DHMeetings_en.asp. Cases that were object of more than one decision were counted only once. As new cases were grouped under already existing leading cases, the number of cases affected represents the time when the last decision on a leading case was adopted.

Brighton Conference, the CoE member states adopted further proposals to tackle these issues in the medium term. The Brighton Declaration concentrates on further prioritization of systemic cases and enforcement of the application of the principle of subsidiarity to other cases. To this end, the states were called upon to improve their domestic capacity to implement judgments. Also, interaction between national authorities and the Court should be strengthened by the introduction of an optional advisory procedure that could be triggered concerning specific domestic cases.[31] New instruments shall be added to the Committee's toolbox so that it can take effective measures against states that fail to comply with their obligations, in particular in pilot cases and other cases revealing systemic shortcomings.[32] Concerning the long-term future of the execution system, the Committee was called to initiate a process of revision of the supervision procedure in general and its role therein in particular.[33]

In the scope of this process, further improvement of the European human rights system's monitoring capacity could be envisaged. On the one hand, the eventual accession of the European Union to the ECHR will offer possibilites to increase cooperation between CoE and EU organs in the process of execution of judgments. Finland's motion in the European Parliament in the *Yuriy Nikolayevich Ivanov v. Ukraine* case has already demonstrated how this could work.

For serious unexcused delays in the implementation of measures required to comply with a judgment, the possibility of financial responsibility might also be considered an option.[34] Judgments cause obligations for the responding state not only towards the applicant

[31] Council of Europe, *High Level Conference on the Future of the European Court of Human Rights*, 19 April 2012, URL: https://hub.coe.int/20120419-brighton-declaration, no. 12(d); see also Huneeus, "Courts Resisting Courts", 3 *CILJ* 44 (2011), p. 132, referring to the European Court of Justice's capacity to be seized in order to obtain a preliminary ruling.

[32] Council of Europe, *High Level Conference on the Future of the European Court of Human Rights*, 19 April 2012, URL: https://hub.coe.int/20120419-brighton-declaration, no. 29.

[33] Council of Europe, *High Level Conference on the Future of the European Court of Human Rights*, 19 April 2012, URL: https://hub.coe.int/20120419-brighton-declaration, no. 35(f).

[34] See already no. 11(A)(ii) of PACE Resolution 1226 (2000).

but also in relation to all other member states. While the applicant is principally interested in the execution of individual reparation measures, the other member states' concern focuses on the execution of general measures to relieve the European human rights system of the still increasing pressure caused by repetitive cases. Delays in the execution of both individual and general measures are economically calculable. Therefore, in case of delays in the execution of individual measures, the Committee should be enabled to award the applicant additional financial reparation for the delay similar to the interests that accrue in case of delayed payment of just satisfaction. In massive cases, this additional burden might, as a collateral effect, encourage the state to better implement individual measures. In case of delayed adoption of general measures, the introduction of financial compensation for the additional implementation workload of the Committee could be envisaged. When systemic shortcomings are revealed, or in pilot cases, the ECHR could be amended to include the capacity of the Court to award compensation payable to the CoE for the additional workload caused by subsequent cases raising from the same systemic problem. Also, the procedure under Article 46(4) of the ECHR could cause an obligation by the respondent state to pay court costs. In these particular circumstances, punitive damages should also be reconsidered to make the state comply with its human rights obligations.[35]

On the structural level, the Committee should enforce its role as a supranational body that confronts the state as a multi-faceted entity.[36] Hitherto it has principally addressed organs from the executive, legislative and judiciary branches when discussing execution. The applicant and civil society are, apart from the limited possibilities of written submissions, excluded from the execution process.[37] The Committee should recognise that state politics are not

[35]Cf. *Cyprus v. Turkey* (Just Satisfaction) [GC], ECtHR, no. 25781/94, 12 May 2014, concurring opinion of Judge Pinto de Albuquerque, joined by Judge Vučinić.

[36]See hereon Helfer and Slaughter, "Toward a Theory of Effective Supranational Adjudication", 2 *Yale L.J.* 107 (1997), pp. 287ff. and Huneeus, "Courts Resisting Courts", 3 *CILJ* 44 (2011), pp. 132ff., the latter focusing on domestic judges as "compliance partners".

[37]Tackling the issue from the other side, proposing better training for representatives and applicants to communicate effectively with the Committee of Ministers: OSJI, *From Judgment to Justice*, p. 18.

only made by governments but also by civil society.[38] The IACtHR's experience of cooperation with the victims and civil society in countries with less rule of law, treating grave and systemic violations of the ACHR, is a promising example for such an approach. Also, domestic interest groups are often better acquainted with the situation in a country than the Execution Department's experts, and state agents may not always give the complete picture to the CoE organs.[39] Again, the IACtHR's practice to hold sessions away from its seat in San José has produced good results in bringing the human rights system closer to the people in the American states. The Execution Department and Committee representatives have already undertaken visits, among others, to the Chechen Republic in Russia to hold talks with victim representatives and state officials and have recognized the importance of these missions for the supervision of execution of judgments.[40] This option should be further expanded to increment the CoE's presence in countries affected by systemic problems, organizing hearings and probably even public workshops or presentations on the state of execution of a specific group of cases. Making further use of the National Human Rights Institutions network built under the auspices of the Commissioner of Human Rights might be another approach to further implementation of the execution procedure on the national level.

This would also offer a framework to improve the unsatisfactory participation of victims in the execution process. While the state can expose in writing as well as orally before its peers, victims are restricted to submitting written observations on the state of execution. The principle of equality of arms should not only apply to Court proceedings, but also to the Committee's monitoring. The positive effects of the victims' increased participation on the monitoring stage have become evident in the IACtHR's hearings on compliance. While it seems unrealistic to hear all victims in Strasbourg due to the huge amount of cases pending before the Court and the

[38] Helfer and Slaughter, "Toward a Theory of Effective Supranational Adjudication", 2 *Yale L.J.* 107 (1997), p. 333.

[39] On the importance of individual groups on the implementation stage also Keohane, Moravcsik, and Slaughter, "Legalized Dispute Resolution: Interstate and Transnational", 3 *Int'l Org* 54 (2000), p. 467.

[40] Committee of Ministers, *Supervision Annual Report 2011*, pp. 12f.

Committee, the Execution Department could, at least in grave cases, organize more hearings in the respective state.

Finally, cooperation between the organs involved in the execution of judgments can be improved. Each of these organs has its specific advantages in the execution process as they often act in relation to different domestic organs. Thus, the Committee's main interlocutor on the state level are the governments and administration, while the Parliamentary Assembly preferably communicates with the legislative power, and the Commissioner of Human Rights is linking the CoE to civil society. The Court maintains contacts to the member states' supreme judicial organs. It would be essential for all these organs to pull states into the same direction.[41] Better interaction would also help prevent situations like the *VgT v. Switzerland (No. 2)* case, where the Court had to decide a case because an implementation measure had been considered sufficient by the Committee but not by the Court.

The Parliamentary Assembly's role as an organ less strictly bound to official government politics and with direct access to national parliaments, i.e. the organs that in most cases will have to adopt or at least check the general measures required to counter systemic shortcomings, should be particularly enforced in the execution process.[42] Cooperation among PACE and the Committee should be further intensified instead of maintaining the idea of competence that is still largely persistant in both organs.[43] The Committee should ensure that PACE is better notified of cases where implementation fails because required legislation is not passed or of cases where, out of other reasons, parliamentary action might seem more fruitful than diplomatic action on the level of government representatives. To this end a stable link between the Committee of Ministers and PACE's judicial committee would be desirable. PACE could also enforce its role as a sanctioning organ, as it did in 2000 when it sus-

[41] See examples for good cooperation: Lambert Abdelgawad, "The Execution of Judgments of the European Court of Human Rights", 3 *ZaöRV* 69 (2009), pp. 488ff.

[42] Also: OSJI, *From Judgment to Justice*, p. 18.

[43] The impression that such a competence exists was confirmed in interviews conducted in Strasbourg in November 2011 with Committee as well as AS/Jur staff.

pended Russia's voting rights following an experts' report on the situation in the Chechen Republic.[44]

10.2 The Inter-American Monitoring System

According to the numbers, execution of judgments under the inter-American system is in an even worse state than in Europe. By the end of 2014, the IACtHR had 158 cases pending compliance, i.e. cases that had not or only partially been complied with. Given that until then it had only handed down 216 judgments in total, full compliance had only been achieved in a mere 26.85%.[45]

The IACtHR's practice of detailed reparation orders that leave no margin of appreciation to the states though allows to further detail compliance numbers. When supervising execution, the Court treats judgments by reparation order, literally ticking off each specific order that has been complied with. Compliance can therefore be measured not only by case but even by reparation order. This task has been undertaken by Hawkins and Jacoby covering the years between the Court's first judgment of 1989 and 2006, by González-Salzberg for the period between 1998 and 2006, and by the Argentina-based Asociación de los Derechos Civiles (ADC) for cases between 2001 and 2006.[46]

Hawkins and Jacoby's analysis shows that states complied with 28% of all measures that were ordered. Compliance is best with monetary compensation, either for moral (47% of orders complied) or material (42% of orders complied) damages. Court costs and expenses were paid in 38% of cases. Compliance with other forms of reparation is lower. Apologies were complied with in 31% of cases, punishment of those responsible or restoration of rights were complied with between 13% and 19%, while legislative changes were in-

[44] See the verbatim report of the Assembly's session of 6 April 2000, 15 p.m., available at http://assembly.coe.int.

[45] IACtHR, *Annual Report of the Inter-American Court of Human Rights 2014*, pp. 69, 72ff.

[46] Hawkins and Jacoby, "Partial Compliance"; González-Salzberg, "The Effectiveness of the Inter-American Human Rights System", *Rev. Colomb. Derecho Int.* 16 (2010); ADC, *Efectividad del SIDH*.

troduced in only 2 out of 43 instances (5%).[47] The authors conclude that compliance depends not so much on the financial consequences for the state but on the political cost.[48]

While no relation can be established between the year of the judgment and the compliance rate, compliance improved considerably after the Court had decided that it could monitor compliance in the *Baena-Ricardo et al. v. Panama* case in 2003. Before that date, states had complied with three out of 98 actions that were required, while after the decision the rate stabilized at around 30 to 40 percent per year.[49]

González-Salzberg's and the ADC's analyses confirm the positive trends described by Hawkins and Jacoby. While their datasets do not match (the ADC takes into account IACommHR decisions, too), they at least serve to identify trends in compliance. According to the ADC, between 2001 and 2006 states complied in total with 36% of all measures ordered.[50] Both studies coincide in that pecuniary reparation is best complied with at 58%,[51] while the rate for costs and expenses jumped to 70%.[52] Symbolic reparation measures also rose to a compliance rate of 52% between 2001 and 2006 or, more specifically, 70% for public acknowledgments.[53] More complex forms of reparation, such as prosecution and eventual punishment (compliance rate 23% according to the ADC, 0% according to González-Salzberg) and legal amendments (compliance rate 14% according to the ADC and 23% according to González-Salzberg) remain at the lower end of the scale. In another study the Open Society Justice Initiative found

[47]Hawkins and Jacoby, "Partial Compliance", p. 26. The authors count investigations as completed when the Court acknowledged that a perpetrator had been found. The Court has, however, never accepted that the obligation to investigate has been fully complied with, as even in the cases where perpetrators had been found the disappeared victims were not localized: see Huneeus, "Courts Resisting Courts", 3 *CILJ* 44 (2011), p. 122, fn. 80.

[48]Hawkins and Jacoby, "Partial Compliance", p. 27.

[49]Ibid., table 2.

[50]ADC, *Efectividad del SIDH*, p. 14.

[51]González-Salzberg, "The Effectiveness of the Inter-American Human Rights System", *Rev. Colomb. Derecho Int.* 16 (2010), p. 129; ADC, *Efectividad del SIDH*, p. 14.

[52]González-Salzberg, "The Effectiveness of the Inter-American Human Rights System", *Rev. Colomb. Derecho Int.* 16 (2010), p. 129.

[53]ADC, *Efectividad del SIDH*, p. 14; González-Salzberg, "The Effectiveness of the Inter-American Human Rights System", *Rev. Colomb. Derecho Int.* 16 (2010), p. 129.

out that around 50% of symbolic measures are being complied with, while immediate remedies such as the release of prisoners, reversal of arbitrary lay-offs or granting security measures were fulfilled in 40% of cases.[54]

The Court itself undertook an internal study on compliance with monetary reparation in 2008, updated in 2009, which showed that 81% of costs and expenses ordered and 83% of indemnifications ordered were totally or partially complied with.[55] It remains unclear, though, what the Court identifies as "partial compliance", i.e. whether partial compliance exists when specific, but not all, heads of reparation have been fully complied with or also when only part of an amount ordered under a specific head has been paid to the victim. In the latter case, the statistic would be of little use because even upon paying only one symbolic dollar a case would have to be counted in the statistics.

There is no systematic way in which the Court documents which cases have been finally complied with. While its annual reports contain lists of cases that were under supervision in the respective year, no such list is available for cases where supervision has been closed. Such a list would be of interest because the fact that a case no longer appears in the list of cases under supervision does not necessarily mean that the Court has closed supervision. In *Salvador Chiriboga v. Ecuador* for example, the Court handed down the judgment on the merits and reparation in 2008 and included the case in the list of cases on the stage of monitoring compliance in its 2008 annual report. The amount of reparation should be determined by mutual agreement between the parties. As no such agreement could be reached, the Court reopened the reparation stage and listed the case in its 2009 report again under the section "Contentious cases pending judgments" and no longer under "Contentious cases at the stage of monitoring compliance with judgment".

The cases in which supervision could be closed by the Court until now confirm the findings by the aforementioned studies that complex reparation measures are less likely to be complied with.[56] None of these cases required complex reparation measures from the re-

[54] OSJI, *From Judgment to Justice*, p. 20.
[55] IACtHR, *Annual Report of the Inter-American Court of Human Rights 2009*, p. 12.
[56] See appendix, p. 258.

sponding states. Reparation in the Court's early cases was limited to monetary reparation or administrative measures such as the titling of land, which, as long as the lands in question are not occupied by others, as is the case in *Sawhoyamaxa Indigenous Community v. Paraguay*, is not a complicated issue. The most complex issues that were hitherto fully complied with were ordered in the case of *Lori Berenson-Mejía v. Peru*. In this case, though, the victim was a US national and the USA exerted pressure on Peru to comply with the Court's judgment and improve the victim's conditions of detention.[57]

While the Court is certainly right when reiterating in its annual reports that the huge number of cases pending compliance does not correlate with an overall low number of compliance with specific measures,[58] it is undeniable that implementation of judgments is a weak point in its balance that demands particular attention. As was already said *supra* concerning the European system, implementation corresponds to the states. Their domestic organs, the executive, the legislative and the judiciary are the primordial addressees of the Court's reparation orders. As regional integration of states is much less developed in the Americas than in Europe, cooperation and strengthening of these domestic organs in a similar fashion as the CoE and EU organs do is a much more difficult task. There is, for instance, no parliamentary representation on the inter-American level, and a regular exchange of the judiciary has not been implemented either. The European system's diversified set of instruments, whose combined powers have proven to be quite successful, does hence not find its counterpart in the Americas. It is therefore all the more valuable that the Court is undertaking considerable efforts to organize exchanges with all sorts of domestic actors, from civil society to parliaments, governments and the judiciary, when holding sessions away from its seat, as these offer a rare space to share execution experiences across borders.

[57] Associated Press, *Clinton Urges Peru in Berenson Case*, 17 January 2001, URL: http://www.latinamericanstudies.org/peru/clinton-berenson.htm; Los Angeles Times, *Bush Cites Case of U.S. Woman in Peru Meeting*, 27 June 2001, URL: http://articles.latimes.com/print/2001/jun/27/news/mn-15032.

[58] IACtHR, *Annual Report of the Inter-American Court of Human Rights 2011*, p. 14.

Apart from these efforts by the Court, the OAS's internal procedures should be improved to ensure better compliance with the Court's judgments.[59] All proposals must presuppose that the IACtHR's role as an organ of the judiciary is not to exert political pressure on states to make them comply with judgments. Its role is limited to requesting state reports on the status of compliance.[60] This limitation was also recognized by several judges of the Court, who have made proposals to create the institutional framework for an effective execution monitoring.[61] Furthermore, the discussion within the Court about whether to again submit cases to the General Assembly in which no progress was made in a long period, implies the recognition that its competence on the execution stage is limited. On the other hand it has become evident in the Americas, too, that pressure by other states can catalise state efforts to achieve results in executing Court judgment.[62] Also, the influence of domestic stakeholders, be they part of the state administration or of civil society, can be favourable to compliance.[63] Efforts to improve the fulfillment rate with IACtHR judgments should therefore take these stakeholders into account, too.

Participation of civil society in the procedure before the inter-American human rights system is already more advanced than in Europe. Victims are usually defended by NGOs and not by private practitioners and, due to the contradictory monitoring procedure established by the Court, are also present in the phase after the judgment has been adopted. Should the General Assembly take a more active role in the implementation of judgments or should another procedure be established, participation of the victims should be se-

[59] The following has partially been published in Schneider, "Implementation of Judgments", 1–2 *IAEHRJ* 5 (2012).

[60] Cf. Londoño Lázaro, "El cumplimiento de las sentencias de la Corte Interamericana: dilemas y retos", p. 119.

[61] See *supra*, section 9.2.1.

[62] See the *Gangaram-Panday v. Suriname* and *Aloeboetoe et al. v. Suriname* cases: IACtHR, *Annual Report of the Inter-American Court of Human Rights 1995*, p. 15 and IACtHR, *Annual Report of the Inter-American Court of Human Rights 1998*, p. 30. On experiences in Europe see the *Loizidou* case described *supra* in section 9.1.1.2.1.

[63] The role of domestic civil society and the effects of human rights treaties on its activity is described by the "liberal theory" of compliance with international human rights law: see Hathaway, "Do Human Rights Treaties Make a Difference?", *Yale L.J.* 111 (2002), pp. 1952ff.

cured there, too, in order not to repeat the closed-doors policy of the CoE's Committee of Ministers, in particular seen that the Committee has been gradually improving the applicants' position in the execution process. Inclusion of civil society into the IACtHR's execution procedure is furthermore facilitated by the Court's practice to hold sessions in the member states. These sessions take place in surroundings that enable the general public to participate. Furthermore, the Court organizes other activities in the visited state that involve civil society.

Cooperation between the Court and the OAS's political organs should be improved, too. In order for the General Assembly, the Permanent Council or the CJPA to fulfil their tasks, the Court has to provide them with the necessary information on the state of compliance in each case. It would, however, not be sufficient for the Court to simply submit cases of non-compliance to the General Assembly again. To really comply with the requirement in Article 65 of the ACHR to make pertinent recommendations in cases of non-compliance, the Court should modify its annual reports. Such modification could rely on the experiences made with supervision under the ECHR, in particular the pilot judgment procedure, where the ECtHR points the Committee of Ministers to situations of systemic shortcomings in a state. Both situations are insofar comparable as IACtHR and IACommHR have an advantage of information with regard to the General Assembly. The Court is often well acquainted with the situation in a particular state due to its intense occupation with a case or several cases from that state. Thus, it can determine systemic problems that are underlying execution problems.[64] The Court's analysis should be completed with information from the IACommHR, which knows the human rights situation in the American states even better as it receives all applications that enter the inter-American human rights protection system and prepares general or specific reports on the human rights situation in the

[64]For instance, several massacre cases concerning Colombia all suffered from similar problems in relation to investigation and judgment of those responsible or the procurement of psychological treatments for the victims. See on the last issue *Monitoring Compliance with the Measures of Reparation Concerning the Medical and Psychological Attention Ordered in Nine Colombian Cases* (Monitoring of Compliance), IACtHR, 8 February 2012.

OAS member states.[65] Court and Commission should consequently consider to combine their insight to improve the annual report on supervision the Court has to submit to the General Assembly. Thus, when the Court reports a case to the General Assembly, it might, in the future, describe more specifically the reasons why a state does not comply with certain measures, further sustaining it with the IACommHR's knowledge on other similar situations. This would allow the General Assembly to adopt more appropriate resolutions.

Beyond these considerations, it must be asked in a more general way whether the General Assembly is the appropriate organ to deal with cases of non-compliance. This may be doubted out of two reasons: first, the lack of specification of the General Assembly's powers with regard to states failing to comply with judgments. Whichever measure the Assembly adopts will suffer from the lack of clear legal support in the OAS Charter and the ACHR. In addition to that, given the lack of a catalogue of measures, the OAS member states will not only have to agree upon the adoption of measures against a state, but they will also have to overcome the additional hurdle of first having to determine which specific measure would be appropriate and politically viable. This adds another layer of insecurity to the Assembly's ability to react to cases of non-compliance submitted by the IACtHR. Secondly, the General Assembly sits only once per year during three days. In each of these sessions it adopts around 60 resolutions on all kinds of issues concerning the OAS. The Court is only being dealt with in a short formal presentation of the annual report by its president. Proper discussions take place earlier in the CJPA, where the president of the Court presents the annual report some three months before the General Assembly's session. It has already been mentioned that, despite the technical possibility of majority decisions, the CJPA and the Permanent Council in fact take their decisions unanimously, which in practice gives the state concerned a veto right. Furthermore, the resolution prepared and adopted by the aforementioned organs always concerns the entire annual report instead of treating the cases of non-compliance

[65] Articles 57(1)(h) and 58 of the Rules of Procedure of the IACommHR.

apart.[66] Any state that wants to oppose the adoption of a measure thus has to block the adoption of the resolution on the entire report, which implies that the Court's work during the past year cannot be approved. This constellation makes the adoption of any measure against a state that is not complying with its obligations from Court judgments very unlikely.

Another element to be taken into account when assessing the effectiveness of the proceedings before the General Assembly is the situation underlying the cases the IACtHR submitted to it. Stalemate in most of these cases was caused by macropolitical issues. Thus, in the Peruvian cases the authoritarian Fujimori government justified human rights violations with the overarching aim of fighting the communist guerrillas in the country, a circumstance in which it received support from the neighbouring countries.[67] The Peruvian blockade could only be overcome when Fujimori lost elections and Peru returned to cooperate with the IACtHR. Venezuela, for its part, is confronting the institutions of the inter-American human rights system accusing them to be vehicles for US imperialism in the region. It denounced the ACHR at a moment when several South American states had adopted or at least were favourable to a new "Bolivarian" socialism which led to frictions with conservative governments in the region. In this setting Venezuela did not become a pariah when denouncing the ACHR. It is hence improbable to expect public exposure of a state in the General Assembly for non-compliance when it opposes a human rights protection system that, in the view of a number of its members, hinders the effective resolution of a macropolitical issue. Only in the absence of such overarching circumstances, the General Assembly has shown to be able to take measures when it adopted a resolution that enabled the Court to close two cases against Suriname. It might therefore be worth for the Court to consider submitting cases to the Assembly in which stalemate is not caused by political but rather by practical issues. This might enable the Assembly to actually adopt a resolution on a situation and thus open a space for the states to enter into more

[66] *Caesar v. Trinidad and Tobago* (Merits, Reparations and Costs), IACtHR, 11 March 2005, Series C no. 123, separate opinion of Judge Manuel E. Ventura Robles, para. 26ff.

[67] Cassel, "Perú se retira del SIDH", *Revista IIDH* 29 (1999), pp. 69ff.

substantive discussions on the execution process of IACtHR judgments.

The execution process under the ACHR can be considered unsatisfactory for yet another reason. The General Assembly of the OAS unites all member states, independent from whether they have ratified the ACHR or not. Even states that have denounced the Convention, such as Trinidad and Tobago or Venezuela, continue to vote on other states' compromise with the protection of the Convention rights. But also states like Canada, which has never signed the Convention, or the United States, which have signed but never ratified, may judge the human rights record of their fellow American states under the ACHR. Political monitoring of compliance would however be more credible and potentially less conflictive if decisions were taken by a body conformed only of states that are subject to the IACtHR's jurisdiction, or that have at least ratified the Convention. Such a body of like-minded states could conduct peer-review in a way the Committee of Ministers of the Council of Europe does. This organ should be equipped to hold several meetings per year and have a permanent secretariat that constantly monitors cases and procures assessment to the states. The IACtHR and the IACommHR should constantly maintain this body informed about situations under their scrutiny so that it can identify systemic problems and define its course of action. Ideally, this organ would be located close to the IACtHR to facilitate cooperation.

Seen that the member states of the OAS did not adopt any of the proposals submitted by the former President of the IACtHR, Judge Cançado Trindade, and afterwards by Judge Ventura Robles to modify the execution procedure, it appears appropriate to consider modifications that do not require adaptations of the basic texts of the OAS. A body like the one described above could be implemented in different ways that would not require modifications to the OAS Charter or the ACHR. It could either be created as an independent body under the ACHR, consisting for instance of the states' ambassadors to Costa Rica, as these already maintain relations with the IACtHR. The legal basis could be a protocol to the ACHR. Ideally, signature would be made obligatory for all states parties having recognized the Court's jurisdiction. States that only recognize the Court's jurisdiction on a case-to-case basis according to Article

62(2) ACHR should be admitted to sessions on cases that concern them.[68]

The supervisory body could also be formed as working groups of the states subject to the Court's jurisdiction within the General Assembly of the OAS. Fragmentation is not unknown to the Assembly. Thus, the seat of the Court or the nomination of its judges is to be determined within the General Assembly only by the states parties to the Convention according to Articles 53(1) and 58(1) of the ACHR. Similarly, permanent working groups of the states subject to the Court's jurisdiction could be established in all organs currently concerned with the Court's annual reports. These working groups would, similar to Cançado Trindade's and Ventura Roble's proposals, constantly monitor compliance by the states. This solution however has the disadvantage of keeping supervision within the organs of the OAS in Washington, D.C., which have already shown to be unwilling to modify their procedures. At least the establishment of these working groups would require the vote of all member states to the Organization. Therefore, a solution within the ACHR would be preferable.

[68] An amendment to the ACHR to introduce a permanent observation mechanism had been proposed already in 2007 by Uruguay. Cf. Corasantini, "Implementación de las sentencias y resoluciones de la Corte Interamericana de Derechos Humanos", *Revista IIDH* 49 (2009), p. 16.

Part IV

Conclusions

The Inter-American and the European Court of Human Rights share many organisational features, principally concerning their construction and proceedings. It becomes palpable in these areas that the authors of the ACHR took inspiration from the "old", pre-1998 European human rights protection system, that also consisted of a court and a commission. Judgments of both courts and their execution, though, evidence remarkable differences on the final stages of the proceedings. These differences can largely be retraced to the prominent role of the principle of subsidiarity in Europe, which affects the CoE's human rights protection work on all levels.

Human rights protection in Europe is based on the assumption that the states are generally willing and able to procure effective remedies. Under this assumption the ECtHR's role would be reduced to that of a background player that resolves uncertainties about the interpretation of the ECHR and ensures that it is applied in the same way in all member states. Even in cases of gross human rights violations the state is supposed to be in the best position to award effective and complete reparation, so that the ECtHR usually does not make any orders on this issue. At the same time, the authors of the ECHR considered that human rights violations could generally be repaired by monetary reparation if the responding state did not take other practical measures of individual reparation.

The inter-American system, on the other hand, puts less confidence in its member states' capacity to effectively prevent and remedy human rights violations. Considerations of subsidiarity only concern the question of admissibility of a case before the IACommHR. Once the hurdle of the local remedies rule has been overcome, the IACtHR is no longer bound by concerns about the capacity of domestic organs to repair the consequences of violations. It makes broad use of its capacity under Article 63(1) of the ACHR to award reparation, handing down very detailed decisions that are motivated by the concept of certainty of justice, generally leaving no margin of appreciation to the state.

Apart from confidence in the states' willingness and capacity to protect human rights, the restrictive European solution can be retraced also to the ECHR's authors' assumption that the ECtHR would mainly decide inter-state cases. Therefore, despite other proposals, they took inspiration for the Court's reparation competence

from treaties concerning state responsibility towards other states in cases of violations of individual rights.

It is unclear why the American states, when discussing the ACHR, went exactly in the opposite direction, starting with restrictive proposals for reparation rules that were oriented by the ECHR, and finally adopting a much wider competence for the Court.[1] It may be suspected that developments in international law on reparation for human rights violations and state responsibility have influenced this decision. Inter-American cooperation had already before been geared towards preventing interventions that were justified with the argument of diplomatic protection. This circumstance may have caused in particular the Latin American states to vote for a stricter reparation regime as an argument for effective protection of individual rights in those states.[2]

Reparation measures considered sufficient by the Committee of Ministers tend to be less strict than those ordered in similar situations by the IACtHR. Thus, for example, the entire complex of psychological or medical treatment has hitherto been resolved through monetary compensation in Europe, leaving untouched the question whether qualified psychologists are actually available in the region the affected persons live.[3] In such situations, the IACtHR's practice to order the state to effectively provide psychological assistance, rather than leaving the practical task of obtaining such help to the victims, may better meet the needs of victims in less developed regions. On the other hand, states with an effective administration may indeed be in a better position than international courts to identify the needs of the victims rendering too detailed orders counterproductive in the worst case. It is therefore essential for the courts to take into account the actual conditions in each responding state when deciding reparation orders.

More responsibility for the states concerning the determination of reparation requires different monitoring procedures. If, like in the Americas, the states' margin of appreciation on how to comply with Court orders is reduced to almost zero, monitoring of compliance is

[1] Shelton, *Remedies in International Human Rights Law, ed. 2*, pp. 189ff. and 216ff.
[2] See: Kokott, *Das interamerikanische System zum Schutz der Menschenrechte*, pp. 8f.
[3] Cf. the considerations on reparation in *Abuyeva et al. v. Russia*, ECtHR, no. 27065/05, 2 December 2010, paras. 247ff.

limited to merely assessing whether a measure has been complied with or not. In a regime governed by subsidiarity of the international control mechanism, like in Europe, the monitoring mechanism has to be much more elaborate as it also has to comply the task of identifying which measures are required in each specific situation to repair a violation on the individual and general level and eventually convince the responding state of its views.[4]

Based on the findings of this investigation, two principal areas for reform could be identified, which were exposed in detail at the end of parts 2 and 3 respectively. In Europe, the ECtHR's involvement in the matter of reparation should become stronger. Developments such as the "Article 46 judgments" or "pilot judgments" that contain more specific indications to the states might be applied more frequently to situations where states have shown their inability or unwillingness to adopt measures. The principle of subsidiarity puts an obligation of result onto the states. If they do not comply with this obligation, the ECtHR should increase the specificity of its orders in following cases stemming from the same fundamental problem, reducing the state's margin of appreciation with each new similar case that is reaching it. Also, the state's compliance record in other cases and its level of development may be taken into account as factors to determine the level of detail of the ECtHR's reparation orders.

The inter-American system, on the other hand, is missing a dedicated and functioning system to monitor compliance. Monitoring compliance is not so much a juridical but a political task and should be treated as such by the corresponding organs. Supervision should therefore be attached to the OAS's political structure. Given that the IACtHR is already defining the reparation measures to be adopted, such an organ's tasks would be reduced to verifying compliance in the strict sense. Therefore such a mechanism could be smaller than the European monitoring organs. It should, however, be enabled to provide training and advice to the states to draw the pertinent conclusions from the IACtHR's judgments. In general, cooperation among the organs of the OAS and those of the inter-American hu-

[4]The possible contradictory nature of these procedures has been the reason for the introduction of Article 46(4) of the ECHR: Eaton and Schokkenbroek, "Reforming the Human Rights Protection System", *HRLJ* 26 (2005), p. 15.

man rights system should be improved to foster better implementation of judgments.

At the time of writing, both systems were undergoing reform processes that also affect the monitoring systems. The European system's capacity to ensure more effective implementation of judgments had been identified by the member states as one of the central issues to revise in the aftermaths of the Brighton Conference of 2012. The Committee of Ministers has begun to evaluate its supervision tools. In a first step, the Ministers' Deputies concentrated on tools available in case a state did not comply in a timely manner, sparing out the question of persistent failure to comply with the judgments. They concluded that more use should be made of press releases on individual cases and grouping cases from different states sharing similar problems to enable an exchange of experiences. Civil society should be better included into the monitoring process and other tools of public dissemination of positive execution results, such as press conferences, should be applied. Further evaluation should take place on the idea of setting deadlines for specific execution measures, to increase assistance to states and to publish the list of cases under discussion at each meeting. Other subjects to be treated will particularly include measures to be taken in respect of states that fail to implement judgments in a timely manner.[5]

The reform proposals so far expressly reject the proposal to stigmatise states or take punitive measures against them. The results of this investigation however indicate that in cases of intense opposition to execution or very serious delays the states should be imposed costs of the ongoing monitoring procedure before the Commission and eventually the Court. This would not amount to stigmatization or punishment, but would simply impose the costs of the delay onto the responsible state. While these costs will remain relatively low, they may be an additional reason for the state to increase its compliance efforts. Also, the Committee continues to confront the state as a closed entity instead of directing its efforts more specifically to the different interest groups such as the judiciary or the parliament.

[5]Steering Committee for Human Rights, *Measures to improve the execution of the judgments of the European Court of Human Rights*, CDDH(2013)002, Committee of Ministers, 24 January 2013, no. 8.

A more holistic approach would require to include those organs' respective counterparts within the CoE, like PACE or the ECtHR.

The American states have also identified the need for reform of the inter-American human rights protection system. They installed a working group within the Permanent Council in 2011 to evaluate the areas of reform in a process that includes different stakeholders such as OAS organs, the states and civil society. This working group identified the implementation of orders and decisions of the inter-American organs as one of the issues to be treated in the middle and long-term and recommended that the states elaborate a guide or document of reference on successful experiences and good practices concerning domestic institutional or legislative mechanisms that cooperate in the implementation of the recommendations of the IACommHR and the compliance with the decisions of the IACtHR.[6]

The fact that both reform processes include the issue of execution of judgments shows the continuing importance of this subject, which is inseparably linked to that of reparation. This work can therefore only be a stocktaking of the status quo. Its analysis would have to be updated after the implementation of the coming reform steps. The proposals developed herein may serve as an inspiration to further improve these procedural steps, so that the effectiveness of both human rights systems may be further enhanced for the sake of better protection of the victims and prevention of future human rights violations.

Both courts have developed their own rich case law and procedural traditions. Therefore, cooperation between the European and the inter-American human rights organs is worthwhile to be improved in many ways. The establishment of an official link between both human rights courts is an important first step to this end. The IACtHR has shown that it is a serious peer to the ECtHR, that, in certain areas, is more modern than its European counterpart. Its efforts to translate its orders into English have eliminated the language bar-

[6]Consejo Permanente de la Organización de los Estados Americanos, *Informe del grupo de trabajo especial de reflexión sobre el funcionamiento de la Comisión Interamericana de Derechos Humanos para el fortalecimiento del Sistema Interamericano de Derechos Humanos para la consideración del Consejo Permanente*, OEA/Ser. G GT/SIDH-13/11 rev. 2, 13 December 2011, p. 10.

rier and make its judgments available to scholars and practitioners all over the world. Meetings on different levels, between judges, registry staff and hopefully even lawyers and NGOs, will produce synergies and enable discussions about solutions to similar problems on both continents. The value of a comparative approach also becomes evident in the growing number of scholarly works that take this approach. All these steps and experiences combined will hopefully pave the way towards a continuously improving protection of individuals from human rights violations and more effective reparation in case such violations have occurred.

With the development of an African human rights protection system it is to be expected that in the future a bilateral comparison will not be sufficient, but that there will be three effective systems whose experiences are worthwhile to be looked at. But until then there may still be a rather long way to go. It is, however, noteworthy that the rules for the new African Court of Justice have closed a competence gap we could identify for the European and the inter-American systems in the area of execution of judgments, by expressly authorizing the Assembly of the African Union to impose sanctions on a state that does not comply with its obligations from a Court judgment.[7]

[7] Article 46(4) of the Protocol on the Statute of the African Court of Justice and Human Rights.

Appendix: Fully Implemented Cases of the IACtHR

Name	Measures	Jdgmnt	Closed
Velásquez-Rodríguez v. Honduras	payment	1989	1996
Godínez-Cruz v. Honduras	payment	1989	1996
Aloeboetoe v. Suriname	payment, trust fund, opening of school	1993	1998
Gangaram-Panday v. Suriname	payment	1994	1998
Genie Lacayo v. Nicaragua	payment	1997	1998
Last Temptation of Christ v. Chile	amend laws, payment	2001	2003
Mayagna (Sumo) Awas Tigni v. Nicaragua	legal basis for demarcation of indigenous properties, delimit and title lands, payment	2001	2008
Ricardo Canese v. Paraguay	payment, publication	2004	2008

Name	Measures	Jdgmnt	Closed
Acosta Calderón v. Ecuador	publication, eliminate name from registers, payment	2005	2008
Claude Reyes et al. v. Chile	submit information to victims, publication, measures to permit access to information, formation of officials, payment	2006	2008
Herrera Ulloa v. Costa Rica	nullification of judgment, adjust domestic legal system, payment	2004	2010
Tristán Donoso v. Panama	payment, nullification of conviction, publication	2009	2010
Lori Berenson-Mejía v. Peru	adapt legislation, publication, medical care, condone debt for civil reparation, adapt detention conditions in one prison	2004	2012
Escher v. Brazil	payment, publication, investigation of facts (phone tapping during 4 months)	2009	2012

Name	Measures	Jdgmnt	Closed
Mejía Idrovo v. Ecuador	publication, payment	2011	2012
Kimel v. Argentina	payment, nullification of conviction, eliminate victim's name from criminal records, publication, public act of recognition, adapt domestic law	2008	2013
Abrill Alosilla et al. v. Peru	payment, publication	2011	2013
Castañeda Gutman v. Mexico	payment, publication	2009	2013
Familia Pacheco Tineo v. Bolivia	payment, publication, implementation of training programme	2013	2015
Suárez Perala v. Ecuador	payment, publication, payment to fund for legal assistance	2013	2015
Albán Cornejo et al. v. Ecuador	payment, publication, distribution of knowledge on patient rights, training of public officials	2007	2015

Fully implemented cases of the IACtHR as of 31 October 2015.