REDRESS

Seeking Reparation for Torture Survivors

Enforcement of Awards for Victims of Torture and Other International Crimes

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Is it not a refined form of permanent torture,
an evil objective,
to leave the authors of the crime unpunished and leaving the victims discouraged?...

Before we die,
We would like to take a final taste of justice to our tombs,
And not the idea that the world is some dark omen where justice is nothing more than words.

[Statement of a Peruvian family,
whose son was 'disappeared' by the security forces in 1990]

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The views and positions advanced in this Report do not necessarily correlate to the persons mentioned above outside of REDRESS. Any errors or omissions remain those of REDRESS alone.

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INTRODUCTION

The growth of human rights jurisdictions and the increasing recognition by domestic and international judicial forums of the right of victims of torture and other international crimes to a remedy and reparations is an important victory for victims whose cries for justice have often been in vain. Yet, access to justice remains the exception rather than the rule in many parts of the world and efforts to increase victims' ability to assert their rights and to end impunity for international crimes remains a fundamental priority for organisations such as REDRESS, with a mandate to assist victims to obtain effective and enforceable remedies.

Obtaining justice and other forms of reparation is exceedingly difficult. Often there are no effective remedies in the State where the acts were committed. These crimes normally imply and often require a certain level of State involvement. To obtain justice and redress implies that the State acknowledges responsibility and makes amends, but the perpetrators are often supported by the very States who should be punishing them. Torture and other violations are systematic or widespread precisely in the countries where there is a lack of remedies and safeguards capable of preventing and deterring these crimes. Moreover, victims may not have access to international mechanisms, if there is no applicable human rights body in the region (in Asia and the Middle East, there are no regional human rights bodies), or if the State where the acts occurred has not agreed to the individual complaints procedures of UN treaty mechanisms such as the Human Rights Committee or Committee against Torture.

Despite the challenges, there have been important developments at both the national and international levels, and these are worthy of considered examination. The advancement of national and international jurisprudence on victims' rights, which is a testament to victims' perseverance and the concerted efforts of a range of actors, raises a number of questions:

- How effective have such decisions been in answering victims' calls for justice?

- To what extent have decisions been enforced – have they remained 'paper' judgments or have real and positive changes resulted, for the victims immediately affected and for wider communities?

Little attention has so far been paid to the position of the applicant who has taken the long road to justice and finally won his/her case. Whilst for many victims, obtaining a judicial decision which acknowledges the harm done to them is important in and of itself, the need for such decisions to be practically enforced is evident. As this Report discusses, in practice victims face procedural and political barriers to lodge a claim, but even in those instances when their claims are successful and they obtain a positive judgment/award, the practical enforcement of the decision can be as hard, or even harder, than the process of bringing the initial legal claim.

The enforcement of reparation judgments or decisions is an essential part of the right to a remedy and reparation. In order for remedies to be effective, they need to be enforceable. The execution of judgments, as explained by the Inter-American Court of Human Rights in the *Baena-Ricardo* case, "*should be considered an integral part of the right to access to justice, understood in its broader sense, as*

also encompassing full compliance with the…decision".[1]

The purpose of this Report is to analyse how individual decisions from domestic (national and foreign) courts and regional and international courts and treaty bodies are implemented in practice. The Report provides an overview of the wide range of remedies and mechanisms available to victims of torture and other international crimes, including those in domestic and foreign courts, in international and regional human rights mechanisms as well as at the International Criminal Court. It also addresses instances in which truth and reconciliation commissions recommend reparation to victims or where governments have implemented reparation programmes to compensate massive and/or systematic past violations. The analysis covers the enforcement framework for material and non-materials awards,[2] explores the enforcement of preliminary/provisional measures, the enforcement of restitution and compensation (monetary awards) and other non-monetary awards such as rehabilitation,[3] satisfaction and guarantees of non-repetition, and considers whether certain forms of reparation are easier to enforce than others.

The Report is divided into three parts. Firstly, it gives a brief introduction on the right to reparation for torture and other serious violations of human rights, describing the legal standards applicable to reparation, the forms of reparation recognised under international law, and the extent to which substantive and procedural remedies have been implemented in national contexts. Secondly, it addresses the enforcement mechanisms of international courts and tribunals as well as the domestic enforcement of the views, decisions or judgments of these international bodies. Thirdly and finally, it reviews the enforcement of civil awards at both the domestic and cross-jurisdictional levels. This part also briefly describes the enforcement of administrative compensation afforded by national truth and reconciliation commissions and/or by reparation programmes established to redress past human rights violations.

The Report considers the standard mechanics of enforcement of judgments such as the role that private international law plays and enforcement pursuant to a treaty or local rules (e.g. recognition of punitive damages, the scope of public policy, etc.). It also addresses the unique issues arising from enforcing reparation judgments relating to torture and other international crimes. The Report considers practical matters affecting the enforcement of reparation judgments, such as locating assets, and obtaining freezing injunctions and other interim relief, and recognises that implementation of preliminary measures is vital to the eventual enforcement of judgments. An extreme example would be where an international court or tribunal requests a State to issue a stay of execution while it reviews the allegations of an individual on death row.

REDRESS became interested in the issue of enforcement of judgments as a result of its work to assist victims of torture to access judicial remedies. In the cases in which positive judicial decisions were achieved, a range of new hurdles presented themselves at the enforcement stage, often as

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[1] *Baena-Ricardo Case*, Judgment of 28 November 2003, Inter-Am. Ct. H.R., (Ser. C) No. 104 (2003), para 82, cited in Shelton, *Remedies in International Law*, Oxford, Second Edition (2005), pg. 383.

[2] The different forms of reparation recognised under international law include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition See: UN *Principles and Guidelines on the right to reparation and a remedy of victims of gross violations of international human rights law and serious violations of international humanitarian law (the Principles and Guidelines)* UN GA Res. 60/147, 16 December 2005.

[3] Rehabilitation (medical/psychological) services may be provided "in kind" or the costs may form part of a monetary award. It is important to distinguish between indemnity paid by way of compensation and money provided for rehabilitation purposes. See: *Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation*, Redress, March 2006, available at http://www.redress.org/publications/Reparation%20Principles.pdf.

complex if not more so, than the earlier efforts to obtain the positive decision. It also became very clear that in order to improve the prospects for enforcement, a specific strategy for enforcement needed to be integrated into the initial case strategy, and worked upon simultaneously with the merits phase.

This Report follows a Conference that was convened by REDRESS together with the international law firm Freshfields Bruckhaus Deringer, which tool place in London on 2-3 June 2005. Freshfields Bruckhaus Deringer is involved in this field as part of the firm's extensive *pro bono* practice. The Conference brought together practitioners and others representing victims and working within international bodies to consider the steps that can be taken to help ensure that victims are able to obtain judgments that are capable of being enforced. This Report is based in part on the themes and discussions which arose during the Conference proceedings, and relies on input provided by Conference participants, many of whom provided input on earlier versions of this Report. All errors and omissions in this Report are REDRESS' alone.

I. THE RIGHT TO A REMEDY AND REPARATION

The right to reparation for victims of serious human rights violations is well established: it is a fundamental principle of general international law that the breach of an international obligation entails the duty to afford reparation.[4] As a matter of general international law, all States are obliged to refrain from conduct that constitutes a crime under international law, such as torture, genocide, slavery or enforced disappearances. If States commit such acts, a new international duty to afford reparation arises independent of any treaty obligation.

Under international law "*reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed*".[5] In other words reparation must be adequate and appropriate, that is, proportional to the harm suffered and should as far as possible restore the life and dignity of the victim. For example, the United Nations Human Rights Committee, the body which oversees State party compliance with the International Covenant on Civil and Political Rights, established that although 'compensation' may differ from country to country, adequate compensation excludes purely "symbolic" amounts of compensation. [6]

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[4] See: Permanent Court of Arbitration, *Chorzow Factory Case* (Ger. V. Pol.), (1928) P.C.I.J., Sr. A, No.17, at 47 (September 13); International Court of Justice: *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. U.S.), Merits 1986 ICJ Report, 14, 114 (June 27); *Corfu Channel Case*; (UK v. Albania); *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 184 ; *Interpretation des traites de paix conclus avec la Bulgarie, la Hongrie et la Romanie, deuxieme phase, avis consultatif*, C.I.J., Recueil, 1950, p. 228. See also Article 1 of the draft Articles on State Responsibility adopted by the International Law Commission in 2001: "Every internationally wrongful act of a State entails the international responsibility of that State". (UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001 ("ILC draft Articles on State Responsibility")).

[5] Permanent Court of Arbitration, *Chorzow Factory Case* (Ger. V. Pol.), (1928) P.C.I.J., Sr. A, No.17.

[6] *Albert Wilson v the Philippines*, Communication No. 868/1999, U.N. Doc. CCPR/C/79/D/868/1999 (2003). The Human Rights Committee has referred in several decisions to the duty to afford "appropriate" compensation. See *Bozize v Central African Republic* No. 449/1990, U.N. Doc. CCPR/C/50/D/428/1990 (1994); *Mojica v. Dominican Republic* No. 449/1991, U.N. Doc. CCPR/C/51/D/449/1991 (1994). In *Griffin v. Spain* the Committee ordered "appropriate compensation for the period of his detention in the prison in Melilla", *Griffin v. Spain* No. 493/1992, U.N. Doc. CCPR/C/53/D/493/1992 (1995). See also Bossuyt, Marc J. "GUIDE TO THE `TRAVAUX PREPARATOIRES' OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS" (2002 ed. Kluwer Academic Publishers).

1.1 Forms of Reparation

According to the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, the forms that reparation may take include: *restitution, compensation, rehabilitation and satisfaction and guarantees of non-repetition.*[7]

Restitution: This form of reparation consists of re-establishing the *status quo ante*, i.e. the situation that existed prior to the occurrence of the wrongful act. Although it is generally not possible to 'undo' the pain and suffering caused by human rights violations, certain aspects of restitution might nonetheless be possible – such as restoring an individual's liberty, legal rights, social status, family life and citizenship; return to one's place of residence; restoration of employment; and return of property.[8]

Compensation: The role of compensation is to fill in any gaps so as to ensure full reparation for the damage suffered (as long as the damage is financially assessable).[9] The Inter-American Court of Human Rights held in the *Velásquez Rodríguez Case* that "*it is appropriate to fix the payment of 'fair compensation' in sufficiently broad terms […].*"[10] Awards of compensation encompass material losses (loss of earnings, pension, medical expenses, etc.) and non-material or moral damage (pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of companionship or consortium), the latter usually quantified on the basis of an equitable assessment.

Rehabilitation: Rehabilitation is an important component of reparation and it is a right specifically recognised in international human rights instruments.[11] The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power stipulates that: "victims should receive the necessary material, medical, psychological and social assistance and support." The Special Rapporteur on the right to reparation has noted that reparation should include medical and psychological care and other services as well as legal and social services.[12] Rehabilitation may be provided 'in kind' or the costs may form part of a monetary award. It is important to distinguish between indemnity paid by way of compensation (for material and/or moral damage) and money provided for rehabilitation purposes.

Satisfaction and Guarantees of Non-repetition: Satisfaction and guarantees of non-repetition refer to the range of measures that may contribute to the broader and

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[7] UN GA Res. 60/147 16 December 2005.

[8] *(the Principles and Guidelines)* UN GA Res. 60/147 16 December 2005. See also, Principles 8 - 10 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by GA Res. 40/34 of 29 November 1985.

[9] Commentary to the Draft Articles on State Responsibility for Internationally Wrongful Acts; Report of the International Law Commission on its Fifty-third Session, GA, Supplement No. 10 (A/56/10); cph. IV.E.

[10] *Velásquez Rodríguez Case,* Interpretation Of The Compensatory Damages Judgment, Judgment Of 17 August 1990, Inter-Am. Ct. H.R. (Ser. C) No. 9 (1990).Para. 27.

[11] See for example the UN Convention on the Rights of the Child U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2 1990, and its Optional Protocol U.N. Doc. A/54/49, Vol. III (2000), *entered into force* February 12, 2002; UN Convention against Torture U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987; Declaration on the Protection of All Persons from Enforced Disappearances GA Res. 47/133 of 18 December 1992 ; Declaration on the Elimination of Violence against Women GA Res. 48/104 of 20 December 1993.

[12] Principle 24, Final report of the Special Rapporteur, Professor M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, E/CN.4/2000/62, 18 January 2000.

longer-term restorative aims of reparation. A central component is the role of public acknowledgment of the violation, the victims' right to know the truth and to have the perpetrators held accountable.[13] The Basic Principles on Reparation list measures such as cessation of continuing violations; judicial sanctions against persons responsible for the violations; an apology, including public acknowledgement of the facts and acceptance of responsibility; commemorations and tributes to the victims; and implementing preventative measures, such as ensuring effective civilian control of military and security forces, protecting human rights defenders and persons in the legal, media and other related professions.

As discussed in the next section, the *form* of reparation, whether it is a monetary or a non-monetary award, also plays an important role in its enforceability. Monetary awards such as compensation can be implemented directly without affecting the structural system of the State, and in this respect may be easier to implement for some States. However not all States are willing to afford monetary compensation, particularly in situations of massive and/or systematic violations or where the State has severe economic constraints. In contrast, non-monetary awards calling for legal or institutional reforms (e.g. cancelling an amnesty decree to make way for the prosecution of alleged torturers, affording victims with new opportunities to challenge the legality of detention, removal of the immunity of senior officials) will usually require a series of procedural steps within the legislative and/or judicial branches of the government, and for this reason it will invariably take more time and be more complicated for the State to implement such awards.

I.2 Effective procedural remedies

International law requires States to provide effective procedural remedies under domestic law to guarantee adequate reparation to victims of human rights violations. In other words, the right to reparation for torture and other human rights violations includes both the right to substantive reparations (such as compensation) *and* the right to effective procedural remedies to enable victims to access substantive reparations (e.g., access to civil, administrative and criminal remedies). This right is firmly embodied in all major international human rights treaties and declarative instruments.[14]

The right to a remedy for a violation of a human right protected under any of the international instruments is itself a right expressly guaranteed by the same instruments and, in the case of fundamental human rights, it has been recognised as non-derogable.[15] Accordingly, there is an

[13] Question of the impunity of perpetrators of human rights violations (civil and political); E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997, para. 17.

[14] For example, art. 8 Universal Declaration of Human Rights, GA Res. 217 A (III) of 10 December 1948; art.2 (3), art 9(5) and 14(6) International Covenant on Civil and Political Rights, (entry into force 23 March, 1976); art 6 International Convention on the Elimination of All Forms of Racial Discrimination (entry into force 4 January 1969); art. 39 Convention of the Rights of the Child, (entry into force 2 September 1990) ; art. 14 Convention against Torture and other Cruel Inhuman and Degrading Treatment, (entry into force 26 June 1987) and art. 75 of the Rome Statute for an International Criminal Court (entry into force 1 July 2002, UN Doc A/CONF.183/9). It has also figured in regional instruments, e.g. the European Convention on Human Rights (entry into force 3 September 1953, art 5(5), 13 and 41); the Inter-American Convention on Human Rights (entry into force 18 July 1978) (arts 25, 68 and 63(1)); the African Charter on Human and Peoples' Rights (entry into force 21 October 1986) (art. 21(2)). See also, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/34 of 29 November 1985; Declaration on the Protection of all Persons from Enforced Disappearance (art 19), GA Res. 47/133 of 18 December 1992; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Principle 20), recommended by Economic and Social Council resolution 1989/65 of 24 May 1989; and Declaration on the Elimination of Violence against Women. GA Res. 48/104 of 20 December 1993.

[15] See, for example, General Comment 29 on States of Emergency (Art. 4) of the UN Human Rights Committee, CCPR/C/21/Rev.1/Add.11, 31 August 2001, at para. 14: "Article 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are

independent and continuing obligation to provide effective domestic remedies to protect human rights - during peace or war, and irrespective of states of emergency. Human rights instruments guarantee both the procedural right to an effective access to a fair hearing (through judicial and/or non-judicial remedies) [16] and the substantive right to reparations (such as restitution, compensation and rehabilitation).[17] As has been said:

> *"A remedy must be effective in practice as well as in law, particularly in the sense that its exercise must not be unjustifiably hindered by acts or omissions by national authorities".*[18]

The nature of the procedural remedies (judicial, administrative or other) should be in accordance with the substantive rights violated and the effectiveness of the remedy in granting appropriate relief for such violations.[19] As explained by the UN Human Rights Committee, *"administrative remedies cannot be deemed to constitute adequate and effective remedies […], in the event of particular serious violations of human rights".*[20]

In other words, in cases of serious human rights violations, non-judicial remedies, such as administrative or other remedies, are not considered sufficient to fulfil States' obligations under international law. This means that even if a torture victim wishes to apply for compensation through an administrative procedure, he/she should also have the right in law and the ability in practice to bring a civil claim against the individual and State in a court of law.[21] Nevertheless, the relevant procedures may take into account compensation already awarded to the victim in order to determine whether the claimant has received full and adequate reparation. For example, the benefit to those persons who were detained in Argentina before 10 December 1983 by virtue of the state of siege and who were in the custody of the Executive (under Decree No. 10/90 and Law 24.043), was extended to cover persons who had initiated legal action and won their cases, but who had received compensation lower than that awarded by the reparations laws. [22]

strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective." The Committee considered further that "It is inherent in the protection of rights explicitly recognized as non-derogable … that they must be secured by procedural guarantees…The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights (…)." Similarly the Inter-American Court of Human Rights explained that the judicial remedies to protect non-derogable rights are themselves non-derogable. (Advisory Opinion OC-9/87 of 6 October 1987. Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 25(8) American Convention on Human Rights. Series A No. 9).

[16] Some instruments explicitly call for the establishment of judicial remedies for the rights they guarantee; the African Charter on Human and Peoples' Rights for example, provides that all remedies should be judicial. See Art. 7 of the African [Banjul] Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* 21 October 1986.

[17] See Jeremy McBride, "Access to Justice and Human Rights Treaties" (1998) 17 Civil Justice Q.235.

[18] See *Aksoy v. Turkey*, 21987/93 [1996] ECHR 68 (18 December 1996).

[19] Article 13 requires "the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief" although States have some discretion as to how to comply (para 69) *D v. United Kingdom* App. No. 30240/96 Judgment of 2 May 1997 (referring to *Soering v. United Kingdom* App. No. 14038/88 Judgment of 7 July 1989 and *Vilvarajah v. United Kingdom* App. No. 13163/87 Judgment of 30 October 1991). The UN Human Rights Committee commented on Finland's report (CCPR/C/95/Add.6) regarding the obligation under Art 2(b) of the ICCPR that "while noting that a recent reform of the Penal Code makes punishable the violation of several rights and freedoms, including those protected by articles 21 and 22 of the Covenant, the Committee is concerned that criminal law may not alone be appropriate to determine appropriate remedies for violations of certain rights and freedoms (Concluding Observations of the Human Rights Committee, Finland: 08/04/98 CCPR/C/79/Add.91).

[20] *Nydia Bautista v Colombia* No. 563/1993 U.N. Doc. CCPR/C/55/D/563/1993 (1995); José *Vicente and Amado Villafane Chaparro, Luis Napoleon Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres v Colombia* No. 612/1995 UN Doc. CCPR/C/60/D/612/1995 (14 June 1994).

[21] See *Albert Wilson v. Philippines*, Communication No. 868/1999, U.N. Doc. CCPR/C/79/D/868/1999 (2003).

[22] Decree Num. 131/94 of 1August 1994. For a general overview of the reparation process in Argentina, see Guembre, "Economic Reparations for Grave Human Rights Violations: the Argentine Experience" in *The Handbook of Reparations*, Pablo de Greiff, ed.(Oxford: Uxford University Press, 2006).

I.3 Domestic remedies

The first place that a victim will turn to have their rights realised: to obtain justice and other forms of reparation, is the State in which the crimes took place. In this respect, the availability of domestic remedies is a necessary precondition to ensure that justice is close and accessible for all victims. Such remedies are also vital in demonstrating to the wider public that such crimes will not be tolerated in the society.

Remedies available at the national level should comply with international standards. In particular, victims should have access to effective means to lodge a complaint about the violation of their rights and the competent authorities should be required to commence prompt and impartial investigations into the allegations. When there is sufficient evidence of the commission of a crime, authorities should be obliged to prosecute the alleged perpetrators and if found guilty, punish them accordingly. Moreover, to guarantee the efficiency of the process opportunities should be provided to victims to challenge the steps and decisions taken by authorities during criminal proceedings (e.g. if the prosecutor decides to end an investigation or to drop a prosecution). In some countries, judges in criminal trials can order compensation or other remedies against the convicted person, but this does not override the right of victims to civil redress. Notwithstanding the differences in various legal systems, victims of serious human rights violations have a right to bring a civil claim against the alleged perpetrators and/or the State, and this right is independent of any criminal prosecutions or their results.

Although there are different domestic legal systems, States are obliged to afford within their national procedures effective access to justice and adequate reparation proportional to the harm suffered (including rehabilitation and compensation). For example, a national human rights commission might serve as a supervisory body to guarantee the impartiality of police investigations, but it cannot be a substitute for criminal proceedings when allegations reveal the perpetration of crimes. The same applies to administrative boards or commissions which may provide compensation to victims of crime; such boards cannot override the right of victims to bring civil proceedings before a court.

a. National Courts

At the national level, victims can generally seek to initiate **criminal proceedings** by making a complaint to the police, the local public prosecutor or a local court. In many domestic legal systems, a prosecution will only be opened if the public prosecutor decides that it is appropriate, and a victim cannot directly institute proceedings. Military personnel can generally be prosecuted as any other official, though usually they will be subject to a separate military criminal code and will appear before specialised courts or courts martial (trial before a military court applying military law). In addition, some legal systems allow victims to seek civil compensation (*constitution de partie civile*) before the criminal jurisdiction.

On the other hand, **civil proceedings** are usually based on provisions in a national code of obligations, specific legislation, or the common law. Civil proceedings involve a breach of a duty of care against the person instituting the proceedings, which can be either specialised or generic. In

general, civil proceedings are resorted to when an individual wishes to obtain compensation, usually financial, from the person responsible for causing the harm. The proceedings are judicial in nature and take place in the ordinary courts. In cases of human rights violations such as torture, in principle victims have a right to sue the State itself and not only the individual perpetrators because the State is also liable for the violation.

In certain countries it is possible to bring **human rights or fundamental rights proceedings** in national courts**.** If the country has incorporated human rights principles into its national legislation, e.g. through a Constitution, a Bill of Rights or through legislation which allows international treaties to be directly enforced in domestic courts, then it may be possible to make an application to the appropriate court for a declaration of a violation in a particular case or pattern of cases. It is also possible that a claim for compensation could be made on behalf of the victim(s). Such actions may have to be taken to a specific court (often this is a constitutional court).

Examples of **administrative remedies** relevant to victims might include commissions set up to provide compensation to victims of crimes, police complaints authorities, human rights commissions or ombudsman institution. These bodies will usually have a mandate to investigate allegations and depending on the institution, to provide recommendations to remedy the offensive conduct or to respond to systemic problems. Administrative proceedings often involve decision-making by expert tribunals, or by officials with special expertise or responsibility for a particular subject area.

Many countries have established **National Human Rights Commissions (NHRCs)**. While the *Principles relating to the Status of National Institutions* (*Paris Principles)* serve as a point of reference for the establishment of NHRCs,[23] in practice NHRCs differ considerably in virtually all respects. In some cases they can investigate human rights violations on their own motion; in others they are only vested with the mandate to carry out (initial) investigations into human rights violations that amount to criminal conduct. It is common for NHRCs to receive reports or complaints from individuals or groups concerning the commission of grave violations of human rights and to conduct an inquiry. There is usually no time limit for bringing complaints and if they consider there to be sufficient preliminary evidence, a summary of the findings or a recommendation will be submitted to the competent authorities. Finally, States undergoing political transitions have commonly resorted to short-term **Truth and Reconciliation Commissions** as officially endorsed bodies to examine and inquire into past human rights abuses and to offer some form of reparation to the victims.

b. Foreign Courts

States can exercise jurisdiction over international crimes irrespective of where the crimes were committed or the nationality of the perpetrators or the victims, on the basis of the principle of universal jurisdiction – the principle that some crimes are so heinous that they offend the international community as a whole. Each State has the ability, and at times a specific obligation, to ensure the investigation and prosecution of these crimes. For example, the Geneva Conventions of 1949 require each participating state to "search for" persons who have committed grave

[23] See Principles relating to the Status of National Institutions ("Paris Principles") UN Doc. E/CN.4/1992/43, 16 December 1991.

breaches of the conventions and to "bring such persons, regardless of nationality, before its own courts,"[24] and the UN Convention against Torture obliges States parties to prosecute or extradite those accused of torture found within their territory.[25] In *Prosecutor v. Anto Furundzija,* the International Criminal Tribunal for the Former Yugoslavia endorsed the principle of universal jurisdiction in cases of torture and more generally for crimes under international law.[26]

There have been a number of investigations, prosecutions and convictions of torture and other international crimes on the basis of universal jurisdiction. For instance, *Nikolai Jorgic*[27] was convicted in Germany for genocide committed in Bosnia, and recently in the United Kingdom an Afghan warlord was convicted for carrying out torture and hostage-taking in Afghanistan.[28] There are some cases, however, where procedural rules such as immunities may bar a prosecution in a foreign court. In the Spanish extradition request relating to *Pinochet*[29] that led to a number of judicial investigations and proceedings throughout Europe, the exercise of universal jurisdiction over a former head of State was examined. The UK House of Lords established that although acting heads of State do enjoy immunity in foreign courts, a former head of State can only enjoy immunities *ratione materiae* (only for acts carried out in an official capacity), but ruled that acts of torture cannot be "*regarded as functions of a head of State under international law when international law expressly prohibits torture as a measure which a State can employ in any circumstances whatsoever and has made it an international crime.*"[30] The decision of the Belgian investigating magistrate in the *Pinochet* case had also come to the conclusion that the acts alleged could not possibly come within the ambit of official acts performed in the normal exercise of official functions.[31]

It has been difficult to bring civil cases against foreign officials and governments in the tribunals of other States. The relationship between the principle of access to justice for victims in civil proceedings and the principle of State immunity remains controversial. The recently adopted UN

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[24] Universal jurisdiction over war crimes is clearly recognised for grave breaches of the four Geneva Conventions of 12 August 1949, and Additional Protocol I of 8 June 1977. The Geneva Conventions specifically provide that: "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case" (Articles 49 I, 50 II, 129 III, 146 IV). The Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict, includes a similar provision (Art. 28).

[25] Article 5, UN Convention against Torture.

[26] "It would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes. As stated in general terms by the Supreme Court of Israel in *Eichmann,* and echoed by the USA court in *Demjanjuk,* it is the universal character of the crimes in question *i.e.,* international crimes which vest in every State the authority to try and punish those who participate in their commission." Prosecutor v. Anto Furundzija, 38 I.L.M. 317 (1999) (Int'l Crim. Trib. For Former Yugoslavia 1999).

[27] *2 BvR 1290/99.*

[28] *R v Zardad* (Judgment of 18 July 2005, unpublished).

[29] The Audiencia Nacional held on 5 November 1998 that it was able to exercise jurisdiction over Pinochet and other Chilean military officers in accordance with Article 23.4 of the Organic Law of the Judicial Branch.

[30] Lord Craighead Decision of the HL of 24 March 1999, [1999] 2 All ER 97. See also the reasons of Lord Saville, who held that: "So far as the states that are parties to the Convention are concerned, I cannot see how, so far as torture is concerned, this immunity can exist consistently with the terms of that Convention. Each state party has agreed that the other state parties can exercise jurisdiction over alleged official torturers found within their territories, by extraditing them or referring them to their own appropriate authorities for prosecution; and thus to my mind can hardly simultaneously claim an immunity from extradition or prosecution that is necessarily based on the official nature of the alleged torture."

[31] See Reydams, L. Criminal Law Forum, Vol XI, I 2000, citing the decision of 6 November 1999.

Convention on the Jurisdictional Immunities of States and their Properties is silent on how immunity and international human rights law relate. In the small number of cases in which a foreign State has been sued for serious human rights violations, domestic courts have diverged in their analysis of the application of State immunity, and on the end result. In some cases domestic courts have denied the applicability of immunity where cases concerned serious violations of human rights,[32] but in other cases domestic courts have interpreted their national laws granting immunity to States as barring victims' access to civil remedies, even in cases of *jus cojens* norms.

In *Ron Jones v Saudi Arabia,* [33]an English case which at the time of writing was awaiting judgment by the House of Lords, the Court of Appeal found that the Kingdom of Saudi Arabia enjoyed immunity for civil proceedings relating to torture but denied the protection of immunity to the individual State officials. In a Canadian case, the Ontario Court of Appeal in *Bouzari* upheld Iran's immunity based on the terms of Canadian immunities legislation.[34] Following the *Bouzari* case, the UN Committee against Torture in its examination of Canada's most recent State Party report, addressed the implications of Article 14 (right to reparations) of the UN Convention against Torture within its consideration of the Canadian legal system. It criticised "the absence of effective measures to provide civil compensation to victims of torture ***in all cases***" [emphasis added] and recommended to Canada that it "review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture."[35]

1.4 International remedies

a. Human Rights Courts and Bodies

There is currently no general international human rights court where individuals can bring claims against States, so the forum varies depending on the international remedies made available by each country. States have to specifically agree to the jurisdiction of an international court or body to allow individuals injured under their national jurisdiction to bring challenges against them. While claims before the regional human rights bodies may be brought on behalf of individuals as a matter of course through adherence to the Conventions that underpin the bodies, States that have already ratified UN Conventions have to specifically agree to the monitoring bodies' jurisdiction to receive claims from individuals.

Human rights mechanisms monitor States' compliance with specific human rights conventions. For example, the European Court of Human Rights monitors compliance of State parties to the Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention on Human Rights or ECHR] while the UN Human Rights Committee monitors State compliance with the International Covenant on Civil and Political Rights (ICCPR). A key way in

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[32] Italian Supreme Court in *Ferrini v the Federal Republic* of Germany and the Greek Supreme Court (Areios Pagos) in *Prefecture of Voiotia v the Federal Republic of Germany.*

[33]*Jones v. The Ministry of the Interior of Saudi Arabia & Lt. Col. Abdul Aziz and Secretary of State for Constitutional Affairs, The Redress Trust (Intervenors) and Mitchell, Walker And Sampson v. Ibrahim Al-Dali & Others*, [2004] EWCA Civil 1394.

[34] Bouzari v. Iran (Islamic Republic) Ont. C.A. (2004).

[35] Committee against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Conclusions and Recommendations of the Committee against Torture, 34th Session (May 2005), CAT/C/CO/34/CAN at para. C (4)(g).

which they monitor State compliance with their conventional obligations is through individual complaints procedures.

The European, Inter-American and the newly established African Court of Human Rights have the power to order the State to afford reparation directly to victims. This differs from the African Commission on Human and Peoples Rights, the UN Human Rights Committee, or the Committee against Torture, which can only make recommendations to the State concerned to provide reparation to victims. Nevertheless, and as discussed in the next section, these latter bodies are increasingly developing mechanisms to ensure implementation of their recommendations. At the same time, there is also a welcome trend in domestic jurisprudence that recognises the enforceability of these recommendations as a reflection of States' treaty obligations.

International law recognises that States should have an opportunity to repair any human rights violation for which they are responsible before the international bodies intervene [36] - consequently, international procedures for individual complaints generally require domestic remedies to have been "exhausted" before they will agree to examine the complaint. Local remedies will be considered to have been "exhausted" once all appropriate internal remedies have been sought or, when it is considered that local remedies are ineffective or cannot provide fair and adequate reparation. In the latter case victims, if they are able to prove that internal remedies are ineffective, can seek recourse through the most appropriate individual complaints procedure at the regional or international (universal) level. [37]

b. International Criminal Tribunals

During the past decade, there has been a surge of international criminal tribunals that have been established to ensure that perpetrators of the worst crimes are made accountable. Following the examples of the Nuremberg and Tokyo trials at the end of the Second World War, the United Nations Security Council created two *ad hoc* International Criminal Tribunals[38] to try those accused of committing war crimes, genocide and crimes against humanity in the territory of Rwanda (ICTR) and the Former Yugoslavia (ICTY). Since then a series of mixed or quasi-internationalised jurisdictions have been established to investigate and prosecute the most serious crimes in particular countries, e.g., Sierra Leone, East Timor, Cambodia and Kosovo.[39] On 17 July 1998 the Statue of the International Criminal Court (ICC)[40] was adopted. Perhaps the most significant aspect of the Rome Statue is that it established a permanent body, without the temporal and contextual restrictions that characterized the *ad hoc* Tribunals.[41] Another important

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[36] This principle does not apply for systematic and/or gross violations of human rights. For more information see *Reparation - A Sourcebook For Victims of Torture and other Violations of Human Rights and International Humanitarian Law*, REDRESS, March 2003, available at http://www.redress.org/publications/SourceBook.pdf (REDRESS' Sourcebook on Reparation).

[37] Ibid.

[38] Statute of the International Tribunal for Former Yugoslavia; UN Doc. S/25704, annex (19930 and the Statute of the International Tribunal for Rwanda; UN Doc. S/RES/995, annex (1994).

[39] Lebanon is also in the progress of establishing an international tribunal to try those accused of former Lebanese Premier Rafik Hariri's murder (see http://www.globalpolicy.org/intljustice/general/2006/0318hybrid.htm).

[40] Rome Statue of the International Criminal Court, UN Doc A/CONF.183/9.

[41] While the ICC is a permanent body, Art 11(1) of the Rome Statute specifies that "the Court has jurisdiction only with respect to crimes committed after the entry into force of this Statue," and certain preconditions to exercise its jurisdiction are required in Art 12 (ratione personae). Additionally, Art 17 establishes that the jurisdiction of the ICC is complementary to national jurisdictions, meaning that the ICC will only be able to exercise jurisdiction in the event that the State with primary competence is unwilling or genuinely unable to investigate and prosecute. This differs

difference, and key element of the Rome Statute, is that the ICC acknowledges the rights of victims to participate in the proceedings as interested parties (not only as witnesses of the crimes), and to seek reparations before the Court.

II. ENFORCEMENT OF INTERNATIONAL AWARDS

All international bodies have expressed concern over ensuring that their views, decisions, and judgments are made effective so that full reparation is afforded to the victims of human rights violations. But even in cases where such views, decisions and judgments are legally binding (e.g. judgments from the European and Inter-American Courts of Human Rights) there is a tension between their binding force and the finality of domestic decisions. In particular, there is no established collateral procedure for cases in which international courts and tribunals find a violation by a domestic decision (particularly when it has been reviewed by the highest judicial body of the State). In practice, a respondent State's political and judicial divisions are mobilised to varying degrees depending on the nature of the judgments, views or decisions: Do they require purely executive remedial action or legislative and/or judicial action? It appears that compliance depends on the extent to which each governmental division rallies to respond to a specific judgment and on the pressure that each international enforcement procedure is able to exercise over the State.

II.1 Regional Human Rights Mechanisms

a. The African System

The African System is based on the normative and institutional framework provided by the African Charter on Human and Peoples' Rights[42] (the Charter) which is the primary instrument for the promotion and protection of human rights in Africa. The system is comprised of the dual protective mechanisms of the African Commission[43] and the African Court on Human and Peoples' Rights which as yet is not fully up and running. The Commission is tasked with ensuring compliance with the terms of the Charter and implementing the rights under it; the Commission's role in this regard is to be complemented by the creation of the new African Court.

With the adoption of the Constitutive Act[44] in 2000 the Charter was put under the ultimate political authority of the newly established African Union (AU), what was the Organisation of African Unity (OAU), making the treaty bodies of the Charter similarly subordinate. The implementation therefore, of their decisions, depends on the support of the Heads of State that

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from the primary jurisdiction afforded to the ICTY and ICTR, where national courts were subordinate to the ad hoc jurisdiction.

[42] Adopted by the Assembly of Heads of States and Government of the Organisation of African Unity on 27 June 1981, entering into force on 21 October 1986.

[43] Based in the Gambia.

[44] Adopted on the 11 July 2000 and entering into force 26 May 2001.

make up the Assembly[45] (AHSG), which is the main political organ of the AU.

The regime under the Constitutive Act appears to provide for a stronger and more transparent human rights framework. The Constitutive Act explicitly and comprehensively incorporates human rights as one of the AU's principles, referring to the promotion and protection of human and peoples rights, in accordance with the Charter, as one of the objectives of the Union. The authority of the Constitutive Act gives the AU the right to intervene, upon a decision by the Assembly, in cases of war crimes, genocide and crimes against humanity,[46] a right further formalised by the creation of the African Peace and Security Council.[47] Particularly important is the provision in Article 23(2) of the Constitutive Act imposing sanctions on Members failing to comply with the decisions and policies of the AU[48]:

> 23 …
> (2) Furthermore, any member State that fails to comply with the decisions and policies of the Union maybe subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.

This provision can also be applied to ensure compliance with the decisions by the various human rights bodies; and in this context, it has the potential of creating a more stringent enforcement mechanism.[49]

The African Commission

Although neither the Commission nor the Court on Human and Peoples' Rights feature in the Constitutive Act as principle organs of the AU, the transition from OAU to AU does not alter the mechanisms that operated under the OAU. For this reason, the Commission functions under the AU as it did under the OAU.[50]

As mentioned above the Commission is charged with the task of overseeing compliance with the terms of the Charter and the implementation of the rights guaranteed under it; the mechanisms

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[45] Described by former member of the commission Moleleki Mokama as a political body that 'consists of the very guilty parties' – in C.Odinkalu, *An Interview with Moleleki Mokama* Interights 1993, cited in *The African Charter on Human and Peoples Rights: Effective Remedies in Domestic Law* – N.Enonchong, 2 Journal of African law 48 2002.

[46] Article.4(h).

[47] The African Peace and Security Council is established by a Protocol adopted in July 2002 to replace the OAU Mechanism for Conflict Prevention, Management and Resolution. The re-incorporation of the OAU Mechanism into the AU as the Peace and Security Council was done with the authority provided under Article.5(2) of the Constitutive Act for the Assembly to establish 'other organs.' See OAU 'Decision on the implementation of the Sirte summit decision on the African Union', 37th ordinary session of the AHSG July 2001, AHG/Dec(XXXVII) and the AU 'Decision on the establishment of the Peace and Security Council of the African Union' AU Doc/Ass/AU/Dec3 (I).

[48] Article.23(2).

[49] *Institutions with the Responsibility for Human Rights Protection under the African Union* – Amanda Lloyd and Rachel Murray, 2 Journal of African Law 48 2004.

[50] The OAU/AU organs have continually stressed that it is for the Commission to consider its place within the Union and to inform the AU organs accordingly. However, the transition from OAU to AU has not been accompanied by a review of the Commission's Rules of Procedure or of the Charter, and it has been suggested that precisely such a review is needed to make the necessary amendments to bring the Charter inline with the new structures and arrangements under the AU. See Rachel Murray, *Human Rights in Africa – From the OAU to the African Union*, 2004. Given the new emphasis on Human and Peoples' Rights under the AU, such a review could address the absence of a specific follow-up mechanisms discussed below.

for discharging that mandate having evolved from the Charter and from the Commission's own Rules of Procedure to include resolutions,[51] findings on individual communications[52] and interim measures.[53] The Charter confers both promotional and quasi-judicial/protective functions on the Commission. The quasi-judicial functions include both the interpretive powers under Article 45(3) of the Charter conferring the Commission the authority to 'interpret all the provisions of the present Charter', and the protective powers under Article 45(2), interpreted to cover the resolution of disputes arising from allegations of violations of the Charter.

The Commission has developed the now well established practice of receiving and considering individual complaints alleging violations of the rights contained in the Charter and has further developed a practice whereby it not only lists the articles violated by a State but also recommends remedial measures to be adopted by the State concerned. Although the express wording of the Charter does not provide for this procedure, it has been developed on the basis of Article 45(2) empowering the Commission 'to ensure the protection of human and peoples rights' and Article 58 providing for 'other' communications to be considered besides the inter-State communications under Article 47. The primary aim of this procedure has been expressed by the Commission as the initiation of 'a positive dialogue, resulting in an amicable resolution between the complainant and the state concerned, which remedies the prejudice complained of'.[54] The Commission considers the objective of the individual communications procedure to be effected primarily through 'amicable' dialogue. However in the event that such an 'amicable resolution' proves unproductive, the Commission is forced to reach a decision on its merits, involving a finding on a violation and recommendations which the Commission considers would be appropriate measures to be taken for that violation to be addressed.[55] In the past years the decisions of the Commission have been more substantive and have tended to elaborate on the issues of law and fact that are raised in each communication. These findings and recommendations are submitted to the Assembly and then published in the Commission's Annual Activity Report.

One serious limitation of the current individual communication procedure is the time frame for consideration of communications. The seizure of a communication takes place in any ordinary session in a process separate from and six months prior to consideration of its admissibility. Only after *a further* six months, at the next session, will the merits of the communication be considered. This delay in the relief sought is further exacerbated by the absence of a follow-up mechanism by which compliance with the recommendations of the Commission could be assessed.

Enforcement of the Commission's findings

Very little is known about the actual levels of compliance with the recommendations of the

[51] Contemplated by Article.45(3) of the Charter, their purpose being 'to clarify the vague and ambiguous provisions of the Charter in an effort to give the treaty its maximum effect' – Ankumah, *the African Commission on Human and Peoples' Rights – Practice and Procedures* 1996.

[52] The Charter only seems to provide for inter-state communications under Article.55 and 'other' communications in cases concerning massive violations of the Charter in Article 58, however as noted below the individual communication procedure seems to have evolved from a combination of the powers given to the Commission by Articles.45(2) and 58.

[53] Interim or 'provisional' measures are not specifically mentioned in the Charter but are provided for by Rule 111 of the Commission's Rules of Procedure, see Rules of Procedure of the African Commission on Human and Peoples' Rights, 1995.

[54] Free Legal Assistance Group Case (1996) (Merits), communication no.25/89, see also communication no.16/88, *Comite Culturel pour la Democratic au Benin v. Benin* (Merits) joined with communication no.17/88, Hilaire Badjougoume v. Benin (Merits) and communication no.18/88, El Hadj Boubacar Diawara v. Benin (Merits), adopted at the 16th ordinary session of the Commission in October 1994.

[55] *The Individual Complaints Procedure of the African Commission Human and Peoples Rights: A Preliminary Assessment* – Chidi Ansalm Odinkalu, 8 Trans-national Law and Contemporary Problems 359 1998.

Commission because of the lack of an established follow-up policy, though it has often been suggested that States do not comply with the Commission's recommendations. The first empirical study[56] on the status of compliance with the decisions of the Commission undertaken recently established the Commission to have found, in considering individual complaints, 44 violations by 17 different States, putting the figure for full compliance at around 14% and the number of instances of unambiguous non-compliance at around 48%, concluding that there is in fact overall lack of compliance with the recommendations of the Commission.

Legal status of the Commissions findings

The Commission's findings on individual communications are not binding *stricto sensu*, as the Charter provides for the Commission's competence to issue 'recommendations' and not remedies under Article 45(1(a)). However, in parallel to the Commission's elaboration of its mandate in receiving and pronouncing on individual communications, the Commission has also elaborated on the obligation on States to comply with its findings, leading to a state of affairs where an expectation of compliance appears to have been engendered.[57] In other words, while the Commission's findings in themselves are not binding *stricto sensu* they cannot be seen as 'mere' recommendations, rather they are authoritative interpretations of the obligations and rights under the Charter, which is legally binding. This is consistent with the obligation on States Parties 'to implement the Charter in good faith'. Furthermore the OAU/AU organs have made general calls for States to cooperate with the Commission.[58]

Beyond the legal status of the findings, a major obstacle to the implementation and execution of the findings is the Commission's lack of official powers of follow-up with which to monitor compliance with their recommendations. Though the Commission has no official or formal policy on follow-up or other powers with which to coerce compliance with these decisions, there are mechanisms within its procedures that can be used to this end.

Mechanisms for the enforcement of findings

i. Follow-up on individual communication findings using state reporting

Despite the lack of an express provision for it in either the Charter, the Commission's own rules of procedure, or the issued Guidelines on State Reporting, the Commission has developed the practice of following-up its findings by requesting States to include information on the measures taken to implement its recommendations in the periodic reports due under Article 62 of the Charter. The Commission has on two occasions, in relation to communications 211/98[59] and 241/2001,[60] requested a State to:

> 'report back to the African Commission when it submits it next periodic report in terms of article 62 of the African Charter on measures taken

[56] *Analysis of State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights*, Lirette Louw 2005.

[57] Naldi 2002.

[58] Resolution.240 AHG/(XXXI).

[59] Legal Resources Foundation v. Zambia 2001, 14th Annual Activity Report.

[60] Purohit and Moore v. The Gambia 2003, 16th Annual Activity Report.

> to comply with the recommendations and directions of the African Commission in this decision.'

However in these two instances the specific requests did not result in any information forthcoming. This attempt at follow-up has also been pursued by including 'reporting back' as one of the recommendations formulated upon finding the State party in violation of the Charter and by making use of the questioning of State delegates during the public examination of periodic reports. During the Commission's 31st ordinary session the governments of Mauritania and Cameroon submitted their initial State reports. Both countries had previously been found in violation of the African Charter in prior individual complaint procedures and the Commission had recommended to both the measures that should be taken to redress these violations.[61] At the 31st Session the Commissioners, in examining the State reports before them, posed specific questions to the government representatives of both State parties inquiring as to the status of implementation of the decisions against them.[62]

Promotional and Protective Missions

As part of its promotional mandate under Article 45 of the Charter, the Commission undertakes visits to countries during the period between ordinary sessions.[63] Although these missions are primarily promotional in character[64] they have been used in a protective capacity to monitor implementation of the Commission's findings and recommendations resulting from prior communications. This was one of the stated objectives of the promotional visit to Burkina Faso, expressed as being to:

> 'remind the government of the need to honour its obligations under the African Charter by adopting special measures aimed at…Giving effect in the shortest possible time to the decision taken by the Commission at its 29th ordinary session in Tripoli, Libya, regarding the communication for human rights violations lodged by MDBHP and it chairman Mr Halidou Ouedraogo…'[65]

These promotional missions can therefore be understood as mechanisms for follow-up on, and enforcement of, the recommendations of the Commission. Follow-up on the status of compliance with the Commission decisions in relation to prior communications[66] was also cited as one of the purposes of the promotional mission to Zambia. With regard to the status of the particular recommendations[67] enquired about on the Zambia mission, the delegation was informed that the President had revoked the deportation order issued against the complainants in full compliance with the Commissions recommendations. In terms of the effectiveness of the mission to Burkina

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[61] In the case of Mauritania the inquiry related to communication nos. 54/91 61/91 98/93 164/97 169/97 and 210/98. In the case of Cameroon the inquiry related to no. 39/90 and 59/91.

[62] Louw 2005.

[63] Ordinary sessions of the Commission are held bi-annually, see Rules of Procedure of the African Commission, chpt.1, rule.2.

[64] See introduction to the *Report of the African Commission's Promotional Mission to Burkina Faso* DOC/OS(XXXIII)/324b/I in which the Commission reported that it decided to 'embark on constructive dialogue with the states parties to the Charter through promotional missions.'

[65] *Report of the African Commission's Promotional Mission to Burkina Faso* DOC/OS(XXXIII)/324b/I.

[66] Communication no.212/98 Amnesty International v. Zambia and communication no.211/98 Legal Resources Foundation v. Zambia.

[67] Communication 212/98 Amnesty International v. Zambia, 12th Annual Activity Report.

Faso for follow-up on the recommendations made on the MBDHP v. Burkina Faso communication,[68] partial compliance was recorded.[69]

As well as missions under the Commission's promotional capacity, the Commission also undertakes missions prompted by protective reasons, or on site investigations, in the face of allegations of prevailing human rights violations. Although primarily fact-finding missions are to gather information about pending communications,[70] they also serve as opportunities to secure amicable settlement of pending communications[71] and, of particular relevance here, as an opportunity for follow-up. This procedure has been utilised in relation to Togo, Senegal, Sudan, Mauritania and Nigeria.[72] This mechanism has been developed under the authority given to the Commission by Article 46 of the Charter to 'resort to any appropriate method of investigation' and these missions are similarly opportunities for pressure to be exerted on States to implement the Commission's decisions.[73]

Recent moves at strengthening the follow-up procedure

In 2005 at their 37th session, the African Commission adopted the *Resolution on the Creation of a Working Group on Specific Issues Relevant to the Work of the African Commission on Human and Peoples' Rights* which established a working group charged with dealing with *inter alia* 'the mechanism and procedure on the follow-up on decisions and recommendations of the African Commission'.[74] The mandate of this working group was subsequently renewed by resolution at the 38th session.

There is at present no Special Rapporteur on Follow-up but this has been strongly recommended.[75]

The African Court

The African Court on Human and People's Rights is yet to be fully established. It will eventually operate as the second of the dual protective mechanisms for human rights in Africa along side the Commission. It is mandated to undertake effective adjudication, render enforceable judgments and remedies to victims and make States more accountable for violations of human rights. By doing this the Court is meant to 'enhance the efficiency of the African Commission' and 'to complement and re-enforce its functions'[76] specifically in terms of its protective mandate.[77] Its establishment is

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[68] Communication 20/97 MBDHP v. Burkina Faso, 14th Annual Activity Report.

[69] The level of compliance with regard to the recommendations on these two communications was recorded in the study by Lirette Louw, *Analysis of State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights*, 2005.

[70] For example the protective mission to Sudan to establish facts pertaining to pending communications nos. 48/90 and 50/91, see section V, pg 19 of the *Report of the African Commission on Human and People's Rights Mission to the Sudan* DOC/OS/35a(XXII).

[71] For example the mission report to Nigeria reports '[i]t had been agreed to at the beginning of the mission that the cases against Nigeria before the Commission would be taken up with the appropriate authorities. The hope was that all of them would be settled amicably.' See pg 17 of the *Mission Report to Nigeria* DOC/OS/(XXV)/99.

[72] Louw 2005.

[73] Ibid.

[74] 82. ACHPR /Res.77(XXXVII)05: Resolution on the Creation of a Working Group on Specific Issues Relevant to the Work of the African Commission on Human and Peoples' Rights.

[75] Louw 2005 and Murray, *the African Charter on Human and Peoples' Rights 1987-2000: An Overview of its Progress and Problems,* 1 African Human Rights Law Journal 9 2001.

[76] Preamble to the Protocol on the African Court.

governed by the Protocol to the African Charter on Human and People's Rights, adopted in 1998 by the OAU Assembly.

As noted above, the Constitutive Act did *not* include the African Court on Human and Peoples' Rights as one of the principle organs of the AU, however an African Court of Justice was contemplated and provision was made for the adoption of a Protocol to determine its statute, composition and functions.[78] In July 2004 the AHSG decided that the African Court of Justice and the Court on Human and Peoples' Rights would be integrated, however this has been put on hold and the establishment of the Court on Human and Peoples Rights is being pushed ahead with the decision to begin operationalising the Court having been taken at the July 2005 Summit in Libya. The process of election of judges has begun with 11 judges having been elected at the January 2006 Ordinary Session of the Executive Council and those judges having been appointed by the Assembly under the 'Decision on the Election of Judges of the African Court on Human and Peoples Rights' (Doc. EX.CL.241 (VIII)) taken at the January 2006 Khartoum Summit. The 2005 Libya AU Summit also decided that the seat of the Human Rights Court would be in the Eastern region of Africa. Mauritius, the Sudan, and Tanzania have offered to host the court. However, under the African Court Protocol, only those countries that have ratified the protocol establishing the human rights court are eligible to host the court. Of these three countries, only Mauritius has done so.

Under its contentious jurisdiction the Court will hear all cases and disputes submitted to it concerning the interpretation and application of the Charter. Access to the Court by individuals and NGOs is restricted by the requirement that a state must have made the relevant declaration accepting the competence of the Court to receive individual and NGO petitions before the Court can hear the case. This is similar to the declarations under the Optional Protocol to the ICCPR and under Article 22 of the Convention against Torture accepting the competence of the Human Rights Committee and the Committee against Torture respectively. In the absence of such a declaration having been made the Court can still hear complaints regarding violations committed by those states where the complaint is bought by the Commission.

Court judgments and their execution: the domestic effect of the Court's jurisprudence

The Court is empowered by Article 27 to 'make the appropriate orders to remedy the violation including the payment of fair compensation or reparation', and Article 27(2) empowers the Court to order provisional measures as it deems necessary 'in cases of extreme gravity and emergency, and when necessary to avoid irreparable harm to persons.' The Court's decisions are clearly intended to have binding force which will distinguish them from the Commission's more persuasive 'recommendations'. In accordance with Article 30 States parties to the Protocol undertake to comply with the judgment in any case to which they are parties and to guarantee execution of the judgment within the time specified by the Court. It has been suggested by some commentators[79] that beyond the Article 30 undertaking there seems to be limited recourse for the Court if a delinquent State ignores or for other reasons fails to comply with the judgment. This leaves the effectiveness of the system largely dependant on the willingness of States to comply with

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[77] Article 2 Protocol on the African Court.

[78] Article.18 Constitutive Act.

[79] See Association for the Prevention of Torture, *Occasional Paper* on *the African Court on Human and Peoples' Rights*, January 2000, http://www.apt.ch/africa/African%20Court.pdf.

its decisions.

There is however the potential within the framework provided by the Protocol for a number of mechanisms with which to induce compliance. Firstly there is the provision in Article 29 para. 2 for the Council of Ministers, on behalf of the Assembly, to monitor compliance. Secondly under the authority provided by the Protocol, the Court can draw up its own Rules of Procedure[80] which could then provide for the follow-up mechanisms by which it could monitor compliance with its own decisions. Thirdly the Court is required to include in its report to the Assembly a list of 'cases in which a State has not complied with the Court's judgment.'[81] These are all potential further enforcement mechanisms in terms of the additional pressure they can exert on States to comply with the Court's decisions. This framework suggests that, by the Court being the last to have been established among comparable regional human rights systems, the drafters have considered the practice of existing regional courts and have established a system to monitor compliance that is more comprehensive than any of those existing systems.[82] However it remains to be seen how this potential will translate into practice.

b. The European System

Relatively little attention has so far been paid to the problem of execution of the judgments of the European Court of Human Rights (ECHR). The importance of this topic can hardly be overstated. Without the speedy and effective execution of the Court's judgments, which includes the payment of just satisfaction to the victim of the violation, the adoption of other remedial measures to achieve *restitutio in integrum*, and the adoption of general measures to prevent new similar violations, the ECHR can arguably never play its central role of a "*constitutional instrument of European ordre public*"[83] ensuring democratic stability, good governance and respect for human rights.

In accordance with Article 46 of the European Convention of Human Rights as amended by Protocol No. 11, the Committee of Ministers supervises the execution of judgments of the European Court. The Committee of Ministers' essential function is to ensure that Member States comply with the Court's judgments. In order to discharge its enforcement function, the Committee has adopted *"Rules Concerning the Application of Article 46 of the European Convention of Human Rights."* These rules provide that as soon as a judgment of the Court has been transmitted, it shall be inscribed on the Committee's agenda (Rule 1). The State concerned must then inform the Committee of what steps it has taken to comply with the judgment. If the State has not taken the requisite action, the case is automatically placed on the Committee's agenda for consideration within the next six months (Rule 2). The Committee completes each case by adopting a final resolution. In some cases, interim resolutions may prove appropriate. Both kinds of resolutions are public.

When the just satisfaction awarded consists of monetary damages, it is usually relatively easy for a

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[80] Article 33 Protocol.

[81] Article 31.

[82] This suggestion is advanced in Louw 2005.

[83] *Loizidou v. Turkey*, 15318/89 [1995] ECHR 10 (23 March 1995).

willing State to pay the injured party and inform the Committee. But sometimes the Court's judgments may declare that certain national laws and/or practices are in conflict with the Convention and that appropriate legislation or other measures need to be implemented. Compliance with these type of judgments is much harder to police.[84] Often the State will require more time. It is also not always easy for the Committee, which is not a judicial body, to determine whether the legislative or other measures undertaken by a particular State do in fact fully comply with the Court's decision.[85] On this issue, it remains to be decided whether a case can come back to the Court for review of enforcement measures; the Evaluation Group appointed to study further reforms to the system opposed the idea on the ground that it could result in a blurring of the respective responsibilities of the Court and Committee of Ministers and draw the Court into an arena outside its purview.[86]

The nature of the Court's judgments and the Court's competence under Article 41 of the European Convention

The European Court's judgments are declaratory in nature.[87] The Court establishes the existence of a violation, and the process of giving effect to that finding is left to the Committee of Ministers of the Council of Europe.

The Court has consistently confirmed that it is not empowered to order consequential or far reaching measures. In *Selmouni v. France*,[88] the Court found violations of Articles 3 and Article 6 of the Convention on the grounds that the French police tortured the Applicant (a Dutch national of Moroccan origin) during his detention in police custody in Paris and that the proceedings in respect of his complaint against the police officers were not conducted within a reasonable time as required by Article 6 § 1 of the Convention. The Court awarded the Applicant a substantial sum, notably 500,000 French francs, to cover both personal injury and non-pecuniary damage, assessed on an equitable basis.

The Applicant made two further requests as part of his just satisfaction claims under Article 41 of the Convention. He firstly asked for a transfer to the Netherlands to serve out the remainder of his sentence. Secondly, he pointed out that he had been ordered to pay, jointly and severally with the other persons convicted in the proceedings against them, a customs fine of twelve million French francs. Accordingly, the Applicant asked the Court to specify in its judgment that the sums awarded under Article 41 should be exempt from attachment.

The Court dismissed both requests made by the Applicant. As regards the Applicant's request to be transferred to a prison in the Netherlands, the Court held that Article 41 did not give it jurisdiction to make such an order against a Contracting State.[89] As to the second request, the

[84] See for example Committee's Interim Resolution on the execution by the United Kingdom of a number of judgments of the European Court of Human Rights. (Resolution ResDH (2005)20 of the Committee of Ministers. (Strasbourg 24.ii.05)). The judgments found violations of Article 2 (right to life) in Northern Ireland due to the failure to conduct effective investigations into the deaths of the Applicants' next-of-kin (cases of Jordan, McKerr, Kelly and others, Shanaghan, McShane and Finucane).

[85] See Robertson and Merrills (1993), cited in Shelton (2005), *supra note 1*.

[86] Shelton (2005), *supra.*

[87] *Assanidzé v. Georgia* 71503/01 [2004] ECHR 140 (8 April 2004).

[88] *Selmouni v. France* 25803/94 [1999] ECHR 66 (28 July 1999).

[89] see also *Saïdi v. France,* 14647/89 [1993] ECHR 39 (20 September 1993).

Court reiterated its earlier jurisprudence in the cases of *Philis v. Greece* [90] and *Allenet de Ribemont v. France* [91] and held that it did not have jurisdiction to specify in its judgment that the sums awarded under Article 41 should be exempt from attachment. It therefore left this point to the discretion of the French authorities.

However, the Court did point out that the compensation due by virtue of a judgment of the Court should be exempt from attachment. It noted that it would be incongruous to award the Applicant an amount in compensation for, *inter alia*, ill-treatment constituting a violation of Article 3 of the Convention and costs and expenses incurred in securing that finding, if the State itself were then to be both the debtor and creditor in respect of that amount. Although the sums at stake were different in kind, the Court considered that the purpose of compensation for non-pecuniary damage would inevitably be frustrated and the Article 41 system perverted if such a situation were to be deemed satisfactory.

The Court's role in the execution of judgments

Aside from awarding monetary compensation, the case law of the Court shows that it has consistently declined to assume jurisdiction to order a State to implement specific measures of reparation or to change its law or practice in any particular way so as to prevent similar violations from recurring in the future.[92]

Subsequent to a finding of a violation and award of just satisfaction to the injured party, the Court transmits its judgment to the Committee of Ministers to supervise the execution of that judgment by the respondent State (Article 46 § 2 of the Convention). In numerous cases the Court held that the execution of a judgment in accordance with Article 46 of the Convention - a judgment in which the Court finds a violation of the Convention or its Protocols - imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation, and make all feasible reparation for its consequences to restore as far as possible the situation existing before the breach.[93]

For example, where the Court has found a violation of Articles 3 and 8 of the Convention caused by a deportation order against an individual, the respondent State will be required to quash the deportation order and most probably will be compelled to issue a residence permit. The individual measure most commonly required for *restitutio in integrum* is the reopening of domestic legal proceedings. The need for such a measure arises primarily in respect of criminal proceedings since problems with civil proceedings can frequently be remedied through financial compensation. But a crimininal conviction may need to be quashed, or a retrial ordered, in two types of situations: first, where the Court has found procedural injustice in the original trial giving rise to a violation of an Article of the Convention; or secondly, where it has found that the the substantive criminal law of

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[90] 14003/88 [1991] ECHR 38 (27 August 1991).

[91] 15175/89 [1996] ECHR 27 (7 August 1996).

[92] *Ireland v. United Kingdom*, 5310/71 [1978] ECHR 1 (18 January 1978) cited in Claire Owey, Robin C.A. White, *European Convention on Human Rights*, p. 420.

[93] *Scozzari and Giunta v. Italy* [GC], 39221/98;41963/98 [2000] ECHR 372 (13 July 2000), *Menteş and Others v. Turkey* (Article 50), 23186/94 [1998] ECHR 57 (24 July 1998); *Maestri v. Italy* [GC], 39748/98 [2004] ECHR 77 (17 February 2004).

a State is incompatible with one of the provisions of the Convention[94] - for example, where an Applicant has been tried and convicted by a court which is not independent within the meaning of Article 6 § 1 of the Convention,[95] or where his or her right to freedom of expression has been in some way restricted by national law.[96]

In all these cases the Committee of Ministers interprets the judgments of the Court and, if necessary, exerts pressure on the respondent State with a view to forcing it to remedy the situation giving rise to a violation (e.g. reopening of proceedings or release of the Applicant from prison), or to take necessary measures to amend its legislation or practice.

Recent trend in the Court's judgments

Despite the declaratory nature of its judgments and its lack of jurisdiction to order consequential measures against a State, the recent practice of the Court indicates a willingness to assist the Committee of Ministers in the execution process and also to give some guidelines to the respondent States to remedy consequences of a particular violation of the Convention.

The landmark case regarding this new practice is *Gençel v. Turkey* [97] in which the Applicant complained that he was denied a fair hearing by an independent and impartial court because a military judge was sitting on the bench of the State Security Court which tried and convicted him. The Court found a breach of Article 6 § 1 of the Convention in the light of the conclusions it reached in an earlier case concerning these special courts, notably in *Incal.*[98] As regards the Applicant's just satisfaction claims, the Court considered that the finding of a violation constituted in itself sufficient compensation for any non-pecuniary damage suffered by the Applicant. However, for the first time, the Court indicated the measure to be taken to remedy the situation giving rise to the violation in question. It held:

> *"27. Where the Court finds that an applicant has been convicted by a tribunal which is not independent and impartial within the meaning of Article 6 § 1, it considers that, in principle, the most appropriate form of relief would be to ensure that the applicant is granted in due course a retrial by an independent and impartial tribunal."*

This ruling was recently followed by the Grand Chamber in the case of *Öcalan v. Turkey.*[99] In this case, the Court found a violation of Articles 3, 5 and 6 of the Convention on the grounds that Öcalan was not brought before a judge promptly after his arrest, that he was denied a fair hearing by an independent and impartial tribunal, and that he was sentenced to death following an unfair trial. As part of his just satisfaction claims the Applicant asked the Court to order a retrial by an independent and impartial court in which he would enjoy full defence rights, his transfer to a prison in the mainland, and finally facilitation of his contact with members of his family and lawyers.

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[94] Robin C.A. White, *European Convention on Human Rights*, p. 425.

[95] *Incal v. Turkey*, 22678/93 [1998] ECHR 48 (9 June 1998).

[96] *Sürek v. Turkey (no. 2)* 24122/94 [1999] ECHR 52 (8 July 1999).

[97] 53431/99 [2003] ECHR 536 (23 October 2003).

[98] 22678/93 [1998] ECHR 48 (9 June 1998).

[99] 46221/99 [2005] ECHR 282 (12 May 2005).

The Court examined these specific requests under Article 46 of the Convention. It recalled that its judgments were essentially declaratory in nature and that, in general, it was primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention.[100] The Court went on to state that, exceptionally, with a view to assisting the respondent State to fulfil its obligations under Article 46, the Court will seek to indicate the type of measure that might be taken in order to put an end to a systemic violation. In such circumstances, it may propose various options and leave the choice of the measures and their implementation to the discretion of the State concerned.

The Grand Chamber of the Court endorsed the general approach adopted in the above-mentioned case-law. It held that where an individual, as in the instant case, had been convicted by a court which did not meet the Convention requirements of independence and impartiality, a retrial or a reopening of the case, if requested, represented in principle an appropriate way of redressing the violation. However, it pointed out that the specific remedial measures required of a respondent State in order to discharge its obligations under Article 46 of the Convention must depend on the particular circumstances of the individual case and must be determined in the light of the terms of the Court's judgment in that case, and with due regard to the above case-law of the Court.

It is to be noted that a Chamber of the Court has adopted a similar stance in a case against Italy where the finding of a breach of the fairness guarantees contained in Article 6 was not related to the lack of independence or impartiality of the domestic courts. [101]

Cases involving serious human rights violations

The Court has indicated specific measures to remedy serious breaches of the Convention. In *Assanidze v. Georgia,*[102] the Applicant was accused of unlawfully possessing and handling firearms and kidnapping a person. Despite his acquittal by the Supreme Court of Georgia on 29 January 2001, he was not released by the authorities of the Ajarian autonomous republic in Georgia. More than three years later, he remained in custody in a cell at the Short-Term Remand Prison of the Ajarian Security Ministry. The Court accordingly found that since 29 January 2001 the Applicant had been arbitrarily detained, in breach of Article 5 § 1.

When examining the Applicant's just satisfaction claims, the Court reiterated that it was for States, subject to supervision by the Committee of Ministers, to decide on and take measures to put an end to any violations that are found. But having regard to the particular circumstances of the case and the urgent need to put an end to the violation of Articles 5 § 1 and 6 § 1 of the Convention, the Court held that Georgia had to secure the Applicant's release at the earliest possible date.

Another case where the Court indicated specific measures to be taken by a respondent State to discharge its obligations under Article 46 is *Güngör v. Turkey.*[103] The Applicant's son was killed in an

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[100] See, e.g., *Brumărescu v. Romania* (just satisfaction), 28342/95 [2001] ECHR 47 (23 January 2001) at 20.

[101] *Somogyi v. Italy*, 67972/01 [2004] ECHR 203 (18 May 2004) at 86.

[102] *Assanidze,* 71503/01 [2004] ECHR 140 (8 April 2004), at 202.

[103] 28290/95 [2005] ECHR 169 (22 March 2005).

official apartment in the parliamentary quarter of Ankara in June 1991. Criminal and parliamentary investigations did not lead to the assailants being identified. The Court held that there had been a violation of Articles 2 and 13 of the Convention as regards the manner in which the investigation was conducted. It reasoned, *inter alia*, that although the investigators had considered it necessary to obtain statements from members of parliament living in the parliamentary quarter at the time of the murder, and although there was no legal obstacle to prevent them from doing so, they had not taken all the necessary statements. This judicial failure and the superficial and summary nature of the statements obtained from certain members of parliament had prevented the main facts of the case from being established.

The Court did not award the Applicant non-pecuniary damages. However, it pointed out that Turkey needed to take appropriate measures without delay to discharge, in accordance with the Court's judgment, its obligations to ensure that its legislation was clarified, so that parliamentary immunity could no longer operate in practice to prevent prosecutions for ordinary criminal offences in cases in which members of parliament or their families were involved as possible witnesses or suspects.

There is no judgment where the Court specifically indicated, as part of a just satisfaction under Article 41, a type of measure that might be taken by the respondent State to remedy the suffering of the victim of torture or other forms of ill-treatment. Nevertheless, in some cases the Court has pointed to certain flaws in the legislation or practice of States giving rise to a systemic violation of Article 3 of the Convention. In the case of *Abdülsamet Yaman v. Turkey*,[104] which concerned torture of the Applicant during his detention in police custody and where the criminal proceedings against the accused were discontinued on the ground that the prosecution was time-barred, the Court pointed out that where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an "effective remedy" that criminal proceedings and sentencing are not time-barred, and that the granting of an amnesty or pardon should not be permissible. The Court also underlined the importance of the suspension from duty of the agent under investigation or on trial, as well as his dismissal if he is convicted.[105]

In some cases involving allegations of ill-treatment or other serious violations of the Convention, the parties agreed to settle their cases on the basis of friendly settlement declarations proposed by the Registry of the Court. In these declarations, the respondent governments have accepted a) the alleged violation(s), b) to take necessary measures to prevent similar violations in the future, and c) to pay compensation to the victims. So, although the Court is not empowered under the Convention to order a State to carry out specific measures of reparation or to change its law or practice in any particular way, it has achieved to make States undertake these measures by way of friendly settlement judgments containing the aforementioned type of declarations.

In the case of *Kalin, Gezer and Otebay v. Turkey*[106] which concerned alleged ill-treatment inflicted on the Applicants during their detention in police custody, the parties submitted formal declarations accepting a friendly settlement. The Turkish Government accepted in the declaration that the treatment suffered by the Applicants gave rise to a violation of Article 3 of the Convention. The Government also undertook to issue appropriate instructions and adopt all necessary measures to

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[104] 32446/96 [2004] ECHR 572 (2 November 2004)

[105] See Conclusions and Recommendations of the United Nations Committee against Torture: Turkey, 27 May 2003, CAT/C/CR/30/5.

[106] 24849/94;24850/94;24941/94 [2003] ECHR 550 (28 October 2003).

ensure that the prohibition of such acts and the obligation to carry out effective investigations are respected in the future. They further offered each of the Applicants monetary compensation. Following acceptance of the Government's declaration the Applicants agreed to settle their case and the case was struck from the list of the Court's cases by a decision of 28 October 2003.

Although the Court's judgments are declaratory in nature and the Court is not empowered to order consequential measures against Contracting States, recent practice indicates a new willingness of the Court to assist the Committee of Ministers in the execution process and also to give some guidelines in its judgments to the respondent States to remedy the consequences of a violation of the Convention. Accordingly, the Court might in the future, not only award damages to torture victims but also indicate the specific measures that States might take to remedy the situation giving rise to the violation, such as reopening the criminal proceedings against the perpetrators of torture.

The Council of Europe

As described earlier, the ECHR provides a specific mechanism to enforce the judgments of the European Court of Human Rights. Article 46 (former Articles 53 and 54) of the ECHR establishes the binding nature of the Court's judgments and the procedure for automatic and systematic supervision of their execution. This supervisory task was entrusted since the very beginning to the Committee of Ministers, which has thus become a Convention organ. As observed by the Court, the execution of judgments is an integral part of proceedings under the ECHR.[107]

As listed in the Committee of Ministers' Rules for the application of Article 46 of the ECHR (Rule 3b), there are three major types of enforcement measures: payment of just satisfaction to the victim, specific individual measures to ensure *restitutio in integrum*, and general measures to prevent future violations of the same nature.

In cases where the Court has found serious human rights violations, like torture, compensation for damages and costs is generally paid by the respondent State to the Applicant. Default interest is also paid if there is a delay. The Committee of Ministers is kept informed of the payment and there is usually no difficulty in ensuring respect for this obligation. However, the execution of the Court's judgments is not limited to payment of compensation. Once the payment is made, the Committee of Ministers will consider whether other measures could and should be taken to erase the remaining effects of the violation as well as those measures necessary to prevent similar violations in the future. These types of measures have proved to be more problematic to enforce.

Specific individual measures to ensure restitutio in integrum

Following the principles of general international law, the European Court has consistently required from the respondent State *restitutio in integrum* for the Applicant, in other words, an end to the violation of the Convention and to make full reparation for its consequences in such a way as to restore as far as possible the situation existing before the violation.[108] The Committee is

[107] See *Hornsby v. Greece*, 18357/91 [1997] ECHR 15 (19 March 1997) at 40, where the Court considers the execution of a judgment given by any court as an integral part of the "trial" for the purposes of Article 6.

[108] *Papamichalopoulos v. Greece*, 14556/89 9.ECHR .8. ECHR, 31 October 1995 at 34.

responsible to ensure enforcement of this obligation.[109] Although *restitutio in integrum* is not possible in cases of serious human rights violations that involve an irreparable harm, there are aspects of the violation that can be redressed through other measures. For example, the Court has recognised that there are procedural aspects of Articles 3 of the Convention which impose an obligation to conduct a thorough and effective investigation capable of leading to identification and punishment of those responsible.[110] The Committee is thus charged with ensuring that the State discharges its procedural obligations in respect of any substantive violation.

In practice, the Committee of Ministers has often decided to supervise domestic investigations in cases of procedural violations of the right to life and the right not to be subjected to torture and ill-treatment. Recently, in the context of the execution by the United Kingdom of the Court's judgments in *McKerr* and 5 similar cases,[111] the Committee confirmed its *"consistent position, that there is a continuing obligation to conduct [effective] investigations inasmuch as procedural violations of Article 2 were found in these cases."* [112] However, the supervision by the Committee of Ministers of the conduct of such investigations is complex. Such investigations and their outcome depend on different factors, including the Applicant's role and participation in the enforcement stage, the details and precision of the Court's findings, and the feasibility of fresh investigative and other remedial measures.

As with all other individual measures, an important factor is the position of the Applicant, as well as their success in using their procedural rights both at the domestic level and before the Committee of Ministers - although it is worth noting that the role of the Applicants before the Committee is still not formally established. According to the Committee's Rules, the information on execution of judgments and the documents relating thereto are in principle accessible to the public, unless the Committee decides otherwise (Rule 5). In addition, any communication from the injured party with regard to the payment of the just satisfaction or the taking of individual measures is brought to the attention of the Committee (Rule 6). Thus, if the Applicant does not show any interest in pursuing a domestic investigation, this may be a reason for the Committee to discontinue the examination of the matter.[113] Conversely, an Applicant's lawyer's insistence and active use of available domestic remedies to promote fresh investigation has been of great assistance to the Committee's supervision.[114]

In one recent case concerning Turkey, the Applicant indicated to the Committee that he would not accept the Court's award of an amount for just satisfaction, and requested instead that the perpetrators of his brother's killing be identified, prosecuted and punished.[115] The Committee supervised the investigation of the case and also requested information concerning the possibilities

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[109] *Akdivar v. Turkey*, 21893/93 [1998] ECHR 25 (1 April 1998) at 47.

[110] e.g. *Aksoy v. Turkey*, 21987/93 [1996] ECHR 68 (18 December 1996), at 98.

[111] *supra note 84*.

[112] Interim Resolution ResDH(2005)20. An important development took place after this report was presented on 2 June 2005. In its decision of 21 July 2005 in the *Hirst* case, the Court of Appeal largely followed the Committee of Ministers' position expressed in Interim Resolution DH(2005)20. The Court of Appeal stated, *inter alia,* that Section 3 of the 1998 Human Rights Act, which limited its application to the facts that occurred after its entry into force, "is to be read and given effect in a way that is compatible with the United Kingdom's international duty under Article 2 of the ECHR". As a result, the Court upheld the lower court's decision ordering the Coroner to resume the inquest, even though the death of the Applicant's son occurred prior to the entry into force of the Human Rights Act on 2 October 2000. [2005] EWCA 890.

[113] See *Denizci and others v. Cyprus*, CM/Del/OJ/DH(2005)922 Volume I Public, p.97.

[114] See *McKerr* and 5 similar cases v. the United Kingdom, Interim Resolution ResDH(2005)20 and CM/Inf/DH(2005)21rev of 1 June 2005, p.25-31.

[115] *Ağdaş v. Turkey*, judgment of 27 July 2004, CM/Del/OJ/DH(2005)928 Vol. I Public, p. 27.

of reopening the criminal proceedings.[116]

The precision of the Court's findings is another important factor for enforcing individual remedial measures. For example, in the aforementioned *McKerr* and other similar cases, the Court identified in detail a number of specific shortcomings in domestic investigative proceedings. It has therefore been easier for the lawyers to claim – and for the authorities and the Committee to ensure – that the impugned shortcomings be remedied.

On the other hand, there may be both legal and factual obstacles to successfully remedying procedural shortcomings in the protection against torture and other grave abuses. As regards the legal obstacles, there have been cases when domestic statutes of limitation have barred criminal investigations.[117] While the extension of the limitation periods may be appropriate, in principle legal reforms cannot apply retroactively (*cf.* Article 7 of the ECHR). The Committee therefore has taken the position that extension or removal of limitation periods may be appropriate in respect of future cases; it is difficult to apply it to the case in question because of the problem of retroactivity. In such cases the Committee has explored other remedial measures (e.g. disciplinary proceedings)[118] but they may also encounter similar legal obstacles, and such other measures might not be sufficient to adequately redress the violation(s).[119]

The factual context of the violations can also engender difficulties. For example, violations committed during a large-scale military conflict present particular complexities.[120] The circumstances in which these violations occurred, their massive character and the long time that lapses since the event, make it more difficult to conduct effective domestic investigations. It falls within the Committee's duty to determine in close dialogue and cooperation with the respondent State what can and has to be done to comply with the Court's judgments in such cases. The Committee may also follow-up these issues in the context of supervision of general measures rather than proceedings on a case-by-case basis.

Despite these obstacles, the need for conducting an effective investigation is increasingly raised by the Committee of Ministers in its supervision of the execution of judgments. In cases of procedural violations of the right to life, the Committee recently recalled that an "effective" investigation means one that is *"capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible."*[121]

The enforcement of the Court's judgments also comprises the adoption of general measures to prevent future violations. In practice, the Committee of Ministers pays particular attention to the States' compliance with the obligation to take general measures, since it considers that such measures constitute the essence of the ECHR mechanism.

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[116] At the time of writing the Committee was still awaiting this information.

[117] E.g. *Pantea v. Romania*, judgment of 3 June 2003, CM/Del/OJ/DH (2005)922 Vol. I Public, p.24; *Kmetty v. Hungary*, judgment of 16 December 2003, CM/Del/OJ/DH(2005)928 Vol. I Public, p.13; *Batı and others v. Turkey*, judgment of 3 June 2004, p.26.

[118] *Batı and others v. Turkey, ibid* note 117.

[119] *Pantea v. Romania,* ibid note117.

[120] e.g. *Cyprus v. Turkey*, judgment of 10 May 2001, Interim Resolution DH(2005)44; cases concerning violations by the security forces in South–East Turkey, Interim Resolutions DH(99)434, DH(2002)98, DH(2005)43).

[121] Interim Resolution ResDH(2005)20.

Member States have adopted more than 350 constitutional, legislative, regulatory reforms, or other general measures to comply with the Court's judgments, and more than 400 of such reforms or measures are presently being supervised by the Committee of Ministers in cases still pending before it.[122] The Committee has stressed on several occasions that "*the necessity of taking such measures is all the more pressing in the case of repeated violations as serious as those (…) resulting from torture, inhuman treatment, destruction of property, illegal killings and disappearances.*"[123]

As in any case, the first step is to identify whether the violation found by the Court is due to an isolated incident or reveals a pattern. In the former situation, the general measures could be limited to the publication of the judgment, its dissemination to the authorities concerned as well as the awareness raising and training of members of security forces in the light of the Court's conclusions.[124] In *Selmouni v. France*[125] the Court's finding of torture has, in addition, been followed by the establishment of a National Commission for policing ethics and security. This organ monitors the adherence by all security personnel of existing rules of professional conduct.[126]

In cases where the violations reveal a structural problem, the respondent State has to identify under the Committee's supervision the appropriate measures to prevent new similar violations. Once such measures are identified, the Committee supervises their adoption and assesses their efficiency to achieve the result required. However, the experience of the Committee, particularly in the execution of judgments in numerous cases concerning Turkey, has shown that the prevention of torture and ill-treatment is a multidimensional and time-consuming process. Following the first finding of the violation of Article 3 in *Erdagöz v. Turkey,*[127] the Committee closed its supervision of general measures after comprehensive legislative reforms and administrative measures which *prima facie* appeared to significantly strengthen the protection against torture and ill-treatment in police custody.[128] Later judgments of the Court and reports of the Commission showed that the measures adopted following the *Erdagöz* case were insufficient for the effective prevention of torture and ill-treatment in Turkey. Additional serious shortcomings were revealed in the regions subject to the emergency rule in the south-east of the country.

The Committee accordingly considered these matters in more depth and supervised the implementation of additional comprehensive reforms by Turkey.[129] A number of specific measures were also undertaken following judgments concerning events under emergency rule. Among the major issues that have been and continue to be addressed by Turkey under the Committee's supervision are the reform of the constitutional, legal and regulatory framework for security forces; change of attitude of the security personnel through detailed instructions, awareness-raising, training and deterrence; and the setting up of domestic remedies to guarantee effective investigation and training of magistrates with a view to ensuring direct effect of the

[122] Presentation by Mikhail Lobov, Legal Officer / Administrator of the Department for the Execution of Judgments of the European Court of Human Rights, Directorate General II - Human Rights of the Council of Europe.

[123] Interim Resolutions DH(99)434 and DH(2002)98 concerning the action of the Turkish security forces.

[124] E.g. *Ribitsch v. Austria*, judgment of 4 December 1995, Resolution DH(97)351).

[125] 25803/94 [1999] ECHR 66 (28 July 1999).

[126] CM/Del/OJ/OT(2001)757, p.65.

[127] 21890/93 [1997] ECHR 85 (22 October 1997).

[128] See Resolution (96)17.

[129] See *Yağiz v. Turkey*, Resolution DH(99)20 and *Sur v. Turkey*, Resolution DH(99)26).

Court's judgments in Turkish law.[130] The Committee of Ministers continues its supervision of the execution of more than 70 ECHR judgments concerning violations by the Turkish security forces, with specific focus on effective implementation of the prohibition of torture and other ill-treatment. In this respect, the Committee has noticed the direct effect increasingly granted to the Court's judgments by Turkish courts.[131]

There are other examples of enforcement of judgments through adoption of comprehensive general measures. The United Kingdom is in the process of adopting important reforms in order to prevent new violations of the right to life similar to those committed by the security forces in Northern Ireland.[132] Cyprus has adopted a number of reforms to further protection against abuses in police custody and to render its domestic remedies against such abuses more effective.[133]

The Committee has also been engaged in the supervision of general measures adopted or being taken by Turkey following the Court's judgment in the *Cyprus v. Turkey* [134] which concerned *inter alia* a violation of Article 2 in respect of Greek Cypriot missing persons in Cyprus. In this case, the Committee recently adopted an Interim Resolution which takes stock of the general measures taken and notably "*calls upon Turkey to envisage the necessary further measures so that the effective investigations required by the Court's judgment can be conducted as soon as possible*".[135]

c. The Inter-American System

The Inter-American Commission of Human Rights monitors compliance with treaty obligations for the 25 States Parties to the American Convention on Human Rights (the Convention).[136] The Commission also monitors compliance for the 10 Member States that are not yet Parties to the Convention by applying the American Declaration of the Rights and Duties of Man.[137] The Inter-American Court of Human Rights monitors compliance under the Convention for the 17 States Parties to the Convention that have also recognised the compulsory jurisdiction of the Court pursuant to Article 62 of the Convention.[138]

The Inter-American Court has exercised extensive powers to ensure implementation of the awards made to victims, establishing for example, trust funds overseeing payments. Indeed it does

[130] See for details Interim Resolutions DH(99)434, DH(2002)98 and DH(2005)43).

[131] See Interim Resolution DH(2005)43).

[132] See aforementioned *McKerr* and other similar cases, Interim Resolution DH(2005)20.

[133] See aforementioned *Egmez v. Cyprus*, CM/Del/OJ/DH(2004)906 Vol. I Public, p. 110 and *Denizci v. Cyprus* CM/Del/OJ/DH(2005)922 Volume I Public, p.97.

[134] 25781/94 [2001] ECHR 331 (10 May 2001).

[135] Interim Resolution DH(2005)44.

[136] Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay and Venezuela.

[137] Antigua and Barbuda, Bahamas, Belize, Canada, Guyana, St. Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines and US. In other words, only common law, English-speaking countries are still reluctant to become full participants in the inter-American human rights system. The 10th country which has not yet ratified the Convention is Cuba. Resolution VI of the Eighth Consultative Meeting of Ministers of Foreign Affairs (1962) excluded `the present government of Cuba from participation in the inter-American system'.

[138] Argentina, Bolivia, Brazil ,Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Mexico, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay, and Venezuela.. The Dominican Republic announced recently its intention to accept the Court's contentious jurisdiction. This will mean that all of the Latin American countries will be under the jurisdiction of the Inter-American Court.

not close a case until there has been full compliance with all remedial orders and awards.[139] However, neither the American Convention nor the Court's Statute and Rules of Procedure indicate a procedure that should be followed to ensure compliance with the Court's judgments or provisional measures that are ordered.

The Court has required the responsible State to present reports detailing its compliance with decisions of the Court. The Inter-American Commission and the victims or their legal representatives, submit comments on these reports. The Court also issues orders or sends communications to the responsible State to express its concern in relation to aspects of the judgment for which compliance remains outstanding in order to urge the State to comply with specific measures of reparation. Such communications may provide instructions for compliance and clarify aspects relating to the execution and implementation of reparations measures when there is a dispute between the parties.

The Court will only issue an order or comments on compliance after it examining the reports and comments that it has received from the parties. The Court has considered that it could hold a public hearing on compliance of the judgment if it finds it necessary, and it did do so in the *El Amparo Case*.[140] In practice, the Court has issued orders and instructions on compliance in all contentious cases. While monitoring compliance, the Court sometimes modified the reparations decisions. In the *Caballero Delgado* and *Santana Case*, for example, the Court modified its judgment to authorise the parties to invest in term deposit certificates rather than to create a trust fund, because this was the most favourable arrangement for the minor beneficiaries.[141]

In *Baena-Ricardo*, Panama challenged for the first time the competence of the Court to monitor compliance with its decisions. The Court rejected the challenge stating:

> *"Its jurisdiction includes the authority to administer justice; it is not restricted to stating the law, but also to encompass monitoring compliance with what has been decided. It is therefore necessary to establish and implement mechanisms or procedures for monitoring compliance with the judicial decision, an activity that is inherent in the jurisdictional function".*[142]

In other words, the Court said that without compliance the *raison d'être* for the functioning of the Court would be imperilled. As to the legal grounds, the Court derives this power from a joint reading of Articles 33, 62 and 65 of the American Convention. In this respect, the Court contrasted its powers with those contained in Article 46 of the European Convention on Human Rights, concerning the role of the Committee of Ministers. The Court noted that the drafters of the American Convention chose not to follow the European model but instead provided in Article 65 that the Court must indicate the cases in which a State has not complied with its judgments, with the pertinent recommendation of the Court. Additionally, the Court notes that the General Assembly of the OAS has accepted the Court's monitoring function and the Court has exercised this function and all involved have accepted it.[143]

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[139] Shelton (2005), supra note 1.

[140] *El Amparo Case* - Series C No. 19 [1995] IACHR 2 (18 January 1995).

[141] *Caballero Delgado* and *Santana Case,* compliance with judgment. Order of the IACHR of 4 Dec. 2001 and Note CDH-10.319/643 of 20 Jan. 1999.

[142] *Baena-Ricardo Case*, Judgment of November 28, 2003, Inter-Am. Ct. H.R., (Ser. C) No. 104 (2003), para 82.

[143] In 1994, The General Assembly adopted a recommendation to Suriname urging the government of Suriname to inform the Court about Compliance. See AG/RES.1330 (XXV-O/95) of 9 June 1995.

In this regard, the Inter-American Commission has interpreted the obligations contained in Articles 1 and 2 of the American Convention as imposing a duty on States to comply with the recommendations made by the Commission. In its 1997 Annual Report, the Commission explicitly urged States to "*comply with the recommendations made in its reports on individual cases and to abide by the request of provisional measures*". It further invited States *"to adopt legal mechanisms for the execution of the recommendations of the Commission in the domestic sphere"*.[144]

If the State does not comply with a judgment of the Court, the Court notes the specific instances of non-compliance and formulates pertinent recommendations in its annual report to the General Assembly of the OAS.[145] However, this procedure falls short of the enforcing powers that the Court requires to command executions of its judgments. An example of this is the account of the Court's attempted use of the procedure to force Honduras to comply with its judgment as interpreted in the *Velásquez Rodriquez* and *Godinez Cruz* cases, an attempt which was unsuccessful. Although Honduras had paid the compensation originally ordered by the Court in these cases, albeit late, it refused to pay the Court-ordered interest and additional amount resulting from its failure to make the payment on time, before the devaluation of its currency. Consequently, the Court included a resolution detailing Honduras' non-compliance in its yearly report, which it expected to present to the General Assembly of the OAS. Due to the extensive lobbying campaign of Honduras, however, this statement was never officially presented to the General Assembly. Honduras reportedly threatened to withdraw its acceptance of the contentious jurisdiction of the Court if the General Assembly was to read the Court's condemnation. After an extended delay the Honduran Government paid the full compensation ordered by the Court, but its successful campaign to block OAS efforts to oversee compliance with Court judgments may make that avenue untenable in future.

Reparation Judgments by the Inter-American Court

The Commission makes recommendations to States and conducts *in loco* visits and produces reports on such visits. Judgments issued by the Court are binding and the Court has in the past issued a range of remedies to redress the damage caused to individuals and to redress systematic and structural deficiencies in the State.

The Court has been sensitive toward victims' needs and has granted most of their requests by establishing substantively elaborated reparations, based on the first paragraph of article 63 of the American Convention, which provides for *restitution in integrum*:

> *"1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."* [146]

[144] Inter-Am. Comm. H.R., Annual Report of the IACHR 1997, at Ch. VII, para. 12 and 13, OEA/Ser.L/V/II.98 doc.6 rev. (1998) Cited in Shelton 2003.

[145] Under Article 65 of the American Convention.

[146] Article 63.1, American Convention on Human Rights. Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969.

Apart from compensation, the Court has ordered measures to bring full reparation to the victim, such as the releasing of persons unjustly incarcerated;[147] the prosecution of alleged offenders; the provision of medical and psychological treatments, [148]and the granting of scholarships to the victim[149] or their relatives.[150]

It has also ordered guarantees of non-repetition through legal reform; [151] training of law-enforcement officials;[152] adoption of a national plan for children and adolescents who have had conflicts with the law;[153] the creation of DNA databases that would facilitate the identification of disappeared persons;[154] and the implementation of detainees' records to enable control of legality of the detentions.[155] The Court has also ordered symbolic reparations for the victims or their relatives. For example, by naming a street[156] or a school[157] in memory of the victims or adopting a day to remember them;[158] the enactment of a development plan in rural communities;[159] the presentation of public apologies to the victims; publication of the judgment or parts of it in the

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[147] *Case of Loayza-Tamayo* vs. *Peru*. Judgment of September 17, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 33 (1997), at para. 84.

[148] The Court has ordered medical and/or psychological treatment for direct victims. See, *inter alia*, I/A Court H.R., *Case of Children´s Rehabilitation* vs. *Paraguay*. Judgment of 2 September 2004. Series C No. 112, at paras. 318 to 320; *Case of Plan de Sánchez Massacre vs. Guatemala*. Judgment of 29 April 2004. Series C No. 105, at paras. 107 and 108; *Case of Barrios Altos* vs. *Peru. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of 30 November 2001. Series C No. 87, at para. 42. The Court has also ruled that medical and psychological treatment must be given to the victims or their next of kin. See, I/A Court H.R., *Case of Cantoral-Benavides* vs. *Peru. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of 3 December 2001. Series C No. 88 at para. 51.e; *Case of Serrano Cruz Sisters v. El Salvador.* Judgment of 1 March 2005. Series C No. 120, at paras 197 to 200.

[149] The Court decided that "The best way to restore Luis Alberto Cantoral Benavides' life plan is for the State to provide him with a fellowship for advanced or university studies, to cover the costs of a degree preparing him for the profession of his choosing, and his living expenses for the duration of those studies, at a learning institution of recognized academic excellence, which the victim and the State select by mutual agreement." I/A Court H.R., *Case of Cantoral-Benavides vs. Peru. Reparations* (Art. 63(1) American Convention on Human Rights), Inter-Am. Ct. H.R., (Ser. C) No. 88 (2000), at para. 80.

[150] I/A Court H. R., *Case of the "Gómez-Paquiyauri Brothers"* vs. *Peru.* Judgment of 8 July 2004. Series C No. 110, at para. 237; *Case of Barrios Altos* vs. *Peru. Reparations, supra* nota 2, at para. 43. Also, In the *Mack* case the Court ordered that "the State must establish a scholarship, in the name of Myrna Mack Chang, to cover the complete cost of a year of study in anthropology at a prestigious national university. The said scholarship must be granted by the State permanently every year. I/A Court H. R., *Case of Myrna Mack-Chang vs. Guatemala*. Judgment of 25 November 2003. Series C No. 101, at para. 285.

[151] For example, in the Barrios Altos case, the Court held that "Amnesty Laws No. 26479 and No. 26492 are incompatible with the American Convention on Human Rights and, consequently, lack legal effect." I/A Court H.R., *Case of Barrios Altos* vs. *Peru*. Judgment of 14 March 2001. Series C No. 75, at operative paragraph No. 4; also, paras. 41 to 44. Also, in the Villagrán Morales case, it ordered to adopt children's legislation. See, Also, Case of the "Street Children" vs. Guatemala. (Villagrán-Morales et al.). Reparations (Art. 63(1) American Convention on Human Rights). Judgment of 26 May 2001. Series C No. 77, at para. 98.

[152] I/A Court H.R., *Case of Del Caracazo vs. Venezuela. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of 29 August 2002. Series C No. 95, at para. 127; *Case of Tibi* vs. *Ecuador.* Judgment of 7 September 2004. Series C No. 114, at paras. 262 to 264; *Case of Myrna Mack-Chang vs. Guatemala*, Judgment of 25 November 2003. Series C No. 101, at para. 282.

[153] I/A Court H.R., *Case of Children's Rehabilitation* vs. *Paraguay*, Judgment of 2 September 2004, I/A Court H. R., (Ser. C) No. 112 (2004), at paras. 316 and 317.

[154] I/A Court H. R., *Case of Molina-Theissen vs. Guatemala. Reparations* (Art. 63.1 American Convention on Human Rights). Judgment of 3 July 2004. Series C No. 108, at para. 91.b); *Case of Serrano Cruz sisters* vs. *El Salvador,* Judgment of 1 March 2005. Series C No. 120, at paras. 192 and 193.

[155] I/A Court H. R., *Case of Juan Humberto Sánchez vs. Honduras*. Judgment of 7 June 2003. Series C No. 99, at para. 189; *Case of Bulacio vs. Argentina.* Judgment of 18 September 2003. Series C No. 100, at para. 132; *Case of the "Panel Blanca" vs. Guatemala. (Paniagua-Morales et al.). Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of 25 May 2001. Series C No. 76, at paras. 195 and 203.

[156] I/A Court H.R., *Case of Myrna Mack-Chang vs. Guatemala*, Judgment of 25 November 2003. Series C No. 101, at para. 286.

[157] I/A Court H.R., Case of the "Street Children" vs. Guatemala. (Villagrán-Morales et al.). *Reparations*, *supra*, note 151, at para. 103; Case of Molina-Theissen vs. Guatemala. *Reparations*, *supra* note 154, at para 88; *Case of the "Gómez-Paquiyauri Brothers"* vs. *Peru*, *supra* nota 150, at para. 236.

[158] *Case of Serrano Cruz sisters* Vs. *El Salvador, supra* note 154, at para.196.

[159] *Case of Plan de Sánchez Massacre vs. Guatemala, supra* note 148, at paras. 109 and 110.

official[160] and/or military journals.[161]

However, this has been not only the Court's main virtue but also one of its greatest weaknesses. On one hand the Court has been receptive to the real needs of justice for victims and their relatives, but on the other hand due to the difficulties of implementation, those parts of the judgment that deal with structural, institutional and legal reforms make the task of full compliance a real challenge.

Implementation of decisions/judgments

In the *Velasquez-Rodriguez* and *Godinez-Cruz* cases, the Court began a consistent practice of governing the mode of payment. The Court ordered payment of a lump sum within ninety days, free of taxes, or payment in six equal monthly instalments, beginning within ninety days. In the latter case, the remaining amount due was subject to interest at current rates in Honduras, so the Court ordered the establishment of a trust fund for the children, created in the Central Bank of Honduras *"under the most favourable conditions permitted by Honduran banking practice"*. The children received monthly payments from the fund until the age of 25 years, when it was distributed. On 6 September 1996, the Court ordered the *Velasquez-Rodriguez* and the *Godinez-Cruz* cases closed after it found that the Government had complied with the reparation orders.

As in the Honduras cases, the Court ordered the establishment of a trust fund in the *Aloeboetoe* case, only this time the Court ordered it to be established in United States dollars and administered by a foundation. The Court appointed the trustees of the foundation and Suriname was ordered to make a one-time contribution to the operating expenses and not to restrict or tax the foundation activities. In 1998, the Court found that the judgment had been complied with and closed the case.

Compensation has been paid in most cases, although there has been some 6 or 7 years of delay in payment.[162] For example, Peru and Guatemala (the countries with the highest number of decisions) have paid millions of dollars to the victims and/or their relatives. But compensation is not the only form of reparation ordered by the Court. When Peru complied with the Court's order to release Maria Elena Loayza Tamayo from prison,[163] a new level of State compliance was reached. In subsequent cases in which the Court declared a domestic law or judgment to be in violation of the American Convention, States amended the laws,[164] or domestic courts declared them to be unconstitutional,[165] or annulled judgments.[166]

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[160] This has been ordered since the reparations judgment of the Barrios Altos case. *Supra* note 151.

[161] The Court has determined that Colombia "must publish once, in the daily Official Gazette and in a press release of the National Police and of the Armed Forces of Colombia, the judgment on the merits issued by the Court on 6 December 2001 and chapter VI, Proven Facts, and operative paragraphs 1 to 4 of the instant judgment." I/A Court H.R., *Case of Las Palmeras vs. Colombia. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of 29 August 2002, Inter-Am Ct. H.R., (Ser. C) No. 95 (2002), at para. 75.

[162] Presentation by Alejandra Nuño, Legal Adviser, CEJIL/Mesoamérica

[163] *Loayza Tamayo v. Peru (Merits),* Judgment of September 17, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 33 (1997). para 84, op.para. 5.

[164] *Cantoral Benavides v. Peru (Reparations),* , Judgment of 3 December 2001, Inter-Am. Ct HR, Ser.C No.88, para 76.

[165] *Suarez Rosero v. Ecuador (Reparations),* , Judgment of 20 Jan 1999, Inter-Am Ct HR Ser.C. No.44 paras. 81-83.

[166] *Cesti-Hurtado v. Peru (Reparations),* Judgment of 31 May 2001, Inter-Am Ct HR Ser C, No.78, para 15.

However, there is another level of State compliance with Court ordered reparations that is not yet commonly observed in the Inter-American system. The Court, in almost every case, orders the State to investigate, prosecute and punish the individuals responsible for the human rights violations. These orders are seldom fulfilled. In many States impunity still reigns, and the State power structures lack the means or the will to bring the perpetrators of human rights violations to justice.[167]

Still, some orders by the Court have been unrealistic (e.g. that a State's Criminal Code be reformed in 30 days), since in order to comply with the Courts judgments, different organs within the State apparatus have to implement the measures ordered by the Court.

But despite the complexity there are several example of implementation. The legislative branches of many countries, in accordance with Article 2, have abolished laws or legal provisions that were contrary to the American Convention, as well as enacted new laws to guarantee the rights set out in it. Examples of adopted implementing legislation to pay damages ordered by the Court include Law 288 from Colombia,[168] the Habeas Corpus Law and Law 27775 in Peru,[169] and a Bill recently presented to the congress in Panama. As regards legislation to implement substantive provisions of the Convention, Guatemala adopted children's legislation as it was ordered to do in the *Villagrán Morales* case[170] and modified its civil legislation in order to eliminate discriminatory provisions against women identified by the Court in *María Eugenia Morales de Sierra.*[171] Mexico changed the state of Oaxaca's legislation to include the crime of forced disappearance (as part of a friendly settlement in two cases before the Inter-American Commission on Human Rights).[172] Judiciaries have also contributed to the compliance of decisions by quashing domestic judgments in violation of the American Convention.[173]

Importantly, several countries have also complied with the obligation to make public apologies to the victims for the violations they suffered. As an example, the Minister of Justice apologised to José Alberto Cantoral Benavides, a student tortured and accused of being a terrorist in Peru; President Toledo has also asked for forgiveness in several Peruvian cases before the Inter-American Commission.[174] In Honduras, President Maduro asked for forgiveness to the family of Juan Humberto Sánchez who was arbitrarily detained, tortured and murdered by the military. President Berger has also addressed the family of Myrna Mack Chang, an anthropologist killed by Guatemalan agents. Compliance with this form of reparation has been of special significance for the victims of human rights violations and their families, mainly because in most cases they and

[167] Pasqualucci*, The Practice and Procedure in the Inter-American Court of Human Rights* (Cambridge, 2004).

[168] Law 288, of 5 July1996.

[169] Law 27775, of 2004.

[170] *Case of the "Street Children" vs. Guatemala. (Villagrán-Morales et al.). Reparations*, supra, note 151.

[171] Inter American Commission on Human Rights, Report No. 4/01, Case 11.625. *María Eugenia Morales de Sierra (Guatemala).* 19 January 2001. Accessible at: http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Merits/Guatemala11.625.htm.

[172] Presentation by Alejandra Nuño, Legal Adviser, CEJIL/Mesoamérica.

[173] This has been possible, *inter alia*, in the *Canese* and *Trujillo Oroza* cases. See, *Case of Ricardo Canese* vs. *Paraguay.* Judgment of 31 August 2004, I/A Court H.R. Series C No. 111; *Case of Trujillo-Oroza* vs. *Bolivia. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of 27 February 2002. I/A Court H. R Series C No. 92.Also, something similar happened in a case before the Inter. American Comission on Human Rights; Report No. 2/99. Case 11.509. Manuel Manríquez San Agustín (Mexico) 23 February 1999. Accessible at: http://wwwserver.law.wits.ac.za/humanrts/cases/1998/mexico2-99.html .

[174] *Inter alia*, cases of *Leonor La Rosa*, *Mariela Barreto* and *General Robles* (pending before the Inter-American Commission on Human Rights).

their suffering have previously been ignored by the Governments of the State where the violations occurred.

Some States have also recognised the importance of conducting effective investigations and punishing the perpetrators of human rights violations and have created special units to investigate violations of human rights in their prosecutorial offices. This is the case, *inter alia* in Colombia, Guatemala and Peru. In Colombia, there is also a special team in charge of the security of persons, in favour of whom the Commission or the Court has ordered the adoption of special measures of protection (i.e. interim/precautionary measures).

Shortcomings in implementation: conducting effective investigations

As noted earlier, when it comes to implementation of the Court's judgments there are a number of shortcomings, in particular, the lack of effective investigations. This relates both to the identification, prosecution and punishment of alleged perpetrators of human rights violations, as well to the conduct of investigations to establish, for example, the location of disappeared persons.

Even though there have been some advances in this field,[175] this is still the main obstacle that the Inter-American system is facing. There are several reasons for this:

- Firstly, the time and place where the events occurred as well as the nature of the violations might prevent an effective investigation. Often the events will have occurred more than ten, twenty or even thirty years ago. Additionally, many of these cases involve massacres and/or systematic forced disappearances for which the collection of evidence is very difficult.

- Secondly, in many cases the alleged perpetrators are high ranking officers or even former presidents[176] who still hold significant political power within the country.

- Finally, States have argued that it is not possible to reopen already closed investigations or to retry individuals in order to comply with the Court's judgments, as this would breach the principle of *res judicata*. In this regard the Court recently ruled that trials in breach of due process guarantees and which are not held with the objective of bringing perpetrators to justice and to punish them (sham trials) cannot be considered as valid proceedings capable of raising issues of *res judicata*.[177]

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[175] *Trujillo Oroza* and *Canese* cases supra note 173.

[176] For example, ex president Alan García is currently been investigated for the events that occurred in the El Fronton prison (See cases *Neira Alegría vs Peru* Judgment of 19 January 1995, Inter-Am. Ct. H.R. (Ser. C) No. 20 (1995).and *Durand and Ugarte vs Peru* Judgment of 16 August 2000, Inter-Am. Ct. H.R., (Ser. C) No. 68 (2000)); ex president Fujimori and Vladimiro Montesinos are accused to be the masterminds of the Barrios Altos killings; ex president Rios Mont is involved in massacres perpetrated in the early 80's (including the Plan de Sánchez massacre); high ranking officials are also been investigated in the murder of Myrna Mack and in the massacre of Mapiripán in Colombia.

[177] According to the Court, "the development in the legislative and international jurisprudence […] has allowed the assessment of the so called sham trial ("cosa juzgada fraudulenta") which is the result of either a trial that has not respected due process guarantees, or of lack of judicial independence and impartiality. It has been probed beyond doubt […] that the domestic trial in this case was contaminated for such vices. Therefore, according to the standards of the American Convention, the State cannot invoke the domestic judgments issued without the above-mentioned requirements as an excuse that would free it from its international responsibility to duly investigate and sanction the perpetrators of human rights violations. […]" ICtHR, *Case of Carpio Nicolle Vs. Guatemala.* Judgment of 22 November 2004. Series C No. 117, at paras. 131 and 132 (unofficial translation).

Lack of a formal follow-up mechanism

Apart from the inherent difficulties in conducting effective investigations to comply with reparation judgments, another significant problem is the lack of supervision for compliance. Even though the Court and the Commission have established a practice to follow up their resolutions, there has been little political will within the OAS' organs to create a formal and effective mechanism to evaluate full compliance with the Court's and Commission's decisions.

In general, there is also a lack of domestic legislation to allow States to directly implement the decisions of the Commission and the judgments of the Court. Ideally, every State party to the American Convention should enact domestic legislation and implement public policies to ease the effective enforcement of the Commission/Court's decisions.

There is some evidence that States are starting to recognise this need. In Costa Rica, the headquarters agreement of the Court provides that decisions of the Court or the President have the same effect as judgments handed down by the domestic judiciary upon their transmission to the domestic administrative and judicial authorities. Colombia established a mechanism through law 288/96 to require the Government to pay damages resulting from human rights violations found by the institutions of the Inter-American system. Peru's law no. 23506 on *amparo* and *habeas corpus* recognises the binding nature of the Inter-American Court. The Honduran Constitution proclaims the validity and mandatory execution of international judicial decisions. Similarly, the Guatemalan, Nicaraguan and Argentinean constitutions specifically recognise human rights treaties as overriding domestic legislation, which facilitates the implementation of international judgments, and some domestic tribunals have also begun to acknowledge the importance of the Court's and Commission's resolutions.[178]

II.2 Universal (UN) Human Rights Treaty Monitoring Bodies

Several UN human rights treaties establish monitoring bodies with jurisdiction to review individual complaints of alleged breaches of States' treaty obligations. Allegations of torture and other ill-treatment can be brought for example, before the Human Rights Committee (HRC), the body in charge of monitoring the implementation of the International Covenant on Civil and Political Rights (ICCPR), and before the Committee against Torture (CAT), the body of independent experts in charge of monitoring compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). However, decisions under treaty-based individual complaints procedures are not *stricto sensu* legally binding.

a. Human Rights Committee

Albeit some exceptions, like the cases of *Lovelace v. Canada*[179] and *Aumeeruddy-Cziffra v. Mauritius,*[180] the HRC was hardly ever informed of what States Parties had done (or not done) to implement its

[178] E.g. Colombian Constitutional Court (*inter alia*, T 558-03 regarding precautionary measures or T 327-04, in relation to San José de Apartadó); Argentinean Supreme Court (Ekmekdjian. Miguel Angel c/ Sofovich, Gerardo y Otros).

[179] *Lovelace v. Canada*, Communication No. 24/1977, U.N. Doc. CCPR/C/OP/1 at 10 (1984).

[180] *Aumeeruddy-Cziffra v. Mauritius* Comm. No. 35/1978, UN Doc. A/36/40 (1981).

'Views' adopted under the Optional Protocol to the ICCPR. For this reason, the Committee recognised that the absence of a follow-up mechanism was a serious *lacuna* in the ICCPR monitoring machinery.

In 1993, the HRC asserted its implied powers to ensure compliance with its decisions, relying on Article 5(1) of the First Optional Protocol, which calls on it to 'consider' cases. According to the HRC *"the word 'consider' in Article 5, paragraph 1 of the Optional Protocol need not be taken as meaning consideration of a case only upon the adoption of a final decision, but consideration in the sense of engaging in those tasks deemed necessary to ensure implementation of the provisions of the Covenant".*[181] Based on this reasoning, the Committee instituted a follow-up procedure to ensure implementation of its recommendations, calling on States to provide information within ninety days about the measures taken in connection with the HRC's Views. As part of these mechanisms it also created a Special Rapporteur for Follow-Up on Views, whose mandate is for a two-year (renewable) term.

The HRC based its authority to establish such a procedure on the doctrine of implied powers, pursuant to which any international organ must enjoy certain implied powers to be able to carry out its functions. According to the HRC, States Parties ratify the Optional Protocol in good faith, intending to respect the Views of the HRC, and therefore the Committee would not act *ultra vires* by monitoring their implementation. Indeed, the HRC has emphasised the close link between the good faith fulfilment of the treaty obligations contained in Article 2 (3) of the ICCPR and compliance with the Views concerning remedies when a violation has been found in an individual case. Importantly, no State Party has challenged this legal authority to engage in follow-up activities.

In this sense, the Views cannot be seen as mere recommendations, and some domestic courts have implemented them accordingly.[182] Additionally, some countries have adopted specific legislative procedures to give effect to the Views in individual cases. For example, in Colombia, Law 288 of 5 July 1996 enables the enforcement of awards of compensation in accordance with the HRC Views, and in the Czech Republic, under Act No. 517/2002, the Ministry of Justice is in charge of coordinating the implementation of the Views. In Hungary, while there is no specific provision allowing the HRC Views to be given direct effect, the Code on Criminal Procedure provides that the decisions of international human rights organs are to be considered as "new evidence" for the purpose of reopening criminal cases.[183]

The HRC has discussed the *modus operandi* of the follow-up procedure on several occasions since its establishment in 1990. Rule 101 of its recently revised Rules of Procedure spells out the modalities of the follow-up procedure and Rule 103 stipulates that unless the HRC decides otherwise, all follow-up information and documentation is in the public domain. As already mentioned, the HRC gives a State Party ninety days to provide information on measures taken to comply with its Views, but in practice the 90-day deadline is generally insufficient for the majority of States to provide adequate follow-up information.

[181] A/CONF. 157/TBB/3 (1993).

[182] See e.g. Finland KHO (Supreme Administrative Court) 1993 A 25 and KHO 15 April 1996 No. 1069, both based on Committee views in individual cases.

[183] A similar provision was expected to be included in a new Code on Civil Procedure. See Final Report on the Impact of Finding of the United Nations Human Rights Treaty Bodies, Para 42, ILA (2004).

Follow-up is relatively straightforward if the State Party has domestic enabling legislation but unfortunately, examples of enabling legislation are rare. Peru had such legislation before taking it off the books in the late 1990's. Colombia passed enabling legislation in 1996, but the implementation mechanism of the law is restricted to monetary awards.[184] However, in its recommendations for an "appropriate remedy", the HRC does not make a recommendation for a specific monetary award, but expresses its recommendation in more general terms: appropriate compensation, release of the prisoner, amendment of legislation, etc.

If no follow-up information is forthcoming within a reasonable time after expiry of the deadline, the Special Rapporteur for Follow-up on Views will address a reminder to the State Party, again requesting the provision of follow-up information. If still no information is forthcoming, the Rapporteur may decide to organise direct follow-up consultations with State Party representatives to discuss possible avenues through which implementation of the Views may be facilitated and eventually secured.

It is also possible to organise a follow-up mission to a State Party that has experienced particular difficulties with the implementation of the HRC's recommendations. To date, the only follow-up mission that has taken place has been to Jamaica in 1995. The example of Jamaica also shows another limitation to the follow-up procedure. Partly because of a multitude of follow-up requests to the Jamaican authorities in 1995-6, the Jamaican Government withdrew from the Optional Protocol in October 1997. It has not considered re-ratification since then.

If States Parties do submit follow-up information, this is routinely transmitted to the victim and/or his/her representative and a summary is included in the follow-up chapter of the HRC's Annual Report to the UN General Assembly. The Special Rapporteur regularly presents "follow-up progress reports" to the Committee plenary. Since 1994, follow-up activities under the Optional Protocol have been reflected in a separate chapter, now generally chapter 6 of the Annual Report. . However, the 1996-8 practice of shaming non-compliant States Parties by highlighting them in a special and highly visible "black list" in the follow-up chapter has been discontinued.

Some States Parties do provide follow-up information indicating that they will implement the Views and provide remedial action, for example, by releasing the victim from custody, providing compensation, or amending legislation. In the cases of *Ignatane v. Latvia*[185] *and Leirvag/Norway,*[186] information was received suggesting that there had been changes to the law and practice of compulsory religious education in primary schools. Other States, however, send follow-up replies that constitute belated submissions on the merits of the case. In these replies States tend to challenge the decision on the basis of perceived factual errors, while other follow-up replies have challenged the HRC's findings and legal reasoning.[187] Finally, there are States parties that have not provided follow-up information in spite of numerous reminders and direct contacts (e.g. the DRC).

[184] Law 288 of 5 July1996, (http://www.mindefensa.gov.co/politica/legislacion/normas/1996_288_ley_con.rtf) enables the enforcement of awards of compensation made by international bodies such as the Human Rights Committee to be enforced in domestic law. In the Czech Republic under Act No. 517/2002 Coll. of Laws on Some Measures in the System of Central State Organs, the Ministry of Justice has been charged with the co-ordination of the implementation of the views of the UN Human Rights Committee.

[185] *Ignatane v. Latvia* No.884/1999, U.N.Doc.CCPR/C/72/D/884/1999(2001).

[186] Leirvag and other v. Norway, 1155/2003, Views of 3 November 2004, follow-up information of February 2005.

[187] *A v. Austrailia* No 560/1993, UN Doc.CCPR/C/59/D/560/1993(1997).

Where no follow-up information has been received or it is insufficient, the HRC seeks information in the context of examination of the State party's next periodic report under article 40 of the ICCPR. The HRC has in the past four years questioned a number of governments as to the reasons for non-compliance with its decisions (e.g. Australia, Dominican Republic, Russian Federation, Tajikistan, Uzbekistan and Suriname). Specifically on torture and ill-treatment, prohibited under article 7 of the ICCPR, there are some positive examples of follow-up:

1. *Mukong v. Cameroon:*[188] Cameroonian journalist jailed and held in unacceptable conditions of detention. The Cameroon Government granted compensation.
2. *Osbourne v. Jamaica:*[189] the HRC found that a sentence involving corporal punishment and whipping violated article 7 of the ICCPR. The Government subsequently informed the HRC that the whipping sentence had been remitted.
3. *Pinto v. Trinidad and Tobago:*[190] the HRC found that the complainant, a former death row inmate, had been ill-treated in detention. The petitioner later informed the HRC that he had been released as a direct result of the finding.
4. *Villacres Ortega v. Ecuador:*[191] the HRC concluded that the complainant had been tortured and ill-treated in detention. Ecuador later advised that it agreed to pay the complainant US$25,000 compensation.

But there have also been negative examples of follow-ups:

1. *Mojica v. Dominican Republic:*[192] Although there have been several follow-up reminders and consultations, and severe criticism of non-compliance with the Views during the examination of the State party report in 2001, no follow-up has taken place.
2. *DRC cases: I*n several cases with findings of violations of article 7, the DRC has repeatedly ignored follow-up requests.
3. *Gridin v. Russian Federation:*[193] the Government advised that the Supreme Court had reviewed the HRC's decision but found that the arguments in the submission were "unsubstantiated."
4. *Wilson v. the Philippines:*[194] the HRC recognised that the treatment and suffering during death row breached article 7, but the Philippines rejected the finding of the merits and replied that it had no obligation to afford reparation.
5. *Ahani v. Canada:*[195] concerning the deportation of an Iranian national from Canada to Iran on national security grounds, the HRC found violations of articles 7 and 13 of the ICCPR. Canada challenged the findings and denied that there had been any violation of Canada's obligations under the treaty.

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[188] *Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (1994).

[189] *Osbourne v. Jamaica*, Communication No. 759/1997, U.N. Doc. CCPR/C/68/D/759/1997 (2000).

[190] *Pinto v. Trinidad and Tobago*, Communication No. 512/1992, UN Doc. CCPR/C/57/D/512/1992 (1996).

[191] *Ortega v. Eduador*, Communication No. 481/1991, U.N. Doc. CCPR/C/59/D/481/1991 (8 April 1997).

[192] *Mojica v. Dominican Republic*, Communication No. 449/1991, U.N. Doc. CCPR/C/51/D/449/1991 (1994).

[193] *Gridin v. Russian Federation*, Communication No. 770, U.N. Doc. CCPR/C/69/D/770/1997 (2000).

[194] *Wilson v. Philippines*, Communication No. 868/1999, U.N. Doc. CCPR/C/79/D/868/1999 (2003).

[195] *Ahani v. Canada*, Communication No. 1051/2002, U.N. Doc. CCPR/C/80/D/1051/2002 (2004).

b. Committee against Torture

In May 2002 the CAT revised its Rules of Procedures and adopted the mandate of a Follow-up Rapporteur pursuant to Article 22 of the Convention (which establishes the individual complaints procedure). The CAT established that the follow-up Rapporteur should engage in the following activities:

1. monitor compliance by dispatching *notes verbales* to States Parties inquiring about measures taken pursuant to the CAT 's decisions;
2. recommend to the CAT appropriate action on responses received from governments on situations of non-response, and upon the receipt of letters from complainants about the non-implementation of the CAT's decisions;
3. meet with State Party representatives to encourage compliance with the CAT's decisions and to ascertain whether technical assistance from the Office of the High Commissioner for Human Rights (OHCHR) would be appropriate or desirable;
4. prepare periodic progress reports to the Committee on her/his activities.

Since mid-2002, the following paragraph is added to all decisions in which the CAT has found a violation/s of the Convention:

> *"The Committee urges the State party to … provide an appropriate remedy and, in accordance with rule 112, paragraph 5, of its rules of procedure, to inform it within 90 days from the date of transmittal of the decision, of steps taken in response to the Views".*

Like the Human Rights Committee, the CAT does not make a recommendation on a specific monetary award but formulates the remedy to be provided to the Petitioner in more general terms (e.g. to provide adequate compensation, immediate release from detention, prohibition to deport or expel the Complainant to the country of origin).[196]

There are positive and negative examples of follow-up to findings made by the CAT. [197] For example, in *Dzemajl at al. v. Serbia and Montenegro,*[198] Montenegro awarded compensation in the order of one million euros to a group of Roma whose rights under the Convention against Torture were found to have been violated. However, in the case of *Ltaief et. al. v. Tunisia*[199] the Tunisian Government has consistently challenged the *ratio decidendi* of the CAT's Views adopted in November 2003.

Secretariat support to follow-up activities under the complaints procedures

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[196] At times, the recommendation for an appropriate remedy is left deliberately vague. See e.g. Views of the Committee against Torture in *Agiza v. Sweden*, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005) at para. 15.

[197] Direct contacts between the Special Rapporteur and State Party representatives have so far been relatively few. As at 28 June 2005, a total of 272 cases had been registered under the procedure governed by article 22. By the same date, the CAT had adopted final decisions on the merits with regard to 110 complaints and found violations in 31 of them, of which interim measures were granted in 21 and acceded to by the State party in 18. Follow-up information was received in 13 cases (one submission in a case where no violation of the Convention had been found). Follow-up deadlines are running in another four cases and in 13 cases information remains outstanding - thus implying a follow-up response rate of roughly 50%. Such information is detailed in a sessional follow-up progress report presented to the CAT plenary. (Presentation by Markus Schmidt, Head of Petitions Unit of the OHCHR).

[198] Dzemajl et al. v. Yugoslavia, Communication No. 161/2000, U.N. Doc. CAT/C/29/D/161/2000 (2002).

[199] LTAIEF v. Tunisia, Communication No. 189/2001, U.N. Doc. CAT/C/31/D/189/2001 (2003).

Until the summer of 2003, no staff member was assigned full-time to assist with follow-up procedures under individual complaints procedures. The Secretariat compiled follow-up progress reports, prepared the follow-up chapter for the Annual Report, and helped organise direct contacts with States parties – but a considerable number of scheduled follow-up activities could not be carried out because of lack of human or financial resources.

A position of Follow-Up Officer was established in 2003, and it is clear that with this new position the follow-up procedure under the Optional Protocol to the ICCPR and under the procedure governed by article 22 of CAT have improved. In particular, it has reinvigorated the practice of direct consultations with representatives of non-compliant States, which had been scaled down in previous years. The Follow-up Officer also analyses and documents follow-up activities conducted by other international or regional bodies and, where appropriate, analyses existing or draft enabling legislation.[200]

Proposals to reform the UN treaty system

There are ongoing efforts to improve the UN treaty system. In his 2002 report, "Strengthening the United Nations: an agenda for further change", the UN Secretary-General identified further modernisation of the treaty system as a key element in the United Nations' goal of promoting and protecting human rights. He called on the human rights treaty bodies to consider the following measures: (a) to craft a more coordinated approach to their activities; (b) to standardise their varied reporting requirements, and (c) to allow each State to produce a single report summarizing its adherence to the full range of international human rights treaties to which it is a Party. The report of the Management Review of OHCHR, conducted by the Office of Internal Oversight Services (OIOS) during 2002, made broadly similar recommendations, as did the General Assembly.[201]

The OHCHR held consultations on the Secretary-General's suggestions, with treaty bodies, States Parties, UN agencies, NGOs and other segments of civil society. This included an informal brainstorming meeting hosted by Liechtenstein in Malbun from 4 to 7 May 2003. The report of the Malbun meeting was considered by the second Inter-Committee meeting and the fifteenth meeting of chairpersons in June 2003 and submitted to the General Assembly.[202] In March 2005, the UN Secretary-General requested that "*harmonized guidelines on reporting to all treaty bodies should be finalized and implemented so that these bodies can function as a unified system*".[203] On 22 March 2006, the OHCHR published a Concept paper on the High Commissioner's proposal for a unified standing treaty body.[204]

Although it is still not clear what type of reforms will actually be implemented, and whether a single treaty monitoring body will be established, these developments will most certainly have an effect on the general functioning of treaty bodies, including of course, on the follow-up mechanisms to

[200] See the OHCHR Annual Appeal for 2002, pp.95-96 (http://www.unhchr.ch/pdf/appeal2004.pdf).

[201] GA Res. 57/300 of 20 Dec. 2002.

[202] UN Doc. A/58/123, Letter dated 13 June 2003 from the Permanent Representative of Liechtenstein to the United Nations addressed to the Secretary-General.

[203] "Larger Freedom: towards development, security and human rights for all", para. 147, UN Doc.(A/59/2005).

[204] HRI/MC/2006/2.

implement the recommendations contained in individual Views/Decisions.

II.3 The International Criminal Court

The International Criminal Court (ICC) is the first international criminal tribunal where victims can assert their right to reparation directly before the court itself. According to article 75 of the Rome Statute, the ICC may award reparations including restitution, compensation and rehabilitation, either on request from the victims or, in exceptional circumstances, of its own volition (Article 75 (1)). Reparations can be awarded either on an individual or collective basis (or potentially both), depending on the *"scope and extent of the damage, loss, or injury."*[205] Furthermore, reparations orders can be made in the name of individual beneficiaries, or, where it is *"impossible or impracticable to make individual awards directly to each victim"* or where *"the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate,"* the Court may order reparations to be awarded through the Trust Fund.[206] Reparations so deposited may also be awarded through an international, intergovernmental or national organization (Rule 98(4)). Finally, the ICC can also order protective measures following either arrest or conviction that involve tracing, identifying, freezing and seizing of assets.

In light of this framework, there are several main areas of concern for the prospects of enforcement of ICC reparations awards. These are:

- enforcing an order for protective measures;
- enforcing a final award of reparations including monetary *and* non-monetary awards;
- the role of the Trust Fund as a supplementary mechanism for ensuring that awards reach victims; and
- institutional responsibility within the ICC for monitoring the enforcement of reparations orders.

Effective enforcement in all of these areas hinges on a number of factors including (a) the compatibility of domestic legislation and procedures with the Court's orders; (b) the potential involvement of non-States Parties in this process; and (c) the availability and management of funds, including the possibility of financial default by the person convicted, and hence, the search for other possible sources of compensation for victims.

Other questions that arise with respect to monetary damages specifically include how to address a potential conflict of claims for the same assets, and how to prioritise or otherwise deal with the claims of victims when available funds are insufficient. With respect to non-monetary reparations, questions arise as to what kinds of supervisory mechanisms can be put in place, and what level of cooperation can be established between the ICC and States in order to ensure that these are fully implemented.

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[205] Rule 97(1) in ICC *Rules of Procedure and Evidence*. U.N. Doc. PCNICC/2000/1/Add.1 (2000).

[206] See rule 98(2) & (3) of the *Rules of Procedure and Evidence* supra note 205 & Article 79 of the Rome Statute supra note 40.

a. Protective measures

The Rome Statute allows the Pre-Trial Chamber or the Trial Chamber to order *"protective measures"* upon the issuance of an arrest warrant or summons, or once a person is convicted.[207] According to Article 93(1)(k), these measures are designed for the *"ultimate benefit of victims"* and require *"the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture".*

The enforcement of protective measures primarily depends upon domestic responses to the ICC's orders and on obtaining cooperation from States Parties and non-State Parties alike. As a general matter, States Parties are obliged to *"cooperate fully with the Court"* and to *"ensure that there are procedures available under their national law for all of the forms of cooperation"* as required by the statute (Articles 86 and 88). More specifically, with respect to protective measures, States Parties are bound by article 93(1)(k) which requires States to comply with the Court's requests to provide assistance. Article 99 of the Statute further provides that requests for assistance under article 93 must be complied with in the exact ways specified by the Court, to the extent that this does not conflict with domestic law (Article 99(1)).

However, where there is a complete lack of cooperation, there seems to be little that the ICC can do to bolster enforcement. It may refer the matter to the Assembly of State Parties or to the Security Council where the case has been referred by it (Article 87(7)). However, at least pending actual practice, it is not clear from this provision what measures the Assembly of States Parties or Security Council can, and will, take in response to the non-cooperation of a State Party.

Nevertheless, assuming States Parties are at least in principle willing to fulfil their obligations, several other questions arise. First of all, where no appropriate domestic legislation and/or procedural mechanism exists, enforcement of protective measures will likely be very slow, which will undermine their preventive purpose. Political or other logistical factors, particularly in post-conflict situations, may negatively impact on enforcement. Another potential barrier might be a conflict with domestic bank secrecy laws that may prevent establishing an effective link between the perpetrator and a particular set of assets. This may be problematic both within the territorial forum, but also in other jurisdictions if at least some of the assets are found in foreign locations. The extent to which the ICC would be able to intervene directly in this context is questionable, as it would probably have to rely on the domestic and inter-State initiatives to enforce ICC decisions.[208] Finally, enforcement may run into serious difficulties where assets subject to protective orders are found in the territories of non-State Parties. States that have not ratified the Rome Statute have no obligation to cooperate unless they enter into a specific ad hoc agreement with the ICC (Article 87 (5)). But even if non-State Parties were willing to cooperate, there would still be a lack of established procedural mechanisms in the absence of a pre-existing ad hoc arrangement and this would cause considerable delay and potentially render protective measures ineffective.

[207] Rule 99(1) of the Rules of Procedure and Evidence supra note 205 & Articles 57(3)(e) and 75(4) of the Rome Statute supra note 40.

[208] See Carla Ferstman, "The Reparations Regime of the International Criminal Court", 15 LJIL (2002).

b. Reparations Awards

With respect to reparations awards, article 75(5) of the Rome Statute indicates that the obligations of State Parties are the same as those set out in Article 109 relating to the enforcement of fines and forfeitures. Article 109 provides that State Parties must give effect to an ICC order in accordance with their national laws, and "*without prejudice to the rights of bona fide third parties*" (Article 109(1)). In case of the inability to give effect to a forfeiture order, a State must "*take measures*" to recover the equivalent value of the award (Article 109(2)). Finally, any funds recovered by the State in this respect *must* be transferred to the ICC (Article 109 (3)).

The Rules of Procedure and Evidence provide further detail on State obligations in this context. Rule 217 indicates that the Presidency can seek cooperation from any State connected to the sentenced person *either* by virtue of nationality or habitual residence, *or* by virtue of the location of assets connected to the victims. Rule 219 provides that States cannot modify the reparations specified by the ICC; its decision on the scope and extent of damages, loss or injury; or the principles upon which this determination was based. Furthermore, States are obliged to "*facilitate the enforcement of such order (sic).*" Similarly, States cannot modify the orders of fines made by the ICC (Rule 220). Finally, the Presidency, having consulted with the State of enforcement, is empowered to "*decide on all matters related to the disposition or allocation of property or assets realized through enforcement of an order of the Court*" (Rule 221).

In the context of enforcing reparation orders, a set of problems arises which is both similar to those related to the enforcement of protective measures, and, in some respects, unique. First, just as is the case with protective measures, it is not clear what the ICC can do if a State Party fails to enforce the reparation order. While States Parties have a general obligation to cooperate under the Statute (art. 86) and while their non-compliance may be referred to the Assembly of States Parties or in some instances to the Security Council, the ICC itself does not appear to be in a position to take any punitive or other measures against a State Party that does not wish to enforce the reparations order. Second, a challenge may arise if domestic mechanisms for awarding reparations do not align with the enforcement of the ICC's order. In particular, the requirement that reparations awards be enforced directly and are not subsequently reviewed in amount or principle under domestic processes might turn out to be problematic. Third, where cooperation will be required from non-States Parties (if, for example, the assets of the sentenced person are held in its territory), difficulties and delays related to arriving at an agreement may arise.

Furthermore, particularly with respect to monetary awards, there might also be obstacles relating to conflicting claims in the domestic forum. For instance, the State itself may have a claim against a corrupt former leader, or, there may be other victims or corporations who have chosen not to seek reparation through the ICC but who are also requesting reparation through domestic or other processes. At the moment, it is uncertain how these competing enforcement claims will be prioritised. Another problem related to monetary awards is where the debtor defaults or has no traceable assets. Given that the ICC's jurisdiction is based on individual criminal responsibility, the Court could probably not impose any obligation on the State itself (regardless of the effect that such judgment could have on the international responsibility of the State(s)). Enforcement may thus depend on models for dealing with defaulting debtors from domestic law.[209]

[209] *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Articles 12 & 13 supra note 8.

c. The role of the Office of the Prosecutor

Enforcement of forfeiture orders will likely only be possible if preliminary measures have been instituted within the investigation phase with a view to locating and freezing such property and assets. Since the Office of the Prosecutor (OTP) acts from the very beginning of the proceedings related to the Court during the investigative phase, it is perhaps the most suitable organ to take action early on to ensure that, wherever applicable, proceeds, property and assets and instrumentalities of crimes are traced and frozen for the purpose of eventual forfeiture. Within his duties and powers, the Prosecutor may request assistance in the form of preliminary measures which may include the freezing or seizure of proceeds, property and assets. [210]

In practice the success of the measures requested by the OTP will depend on the cooperation obtained from the requested States. International cooperation and judicial assistance are therefore crucial elements and it is essential that State Parties to the ICC Statute enact domestic procedures to execute these requests.[211] On the other hand, cooperation may also be requested from non-State Parties, on the basis of an ad hoc arrangement, agreement or on any other appropriate basis.[212]

Part 9 of the Rome Statute stipulates the procedure for obtaining legal assistance for the identification, tracing and freezing or seizure of proceeds, property and assets which are located in a State Party's territory. While Part 9 enumerates the obligation of States Parties to cooperate, the implementation of this obligation is to be executed in accordance with the procedures of the domestic law of the requested State. These requirements may vary from State to State. As a result, whereas in some States the location of accounts and property might be straightforward, in others the accessibility of such information might be subject to varying levels of restriction, and dependant on specific procedural and material requirements being met.

Ultimately it will be a matter for national authorities to ensure that national legislation permits effective cooperation with the ICC and the prompt execution of requests for the identification, location, tracing and freezing or seizure of proceeds, property and assets derived from the crime or linked to the investigated or prosecuted person(s). In this way, in addition to the reparations financed through the donations to the Victims Trust Fund, reparations based on forfeiture may be similarly enforced.

d. The ICC Trust Fund for Victims

The Trust Fund is relevant to the issue of enforcement both as a repository of funds paid out by sentenced individuals (Article 75(2)), and as well as a potential supplementary source of funds where reparation awards cannot be enforced against insolvent perpetrators. Article 79 of the

[210] Art. 54 Rome Statute supra note 40.

[211] Art. 88 Rome Statute, ibid.

[212] Art. 87(5)(a)Rome Statute, ibid.

Rome Statute establishes the Trust Fund, providing *inter alia* that the Fund is to operate for the benefit of victims and their families, and that the ICC may order any assets obtained through fines and forfeitures to be deposited into the Fund. Rule 98 of the *Rules of Procedure and Evidence* further provides that, where it is *"impossible or impracticable"* to make individual awards directly to the victim, the reparation amount may be deposited with the Trust Fund (Rule 98(2)). Furthermore, where a collective award is more appropriate in light of the number of victims and the scope of reparations, this can also be made through the Trust Fund (Rule 98(3)).

In this context, several problems may arise with respect to enforcement. Assuming that the Fund is empowered to act in the manner described above, its level of available funds will depend first of all upon the enforcement of fines and forfeiture orders. This engages all of the issues related to the existence of appropriate domestic legislation as well as the potential of establishing cooperation with non-States Parties. Furthermore, it is possible that, even if fines and forfeitures are successfully disbursed into the Fund, there will still be a lack of funds to cover *all* claims, particularly in respect of claims related to massive or systematic crimes.

Another issue that remains to be considered is the Trust Fund's potential to enforce non-monetary damages. For instance, in the case of a massive crime, it is possible to envision the Fund providing more general forms of reparation directed at all victims, and not just specific claimants:—Article 75(2) states that reparations may not only be made directly *"to"*, but also *"in respect of"* victims. Furthermore, Rule 98 provides for the possibility of the Trust Fund to make collective awards, possibly either out of a claim obtained against a specific individual, or out of funds obtained through fines and forfeitures. Here, one might envision a memorial or a treatment centre, and it is clear that such measures will only be able to be undertaken with the active support of the State in which they will be erected.

All of the above issues on the enforcement of reparation orders are related to the relationship between the ICC and States Parties. However, a further question exists as to which organ(s) within the ICC will be responsible for monitoring the enforcement of these awards. While a system of support for victims currently exists for the duration of the 'proceedings' through the Victims Participation and Reparations Section of the Registry, and while responsibility for collecting and allotting fines and forfeitures is accorded to the Presidency, with the possible assistance of the Registry,[213] neither the Statute nor the Rules of Procedure and Evidence clearly specify a body that will be responsible for following up on reparations claims once awards are made by the Court. While this lack of follow-up responsibility may be common in domestic legal systems, it seems that in light of the possible difficulties relating to obtaining the cooperation of States as described above, a stronger and more visible Court-level enforcement mechanism that can engage directly with States and track compliance is appropriate for an international court such as the ICC.

[213] See Rule 221 of *Rules of Procedure and Evidence (*supra note 205) and Regulation 120 of the *Regulations of the Registry*.

III. DOMESTIC JUDGMENTS AND DECISIONS

This section provides an overview of the mechanisms available for the enforcement of civil judgments awarded by national courts to victims of torture or other international crimes. It considers how enforcement works at both the domestic level (i.e. where the judgment creditor seeks to enforce against the judgment debtor in the jurisdiction where judgment has been given) and also at the cross-jurisdictional level (i.e. where the judgment creditor seeks to have a judgment from country A recognised and enforced in country B since the debtor's assets are located in the latter). Enforcement mechanisms and procedures vary from jurisdiction to jurisdiction. This report cannot provide a comprehensive survey of enforcement worldwide. Rather, it focuses on certain common features of enforcement and highlights some of the issues which are particularly relevant to the enforcement of civil judgments in the context of serious human rights violations.

The second part of this section is dedicated to the enforcement of reparation awards of national truth and reconciliation commissions. It provides a brief overview of the objective and context in which these mechanisms were created as well as a brief analysis of their enforcement procedures.

III.1 Domestic and Foreign Civil Judgments

a. Preliminary Considerations

In a number of national jurisdictions it is possible to bring a civil action arising out of an international crime. Torture and other international crimes are, for example, recognised torts.[214] However, in practice, bringing a civil action and/or enforcing a civil award may not be a viable proposition because of the existing political, legal and social context in a given jurisdiction. The requisite legal and administrative framework may simply be lacking. However, where such cases are possible, a clear strategy for enforcement is vital and it is with this that we deal below.

At what stage should enforcement be considered?

The prospects of successful enforcement should always be considered at the outset of a case, before legal proceedings are even commenced.[215] How enforcement will be effected should never be an afterthought. As discussed in more detail below, the claimant needs to consider, *inter alia*, the extent of the defendant's assets, their location, and what the particular impediments to enforcement peculiar to the defendant or his assets may be. Examples of basic impediments might include: the assets not being in the defendant's name; the likelihood of assets being dissipated as soon as proceedings begin; or the assets being in one or a number of foreign countries.

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[214] See for example the judgment of the US Supreme Court in Filartiga v. Pena-Irala 630 F.2d 876 (1980); 77 ILR 169.

[215] See Payne and Golden, *Commercial Enforcement* (2005), p. 1.

If enforcement is not considered at the outset, the victory in court may prove a pyrrhic one and attempts to enforce may prove complex, time-consuming, and ultimately fruitless.[216] By contrast, where enforcement is considered at the outset, a case strategy can then be formulated which anticipates the claimant taking whatever steps the forum in which the action is to be brought (or indeed any other relevant forum) permits to secure a successful enforcement, should a favourable judgment be obtained.

Identification of assets

As noted in a recent UK White Paper,[217] the key to improving enforcement efforts in the future is to ensure courts have adequate information about the financial circumstances of defendants. Information about assets and about the defendant's likely strategies regarding dissipation/relocation of assets is key to any successful enforcement action. Although, as we shall see, enforcement raises a number of issues of private international and domestic law, successful enforcement often owes as much to investigative as legal skills.

Wherever possible, investigation-gathering relating to assets and their location should take place before proceedings are commenced. Investigation can take different forms, and resources will differ from jurisdiction to jurisdiction. In certain jurisdictions, considerable information may well be available through public sources relating to a debtor's assets. This will be the case whether the debtor is a company or an individual and it will include company records, land registries, registers of ships[218] and aircraft,[219] as well as vehicle licensing agencies (which may have registers of drivers and vehicles). Searches against the entries in appropriate registries are a common first step in any commercial fraud case where there is a fear that assets may be dissipated. Equally, interviewing individuals who live in the locality of the defendant is low cost and may be effective; a hearsay lead could form a new line of enquiry.

Where public sources do not provide all the information required, enquiry agents may be able to elicit substantial information. This is a step that would have cost implications. However, depending on the jurisdiction in question, it may be worth exploring *pro bono* assistance. In the past, simple checks provided *pro bono* have led to significant results. In the early stages it is critically important to ensure that all the basic steps are taken. Even if received wisdom is that property will not be in the defendant's name, all standard checks should still be made. Before an action is begun the claimant has the "element of surprise" in his favour. It only requires one or two assets to be located to make a successful enforcement more likely and more worthwhile. Equally, enquiries may provide surprising results, e.g. enforcement in the defendant's place of domicile may be

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[216] As Lord Bingham noted in *Société Eram Shipping Co Ltd* v *Cie Internationale de Navigation* [2003] UKHL 30; [2004] 1 AC 260, "[a]s many a claimant has learned to his cost, it is one thing to recover a favourable judgment; it may prove quite another to enforce it against an unscrupulous defendant. But an unenforceable judgment is at best valueless, at worst a source of additional loss".

[217] Effective Enforcement: Improved methods of recovery for civil court debt and commercial rent and a single regulatory regime for warrant enforcement agents, a White Paper issued by The Lord Chancellor's Department in March 2003, para. 53. available at: http://www.dca.gov.uk/enforcement/wp/index.htm.

[218] For example, the Registrar General of Shipping and Seamen maintains a Register of British Ships, a central register of UK merchant ships, fishing vessels and pleasure vessels which is a public record, whilst Lloyd's maintains both a Register of Ships and a List of Ship Owners. The List of Ship Owners provides details of ship owners worldwide (although registration is not compulsory it may be required by a bank or insurance company). Ships may also be tracked under a service provided by the Lloyd's Maritime Intelligence Unit.

[219] From the day an aircraft is delivered new by the manufacturer it will generally be registered on the nationality register of a particular country, although occasionally aircraft can be "stateless" if they are grounded for some time in between leases and undergoing extensive maintenance or conversion. Under the main convention, the 1944 Chicago Convention on International Civil Aviation, an aircraft can only be registered in one country at any one time. Different countries have different systems for determining whether an aircraft is eligible for registration.

impossible but enquiries reveal that a portion of his assets is located in a more favourable jurisdiction.

The role of interim remedies

Once the information gathering phase is complete and proceedings are about to be brought in a given jurisdiction, the question then becomes what interim steps may be taken to "protect" any assets that have been located. As noted above, once a defendant is aware that an action is commenced, he will, in all likelihood, seek to dissipate, relocate or transfer assets to keep them out of the hands of a potential judgment creditor.

Freezing orders, search orders and other interim remedies

The availability of interim remedies is something that also varies from jurisdiction to jurisdiction. In general, freezing orders, search orders (i.e. orders for permitting premises to be searched) and other forms of injunctive relief are most likely to be of use to the claimant. Where it is the forum in which the action will be brought, an English court's freezing order will probably stipulate that the defendant is not to remove assets within the jurisdiction, or deal with assets within or without the jurisdiction, up to the value of the claim made against him. It can even order the defendant to move assets from one jurisdiction to another.[220] The form of the order when made in relation to assets within and outside the jurisdiction is known as a "worldwide" freezing injunction.

In England and a number of other common law jurisdictions, pre-action (or indeed interim) applications for injunctions may be made "without notice" to the defendant, i.e. secretly. Once the order is obtained, the claimant must notify the defendant to give him an opportunity to have the order set aside. The claimant, however, has a critical window of opportunity to serve the order on banks etc. to secure assets before the defendant relocates them.

Interim remedies from "foreign" courts

In some cases, proceedings may have been (or be about to be) commenced in jurisdiction A, but assets are located in jurisdiction B. Even where proceedings are not to be brought in jurisdiction B, its courts may be willing to grant interim relief to, for example, freeze assets or prevent removal of assets from the jurisdiction.[221] The availability of such relief would need to be reviewed on a case-by-case basis. However, thinking "across" jurisdictions may, in some cases, be a vital part of any enforcement strategy. As considered in more detail below, a "worldwide" freezing order from an English court may also be recognisable and enforceable in other jurisdictions, potentially making this a very valuable and effective part of any overall preservation of assets/enforcement

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[220] *Derby & Co Ltd v Weldon (No. 6)* [1990] 1 WLR 1189.

[221] For example, where the English court does not have jurisdiction over the substantive claim, section 25 of the *Civil Jurisdiction and Judgments Act 1982* (UK) gives it the power to grant interim relief in relation to foreign proceedings. The general principles to which the court should pay heed when granting a freezing injunction ancillary to foreign proceedings were enumerated by Neuberger J in *Ryan v Friction Dynamics Ltd*. [2001] C.P. Rep. 75. As previously considered in *Credit Suisse Fides Trust S A v Cuoghi* [1997] 3 All ER 724, section 25 indicates that an order should be made unless it is "inexpedient" to do so. Further, the fact that a worldwide freezing order is granted by the principal foreign court does not prevent the English court from granting a freezing order, at least in relation to UK assets and/or against defendants resident and domiciled within the jurisdiction. Additionally, Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters establishes that a court of an EU Member State may be asked for interim measures even when a court of a different EU Member State is the one with jurisdiction as to the substance of the matter. This Regulation applies to civil and commercial matters whatever the nature of the court.

strategy.

b. Enforcement at the Domestic Level

Once the initial phase of information gathering and applications for orders directed at preserving assets is complete, the focus will shift to the proceedings themselves. In some jurisdictions, both criminal and civil proceedings may need to be brought.[222] How those proceedings are coordinated/which need to be brought first may have an impact on overall strategy. Clearly, if criminal proceedings need to be brought before/simultaneously with a civil action this will raise issues over how best to try and preserve assets before the defendant becomes aware of the civil action against him. This would need to be reviewed on a case-by-case basis, with advice from local lawyers.

Enforcing a domestic judgment

It is a feature of most, if not all, court systems that the courts do not automatically enforce their judgments nor even help decide how they should be enforced. Therefore, once a civil judgment has been obtained, enforcement of this judgment is up to the victim.

Enforcement is a practical and procedural matter, the precise mechanics of which will be specific to a given jurisdiction. In some cases, "enforcement" may be straightforward because the defendant agrees to pay or reaches a compromise acceptable to the claimant. However, once the time for payment has passed and no payment has been received, the claimant will then need to turn to standard enforcement mechanisms. By way of example the following are some of the common methods of enforcement available in the UK:

1. seizure of the judgment debtor's goods (known as a writ of *fieri facias*[223])
2. third party debt order: put simply, this is a court order which compels a third party who owes money to the defendant (for example, a bank) to pay the sum direct to the claimant.
3. charging order: this imposes a charge on the debtor's property for securing the payment of any money due under the judgment or order. Broadly, there are three kinds of charging order: a charging order on land; a charging order on securities; and a charge over the debtor's interest in partnership property.
4. a stop order: this prevents dealings in the various securities over which a charging order may be obtained.
5. attachment of earnings: this method is particularly popular where the judgment debtor is a highly paid individual or likely to be in receipt of a high pension.

Enforcing a judgment abroad

As noted above, if a defendant has no assets within the jurisdiction, but does have assets

[222] In common law countries, a criminal action is not a necessary prerequisite to a civil action. In certain civil code jurisdictions on the other hand, whilst it may, theoretically, be possible to bring a civil claim independently of a criminal action, in practice, the backing of a criminal conviction is required.

[223] In some jurisdictions it will also be possible to seize the judgment debtor goods to satisfy a money judgment. In England this is know as a writ of *fieri facias*. There may be other methods of execution available, such as collection of assets including rent, future debts and enforcement of contractual rights, which the judgment debtor is refusing to enforce.

elsewhere, it will be necessary to consider whether the judgment can be enforced abroad. As a general rule, foreign judgments do *not* have direct execution in other jurisdictions since execution is territorially circumscribed.[224] The recognition and enforcement of foreign judgments is essentially a matter of private international law. As explained in more detail below, for any judgment creditor, there are two main questions when he seeks to enforce an award abroad: (i) Is there a treaty-based mechanism between the awarding state and the state where assets are located which might facilitate enforcement; and (ii) If there is no such treaty, what are the local rules in the state where assets are located relating to enforcement of foreign judgments? In relation to the second question, it may well be positive for the creditor's case if the two States in question generally reciprocally recognise the other's judgments. Such reciprocity often has its roots in a notion of parallel procedural reliability, where both states know that judgments in each jurisdiction are awarded impartially.

Bilateral/multilateral treaties on enforcement of judgments

Whilst a judgment from country A may not be automatically recognisable and enforceable in country B, there may be a treaty/convention in place which facilitates recognition and enforcement of the countries' respective civil judgments.[225]

For example, in the European Union (EU), the recognition and enforcement of judgments on civil and commercial matters issued by courts of EU Member States (the Member States) enjoy a unified enforcement mechanism provided by European Council Regulation 44/2001 (the Regulation). The Brussels and Lugano Conventions on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (the Conventions), which were the precursors of the Regulation, apply the same basic mechanism to judgments given in Iceland, Norway, Denmark, Switzerland and Poland.

The purpose of the Regulation itself is set out in paragraph 1 of the Preamble: '*the Community should adopt…measures relating to judicial cooperation in civil matters which are necessary for the sound operation of the internal market*'. The scope of the Regulation as to the subject matter of judgments to be recognised and enforced within the community is stated in paragraph 7 of the Preamble: '*The scope of this Regulation must cover all the main civil and commercial matters apart from certain well-defined matters*'. Article 1(2) of the Regulation further states that the Regulation does not apply to *in rem*[226] actions, bankruptcy proceedings, social security, or arbitration proceeding judgments.

As to recognition and enforcement, the Regulation establishes at paragraph 10 of the Preamble: '*For the purposes of the free-movement of judgments, judgments given in a Member State bound by this Regulation should be recognised and enforced in another Member State bound by this Regulation, even if the judgment debtor is domiciled in a third State* [non-EU state]'. And further, at paragraph 17 of the Preamble , it states that the mechanism must be quick and effective: '*By virtue of the same principle*

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[224] See Dicey & Morris, *The Conflict of Laws*, 2000, p.468.

[225] The terms "recognition" and "enforcement" are often used interchangeably, but, in fact, a judgment needs to be recognised before it may be enforced. Recognition is the adoption of the foreign decision as res judicata and the acknowledgment of its being as acceptable to the recognising court as if it were a decision of its own. Enforcement is the application of the court's powers to give effect to the decision and may follow recognition, for example, by enforcement proceedings or contempt proceedings. Some decisions, such as declarations of status (marriage, divorce, annulment, adoption, filiation, etc.) may be recognised, but they are not enforceable per se. In addition, when a foreign decision is argued to raise an estoppel per rem judicatum, the party claiming the estoppel seeks only the decision's recognition, not its enforcement.

[226] Status determination.

of mutual trust, the procedure for making enforceable in one Member State a judgment given in another must be efficient and rapid. To that end, the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation'.

This means that once a judgment has been obtained on a civil or commercial matter in one Member State, it can be recognised and enforced in another Member State without the need to institute fresh substantive proceedings in the second Member State. However an enforcement judgment will still be required. Thus if a civil[227] torture judgment has been obtained in the UK and the defendant's assets are discovered to be located in, for example, France, the Regulation provides for the recognition and enforcement of that judgment in France, subject to the grounds—upon which recognition may be refused—being present.[228] An English order granting interim relief is similarly in principle entitled to recognition and enforcement in the courts of another Member State, as long as the order is one which the foreign court accepts that the English court was entitled to make.[229] Under the regulation, once recognition has been satisfied enforcement automatically follows.

What happens where there is no bilateral/multilateral treaty between the countries in question?[230]

Where there is no bilateral/multilateral treaty between the countries in question, it will be a matter of investigating the local substantive law on the recognition and enforcement of judgments of the country where enforcement is sought. The formal requirements and the extent to which the foreign court will re-examine a foreign judgment will vary. Some countries will, for example, automatically reject enforcement of default judgments.[231] By way of illustration, it is worth briefly to examine an example of enforcement in both a common law and a civil law jurisdiction.

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[227] In some jurisdictions, both criminal and civil proceedings may need to be brought. At the outset of proceedings, thought should be given to how any damages judgment would be characterised. If the judgment is ultimately "criminal" rather than civil, this could impact on recognition and enforcement under applicable conventions/treaties etc. In some civil law countries, it is possible to attach a civil claim to a criminal case, and any compensation awarded could be recognised and enforced in a foreign jurisdiction. However, this would need to be assessed on a jurisdiction by jurisdiction basis.

[228] Pursuant to Article 34 of the Regulation, a judgment shall not be recognised: if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;- where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when he could have done;- if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;- if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

[229] *Mietz v Intership Yachting Sneek* BV C-99/96, [1999] ECR I-2277.

[230] Until recently, the Hague Conference on Private International Law was working on a global Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters which, had it come into force, would have allowed civil and commercial judgments from one Contracting Party to be recognised and enforced in other Contracting Parties. This would obviously be potentially very helpful in terms of cross-jurisdictional enforcement. However, the scope of the Convention has now been narrowed, such that it only applies to the enforcement of judgments where "exclusive choice of court agreements" are in place in business-to-business cases. The scope of the Convention was narrowed for various reasons, stated to include, firstly, the wide differences in the existing rules of jurisdiction in different States, and secondly, the unforeseeable effects of technological developments, including the internet, on the jurisdictional rules that might be laid down in the Convention. A preliminary draft Convention was adopted by a Special Commission of the Hague Conference on 30 October 1999. For a detailed description of this project, see the Report by Mr Peter NYGH and Mr POCAR at http://europa.eu.int/comm/justice_home/unit/civil/audition10_01/en/rapport_nygh_pocar.pdf.

[231] In a number of jurisdictions, for example, the general rule seems to be that foreign default judgments will not be recognised on the grounds that they do not afford a defendant the opportunity to be heard. Mexico is one such jurisdiction. Another is France, where a foreign judgment will not be recognised if the sole basis for the judgment is the default of the defendant.

Common law enforcement procedures in the UK: In the UK, in the case where there is no bilateral agreement in place with another country, the common law rules will apply. The rules in other common law countries for recognition and enforcement are similar. The theory behind the enforcement of foreign judgments is that of indirect reciprocity, that is to say that it would be good for one or more States to enforce judgments of an alien State, if the requisite criteria are satisfied, so that such judgments of the enforcing State would be recognised in the alien State. It is indirect as this is conventional practice, there being no express agreement to that effect for common-law enforcement.

For a foreign judgment to be ***recognised*** by the English courts it must be: (a) final and conclusive; (b) given by a court regarded by English law as competent to give such judgment; and (c) there must be no defences to recognition. Secondly, for the judgment to be ***enforceable***, it must be (a) for a fixed sum of money;[232] and (b) not involve the enforcement of a foreign penal or revenue law, or contravene the *Protection of Trading Interests Act 1980* (PTI Act).[233]

Assuming all the conditions for enforcement were able to be satisfied, it would be necessary to establish the jurisdiction of the English court and commence fresh proceedings on the judgment debt in order to enforce the obligation or debt created by the judgment. Once the defendant has acknowledged service of the claim, the claimant may seek summary judgment upon the claim.[234] The process would typically be complete in a matter of months; the defendant would have an opportunity to challenge recognition of the judgment. In the event that the judgment is recognised, it will be enforced in the same way as any domestic judgment.

Enforcement in Mexico pursuant to a civil code: The rules and proceedings applicable to the enforcement of foreign judgments are established in the Mexican Federal Code of Civil Procedure ('the Federal Code'). Article 428 of the Federal Code of Civil Procedure addresses the question of enforcement of foreign judgments. It empowers the Mexican courts, prior to enforcing the judgment, to determine "*whether or not said judgment is contrary to the laws of the Republic, treaties or principles of international law*". Article 608 establishes the principle that the Mexican judge should not inquire into the substance of the foreign judgment, or into its legal or factual aspects, but only examine its authenticity and determine whether or not it should be enforced in conformity with the applicable Mexican laws. [235]

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[232] This might restrict certain types of human rights remedies; for example restitution in cases of property usurpation disrupting family domicile.

[233] Under section 5 of the *PTI Act*, enforcement in the English courts of any judgment for "multiple damages" is prohibited. It is not clear exactly what judgment for multiple damages encompasses, but section 5(2) defines it as 'an amount arrived at by doubling, trebling or otherwise multiplying' the sum assessed as damages. In *Panos Eliades v Lennox Lewis* [2003] EWCA Civ 1758 however, the respondent/claimant filed a motion in a US court requesting the trebling of the sum originally awarded, and although the English Court of Appeal excluded the multiple element of the judgment, it still held the judgment to be enforceable in respect of the basic compensatory sum awarded.

[234] It is worth noting that if a foreign judgment were successfully enforced in one EU state but the defendant's assets were later discovered to be located in a number of other member states, the claimant could not rely on the mechanism for enforcement provided by Council Regulation 44/2001 (the rule in *Owens Bank v Bracco* C-129/92 European Courts Reports 1994). In other words, a "judgment on a judgment" from a non-Member State by Member State A is not automatically enforceable in Member State B; the normal rule is that a creditor has to bring separate proceedings for enforcement in Member State B if a debtor's assets are found to be located there.

[235] "The jurisdiction assumed by the foreign court shall be recognised in Mexico regarding the enforcement of a foreign judgment, when the said jurisdiction has been assumed by reasons resulting compatible or analogous with the national law, save in those cases which are of the exclusive jurisdiction of the Mexican courts". This provision has to be read in conjunction with Article 567 which declares said selection "not valid" when it results "in the exclusive benefit of a party but not of all the parties involved". Thus, the final determination of whether the forum selection clause is to be considered to the exclusive benefit of only one of the parties shall be a matter for judicial discretion.

According to Article 569,[236] when a Mexican judge is to enforce a foreign judgment, private arbitral award, or any "*other foreign jurisdictional resolution*" rendered by a foreign judge in the State of origin which is a Party to a treaty or convention that is in force in Mexico, the said judge shall act in strict compliance with the pertinent international instrument.[237] Mexican judges should refer to the provisions of the Federal Code only when the international instruments are inadequate because of omissions or lacunas. As a general rule the proceedings in the foreign State should have been exercised properly with the appropriate foreign rules, integral to this is requirement that the foreign court must exercise appropriate jurisdiction for recognition to occur in Mexico.[238]

Time frame of enforcement proceedings

In many jurisdictions there would be no re-examination of the merits of the decision of the original court. Where a treaty provides for (more or less) automatic recognition and enforcement, the process may be complete via a simple court application or registration procedure within a matter of weeks, provided no defences are raised by the defendant. However, where local rules apply and fresh proceedings need to be instigated, the process may prove much more cumbersome and time-consuming. The common law "summary judgment" route is widely regarded as the most efficient and the whole process may be effectuated within six months. By contrast, in other non-common law jurisdictions, proceedings may last one or two years. This is again an important matter to factor in to any enforcement strategy at the outset.

Impediments to recognition and enforcement pursuant to either a treaty or local rules

As will be apparent from the above, the procedural implications of following the treaty or domestic rules mechanism for recognition and enforcement will be significant. As noted above, in the case of both domestic rules and treaty-based enforcement proceedings, there will be defences to recognition and enforcement. These will differ from jurisdiction to jurisdiction. However, worldwide, there are a number of common defences:

1. the original court did not have jurisdiction over the defendant;
2. the foreign judgment was obtained by fraud;
3. the judgment is not "final";
4. recognition of the foreign judgment would be deemed to be contrary to public policy;
5. the judgment is inconsistent with an earlier domestic judgment or a different foreign judgment between the same parties; and
6. the judgment was given in default of appearance because the defendant was not served with the document which instituted the proceedings in sufficient time and in such a way as to enable him to arrange for his defence.

[236] "Article 569 (1): Judgments, private arbitral awards and other foreign jurisdictional resolutions shall have validity and be recognised in the Republic of Mexico in everything which is not contrary to the internal public order in the terms established by this code and other applicable laws, save what is provided by the treaties and conventions to which Mexico is a party."

[237] Mexico has become a party to: 1) The United Nations Conventions on the Recognition and Enforcement of Foreign Arbitral Awards (1958); 2) The Inter-American Convention on International Commercial Awards (1975); 3) The Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards (1979); 4)The Inter-American Convention on Competence in the International Sphere for the Extraterritorial Validity of Foreign Judgments (1984).

[238] Articles 564-568.

State immunity at the enforcement stage

Where one of the defendants to an action is a State, a State entity or State official, the issue of State immunity will need to be considered. The precise rules on State immunity will differ from jurisdiction to jurisdiction and the impact that they will have on a given case will also depend on the stage of the legal process at which immunity is asserted. State immunity challenges may well be raised both at the outset of a case (e.g. a State claim that it has immunity from suit) and also at the enforcement stage. At the enforcement stage, when a successful decision holder seeks to execute his or her judgment against the property of the State, it may be that the property of the State is determined to be immune from any process for the enforcement of the judgment. Whether such immunity exists may turn, in part, on the purpose for which the property is used. For example, in some jurisdictions, although property used for public or sovereign purposes may enjoy immunity, property used for commercial purposes may not.[239]

c. 'Extraterritorial' Tort Actions in the United States

In recent years some of the most important judgments in civil cases relating to claims arising out of international crimes have been brought in the United States under, inter alia, the Alien Tort Claims Act. Enforcement of these judgments has proved problematic. However, recent successes emphasise that a proper enforcement strategy can prove extremely effective.

The Alien Tort Claims Act (ATCA)[240] and the Torture Victim Protection Act (TVPA) provide a basis in law for US federal courts to hear civil claims against persons allegedly responsible for serious human rights abuses. The ATCA, adopted in 1789, provides jurisdiction to federal district courts over cases brought by non-citizens for torts committed in violation of "*the law of nations*." Beginning with the Second Circuit Court of Appeals' landmark decision in *Filartiga v. Pena-Irala*,[241] US courts have held that conduct which violates the "*law of nations*" under the ATCA includes human rights abuses prohibited by norms of "customary international law." In June 2004, the Supreme Court in *Sosa v. Alvarez-Machain*[242] upheld the validity of the ATCA. In so doing, the court cited with approval *Filartiga* and other cases which have permitted claims for violations of "*specific, universal and obligatory*" international norms. Which claims can go forward under the Supreme Court's definition remains to be seen, but the list likely includes torture, extrajudicial killing, slave labour, war crimes, crimes against humanity, and genocide. The TVPA, passed by Congress in 1992, extended the ATCA by providing a cause of action to US citizens and non-citizens alike for extrajudicial killing and torture.

In a successful case, the penalties imposed are a finding, by a judge or jury that the defendant is liable for the abuses suffered by the plaintiffs and an assessment of money damages against the defendant. Criminal penalties for human rights abuses are very limited in the United States. Only government prosecutors have the authority to initiate criminal prosecutions – neither private

[239] See, discussion of state immunity at the enforcement stage in the Greek Distomo case and its subsequent hearing of the matter by the European Court of Human Rights in *Kalogeropoulou et. al. v. Greece and Germany,* (App. 59021/00), in REDRESS, IMMUNITY v. ACCOUNTABILITY Considering the Relationship between State Immunity and Accountability for Torture and Other Serious International Crimes, December 2005, at pp. 25-26.

[240] 28 U.S.C. Section 1350.

[241] 630 F.2d 876 (2d Cir. 1980).

[242] 542 U.S. 692, 124 S.Ct. 2739 (2004).

citizens, nor organisations, have the authority to file a criminal case. Furthermore, only one criminal statute provides for prosecution of torture committed outside the United States by a non-citizen against another non-citizen.[243] Despite its power to do so, the Department of Justice has so far not brought any criminal prosecutions for torture under this statute.

Although human rights cases in the United States so far have not been criminal in nature, the civil tort system is well-equipped to afford compensation to survivors. Financial awards in the US generally fall into two categories: compensatory and punitive. As the name implies, compensatory damages provide plaintiffs with pecuniary compensation for their losses. Compensatory damages may relate to physical and emotional pain and suffering, lost wages, loss of companionship and medical expenses. Punitive damages are designed to punish the defendant for his actions and to deter others from engaging in similar conduct. As such, standards for imposing punitive damages often require plaintiffs to show that the defendant's actions were intentional, malicious, reckless or wanton.

Because civil lawsuits are between two or more private parties, in order to succeed the plaintiffs usually have to determine the amount and location of the defendant's assets and to affirmatively collect them. There are no criminal penalties for a defendant's failure to pay. To date, there have been few human rights cases under the ATCA or TVPA in which assets have been successfully collected. In a class action suit brought by survivors against former Philippine president Ferdinand Marcos, an award of more than $1 billion was made against the Marcos' estate. Only a very small portion of that judgment has been collected due to numerous logistical and political roadblocks. Approximately $270,000 has been collected from General Carlos Eugenio Vides Casanova against whom three Salvadoran torture survivors won a $54.6 million verdict in 2002. General Vides Casanova and his co-defendant General Jose Guillermo Garcia have appealed the verdict.[244]

There are several reasons why collection has been difficult.[245] Many defendants who have significant assets hide them well, either in the United States or offshore. As noted above, collection in foreign countries can be complicated. In the context of ATCA judgments, enforcement abroad is likely to be particularly problematic. This is essentially because of the lack of mutual recognition and enforcement conventions to which the US is a Party. The application of local domestic rules therefore becomes critical when considering how an ATCA judgment might be enforced outside the United States. Enforcement may also be hampered by political considerations, in particular in repressive or corrupt countries and by courts that do not operate independently.

There are barriers to protecting assets too. Preventing defendants from moving their money or assigning property to others prior to a final verdict is often not possible. Especially in civil lawsuits, defendants are protected by due process considerations that leave plaintiffs with very little likelihood of being able to freeze their assets before a judgment has been entered. In only two instances have some or all of a defendant's assets been frozen prior to a judgment in an ATCA or TVPA case: the Marcos case and the suit against Haitian Colonel Carl Dorelien. Finally, some defendants simply do not have much money. Although many military figures who participated in

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[243] 18 U.S.C. § 2340(a).

[244] Presentation by Matt Eisenbrandt, Litigation Director at the Center for Justice and Accountability (CJA).

[245] To this point, there have not been any judgments in ATCA or TVPA cases against corporations. Unocal Corporation settled a case involving abuses along its natural gas pipeline in Burma but the terms of that settlement were not publicly disclosed. The settlement marked the first time any case has been brought against a US company under the Alien Tort Claims Act..

repressive regimes profited from their important government positions, lawsuits often are not brought until 15 or 20 years after they have left power and some defendants have already spent much of the money they acquired.

However, identification of a defendant's assets prior to the initiation of a lawsuit allows plaintiffs to track whether a defendant may have engaged in fraudulent transfers if he sold or gave property to family or friends after being notified of the case against him. One case is illustrative of the importance of obtaining as much information as possible about a defendant's assets. Carl Dorelien was a Colonel in the Haitian Armed Forces and a member of the High Command of the military dictatorship that ruled Haiti during the three year period from October 1991 to September 1994. In 1994 he fled Haiti and went to the United States where he later won $3.2 million in the Florida state lottery. In January 2003, victims brought a lawsuit in Florida against Dorelien for torture and extrajudicial killing, and then Dorelien was deported back to Haiti. By power of attorney dated October 2003, Colonel Dorelien appointed his son Karl-Steven Dorelien as his attorney-in-fact. In February 2004, through Karl-Steven, Colonel Dorelien filed an application with the lottery to sell his rights to future lottery payments in exchange for a present lump sum payment of $1.3 million. The victims' representatives argued that the attempted transfer was a fraudulent transaction designed to protect the lottery payments from Dorelien's creditors, in particular the plaintiffs.

In 2004, the court entered a temporary restraining order blocking the transfer. The plaintiffs then required Dorelien's sons and the attorney they retained to testify. The testimony revealed that Karl-Steven Dorelien had retained the attorney because of his specialisation in "international asset protection" and "offshore trusts." Karl-Steven Dorelien signed various papers that were required to effectuate the transfer of the lottery payments. The papers contained numerous false statements. The plaintiffs alleged that Karl-Steven Dorelien made these misrepresentations to fraudulently induce the Florida Department of the Lottery and a Florida state court to approve the transfer of the lottery payments. Karl-Steven Dorelien also instructed the attorney to transfer the bulk of the $1.3 million lump sum to his personal bank account. The plaintiffs argued that this evidence showed that Colonel Dorelien's plan was to transfer the net proceeds from the transfer to members of his immediate family while allowing him to continue to control the proceeds through his son and attorney-in-fact, Karl-Steven Dorelien.

The key legal mechanism used by the plaintiffs was the Uniform Fraudulent Transfer Act. The statute was passed by the federal government but has been incorporated into state law by many states. Florida has implemented the statute as the Florida Uniform Fraudulent Transfer Act ("FUFTA").[246] FUFTA defines fraudulent transfer to include a transfer made with the actual intent to hinder, delay, or defraud any creditor.[247] The Act then lists certain factors that may be considered when determining whether the defendant acted with the actual intent to hinder, delay or defraud his creditors. These "badges of fraud" include whether: the transfer was to an insider; the debtor retained control of the property following the transfer; the transfer was concealed; before the transfer was made the debtor was sued or threatened with suit; the debtor was insolvent or became insolvent shortly after the transfer was made; or the transfer occurred shortly before or shortly after a substantial debt was incurred.

[246] Florida Statutes, § 726.108(1).

[247] Florida Statutes, § 726.105.

The key to the plaintiffs' ability to block the transfer was a decision of the Supreme Court of Florida which determined that FUFTA applies even before a judgment has been reached in order to preserve assets for creditors.[248] This decision is critical as individuals often transfer their property and assets to relatives after a lawsuit is filed against them. However, even in states where pre-judgment freezing of assets is not possible, the Uniform Fraudulent Transfer Act can be used to prevent_undue fraudulent transfers after a judgment has been reached. For example, the Salvadoran plaintiffs have alleged that General Vides Casanova carried out several fraudulent transfers after the filing of that case. They hope to be able to recover the money from those fraudulent conveyances as partial satisfaction of their judgment.

These experiences demonstrate the importance of due diligence by human rights lawyers. Attorneys must investigate defendants' assets before filing a case, either on their own or, where possible, with the assistance of private investigators. They must continue to monitor defendants' assets during the course of the case, looking for fraudulent transfers which can then be blocked or undone. Once cases have been completed and verdicts rendered, lawyers should obtain post-judgment testimony from defendants about their assets and about any transactions that were made during the course of the lawsuit. All of these steps are important to maximizing the ability of plaintiffs to recover the damages they have been awarded.

III.2 Awards of National Truth and Reconciliation Commissions

The last decades have seen an abundance of national truth commissions in many parts of the world. By way of example, Argentina, Bolivia, Chad, Chile, Ecuador, El Salvador, Germany, Ghana, Guatemala, Haiti, Malawi, Nepal, Nigeria, Panama, Peru, the Philippines, Serbia and Montenegro, Sierra Leone, South Africa, South Korea, Sri Lanka, Timor-Leste, Uganda, and Uruguay have all established truth commissions.

There are a number of reasons why truth commissions are established, though in essence it is to facilitate the process of reconciliation in societies that have been divided during periods of violence and grave human rights abuses. The commissions can provide an authoritative, holistic account of past human rights atrocities and their causes, thereby lessening the likelihood of such events reoccurring in the future. They also provide victims with an opportunity to communicate their experiences to persons in authority and to receive collective acknowledgment of responsibility for their suffering.

TRCs can also contribute to a restorative process by issuing specific recommendations for reform. But not all commissions make recommendations. The ones that have done so have made recommendations for police and military reform; the strengthening of democratic institutions; measures to promote national reconciliation; reparation awards to victims; as well as improvement of the judicial system. In most cases, with the exception of a few, such as El Salvador, these recommendations are not directly enforceable.[249]

TRCs can face substantial challenges with their work and mandate. Truth 'collecting' in the context of complex and traumatic social events is itself a difficult task under the best of circumstances, and

[248] *Friedman v. Heart Inst. of Port St. Lucie, Inc.*, 2003 Fla. LEXIS 1619 28 Fla. L. Weekly S 808, 20 I.E.R. Cas. (BNA) 742 (Fla. 25 September 2003).

[249] Hayner, P., Fifteen Truth Commissions – 1974 to 1994: A Comparative Study (1994) 16 HRQ 597.

truth commissions typically operate in politically fraught environments with sharply conflicting versions of what occurred. The situation is further complicated by the fact that the source of the testimony is frequently not the victim themselves but a relative. In South Africa for example, about half of all violations were reported to the TRC by someone other than the victim. Additionally, truth commissions work under time constraints. These commissions focus on a past, pre-defined period of time in which the abuses occurred, and typically cease to exist with the publication of a report on their findings. For example, the Haitian truth commission worked for nine months (April 1995 – January 1996), the South Africa commission for two years and eight months (February 1996 – October 1998), and the Guatemalan commission eighteen months plus three months preparation (August 1997 – February 1999).

a. Enforcement of Reparation Awards

As described earlier, reparation includes, *inter alia*, the right to know the truth, the right to justice as well as the right to adequate compensation and rehabilitation. In this sense, truth commissions may contribute to reparation to victims. By verifying their accounts, the truth commission process itself can support the credibility of victims' suffering and help restore their dignity. Also, truth commissions often recommend forms of reparation that may include financial compensation to the victims and their families, rehabilitation, as well as measures to avoid repetition.

The extent to which truth commissions satisfy the requirements under international law to afford full reparation to victims will depend upon their procedures, courses of action, and their impact upon national processes.[250] Originally these bodies were perceived as mere substitutes for judicial forms of justice (e.g., they were established instead of prosecuting the alleged perpetrators or providing victims' with access to the courts to seek civil redress). Post-conflict, newly-established or interim governments were faced with the dilemma of addressing the past (and its State-sponsored abuses) while preparing for the future by building a democratic society based on the rule of law, and truth was often understood as a trade-off for justice. In many cases, this dilemma was further compounded by peace agreements that provided amnesties for perpetrators or by former elites granting themselves amnesties even before the transition. Moreover, perpetrators of past crimes and their sympathisers often continue to occupy positions of power in government, including the judiciary, police and military, making prosecutions difficult. This problem has often been exacerbated by the massive scale of the abuses, the number of years that had passed after the crimes were committed and thus by a lack of evidence making prosecutions difficult, even in cases in which there is a will to prosecute. Consequently, a non-judicial or quasi-non judicial approach was adopted by numerous States undergoing transition.[251]

However, more and more, truth commissions are understood to be complementary tools to justice in order to permit transitions to democracy. Although unfavourable circumstances bar justice in many countries, new formulas are being examined and implemented to avoid impunity

[250] See "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", GA Res. 60/14 of 16 December 2005.

[251] For example, South Africa's Truth and Reconciliation Commission provided for a conditional amnesty, applicable only to those individuals who came forward to testify in order to assist the Commission in the establishment of the truth. However the conditional amnesty did not meet all victims' expectations of justice and the South African Government has failed to initiate prosecutions against those who were not granted amnesties. (See 'A Second Bite at the Amnesty Cherry? Constitutional and Policy Issues around Legislation for a Second Amnesty,' Klaaren and Varney 117 South African Law Journal (2000)).

and to guarantee adequate reparations to victims.

In regards to the enforcement of awards of damages afforded or recommended by truth commissions, the picture is bleak. In many cases, recommendations to afford reparations to victims have never been implemented, even after the passage of many years. In contrast, reparations were awarded and enforced in Brazil, but it was a simple and small programme (one individual monetary award for 336 victims).[252] In Chile, special institutions were created to claim and distribute the awards. In Argentina, the responsibility to manage the reparations programme was given to existing institutions. Although it is difficult to discern what type of mechanism works better, it is clear that countries with straightforward reparations programmes have been more successful (in other words, one allocation mechanism of a monetary award).[253]

b. Examples of Reparation Programmes

The following section contains a brief analysis of the reparation programmes recommended and/or implemented by the truth commissions in Chile, Argentina, El Salvador and South Africa:

Chile

The 'National Commission for Truth and Reconciliation' was set up in 1990, by President Patricio Aylwin, to investigate abuses resulting in death or disappearance over the previous seventeen years of military rule. The Commission ran for nine months and examined 2,920 cases.

As part of its mandate, the Commission was tasked with clarifying the truth '*in order to bring about the reconciliation of all Chileans*'[254] and recommending legal and executive measures to be taken to preclude repetition. It was also empowered to recommend just measures of reparation for the families of the victims. Three aspects of reparation were envisaged: the disclosure of the truth and the "end of secrecy"; the recognition of the victims' dignity and the pain suffered by their relatives; and measures to improve the quality of the relatives lives.

As part of its finial report, the Chilean Commission recommended that specific measures be taken to compensate the relatives of the victims. The legislature enacted Law No. 19.123 establishing a "National Corporation for Reparation and Reconciliation". This was a temporary, decentralised State organ under the Ministry of the Interior with a two-year mandate to provide compensation to victims' families and develop programmes to foster a "culture of respect for human rights" in Chile. The Corporation had two main tasks. The first was to examine over 600 cases that the Commission had been unable to resolve. The second task, directly related to the first, was to administer reparations to the victims' families as identified by the Commission on Truth and Reconciliation and by the Corporation itself.

Reparations included monthly pensions, fixed-sum payments, health benefits, and educational

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[252] Cano & Ferreira, *The Reparations Programs in Brazil*, in de Greiff, ed *The Handbook of Reparations,* (Oxford: Oxford University Press, 2006).

[253] Pablo de Greiff, ed *The Handbook of Reparations,* (Oxford: Oxford University Press, 2006).

[254] Report of the Chilean Commission on Truth and Reconciliation, at 6

benefits. Specifically, the law fixed a monthly pension of 140,000 Chilean pesos (approximately 114 euros) for the relatives of victims. The pension is distributed by giving 40 % to the surviving spouse, 30 % to the deceased's mother (or father in the mother's absence), 15 % to the mother or father of the natural children of the victim, and 15 % to each child of the victim under the age of 25 and to disabled children of any age. Each beneficiary is also entitled to collect a one-time annuity equivalent to twelve monthly pensions, which is not considered taxable income.

The law also confers the right to free health care services in the national health care system to victims' relatives whose income is below the poverty line. In addition, the Ministry of Health established a "Programme of Reparation and Integral Health Care" to cover individuals affected by human rights violations. The programme includes general medical care, social services, psychological counselling, and other services free of charge. The victims' parents, children or siblings are eligible to receive this assistance.

The children of victims are entitled to special educational benefits until the age of 35. The law provides that children studying in secondary schools, universities, professional institutes or technical institutes shall receive scholarships to pay for registration and tuition fees, plus a monthly allowance to cover living expenses. Finally, the law exempts children of victims from mandatory military service. Claims for reparations are tied to the work of the Commission and the Corporation itself. If a victim's name is included in the report, it is sufficient evidence to obtain benefits under the law. A "Higher Council" was also established to manage the Corporation and to institute its internal regulations and procedural rules.

In addition to the financial compensation administered by law, the President and the legislature have also undertaken symbolic measures. In particular, former President Patricio Aylwin proffered a formal apology to the victims and their families on behalf of the State, and asked the army to acknowledge its role in the violence.

Although the Chilean Corporation has been regarded by many as a milestone in human rights protection, the law has also been highly criticised for its limited mandate and scarce monetary awards. On the one hand, the administrative compensation provided under the law is significantly lower to the civil remedies that would have been available under Chilean law had they not been precluded by a 1978 amnesty decree. This amnesty, still in force today, prevents in practice any civil suit against the State or the alleged perpetrators for violations committed during the military coup.[255] On the other hand, since the Chilean Truth Commission's mandate was to investigate, *inter alia*, *"cases of disappearance of detainees and execution and torture resulting in death",* the reparative measures contained in Law No. 19.123 did not apply to individual victims of torture who survived their ordeal, because their cases were excluded from the Commission's report.

However, fourteen years after the establishment of the National Commission for Truth and Reconciliation, the Government has finally acknowledged the need to address the systematic torture committed in Chile during the military regime. On 29 November 2004, the Valech Report (officially the National Commission on Political Imprisonment and Torture Report) was published describing arbitrary dentition and torture committed between 1973 and 1990. The report of November 2004 detailed the results of the six month investigation, and a second part was released in June 2005.

[255] Inter-American Commission on Human Rights: Garay Hermosilla and others v Chile Case 10.843, Report No. 36/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 156 (1996).; Leopoldo Garcia Lucero v Chile case 350/02, Report N° 58/05 (Admissibility).

Based on this report, the State provided a lifelong monthly pension (of about 140 euros, which is inferior to the minimal wage salary, equivalent to 150 euros) to the victims, as well as health benefits, equivalent to what persons below the poverty line are entitled to. Families of the victims included in the Valech Report (3,000 of them were already dead) are not entitled to any reparations. Finally, the testimonies uncovered by the Commission on Political Prisoners and Torture, created by Decree 1040 (which is at the origin of the report), are classified and kept secret for 50 years. Therefore, none of them can be used in trials concerning human rights violations, nor made public. Associations of ex-political prisoners have been denied access to those testimonies.

Argentina

Argentina first established an official national commission (CONADEP) to inquire into the disappearances that occurred during the military rule. After the commission issued its report documenting some 9,000 cases, President Raul Alfonsin ordered former military leaders to stand trial. Nine high-ranking officials were later tried and several convicted of human rights related crimes, and the courts were inundated with individual complaints.

However, amnesty laws and decrees issued in 1986, 1987, and 1989 severely compromised these initiatives. The first law set a 60-day deadline for terminating criminal proceedings involving offences committed as part of the "dirty war." A flood of complaints before the deadline prompted a second law, which established an irrebuttable presumption that military personnel who committed crimes during the dictatorship were acting in the line of duty, thereby acquitting them of criminal liability. Finally, the presidential pardon issued on 7 October 1989 also stipulated that proceedings against persons indicted for human rights violations who had not benefited from the earlier laws would be discontinued. In 2005 however, Argentina's Supreme Court stated that the *Punto Final* (Full stop) and *Obediencia Debida* (due obedience) Acts, better known as amnesty laws, were unconstitutional, null and void.[256]

Although the Argentine legislation had provided that the amnesty "*does not preclude filing a civil claim*", the Government took measures to compensate victims. Law 23.466 granted a pension equal to 75% of the minimum lifetime salary to the next-of-kin of the disappeared person. The pension could be claimed by minors under the age of 21 who demonstrated that one or both parents were the victim of forced disappearance. A surviving spouse and children under the age of 21, parents and or siblings with whom the victim lived prior to the disappearance could also qualify to receive the pension.

Later, the then President Menem signed a decree providing that persons who had been detained for political reasons during the period 1976-83 would be eligible for financial assistance. Special legislation was enacted to carry the principle of compensation further. Act No. 24.043, promulgated on 23 December 1991, provided for State compensation, payable in six instalments, to persons who were "*placed at the disposal of the National Executive, or who, as civilians, suffered detention by virtue of acts of military tribunals*" during the state of siege, provided they had not

[256] See Anthony Faiola, "Argentine amnesty overturned: Ruling could bring trials of soldiers involved in "dirty war," *Washington Post*, 7 March 2001; Colin Barraclough, "Argentina tiptoes toward past," *Christian Science Monitor*, 12 March 2001.

received compensation under a previous court order.

Compensation consisted of one thirtieth of the monthly remuneration at the highest category on the civil service scale for each day of detention. For death during detention, monetary compensation consisted of one thirtieth of the monthly remuneration for each day of detention, plus a sum equivalent to five additional years. For serious injuries suffered during detention, compensation consisted of one thirtieth of the monthly remuneration for each day of detention, plus a sum equivalent to five additional years, reduced by 30 %. The law was implemented under the authority of the Human Rights Office of the Ministry of the Interior. Claims had to be filed within 180 days of publication of the law, and the claimant had to waive the right to any other compensation.

While the law sought to compensate the injuries suffered by unlawfully detained persons, a number of constraints have prevented many individuals from benefiting in practice. First, victims must prove the number of days in detention by producing an arrest order (issued by the executive) and the order of liberty. However, the military government ruling the country typically refused to acknowledge that abductions took place and the new government has not acquired disclosure of many of the necessary facts. On the other hand, victims who were detained only for some days but who were brutally tortured would only be compensated in accordance to the number of days spent in custody.

In addition, many victims and relatives have been unwilling to accept compensation from the government because, in their view, filing for financial compensation is a pay-off that cannot make up for what was lost.[257] Public discontent over the Argentine amnesty provisions may have been lessened by providing redress to victims, but this redress was not viewed as an adequate substitution for the identification and prosecution of human rights offenders.

El Salvador

In contrast to the commissions in Chile and Argentina, the "Commission on the Truth" in El Salvador was established under UN auspices in 1992 pursuant to a peace agreement between the Government and the Frente Farabundo Martí para la Liberación Nacional (FMLN) guerrillas. The Commission's task was to investigate "*serious acts of violence*" that had occurred since 1980 and "*whose impact on society urgently required that the public should know the truth*." As part of its mandate, the Commission was also called upon to recommend "*legal, political or administrative measures*" that could be inferred from its investigations, measures to prevent the recurrence of violence, and "*initiatives to promote national reconciliation*."

Bearing in mind the limitations of the Salvadoran legal system, the Commission recognised alternative forms of investigation, punishment, prevention, and compensation.[258]For example, the publication of the Commission's final report containing the truth about past violations served an investigative function, while the publication of the names of those responsible served an investigative and sanctioning function. Recommendations concerning dismissal from the armed forces and civil service, and disqualification from holding public office were intended to constitute

[257] Only one human rights group maintains its opposition to the idea of reparations—Mothers of Plaza de Mayo Association. The Association is one of the two groups that make up Mothers of Plaza de Mayo, along with Mothers of Plaza de Mayo—Founding Group. (htpp://www.madres.org.ar)

[258] See Letter dated 29 March 1993 from the Secretary-General addressed to the President of the Security Council, UN, S/255001 April 1993

a form of punishment. Another group of recommendations were designed to remedy structural problems linked to the violence, and institutional reforms were aimed at preventing repetition. Finally, material and symbolic reparations to benefit the victims were intended to serve a compensatory function.

The Commission recommended that a special fund be established as an autonomous body with legal and administrative powers, to award appropriate material compensation to the victims of violence. It was envisaged that the fund would take into account the information on the victims reported to the Commission in the annexes to the report. The Commission believed that the fund should receive an appropriate contribution from the State, but in view of prevailing economic conditions, it should also receive a substantial contribution from the international community. It recommended that the UN Secretariat promote and co-ordinate the initiative and that at least one percent of all international assistance be set aside for this purpose.

Finally, the Commission recommended several measures aimed as symbolic reparations, including (i) the construction of a national monument in El Salvador bearing the names of all of the victims of the conflict; (ii) recognition of the good name of the victims and of the serious crimes of which they were victims; and (iii) the institution of a national memorial day to remember the victims of the conflict and to serve as a symbol of national reconciliation.

To date, no legislative act has been introduced to give effect to the letter or spirit of these recommendations. The parties to the peace agreement *had* accepted as binding on them the recommendations of the truth commission,[259] yet despite the gravity of the events and this formal commitment, the Government never implemented the reparation recommendations.

To explain this failure it is important to recall that the recommendations included in the Commission's report did not arise from the negotiation process between the parties to the peace agreement. Just a few days after the publication of the Commission's Report, the Government of President Cristiani and the national legislature controlled by his party granted an across-the-board amnesty to all individuals accused of serious acts of violence. However, as the Commission did not recommend that those it named should be prosecuted, the decision to afford this amnesty cannot be said to have nullified the Commission's work or violate its recommendations. Nonetheless, the amnesty prevented the prosecution in Salvadoran courts of those identified in the Commission's report as responsible for acts of violence and resulted in the release from prison of a few others who had been convicted before the amnesty came into effect. The amnesty did not override the call for the dismissal from their positions of individuals named in the Commission's Report. All military officers identified by the Commission *were* retired from service not long after the Report was issued.[260]

The proposed financing of the reparations fund (international and domestic contributions, plus one percent of all international aid to El Salvador) was equally problematic. Instead of favouring the movement of internal and external resources to fund the programme, it actually had the opposite impact and discouraged contributions. The proposal to finance the fund with external

[259] Art 10 of the commission's mandate found in the *Mexico Agreements* of 27 April 1991, stating that; '10. the parties undertake to carry out the commission's recommendations', *El Salvador Agreements; the Path to Peace,* (Department of Public Information) UN Doc. DPI/1208-92614(1992).

[260] Thomas Buergenthal, Commissioner on the United Nations Commission on Truth for El Salvador, the United Nations Truth Commission for El Salvador, 27 Vanderbilt Journal of Transnational Law, 1994.

contributions because of the lack of internal resources, inadvertently provided legitimacy to the claims by the Salvadoran Government that resources were scarce and otherwise already earmarked. Nevertheless, the Commission's proposal did not anticipate the international community's unwillingness to finance the reparations programme. The latter was reluctant to provide contributions because it considered the fund to be a fundamental responsibility of the State, and understood that the State's contribution to the reparations programme would have a reparative value in and of itself.[261]

As the Commissioners were all foreigners the Commission's report was perceived as distant from the reality of the country. Additionally, the reparations programme was never backed by a political agreement, let alone a law to implement it.

South Africa

South Africa's transition to democratic government in 1994 included the creation of the Truth and Reconciliation Commission, a unique tripartite institution with responsibilities to prepare a record of the apartheid era, make recommendations for reparations, and grant amnesty in limited circumstances on the basis of individual applications received from individuals on all sides of the conflict. As noted above the South African TRC was given considerable powers to facilitate national reconciliation, beyond those enjoyed by previous truth commissions.

During its three years of operation, the TRC held several hundred public hearings at which over 1,800 victims were heard, it conducted more than 21,000 victim interviews, and processed approximately 7,000 amnesty applications. Taken from the TRC's report,[262] 293 members of the security forces applied for amnesty.[263] The vast majority of these were members of the Security Branch of the South African Police. They applied for amnesty for a total of 550 incidents, including killings, torture, abduction, intimidation, bombing, arson and covering up of crimes committed. 998 members or supporters of the ANC applied for amnesty for 1025 incidents, including killings and attempted killings, attacks using explosives, arson, public violence, abductions, assaults, illegal possession of weapons, etc. The TRC noted that, 'unhappily', members of the South African Defence Force made 'pitifully few applications', because the TRC could 'offer them no safety from prosecution for the many violations ... committed in countries outside South Africa'.[264]

The TRC Report asserts that the amnesty process helped 'to find people who would not otherwise have been found' and 'to lead families to a truth that would otherwise forever have been denied. Without some of these applications, many deaths and disappearances would have remained unexplained.'[265] However it has also conversely been suggested that this quasi-judicial power to grant amnesty in the end did not elicit the detailed accounts from perpetrators and institutions that had been anticipated.

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[261] See Alexander Segovia, *The Reparations Proposal of the Truth Commissions in El Salvador and Haiti: A History of Non-compliance*, in de Greiff, supra note 253.

[262] Report of the Truth and Reconciliation Commission, published in 2003 (http://www.info.gov.za/otherdocs/2003/trc/).

[263] Ibid, Vol.6.

[264] Ibid, para.375.

[265] Ibid, para.377.

Beyond the provision for extensive powers of amnesty, predicated upon an acknowledgment of wrong-doing, the provision for recommendations on reparations appeared to ensure that the suffering and loss of victims would be acknowledged and as far as possible repaired, and that this would contribute to the restoration of the dignity of victims and increase the prospects for reconciliation. Successive governments since 1994, under the leadership of the African National Congress (ANC), have engaged in significant institutional reform and created new oversight bodies in an effort to ensure that State structures can never again violate human rights norms with such impunity. However, the recommendations of the TRC have not being seriously and fully implemented: in particular, reparations have not been paid to victims of past human rights violations; prosecutions have not been mounted against individuals about whom there is credible evidence of involvement in gross abuses; and, as a consequence of a court case, the publication of the final two volumes of the TRC's report was delayed by almost one year after their completion, contributing to a further delay in the implementation of reparations.

In its 1998 report, the TRC made extensive recommendations for reparations to victims, including both monetary compensation and various forms of "symbolic" reparations, ranging from the building of monuments and renaming streets and community facilities, to expunging criminal records for acts committed with political motives. The act establishing the TRC recognised that adequate reparation and rehabilitation measures were essential to the process of healing and reconciliation and would counterbalance the consequences of granting amnesties to perpetrators by which victims would be denied the right to institute civil claims, both against the perpetrator and the State. Though there has been progress on many of the non-monetary recommendations, the proposed financial compensation remains largely outstanding.

In July 1998, the President's Fund, established by President Mandela to handle these payments among other matters, made the first disbursements of "urgent interim reparations," acting on recommendations made by the TRC's Reparations Committee. Although R300 million South African Rands (38.9 million Euros approximately) was set aside for this process, only R48.37 million had been paid out under this scheme by November 2001, in grants of between mostly two and three thousand Rands each to 17,100 applicants (from a total of 20,563).

In its October 1998 report the TRC recommended that final reparations to victims involve an amount of money, called an individual reparation grant, to be made available to each victim, or equally divided amongst relatives and/or dependants who have applied for reparation if the victim is no longer living. Estimating 22,000 victims, the TRC calculated the total cost of this policy to be R 2,864,400,000 over six years.[266]

The Government announced in February 2001 that it would be setting aside R800 million for final reparations (i.e. R500 million in addition to the R300 million already set aside for interim reparations) - substantially less than a third of what the TRC had proposed. But it made no announcement about when this money would be disbursed other than stating that it would be paid in one-off settlements. In May 2001, a Department of Justice spokesperson said that the legislation setting the framework for reparations to the victims could not be introduced to parliament until 2002. In March 2002, the Ministry of Justice informed victim support groups that the reparations

[266] The amount of the grant was based on a benchmark of R21,700, the median annual household income in South Africa in 1997, worth U.S.$4,460 at that time. The TRC recommended a three-part formula to calculate each individual award, with components to acknowledge the suffering caused by the gross violation that took place; to enable access to services and facilities; and to subsidize daily living costs, based on socio-economic circumstances.

policy had been developed and was currently before the Cabinet. Subsequently official spokespersons have stated that nothing can be done until the Government has received the final list of victims and report from the TRC.

Despite various legal obligations to provide reparations, and despite the growing anger of victims and those in civil society who support them, the South African Government, has only now begun the process of implementing a reparations programme. However, the only concrete aspect of its reparation policy that the Government has committed to is a one-time payment of R30,000 (US $3,750) to those identified by the TRC as victims of gross human rights violations.[267]

The Constitution itself envisages government follow up and responsibility in order to grant reparations to the victims (this is couched in terms of "President" or "Ministerial" responsibility). Thus the Commission only gives recommendations, which the Government would decide to pursue at its own discretion. Implementation of reparations is clearly left to the governmental level:

> s. 27(2): The recommendations referred to in subsection (1) shall be considered by the joint committee and the decisions of the said joint committee shall, when approved by Parliament, be implemented by the President by making regulations.

Further to this s.40 states*:*

> *(1) The President may make regulations-*
>
> (a) prescribing anything required to be prescribed for the proper application of this Act;

The Committee on Reparations and Rehabilitation recommendations include plans for the implementation process itself. They suggest that '*a structure be developed in the President's office, with limited secretariat and fixed life-span, whose function will be to oversee the implementation of the reparation and rehabilitation policy proposals and recommendations.*'[268] It also outlines several broad issues it says must be taken into consideration as the government designs the implementation structure. However, for the moment, there doesn't seem to be any signs of political will on behalf of the government to design the programme or its enforcement structure.

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[267] Colvin, *Overview of the Reparations Program in South Africa*, in de Greiff supra note 253.

[268] TRC Report, supra note 262.

IV. CONCLUSIONS

As has been stated throughout this Report, enforcement of reparation decisions for torture and other international crimes is an essential part or the right to a remedy and reparation: to be effective, remedies need to be enforceable. To date, there has been very little attention paid to the question of enforcement of judgments for victims of international crimes. This is due in part to the fact that progress in obtaining the initial judgments in favour of victims has been very slow. Victims' advocates have and continue to spend most of their time and efforts in overcoming the major barriers impeding access to justice – for most, the prospect of a successful judgment in need of enforcement remains a far removed consideration.

But as more progress is made by victims and their supporters in ending impunity for the worst international crimes and obtaining positive judgments in favour of victims, the importance of focusing attention on enforcement procedures is clear. The purpose of this Report was therefore to provide a first look at the issues and to identify some of the problem areas impeding enforcement at both the national and international levels.

When considering the underlying basis for problems with enforcement, one must consider

i) the willingness of the State (or individual) to enforce the decision;
ii) the extent to which the views, decisions or judgments are themselves binding on the State (or individual);
iii) the nature of the views, decisions or judgments and the extent to which these pose any particular challenges for enforcement; and
iv) the capacity of the mechanisms to follow-up with States or others as appropriate, on enforcement issues.

Each of these issues will play a part in the degree to which views, decisions or judgments are enforced in practice.

- ***The nature of the obligation of States to implement reparation measures***

The nature of the obligation of States to implement reparation measures plays an important part in enforceability. The fact that a particular decision is 'binding' will not necessarily mean that enforcement will be easy or obvious. Similarly, the fact that a particular mechanism is by its nature 'non-binding' will not preclude enforcement.

In cases where the decisions are legally binding (such as the European or Inter-American Court of Human Rights), there is often a tension between the binding force of the decisions and the finality of domestic decisions. There is no established collateral procedure for cases in which international courts and tribunals find a violation by a domestic decision (particularly when it has been reviewed by the highest judicial body of the State). In practice, a respondent State's political and judicial divisions are mobilised to varying degrees depending on the nature of the judgments, views or decisions: Do they require purely executive remedial action or legislative and/or judicial action? It appears that compliance depends on the extent to which each governmental division rallies to respond to a specific judgment and on the pressure that each international enforcement procedure is able to exercise over the State.

Whilst decisions of quasi-judicial bodies like the Inter-American Commission of Human Rights, the African Commission on Human and Peoples Rights and the UN treaty-body mechanisms (such as the Human Rights Committee and the Committee Against Torture) are not themselves binding *stricto sensu*, they provide an authoritative interpretation of conventional obligations which are arguably, in themselves, legally binding. A State is effectively bound by treaty to make the requisite changes and provide the necessary redress to give effect to its obligations under the treaty. States have accepted the role of these bodies as the interpreters of the conventions. Some of the mechanisms, themselves, have read in an obligation to comply. In this regard, the Inter-American Commission has interpreted the obligations contained in Articles 1 and 2 of the American Convention as imposing a duty on States to comply with the recommendations made by the Commission. The Commission has explicitly urged States to "*comply with the recommendations made in its reports on individual cases and to abide by the request of provisional measures*" and "*to adopt legal mechanisms for the execution of the recommendations of the Commission in the domestic sphere*". Correspondingly, the Organisation of African Unity/African Union has made general calls for States to cooperate with the African Commission.

When it comes to decisions of the International Criminal Court (ICC), as a general matter, States Parties to the Rome Statue are obliged to "*cooperate fully with the Court*" and to "*ensure that there are procedures available under their national law for all of the forms of cooperation*". With respect to protective measures, States Parties are bound to comply with the Court's requests to provide assistance and in respect of reparations orders, they must give effect to an ICC order in accordance with their national laws, and "*without prejudice to the rights of bona fide third parties*". Finally, although not binding for non-States parties, the ICC Presidency can seek cooperation from any State connected to the sentenced person *either* by virtue of nationality or habitual residence, *or* by virtue of the location of assets connected to the victims.

The extent to which such decisions will be enforced is yet to be seen, however here, the generality of the obligations to 'cooperate' and/or to 'enforce' may, in the absence of a clear follow-up mechanism, hinder enforcement in practice. The experience of other human rights courts and treaty mechanisms shows the utility and merits of developing internal enforcement procedures, and as other mechanisms have done, the ICC is encouraged to develop the necessary procedures in order to ensure enforcement in practice.

- ***Monitoring mechanisms/Follow-up procedures***

The existence of a monitoring mechanism or follow-up procedure has in practice greatly improved prospects for enforcement. At times, monitoring mechanisms are established by the laws or treaties setting up the court, commission or treaty body. One example is the European Convention, which establishes a procedure for automatic and systematic supervision by the Committee of Ministers. Another example is the Inter-American Court, which in accordance with Article 65 of the Inter-American Convention, retains jurisdiction for follow-up.

There are pros and cons to either approach mentioned above. The direct role of the Inter-American Court has some obvious advantages. It is not always easy for the Committee of Ministers of the Council of Europe, which is not a judicial body, to determine whether the legislative or other measures undertaken by a particular State do in fact fully comply with the European Court's decisions. But, the lack of oversight by a 'political' body of the Organisation of

American States to match the Committee of Ministers has made it more difficult to tackle political obstacles to implementation, including the lack of political will.

Certain laws/treaties have made no mention of follow-up procedures, and here, the mechanisms themselves have had to creatively interpret their mandates in order to establish such procedures, in order to enhance enforcement. In 1993, for example, the Human Rights Committee (HRC), recognising that the absence of a follow-up mechanism was a serious *lacuna* in the ICCPR monitoring machinery, instituted a follow-up procedure to ensure implementation of its decisions, calling on States to provide information within ninety days about the measures taken in connection with its Views. As part of this mechanism it also created a Special Rapporteur for Follow-Up on Views, whose mandate is for a two-year (renewable) term. Similarly, since mid-2002, the following paragraph is added to all decisions in which the CAT has found a violation/s of the Convention: *"The Committee urges the State party to … provide an appropriate remedy and, in accordance with rule 112, paragraph 5, of its rules of procedure, to inform it within 90 days from the date of transmittal of the decision, of steps taken in response to the Views".* Though the African Commission has no official or formal policy on follow-up or other powers with which to coerce compliance with its decisions, it has used mechanisms within its procedures to this end. For example, the Commission has used its promotional visits to countries, as well as missions prompted by protective reasons or on site investigations, to monitor implementation of the Commission's findings and recommendations resulting from prior communications.

Clear follow up policies generally assist in identifying the areas of concern and lack of enforcement. For example the Committee of Ministers of the Council of Europe has a clear record of the number of Member States that have adopted constitutional, legislative, regulatory reforms, or other general measures to comply with the Court's judgments, and how many of such reforms or measures is currently supervising. Likewise a designated follow-up authority/body has proven useful not only within the European System but also with the UN treaty body mechanisms. A position of Follow-Up Officer was established in 2003 within the Office of the High Commissioner for Human Rights, and consequently the follow-up procedure under the Optional Protocol to the ICCPR and under the procedure governed by article 22 of the Convention against Torture has improved. There is at present no Special Rapporteur tasked with follow-up of African Commission decisions, though this has been strongly recommended.

The ICC does not yet have a follow-up policy or specific enforcement mechanism in place. Where there is a complete lack of cooperation, there seems to be little that the ICC will be able to do to bolster enforcement, other than to refer the matter to the Assembly of State Parties or to the Security Council (where the case has been referred by it). However, at least pending actual practice, it is not clear from this provision what measures the Assembly of States Parties or Security Council can, and will, take in response to the non-cooperation of a State Party. It is advisable for the appropriate organs of the ICC to develop tools and procedures to ensure sufficient monitoring and follow-up of enforcement practices, as other internationalised courts have already done. This may include:

- ***A judicial enforcement function***: Ensuring that the ICC remains seized of cases until enforcement is assured. As part of the continuing responsibility of the relevant chamber of the ICC who issued the order, the person(s) affected should be entitled to seek the assistance of the Court in ensuring compliance. This would involve decisions on standing before the Court as well as continued access to legal

representation in the enforcement phase;

- ***Registry monitoring and oversight function***: An arm of the Registry should be tasked with monitoring cooperation and enforcement requests, and following up with the bureau of the Assembly of States Parties to ensure compliance.

- ***Victims participation in the enforcement stage and procedures to challenge non-compliance***

Formal participation of victims in the enforcement stage is also necessary to guarantee the effectiveness of the enforcement procedure. Although victims have in fact participated in certain cases, their role before the European Committee of Ministers is still not formally established. Victims do have a role in the Inter-American Court's procedure to ensure compliance with its judgments or provisional measures (although this procedure is not formally established but has been developed by the Court itself). The procedure consists of the responsible State presenting reports on compliance as requested by the Court and the Inter-American Commission and the victims, or their legal representatives, submit comments on these reports.

The possibility to challenge non-compliance and the procedure to do so are equally relevant to guaranteeing effective enforcement. On this issue for example, it remains to be decided whether a case can go back to the European Court for review of enforcement measures; the Evaluation Group appointed to study further reforms to the system opposed the idea on the ground that it could result in a blurring of the respective responsibilities of the Court and Committee of Ministers and draw the Court into an arena outside its purview. The Inter-American Court on the other hand has held public hearing on compliance and has sometimes modified the reparations decisions (e.g. to authorise the parties to invest in term-deposit certificates rather than to create a trust fund, because this was the most favourable arrangement for the minor beneficiaries).

In regards to the ICC, since the participation of victims in the Court's proceedings has been recognised by the Rome Statute, it is important to ensure the continued role of victims' legal representatives into the enforcement stage. This would include ensuring the continued role of the Victim Participation and Reparations' Section and the Public Council Unit for Victims, as appropriate, and continued resources for legal representatives during this phase of proceedings. It is recommended that the relevant organs of the Court take an active role in ensuring enforcement of decisions.

- ***Enforcement of the different forms of reparation awarded by international bodies***

As has been indicated throughout this Report, there are a range of forms of reparation that can and have been ordered or recommended by courts and other mechanisms, including individual measures of redress for individual victim(s) and the adoption of general measures to prevent future violations. The implementation of reparation measures involve, depending on the form of the measures (e.g., monetary compensation, investigation or criminal sanction, reform of laws or procedures) different organs within the State apparatus. In general, there is a different compliance rate for monetary compensation as compared with other forms of reparation. This is in part because the types of actions that need to be taken by States to implement non-monetary measures are more complex. They require more time to be implemented and involve several organs of the State. Still, these measures are essential to afford full reparation and to eradicate and prevent

future violations.

In practice, the Committee of Ministers of the Council of Europe pays particular attention to States' compliance with the obligation to implement general measures, since it considers that such measures constitute the essence of the European Convention of Human Rights. In the same way, the Inter-American Court has ordered a variety of measures dealing with structural, institutional and legal reforms that aim to redress the victim(s) and to eradicate the circumstances that allowed the violations to occur in the first place. However, in both of these contexts, whilst compensation orders are usually enforced by States (albeit with persistent delays), other measures of reparation are simply not enforced, shirked completely or only partially complied with.

In the European system, the implementation procedure in cases where the violations reveal a structural problem requires the respondent State to identify under the supervision of the Committee of Ministers the appropriate measures to prevent new similar violations. Once such measures are identified, the Committee assesses their efficiency to achieve the result required and supervises their adoption. However, the experience of the Committee, particularly in respect of Turkey, has shown that the prevention by States of torture and other serious abuses is a multi-dimensional and time-consuming process. The factual context of the violations can also engender difficulties. For example, violations committed during a large-scale military conflict present particular complexities. The circumstances in which these violations occurred, their massive character and the long time that lapses since the event, may make it more difficult to conduct effective domestic investigations in accordance with the remedial measures ordered by the Court.

Since 1997, when Peru complied with the Inter-American Court's order to release a Petitioner from prison, a new level of State compliance was reached within the Inter-American System. In subsequent cases in which the Inter-American Court declared a domestic law or judgment to be in violation of the American Convention, States amended laws, domestic courts declared laws to be unconstitutional, and/or annulled domestic judgments. However, the Inter-American Court, in almost every case, has also ordered the State to investigate, prosecute and punish the individuals responsible for the human rights violations. These latter orders are seldom fulfilled. In many States impunity still reigns, and the State structures lack the means or the will to bring the perpetrators to justice.

- ***The specificity of the findings and remedial measures***

The degree of precision with which findings are recorded and the specificity of the recommended or ordered remedial measures will impact upon the extent to which the measures will be enforced in practice. It is easier for positive decision holders or their lawyers to claim – and for the authorities and the follow-up body to ensure – that the impugned shortcomings are remedied, when they are precisely characterised by the Court or other decision making body. Similarly, enforcement is easier when the forms of reparation awards are succinct, precise, and realistic; taking into account the amount of time and the type of activities that are required to implement the measures.

However, human rights bodies and courts have generally seen their role as declaratory. They have tended to identify the violations/articles breached in their decisions and called upon States to implement 'appropriate' remedies in accordance with their domestic legal systems. For example,

the UN Human Rights Committee and Committee against Torture express their recommendations in very general terms: appropriate compensation, release of the prisoner, amendment of legislation, etc.

The practice of the European Court is also to establish the existence of a violation, and the process of giving effect to that finding, is left to the State concerned and Committee of Ministers. However the recent practice of the Court indicates a willingness to give some guidelines to the responsible States on how best to remedy consequences of a particular violation of the Convention. In a similar way, the African Commission has further developed a practice whereby it not only lists the articles violated by a State but also recommends remedial measures to be adopted by the State concerned. The primary aim of this procedure has been expressed by the Commission as the initiation of 'a positive dialogue, resulting in an amicable resolution between the complainant and the State concerned, which remedies the prejudice, complained of'.

In general, when international bodies order criminal investigations, these measures are hardly ever enforced. Domestic statutes of limitation commonly bar criminal investigations even though international law stipulates that limitation periods are not applicable to some of the most serious international crimes, and in other cases the extension of the limitation periods may be appropriate. Also, States have argued that it is not possible to reopen already closed investigations or to retry individuals, as this would breach the principle of *res judicata*. The Committee of Ministers of the Council of Europe has taken the position that the extension or removal of limitation periods may be appropriate in respect of future cases but that it is difficult to apply it to the case in question because of the problem of retroactivity. In such cases the Committee has explored other remedial measures (e.g. disciplinary proceedings) but such measures may also encounter similar legal obstacles and might not be sufficient to adequately redress the violation(s). The Inter-American Court recently ruled that trials in breach of due process guarantees and which are not held with the objective of truly bringing perpetrators to justice and to punish them cannot be considered as valid proceedings capable of raising issues of *res judicata*.

The factual context of the violations can also engender difficulties. The time and place where the events occurred (often decades ago) as well as the nature of the violations (e.g. no records of detentions in cases of forced disappearances) might impede the successful collection of evidence. Cases of large-scale abuses such as massacres and/or systematic forced disappearances are equally difficult to investigate. The rank or position of the alleged perpetrators may also impede investigations, particularly where such individuals still hold significant political power within the country, and/or where this heightens victims' fears of reprisals.

Enforcement of ICC protective measures and reparation decisions give rise to a set of problems which is both similar to those related to the enforcement of decisions of international human rights bodies, and, in some respects, more akin to the enforcement of domestic and foreign civil judgments; since the awards of reparation are against individuals rather than States (regardless of the effect that a judgment could have on the international responsibility of the State(s)). First of all, where no appropriate domestic legislation and/or procedural mechanism exists, enforcement of protective measures will likely be very slow and cumbersome, which may undermine their preventive purpose. Political or other logistical factors, particularly in post-conflict situations, may negatively impact on enforcement of both protective measures and reparation awards. Another potential barrier might be a conflict with domestic bank secrecy laws that may prevent establishing an effective link between the perpetrator and a particular set of assets. This may be problematic

both within the territorial forum, but also in other jurisdictions if at least some of the assets are found in foreign locations. A further challenge may arise if domestic mechanisms for awarding reparations do not align with the enforcement of the ICC's order. Moreover, particularly with respect to monetary awards, there might also be obstacles relating to conflicting claims in the domestic forum. At the moment, it is uncertain how these competing enforcement claims will be prioritised and by whom. Finally, enforcement may run into serious difficulties where assets subject to protective orders or from a sentenced person are found in the territories of non-State Parties. States that have not ratified the Rome Statute have no obligation to cooperate unless they enter into a specific *ad hoc* agreement with the ICC. But even if non-State Parties were willing to cooperate, there would still be a lack of established procedural mechanisms in the absence of a pre-existing *ad hoc* arrangement and this would cause considerable difficulties and delays.

In a similar way, claimants seeking to enforce foreign civil judgments where no international treaty mechanism is in place, face comparable barriers. In the context of the US Alien Tort Claims Act (ATCA) for example, which allows extraterritorial civil claims for serious human rights violations, enforcement abroad is likely to be particularly problematic. This is essentially because of the lack of mutual recognition and enforcement conventions to which the US is a Party. The application of local domestic rules therefore becomes critical when considering how an ATCA judgment might be enforced outside the United States. Enforcement may also be hampered by political considerations, in particular with repressive regimes and by courts that do not operate independently.

- ***Enabling legislation to enforce international decisions and foreign judgments***

Enabling legislation at the domestic level facilitates implementation of reparation measures in compliance with international decisions. However, there are very few States that have enacted specific legislation, and the existing examples of enabling legislation generally fail to take into account of all the existing international human rights bodies, and/or do not necessarily take into account the varied forms of reparation measures.

For example, Colombia passed enabling legislation in 1996 for the domestic enforcement of awards of compensation made by international bodies, such as the Human Rights Committee and the Inter-American Court and Commission of Human Rights. Peru had legislation for the implementation of Views of the Human Rights Committee before taking it off the books in the late 1990's, although law no. 23506 on *amparo* and *habeas corpus* recognises the binding nature of the Inter-American Court.

There is also a special team in Colombia in charge of the security of persons in favour of whom the Inter-American Commission or the Court has ordered interim/precautionary measures. In Costa Rica, the headquarters agreement of the Inter American Court provides that decisions of the Court or the President have the same effect as judgments handed down by the domestic judiciary upon their transmission to the domestic administrative and judicial authorities.

In Hungary, while there is no specific provision allowing international decisions to be given direct effect, the Code on Criminal Procedure provides that the decisions of international human rights organs are to be considered as "new evidence" for the purpose of reopening criminal cases. In the Czech Republic under Act No. 517/2002 Coll. of Laws on Some Measures in the System of Central State Organs, the Ministry of Justice has been charged with the co-ordination of the

implementation of the Views of the UN Human Rights Committee.

More generally, the Honduran Constitution proclaims the validity and mandatory execution of international judicial decisions. Similarly, the Guatemalan, Nicaraguan and Argentinean constitutions specifically recognise human rights treaties as overriding domestic legislation, which facilitates the implementation of international judgments.

Despite these legal provisions and initiatives, there is still a general sense among national authorities that international law is irrelevant to the domestic context, which normally impedes a swift enforcement of international reparation measures. It is important therefore to promote the education on international standards amongst the legal community, including the judiciary, with a particular focus on compliance and enforcement. States should also publicise international decisions, not only as a measure of satisfaction for the affected victims, but as a way of familiarising public officials and the society at large with the existence and importance of these bodies.

Finally, enabling legislation is also important for recognition and enforcement of foreign judgments. Until recently, the Hague Conference on Private International Law was working on a universal/global Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters which, in its original form, would have allowed civil and commercial judgments from one Contracting Party to be recognised and enforced in other Contracting Parties. Such a global mechanism could have obviously been very helpful in terms of cross-jurisdictional enforcement, and discussions during the drafting process specifically considered ways in which 'human rights' decisions could best be enforced by the Convention system. However, the scope of the Convention has now been narrowed, and it now only applies to the enforcement of judgments where 'exclusive choice of court agreements' are in place in business-to-business cases. The scope of the Convention was narrowed for various reasons, including, the wide differences in the existing rules of jurisdiction in different States, and the unforeseeable effects of technological developments, including the internet, on the jurisdictional rules that might be laid down in the Convention.

- ***Enforceable and adequate reparations by Truth and Reconciliation Commissions***

In regards to the enforcement of monetary awards afforded or recommended by truth commissions, the picture is extremely bleak. In many cases, recommendations to afford reparations to victims have never been implemented, even after the passage of many years. Reparations were awarded and enforced in Brazil, but it was a simple and small programme (one individual monetary award for 336 victims). In Chile, special institutions were created to claim and distribute the awards, and this helped to ensure the distribution, whereas in Argentina, another case where there was enforcement, the responsibility to manage the reparations programme was given to existing institutions.

Reparation for serious human rights violations is complex and multidimensional. While simple measures can be easier to implement, such simplified measures will not usually reflect the gravity of the violations committed, redress as much as possible the loss and suffering of the victims or deter future similar violations.

There are examples of national reparations measures that even when implemented have not been

sufficient or adequate. For example, the administrative compensation provided under the Chilean Corporation law was significantly lower than the civil remedies that would have been available under domestic law had they not been precluded by the 1978 amnesty decree still in force. Also, the reparative measures contained in Law No. 19.123 did not apply to torture survivors, because their cases were excluded from the Truth Commission's mandate which focused principally on disappeared and murdered persons. Although the Government had subsequently acknowledged the need to address the systematic torture committed during the military regime, and recently established a National Commission on Political Imprisonment and Torture, the remedial measures awarded by this body would appear to fall short of international standards. Again the compensation awarded does not reflect the gravity of the violations; the families of the victims have no access to any form of reparation; and the procedure established neglects the victims (and the society in general) of their right to know the truth and to punish the perpetrators. The testimonies uncovered by the Commission are classified and kept secret for 50 years. None of them can be used in trials concerning human rights violations, nor made public. Associations of ex-political prisoners have been denied access to those testimonies.

Although the Argentine legislation had provided that the (then in force) amnesty "*does not preclude filing a civil claim*", the Government took separate measures to compensate victims. One of the reparation laws sought to compensate the injuries suffered by unlawfully detained persons during the military junta. But a number of constraints have prevented individuals from benefiting in practice. First, victims were required to prove the number of days in detention by producing an arrest order (issued by the executive) and a release order. However the military regime of the time of the violations typically refused to acknowledge that abductions took place and the new government has not acquired disclosure of many of the necessary facts. Another problem identified is that victims who were detained only for a few days or weeks but who were brutally tortured would only be compensated in accordance to the number of days spent in custody. In addition, many victims and relatives have been unwilling to accept compensation from the Government because, in their view, filing for financial compensation is a pay-off that cannot make up for what was lost: compensation was not viewed as an adequate substitution for the identification and prosecution of human rights offenders.

The adequacy of reparations and the complementary nature of justice and other forms of reparation (like compensation and rehabilitation) have also played an important role in the South African context. While the case for formal reparations was further detailed in the Constitutional Court's controversial judgment which upheld the validity of the TRC's amnesty process (partially justifying this by highlighting a reciprocal need for a comprehensive reparations programme for victims), the delay and lack of implementation of reparations has arguably overshadowed the achievements of the TRC and has casts serious doubts about the fairness of the process. Considerable tension developed between NGOs lobbying for implementation of the reparations policy and the Government who appeared reluctant to proceed. Victims were angry that many perpetrators had benefited expeditiously from the amnesty process, whilst they were being forced to wait.

It is clear that the extent to which truth commissions satisfy the requirements under international law to afford full reparation to victims will depend upon their procedures, courses of action, and their impact upon national processes. Political will, as well as practical measures to secure and guarantee the operation and implementation of recommendations by these bodies, are therefore crucial. In El Salvador, as the Commissioners were all foreigners, the Commission's report was

perceived as distant from the reality of the country. Additionally, the reparations programme was never backed by a political agreement, let alone a law to implement it. The result has been that to date, the Government has not implemented any of the reparations recommended by the Truth Commission and has simply ignored the whole process.

Legislation setting forth the powers of truth commissions has a significant impact on their functioning and resulting findings. Commentators have recognised the importance of providing Commissions with extensive powers of subpoena, search, freezing and seizure. Equally, specific mechanisms or procedures for the enforcement of reparations recommended or awarded by truth commissions is also critical. Unlike the South African TRC's Amnesty Committee, which had legal powers of enforcement, the TRC's Reparations and Rehabilitation Committee could only recommend a reparations programme to the Government with no authority to ensure its implementation.

While truth commissions and administrative reparations programmes are ad hoc or *sui generis* remedial mechanisms, their aim is to facilitate access to justice. They cannot substitute remedies otherwise afforded by domestic and international law. Thus is important to establish procedural avenues and review mechanisms to challenge the lack of implementation as part of an effective follow-up procedure.

ANNEX 1: AGENDA CONFERENCE

CONFERENCE ON ENFORCEMENT OF AWARDS FOR VICTIMS OF TORTURE AND OTHER INTERNATIONAL CRIMES

PROGRAMME-DAY ONE

Thursday 2 June 2005

9:30-10:00am *Coffee and registration*

Opening

10:00-10:10 am Professor Malcolm Forster, Freshfields Bruckhaus Deringer, London

10:10-10:30 am Carla Ferstman, REDRESS, London

Panel 1: Regional Human Rights Mechanisms

Chair: Professor Bill Bowring, London Metropolitan University

10:30-10:50am Fiona Adolu, former Legal Officer- African Comm. of Peoples' and Human Rights

10:50-11:10am Victor Madrigal, Inter-American Commission of Human Rights, Washington DC

11:10-11:30am Hasan Bakirci, European Court of Human Rights, Strasbourg

11:30-11:50am Mikhail Lobov, Council of Europe, Strasbourg

11:50-12:10pm Questions; Answers; Comments

12:10-2:00pm *Lunch*

Panel 2: UN Human Rights Mechanisms

Chair: Professor Sir Nigel Rodley, University of Essex

2:00-2:20pm Markus Schmidt, UN OHCHR, Geneva, Switzerland

2:20-2:40pm Karinna Moskalenko, Center of Assistance to International Protection, Moscow

2:40-3:00pm Dr. Natalia Álvarez Molinero, Human Rights Legal Adviser, Spain

3:00-3:30pm Questions; Answers; Comments

3:30-4:00pm *Coffee Break*

Panel 3: International Criminal Court

Chair: Steven Powles, Doughty Street Chambers, London

4:00-4:20pm Miriam Spittler, ICC Office of the Prosecutor, The Hague

4:20-4:40pm Carla Ferstman, REDRESS, London

4:40-5:00pm Questions; Answers; Comments

PROGRAMME-DAY TWO

Friday 3 June 2005

9:30-10:00am	*Coffee and registration*

Panel 4: Domestic Enforcement of International Awards/Judgments/Decisions

	Chair: Gabriela Echeverria, REDRESS, London
10:00-10:20am	Alejandra Nuno, Center for Justice and International Law (CEJIL), San Jose
10:20-10:40am	Nuala Mole, AIRE Centre, London
10:40-11:00am	Lucy Claridge, Kurdish Human Rights Project (KHRP), London
11:00-11:30am	Questions; Answers; Comments
11:30-12:00pm	*Coffee Break*

Panel 5: Enforcement of Civil Judgments/Awards in Domestic and Foreign courts

	Chair: Professor Malcolm Forster, Freshfields Bruckhaus Deringer
12:00-12:20pm	Gregory Fullelove, Freshfields Bruckhaus Deringer, London
12:20-12:40pm	John Carnt, Managing Director, Investigations, Vance, London
12:40-1:00pm	Matt Eisenbrandt, Center for Justice and Accountability (CJA), San Francisco
1:00-1:20pm	Neri J. Colemnares, victim and lawyer in the US *Marcos* litigation, Manila
1:20-1:50pm	Questions; Answers; Comments
1:50-4:00pm	*Lunch*

ANNEX 2: BIOS OF SPEAKERS

"CONFERENCE ON ENFORCEMENT OF AWARDS FOR VICTIMS OF TORTURE AND OTHER INTERNATIONAL CRIMES"

SPEAKERS

Fiona Adolu
Fiona Adolu is Ugandan a lawyer. She has been a Legal Officer at the African Commission for Human and Peoples' Rights (ACHPR) since 2000 but she is currently at the University of Nottingham pursuing an LLM in International Law.

As a Legal Officer her work involved drafting decisions of communications for consideration by the ACHPR; accompanying & providing assistance to Members of the ACHPR during Promotional, Protective or Factfinding Missions undertaken to States Parties; analysing initial and periodic state reports and drafting concluding observations thereto; drafting various legal documents, resolutions and reports of Meetings, Conferences etc for adoption by the ACHPR.

Ms Adolu previously worked in the Uganda Law Society, which is the Bar Association of Uganda, and the Federation of Uganda Women Lawyers –FIDA(U).

Dr. Natalia Alvarez
Dr Natalia Alvarez is a consultant and researcher in the area of human rights and indigenous peoples´ rights. She has a BA in Law from the University of Deusto and a degree in humanitarian assistance (NOHA) Refugee Studies Programme from the University of Oxford. Dr Alvarez obtained her Ph.D in 2003 at Deusto University and has been a lecturer at the Universitat Jaume I, the University of Deusto, the University of the Basque Country (UPV), the University of Padua, the University of Seville, the UNESCO-Etxea and the Institute for Development Hegoa. She has worked as consultant for the European Commission, the United Nations Office of the High Commissioner for Human Rights and the University of Arizona, College of Law.

In 1999 she was appointed as consultant for the study on the impact of the UN treaty body system in Spain, organised by the University of York, University of Pretoria and the United Nations Office of the High Commissioner for Human Rights. She has also worked as legal advisor on international cases. In 2002 she founded the Indigenous Fellowship Programme for Latin America at the University of Deusto in cooperation with the United Nations High Commissioner for Human Rights, which she co-ordinated until 2004. Recently she submitted an alternative report on migration law in Spain to the CERD on behalf of the Bizkaia Association Bar and she has also worked as legal advisor in the area of economic, social and cultural rights for the Human Rights Department of the Basque Government.

Hasan Bakırcı
Hasan Bakırcı is a legal officer at the Registry of the European Court of Human Rights. He has started his career in the Convention Institutions in November 1996, in the Secretariat of the European Commission of

Human Rights. Following the entry into force of Protocol No. 11 to the European Convention on Human Rights, he was employed in the Registry of the Court as from 1 November 1998.

Over the years he has worked on a vast number of cases against Turkey covering the whole spectrum of rights and freedoms guaranteed by the Convention and its Protocols. Beyond his practical case-based work, Mr Bakırcı has shown a keen interest in researching developments in International Law and, in particular, International Humanitarian Law. He has also completed a Master's in International Human Rights Law at the University of Oxford. Mr Bakırcı has also been actively involved in the Council of Europe's training programmes for judges and lawyers in the Member States of the Organisation.

Professor Bill Bowring
Bill Bowring is a practising barrister and Professor of Human Rights and International Law at London Metropolitan University, where he is also Director of the Human Rights & Social Justice Research Institute. He founded and is Academic Coordinator of the European Human Rights Advocacy Centre, based at London Metropolitan University and, in partnership with *Memorial*, has taken some 70 cases against Russia to the European Court of Human Rights.

He has represented applicants before the Court in cases against Latvia, Russia and Turkey. He also acts as expert for the Council of Europe (DGI, DGII and DGIV) on minority rights issues, and works as a trainer and expert for the Council, the European Union, Amnesty International and others. He is author of many publications on International Law, Human Rights, Minority Rights and Russian law, in which he is an expert. He is an Executive Committee Member of the Bar Human Rights Committee, a Member of the Council of Liberty and a Trustee of REDRESS. He speaks fluent Russian.

John Carnt
John Carnt is the Managing Director of Investigations at Vance International Limited based at the London Office. Prior to joining Vance he was Deputy Head of New Scotland Yard's Fraud Squad Economic & Specialist Crime Unit, a role which he undertook for six years as Detective Superintendent. John completed 30 years service in total with the Metropolitan Police Service as a career detective.

Throughout his police career he dealt with high profile cases involving serious and organised crime. He had direct oversight of covert surveillance and confidential source deployments within the London area. As Deputy Head of the Economic & Specialist Crime Unit at New Scotland Yard, he directed investigations into fraud, financial crime, corruption, money laundering, asset recovery, and computer crime cases. He has liaised with law enforcement agencies in the US, Caribbean, Canada, South Africa, Hong Kong and in Europe in respect of joint investigations.

Additionally, he was responsible for intelligence development and coordination with the financial industry, regulatory bodies and Government Agencies concerning matters of financial crime. He assisted in the establishment and supervision of the Dedicated Cheque and Plastic Crime Unit, a joint initiative venture between the Home Office, the British Bankers Association and Law Enforcement. John has the expertise to conduct training on fraud prevention and crime related issues to senior management in both the public and commercial sector. From 1998 until 2004 he was the UK representative with oversight for the joint UK – US FBI White Collar Crime Investigation Team for the Caribbean based in Miami.

He is European Chair of the Combating Commercial Crime Steering Group, a joint US – UK initiative, and was the senior law enforcement member of the Intelligence Liaison Group with both the British Bankers' Association and the Financial Services Authority.

John received a BSc (Hons) in Police and Policing Studies from the University of Portsmouth in 1995.

Lucy Claridge

Lucy Claridge is the Legal Officer of the Kurdish Human Rights Project (KHRP), an independent non-political human rights organisation founded in London in 1992, that supports the rights of all those living in the Kurdish regions of Iraq, Iran, Syria, Turkey and the former Soviet Union. Her work includes the preparation of cases before the European Court of Human Rights, the use of other international human rights mechanisms, and the development and implementation of KHRP's training, fact-finding and trial observation programmes within the regions

A qualified solicitor who practised media litigation in the city for several years, Ms Claridge has a postgraduate degree in International Peace & Security from King's College London.

Neri Javier Colmenares

Neri Javier Colmenares has been a practicing lawyer since 1996, primarily in criminal law, constitutional law and human rights litigation. He was the Executive Director of the Philippine National Amnesty Commission in 1999 and a member of the National Council of the Philippine Coalition for the ICC. He is currently doing his Ph.D. at the Asian Law Centre of the University of Melbourne on the legal system impediments to human rights prosecution and the International Criminal Court.

Mr. Colmenares was imprisoned for four years in 1979 by the Marcos regime for being a student activist with the Philippine Student Christian Movement. He was actively involved in the human rights class suit against the Ferdinand Marcos, where the plaintiffs where awarded US $2.1 Billion, one of the largest damages awarded against a natural person at that time. He helped draft the Human Rights Compensation Bill, currently pending in the Philippine Congress providing for the compensation of human rights victims from the US$ 650 million Marcos account turned over by the Swiss banks to the Philippine government. Neri J. Colmenares is also an electoral lawyer and was lead counsel in a Supreme Court petition that resulted in the disqualification of all major political parties from participating in the Philippine party list elections.

Gabriela Echeverria

Gabriela Echeverria is the International Legal Advisor at REDRESS. She holds an LLM from Harvard Law School and a law degree from the National Autonomous University of Mexico (UNAM). She stared her involvement in international law back in 1998, when she won first place in the Phillip C. Jessup International Law Moot Court Competition. Before joining REDRESS, she served as assistant to Professor Rodolfo Stavenhagen, current UN Special Rapporteur on Indigenous Peoples, and worked with UNICEF's Integral Family Development project promoting children's rights through community based advocacy in Mexico City.

Ms Echeverria has litigated several cases before international courts and tribunals, including regional human rights courts and UN treaty bodies. She has also been involved in international advocacy, notably in the drafting process of the "UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Grave Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" where she lead a coalition of NGOs that supported their recent adoption by the UN Human Rights Commission.

Matt Eisenbrandt

Matt Eisenbrandt is the Litigation Director at the Center for Justice and Accountability in San Francisco. In that capacity, he oversees CJA's staff attorneys and cases. He is heavily involved in cases concerning Haiti, El Salvador, Honduras and China, and is currently working on investigations in the Middle East. Before joining CJA three years ago, Matt served as an attorney for the Human Rights Project in Los Angeles, where he handled asylum cases and represented immigrants in INS detention.

Matt received a J.D from the University of Virginia and BA degrees in History and Latin American Studies from the University of Illinois.

Carla Ferstman
Carla Ferstman is Director of REDRESS and she is also the informal coordinator of the NGO Coalition for an International Criminal Court's Victims Rights Working Group. She is also a member of the British Foreign and Commonwealth Office's Expert Panel on Torture.

Previously, she has worked with the UN High Commissioner for Human Rights Field Operation in Rwanda on legal reform and capacity building in post-genocide Rwanda, and in 1999, was appointed Executive Legal Advisor of Bosnia and Herzegovina's Commission for Real Property Claims of Displaced Persons and Refugees (CRPC). She has an LL.B. from the University of British Columbia and an LL.M. from New York University.

Professor Malcolm Foster
Professor Malcolm Foster is joint head of the Public International Law Group at Freshfields Bruckhaus Deringer and is based in London. As such, he advises on a wide range of Public International Law issues of commercial relevance. These include title to offshore oil and gas reserves, the conduct of major transboundary projects (such as pipelines), the operation of international economic sanctions, International Environmental Law, International Law of the Sea issues, expropriation and protection of foreign investment. He is a member of the Freshfields Bruckhaus Deringer team representing the Principality of Liechtenstein in its action against Germany in the International Court of Justice. He is Visiting Professor of International Law at University College London and was formerly Professor of International Environmental Law at the Durrell Institute, University of Kent.

Before joining Freshfields Bruckhaus Deringer, he was director of the Centre for Environmental Law at the University of Southampton and spent several years as general counsel to the Environmental Law Commission of the IUCN in Bonn. He acted as an advisor on Environmental Law for a number of international organisations, including UNDP, the European Commission, the Council of Europe and the Asian Development Bank, specialising in the drafting of environmental treaties and legislation and advising on regulatory standards. He has served as the UK representative on the Conseil Europeen du Droit de l'Environment, as vice-chairman of its specialist group on Marine and Coastal Law.

Greg Fullelove
Greg Fullelove is an associate in the Dispute Resolution department of Freshfields Bruckhaus Deringer and a member of the public international law group. He has advised clients in fraud, insurance and public and private international law disputes. He has also advised lawyers acting for victims of torture and other international crimes on the potential for enforcement of judgments under the US Alien Tort Claim Act.

In April 2004 he was appointed judicial assistant to Lord Woolf, the Lord Chief Justice of England and Wales. He has appeared as an advocate in the English courts (High Court) and is a contributing author to the forthcoming Law Society publication *Ethics for Advocates and Litigators*. Greg studied at Jesus College, University of Cambridge, obtaining both a BA and an MPhil in Classics.

Mikhail Lobov
Mikhail Lobov studied law at the State Institute of International Relations, MGIMO University in Russia and a D.E.A *de droit international* in Robert Schuman University, Strasbourg III. He obtained an LLM from Columbia University in 2004.

Mr Lobov has been a Legal Officer at the Department for the Execution of the Judgments of the European Court of Human Rights in the Council of Europe since 1977 where he has assisted and advised the Committee of Ministers on the implementation of the European Court's judgments; drafted resolutions for the Committee of Ministers, press releases and memoranda; as well as corresponded and negotiated with

state authorities and applicants. He has also participated in expert missions relating to national and international human rights litigation.

Among other publications, in 2003 Mr Lobov published *Problems of the Execution of the Judgments of the European Court of Human Rights.*

Victor Madrigal-Borloz
Victor Madrigal-Borloz is a Costa Rican attorney and *Diplomé* of the International Institute of Human Rights, and is currently the Co-ordinator of Litigation at the Inter-American Commission on Human Rights. He has been an attorney and Legal Director at the Inter-American Court of Human Rights in San José, Costa Rica (1996-1999), and a Researcher and Team Leader for State and Law Reform at the Danish Institute of Human Rights in Copenhagen, Denmark (2000-2004).

He has represented the Danish Institute for Human Rights and the European Co-ordinating Group of National Human Rights Institutions in meetings and seminars concerning the reform of the European system and the European-Iranian Dialogue, and has advised the Secretariat of the African Commission on Human and Peoples' Rights in issues of institutional planning and reform (2003-2003). He has chaired the International Council meetings of the International Council for the Rehabilitation of Torture Victims (IRCT) since 2002, and has been an expert for the IRCT and the United Nations High Commissioner for Human Rights in relation to the implementation of the Istanbul Protocol in Mexico. His publications focus on the issue of reparations. He speaks Spanish, English, French and Portuguese.

Nuala Mole
Nuala Mole has degrees in law from the University of Oxford and the College of Europe, Bruges. She has been working in human rights for more than twenty years. She is the Founder-Director of the AIRE Centre, which she set up in 1993 as a specialist law centre providing information and advice on international human rights law and European Union law. She has litigated more than 60 cases before the European Court of Human Rights, taught and written widely on international human rights law. She has conducted training for judges, public officials and lawyers on these issues in almost all the Member States of the Council of Europe.

Karinna Moskalenko
Karinna Moskalenko is Head of Center of Assistance to International Protection (International Protection Centre) – Russian affiliate of the International Commission of Jurists (ICJ)

She studied law at Leningrad State University and has received extensive training in international human rights law. Ms Moskalenko has been a member of the Moscow City Bar Association sine 1977. She is considered one of the main legal experts on protection of individual rights in Russia and has substantial experience in international and domestic protection of human right. She has litigated cases before the European Court of Human Rights and UN Human Rights Committee.

In 2003 she was elected Commissioner to the International Commission of Jurists; she is also a member of Moscow Helsinki Group and the Russian Lawyers' Committee in defense of Human Rights. Back in 1999, Karinna Moskalenko received the Russian Federation Human Rights Ombudsman prize "For Human Rights", in 2000 the *Femida* - Juridical Prize and in 2004 the Order "Za vernost' advokatskomy dolgu"

Alejandra Nuño
Alejandra Nuño obtained her law degree at the ITESO University, in Guadalajara, México 2000 and her LLM in International Human Rights Law from Essex University in 2002. From 1998 to 2001 she worked in a rural development NGO for the empowerment and development of rural communities in Mexico.

Since 2002 she has worked as an attorney in the Costa Rica office of the Center for Justice and International

Law, where she has represented victims of human rights violations from Mexico and El Salvador before the Inter-American Commission and the Inter-American Court of Human Rights. She has also trained NGOs, victims and authorities in the use of the Inter-American System and its standards, and has participated in publications regarding children's rights and domestic enforcement of international decisions (in press).

Steven Powles

Steven Powles is a barrister at Doughty Street Chambers. He spent a year at the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague as legal assistant to one of the Tribunal's Judges. He has represented accused at both the ICTY and at the Special Court for Sierra Leone.

He has served as a legal assistant to the delegation of Trinidad and Tobago in negotiations at the United Nations on the Rules of Procedure and Evidence for the permanent International Criminal Court. In 1995, he spent some time in Jamaica with the Jamaican Council for Human Rights, where he worked closely with death row inmates in preparing their applications to the Privy Council and other international human rights bodies. He also spent time in Kosovo with a Bar Human Rights Committee delegation to conduct an investigation into the fair trial guarantees for potential war crimes in the domestic Kosovar system.

Mr Powles has worked closely with a number of NGOs on international crime and human rights related matters including No Peace Without Justice, the Redress Trust, and Human Rights Watch. He is on Executive Member of the Bar Human Rights Committee and is an active member of the International Criminal Defence Attorneys Association.

Nigel Rodney

Nigel Rodney obtained an LLB from the University of Leeds (1963), an LLM from Columbia University (1965), an LLM from New York University (1970) and a PhD from the University of Essex (1993). Subsequent to his graduation from Columbia, he was appointed an Assistant Professor of Law at Dalhousie University, Halifax, Nova Scotia, Canada. In 1968-69 he served as an Associate Economic Affairs Officer at the United Nations Headquarters in New York, working on legal and institutional aspects of international economic co-operation. From 1969 to 1972, he was Visiting Lecturer in Political Science at the Graduate Faculty of the New School of Social Research (New York City) and, from 1970 to 1072, was also a Research Fellow at the New York University Centre for International Studies.

Returning to the United Kingdom in 1973 he became the first Legal Advisor of the International Secretariat of Amnesty International, where he remained until 1990. He also taught Public International Law at the London School of Economics and Political Science from 1973 to1990. In 1990, he was appointed Reader in Law at the University of Essex and Professor of Law in 1994. He was Dean of the School of Law from 1992-1995. He is now Chair of the University's Human Rights Centre.

In March 1993, he was designated Special Rapporteur on Torture of the UN Commission on Human Rights, serving until November 2001. Since 2001, he has been the elected UK expert member of the Human Rights Committee established under the International Covenant on Civil and Political Rights (Vice Chair 2003-2004). He was elected Commissioner of the International Commission of Jurists in 2003 and is currently a member of its Executive Committee. His teaching and research interests include Public International Law and Human Rights. He has written extensively, including *The Treatment of Prisoners under International Law* 2nd ed. (1999).

He was awarded a KBE in the 1998/1999 New Years Honours List 'for services to human rights and international law', and an honorary LLD from Dalhousie University in May 2000. In 2005, he was awarded the American Society of International Law Goler T Butcher Human Rights Medal for distinguished work in the field of Human Rights.

Markus Schmidt
Markus Schmidt did a BA in law at the University of Bonn and a Diploma in Advance European Studies in the College of Europe, Bruges. He also has a Masters and a PhD in International Relations and Law from Oxford University

Mr Schmidt has been working with the UN since July 1987, mostly with the UN human rights programme. He spent the first nine years with the Communications Unit of the Office of the High Commissioner for Human Rights (OHCHR), then four years with the special procedures of the Commission on Human Rights. From December 2000 to March 2005, he was secretary of the Human Rights Committee. Since November 2002, he has also been in charge of the Petitions Unit of the OHCHR, which handles individual complaints.

Miriam Spittler
Miriam Spittler works for the Office of the Prosecutor of the International Criminal Court as the Legal Assistance Adviser. In this function, she provides specialist advice on issues of international cooperation and judicial assistance as well as legal and procedural information as required, ensures conformity with Statute and national laws, negotiates cooperation arrangements and agreements, builds networks, cooperates and liaises with judicial authorities, judicial networks, judicial organisations and the related information and analysis centres.

Before joining the International Criminal Court, Miriam worked for the Swiss Ministry of Justice, in the Section for Mutual Legal Assistance in criminal matters. In this function, she examined both incoming and outgoing requests for assistance and, if appropriate, forwarded them for execution to the appropriate competent authorities, decided in several cases about the admissibility of the request and ordered its execution (freezing of accounts, transmission of evidence, documents and bank records, interviews of witnesses) and decided on first level challenges.

Miriam further interacted with both foreign and domestic authorities, providing training to Magistrates and police forces, and represented Switzerland in negotiations regarding Mutual Legal Assistance Agreements and in Networks of Contact Points for Mutual Legal Assistance.