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**(VENICE COMMISSION)**

**DRAFT REPORT**

**ON THE IMPLEMENTATION  
OF INTERNATIONAL HUMAN RIGHTS TREATIES  
IN DOMESTIC LAW  
AND THE ROLE OF COURTS**

**on the basis of comments by**

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## INTRODUCTION

1. In 2012, the Sub-Commission on Latin America of the Venice Commission decided to prepare a Report on the implementation of international human rights treaties in the domestic legal orders, with a special focus on Europe and Latin America and on the role of the judiciary.

2. International law, and international human rights treaties in particular, plays an important role at the national level and has a clear impact on domestic law. Indeed, international human rights treaties deal directly with the relations between public authorities and private actors within national societies. The Venice Commission has previously assessed the issue of the importance of international human rights treaties, their hierarchy and status and impact, mainly taking into consideration European domestic legal orders.<sup>1</sup> There also exists a numerous and comprehensive literature on the relationship between international human rights treaties and domestic Law, at least concerning the European experience.<sup>2</sup>

3. The purpose of the present Report is to contribute to exploring the different elements which influence the implementation of human rights within national legal orders and the role that national and international courts play in this context. International human rights treaties impose obligations upon their States parties. This has important implications for all national authorities, not only the executive and the legislative bodies, but also the judiciary. The Venice Commission considers that courts are key actors which exercise in a meaningful way the review of the compatibility of domestic legislation with international human rights treaties.

4. Courts are relevant on two levels: domestic courts can set in motion a “diffuse review of compatibility” between domestic legal acts and international human rights treaties. This term makes reference to the review carried out by domestic courts concerning the conformity with human rights treaties; it is usually called a “review of conventionality”, especially when the review concerns the European and the American Conventions on

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<sup>1</sup> See the European Commission for Democracy through Law (hereafter referred to as Venice Commission), *Draft report on case-law regarding the supremacy of International Human Rights Treaties*, on the basis of comments by Mr Dutheillet de Lamothe, CDL-DI(2004)005; see also *Idem*, *The Status of International Treaties on Human Rights - Science and technique of democracy*, No. 42 (2005), Council of Europe Publishing; *Idem*, *The relationship between International and Domestic Law*, No. 5 (1993), Council of Europe Publishing, CDL-STD(1993)005; *Idem*, *The relationship between International and Domestic Law*, on the basis of the comments by Mr C. Economides, No. 6 (1993), Council of Europe Publishing, CDL-STD(1993)006.

<sup>2</sup> Just to cite some of the most important works produced concerning the relationship between the European Convention on Human Rights and domestic law, see R. BLACKBURN and J. POLIAKIEWICZ, *The European Convention on Human Rights and its Member States, 1950-2000* (Oxford UP ca. 2000); P. VAN DIJK, F. VAN HOOFF, A. VAN RIJN and L. ZWAAK (eds), *Theory and Practice of the European Convention on Human Rights*, 4<sup>th</sup> edition, Intersentia 2006; H. KELLER and A. STONE SWEET (eds.), *A Europe of rights. The impact of the ECHR on National Legal Systems*, Oxford University Press, 2006; see in French, D. SZYMCZAK, *La Convention européenne des droits de l'homme et le juge constitutionnel national*, Collection des « Publications de l'Institut international des droits de l'homme » n°7, Bruxelles, Bruylant, 2007; or specifically on the implementation of the European Court of Human Rights' case-law, E. LAMBERT, *Les effets des arrêts de la Cour européenne des droits de l'homme. Contribution à une approche pluraliste du droit européen des droits de l'homme*, Bruxelles, Bruylant, 1999, followed by *L'exécution des arrêts de la Cour européenne des droits de l'homme*, Council of Europe Publishing, 2002.

Human Rights. This review is, by its very nature, a “diffuse” type of review, as national courts may exercise it in a different context, give their own interpretation of the legal provisions involved, and take their own decision on the compatibility of the applicable national legal provision with the human rights treaty in question.

5. In addition, the European and the Inter-American Court of Human Rights, which have jurisdiction to review the compliance by the States with their obligations under the respective Conventions, have built an elaborated case-law and have become an “autonomous source of authority”<sup>3</sup> when interpreting the meaning and determining the scope of the human rights laid down in the European Convention on Human Rights and the American Convention on Human Rights respectively. They also carry out an “ex-post” review of the compatibility of domestic law with the respective Conventions. This review is “concentrated”, as opposed to the diffuse review exercised by the domestic courts, and it has a harmonising effect through the binding character of its case-law.

6. A larger number of constitutions grant priority to all international treaties (including human rights treaties) over conflicting national law, although not necessarily over the state’s constitution. Besides, most States include within their constitutional or legislative system clauses, provisions, or sections embodying human rights standards. Sometimes, these standards appear in a more comprehensive “bill of rights,” which is constitutionally entrenched and which under certain conditions enables courts to annul inconsistent legislation or governmental acts. What matters at least as much as the constitutional text is the domestic case-law fleshing out the constitutional provisions. The parallelism between constitutional references to international human rights and the internal human rights clauses in constitutions raises the question about the compatibility of these standards, its guarantee and which authority is competent to review it.

7. Human rights treaties with a judicial system of control, such as the three regional systems of protection (European, American and African), have special characteristics. Indeed, not only the human rights treaties as such need to be integrated in the domestic legal orders, but in addition the case-law of the respective judicial bodies imposes specific obligations concerning compliance with the judgments issued and with the interpretation given to the conventions by the international bodies. The case law of those bodies has an impact on the international obligations assumed by the States, and on the contents and scope of the rights and freedoms incorporated in the conventions.

8. The Latin American experience, which has not been taken into consideration so far in the reports of the Venice Commission, may shed new light on the topic of the relationship and interaction between international and domestic human rights law. Indeed, in Latin America, constitutions have shown an important openness towards international law which has facilitated the integration and implementation of human rights treaties in domestic legal orders. The constitutions of Argentina,<sup>4</sup> Brazil,<sup>5</sup> Bolivia,<sup>6</sup> Colombia,<sup>7</sup> Costa Rica,<sup>8</sup> Peru,<sup>9</sup> Venezuela,<sup>10</sup> among others, contain an explicit reference

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<sup>3</sup> A. STONE SWEET and H. KELLER, “The reception of the ECHR in National legal Orders”, in H. KELLER and A. STONE SWEET, (eds.), *op. cit.*, p. 3.

<sup>4</sup> Adopted on 1 May 1853, the Constitution was last amended and revised in 1994.

<sup>5</sup> Constitution of 5 October 1988.

<sup>6</sup> Constitution of 25 January 2009.

<sup>7</sup> Constitution of 7 July 1991.

<sup>8</sup> Constitution of 7 November 1949.

<sup>9</sup> Constitution of 31 December 1993.

to the status and the hierarchy of international law treaties and some of the constitutions even establish the supremacy of international human rights treaties.<sup>11</sup> The Inter-American system of human rights, in spite of its present institutional crisis, has experienced an important evolution and has dealt with over 200 cases.

9. The European and the Inter-American systems of protection of human rights are similar enough to allow for a useful comparison of their respective impact in national legal orders. The African system of human rights protection has not yet achieved a similar level of judicial development. For that reason, its impact in the African domestic legal orders is not discussed in the present Report. At the universal level, the role of the United Nations Human Rights Committee in supervising the implementation of the International Covenant on Civil and Political Rights, and the reception of its views and recommendations by member States is also discussed.

10. The present Report focuses, more specifically, on three inter-related questions: the first chapter identifies and describes the different legal factors which may have an influence on the implementation of international human rights treaties in domestic law; some of these factors may be found in the domestic legal orders, and some in the international human rights treaties themselves. The second chapter analyses the implementation of the decisions issued by international bodies when exercising a review of the compatibility of domestic law with one of the selected human rights treaties (the European and American Conventions on Human Rights, and the International Covenant on Civil and Political Rights, respectively), from the perspective of International law. Finally, chapter III of the Report explores the role of domestic courts in implementing international human rights treaties, as well as the decisions on the human rights treaties issues by international monitoring bodies.

11. The Report draws from a database of over 503 national decisions selected and compiled for the purpose of this research, based on the International Law in Domestic Courts online reporting service established by Oxford Reports on International Law (ILDC).<sup>12</sup> The most relevant cases are quoted in the Report to illustrate the practice of the member States of the Venice Commission and of their national courts.

## **I. IMPLEMENTING INTERNATIONAL HUMAN RIGHTS TREATIES IN DOMESTIC LAW: THE LEGAL FACTORS**

12. Nowadays, virtually all States are parties to various human rights treaties, adopted either at the universal level (especially in the United Nations and the International Labour Organisation) or within regional organisations (especially the Council of Europe, the Organization of American States and the African Union). Although the obligations contained in such treaties bind all States parties without distinction, the ways in which

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<sup>10</sup> Constitution of 15 December 1999.

<sup>11</sup> Among others, the Constitution of Guatemala (31 May 1985), in its Article 46, refers to the primacy of international human rights treaties over domestic law; the Constitution of Peru (1993), in its Article 105, enounces that the international human rights treaties have constitutional status; the Constitution of Chile (30 July 1980), reformed its Article 5, which establishes that "the organs of the State must respect and promote such rights, guaranteed by this Constitution as well as by the international treaties that are ratified by Chile and that are in force"; the Constitution of Colombia (7 July 1991), establishes in its Article 93 the primacy of international human rights treaties over the domestic legal order; etc.

<sup>12</sup> The database was compiled by Ms Anne Peters and Ms Sarah Stingelin, Max Planck Institute for Comparative Public Law and International Law, Heidelberg.

those States implement the treaty provisions within their domestic legal orders differ substantially. In some States human rights treaties as such form part of the legal order; others need to transpose them into their legal order through national legal acts. In some countries, international human rights treaties have a higher status than national law, in others they do not.

13. The reasons behind the success of international human rights treaties, both concerning the high number of their ratifications and their implementation, lie in a variety of factors. One of these factors may be the legal culture: countries that belong to the civil law culture, for instance, tend to show more openness towards international law than those of the common law culture, though this rule is by no means absolute. The attitude is furthermore influenced by the historical experience and political orientation of individual countries. Democracies usually reserve international human rights treaties a more important position within their domestic legal orders than States with other political regimes. This is evident from legislative reforms that many newly democratic countries of Central and Eastern Europe, Latin America and other regions have undertaken after the fall of previous totalitarian or autocratic regimes. Finally, the temporal element plays a role. Countries which have adopted or revised their fundamental laws rather recently, reveal a higher probability to explicitly regulate the legal status of international human rights treaties, or international treaties in general, and to provide them with an important place domestically, than countries with a legal order based on a more traditional constitution (or with no written constitution at all). This, however, does not automatically mean that the practices of these two groups of states differ to the same extent.

14. The study of historical, social and political factors is beyond the scope of the present Report, which will focus on the legal factors fostering or hindering integration and implementation of human rights treaties in the national legal order. Section A will explore those legal factors which are present in different national orders, while section B will analyse the factors which stem from the international legal order.

#### **A. Domestic law factors influencing the legal effect of human rights treaties into the national legal orders**

15. Several legal factors which pertain to domestic orders have an impact on the implementation of human rights treaties. Among these factors, the following are of particular importance: the conceptualisation of the relation between international and domestic legal orders (1); the status of treaties in the domestic legal order and their place in the hierarchy of norms (2); the direct and indirect effect and the interpretation of conformity clauses in the domestic constitutions (3); and the existence of legislation enabling the reception of human rights treaties into the domestic legal order (4).

##### **1. Factor 1: Conceptualisation of the relation between international and domestic legal orders**

16. Traditionally, two main approaches to the relationship between international and national law have been distinguished: the monist approach (monism) and the dualist approach (dualism).<sup>13</sup> The two approaches are by no means mutually exclusive, as many States combine elements of monism and dualism within their legal orders. In fact,

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<sup>13</sup> See e.g. J.G., STARKE, "Monism and Dualism in the Theory of International Law", 17 *Brit. Y.B. Int'l L.* 66 (1936).

most States today belong to what could be described as a mixed type, showing the universal evolution from strict dualism that most States embraced in the past, to moderate monism, with special treatment reserved to certain sources of international law (usually international treaties or, in some cases, only international human rights treaties). In principle, common law countries tend to stick to dualism more persistently than their civil law counterparts, although this rule is not without exceptions. The transition from dualism to monism often accompanies political transition – thus, many countries of Central and Eastern Europe incorporated elements of monism into their legal orders after the fall of communism at the end of the 1980s.

17. The choice of the model is for the States themselves to make. As the Constitutional Court of Lithuania stated in 1995, *“in accordance with the principle of sovereignty, every State has the right to choose concrete ways and forms of implementing norms of international law, and it is recognised that the validity of international law in general and of international treaties in particular within the legal system of the State shall always depend on national law”*.<sup>14</sup> The State however remains bound by international law, whatever model it chooses. It may never justify its non-respect of international law by the fact that this law does not as such form part of its domestic legal order; or that it contradicts a norm of its national legal order.

18. The *monist approach* (monism) is based on the idea that international law and national law are two components, or two different manifestations, of one and the same legal system. Treaties, as customary rules and general principles of law, may therefore be part of the domestic legal orders, without any need for their transposition by means of national legal instruments. Whether they establish individual rights and/or duties and whether the treaty provisions may be invoked before domestic courts, depends solely on their nature and content, and is not dependent on any prior transposition. The adherence to monism does not in itself automatically entail legal superiority of international law, as the monist approach is compatible with different views on the hierarchical relationship between international and national law. Yet, a clear tendency in monist and/or mixed legal orders is to grant international law, or some parts thereof, in particular human rights treaties, a rather high status.

19. States may use several legal techniques to express their adherence to the monist approach. The first one is the incorporation clause, which is usually contained in the Constitution or another legal instrument of a similar status (organic/constitutional laws). Such a clause can be found for instance in the constitutions of Albania (Article 122),<sup>15</sup> Armenia (Article 6),<sup>16</sup> Bulgaria (Article 5),<sup>17</sup> the Czech Republic (Article 10),<sup>18</sup> Lithuania (Article 138),<sup>19</sup> the Netherlands (Article 93), or Portugal (Article 8).<sup>20</sup> The clauses have quite a standardised form, declaring that international law or some sources thereof, when they enter into force for that particular State, become part of its domestic legal

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<sup>14</sup> LTU-1995-3-008, cit. in CDL-DI(2004)005, *Draft Report on Case-Law Regarding the Supremacy of International Human Rights Treaties*, Study No. 304/2004, 2 October 2004. See also Permanent Court of International Justice, advisory opinion of 21 February 1921, *‘Exchange of Greek and Turkish populations’*, PCIJ Reports, Series B, No. 10, pp. 20-21.

<sup>15</sup> Constitution of 28 November 1998.

<sup>16</sup> Constitution of 5 July 1995.

<sup>17</sup> Constitution of 12 July 1991.

<sup>18</sup> Constitution of 16 December 1992.

<sup>19</sup> Constitution of 25 October 1992.

<sup>20</sup> Constitution of 2 April 1976.

order. The second legal technique is that of concrete references included in laws or other domestic legal acts. These references give legal force within the domestic legal order to a specific international treaty.<sup>21</sup> Finally, the incorporation of international treaties may be based upon non-written, customary rules or case-law,<sup>22</sup> although this is rarely done in practice.<sup>23</sup> Out of the three legal techniques, the incorporation clause is the most common one.

20. Monist legal models differ among themselves not only with respect to the means by which they ensure the incorporation, but also by the object of the incorporation. The most common practice consists of incorporating international treaties; or, more specifically, of declaring that international treaties constitute part of the national legal order, without explicitly pronouncing on the status of other sources of international law (general principles, customary rules, non-incorporated treaties). Such is for instance the case in Albania, where the Constitution declares: “*Any international agreement that has been ratified constitutes part of the internal juridical system after it is published in the Official Journal of the Republic of Albania. It is implemented directly, except for cases when it is not self-executing and its implementation requires issuance of a law*” (Article 122 par. 1). A similar provision can be found in the constitutions of Armenia (Article 6), Bulgaria (Article 5), the Czech Republic (Article 10), Lithuania (Article 138), Poland (Article 91) or the Russian Federation (Article 15). The silence over the status of other sources of international law leaves open the question as to whether these sources are excluded from the incorporation on the basis of the *a contrario* principle, or are incorporated by virtue of other constitutional clauses or legal practice.<sup>24</sup>

21. In some countries, the incorporation clause is construed more extensively, referring not only to international treaties but also to other sources of international law. Binding decisions of international organisations are sometimes included, as is the case in Albania<sup>25</sup> and the Netherlands.<sup>26</sup> General principles of international law<sup>27</sup> are also

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<sup>21</sup> As an example, the United States has passed specific implementing legislation concerning the Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT). The definition as contained in the treaty has been codified in Chapter 113B of Title 18 of the United States Code; the term “torture” is also defined in the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350.

<sup>22</sup> For example the case of Switzerland, see the leading case of the Swiss Federal Court *Frigerio*, BGE 94 I 669, S. 672 E. 2 [1968].

<sup>23</sup> It was, for example, the case of the United Kingdom before the adoption of the Human Rights Act.

<sup>24</sup> Some constitutions contain general clauses proclaiming the loyalty of the State to international law (see Article 1 of the Constitution of the Czech Republic and Article 9 of the Constitution of Poland). It is sometimes suggested that such a clause could serve as the basis for the incorporation of general principles of international law, customary international law, or just all sources of international law. Such a suggestion however seems problematic, since the relevant provisions usually simply confirm that international law is binding upon the States, without pronouncing on whether international law applies within the domestic legal order of such a State.

<sup>25</sup> Article 122 par. 3 of the Constitution: “*The norms issued by an international organisation have superiority, in case of conflict, over the laws of the country if the agreement ratified by the Republic of Albania for its participation in the organisation expressly contemplates their direct applicability.*”

<sup>26</sup> Article 94 of the Constitution: “*Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.*”

<sup>27</sup> The meaning and scope of general principles is not entirely clear, as the term could refer both to “*the general principles of law recognised by civilized nations*” as a specific sources of international law in the sense of Article 38 (1)(c) of the Status of the ICJ, and to fundamental principles of international law such as those enshrined in the UN General Assembly Resolution A/RES/2625 (XXV), *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970.

sometimes mentioned in the clause, for instance in Article 8 of the Portuguese Constitution.<sup>28</sup> Finally, some legal orders refer solely to general principles of international law, as is the case in Austria<sup>29</sup> and Germany.<sup>30</sup> In such a situation, the lack of clarity does not help in determining the extent to which international law is incorporated within the national legal order.

22. The *dualist approach* (dualism) considers national law and international law as two separate legal systems, which, although they may deal with similar or identical issues, have different legal subjects and different sources. International treaties as sources of international law do not apply directly within the domestic legal order. In order for their provisions to have effect domestically, they need to be transformed into national law by means of a statute or another source of national law. International treaties as such may not be invoked before national courts, while provisions of domestic law inspired by them or even reduplicating them may. Several common law countries, such as Australia, Canada, New Zealand and the United Kingdom, are dualist, as are certain other countries (such as Finland, Hungary, Israel and Sweden). The adherence to dualism is explicitly acknowledged in the Constitution of Hungary, which stipulates that “Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by publication in the form of legislation” (Article Q par. 3).<sup>31</sup>

23. In dualist countries several legal techniques may be used to incorporate international law into domestic law, especially transformation, adaptation and adoption. Transformation refers to the model in which the text of an international treaty is literally “incorporated” into a statute or another source of domestic law. Adaptation, on the contrary, includes not only “incorporation” from international to national law, but also substantive modifications.<sup>32</sup> A classic example of an adapted international treaty is the United Kingdom Human Rights Act of 1998, which introduced within the law of the United Kingdom some of the provisions of the European Convention on Human Rights, but cannot set aside conflicting domestic law. Finally, adoption refers to the use of provisions of international treaties, or other sources of international law, in the case-law of national courts, in cases where such sources were not transformed and/or adapted within the domestic legal order.

24. Even if monism and dualism are still very present in the theory of the relationship between domestic and international law, they do not provide a sufficient answer in determining the factors that influence the integration of a human rights treaty into domestic law. Indeed, international human rights treaties may be very successfully applied both in countries adhering to one or the other theory. Moreover, as previously

<sup>28</sup> Article 8 of the Constitution: “(1) *The rules and principles of general or ordinary international law are an integral part of Portuguese law.* (2) *Rules provided for in international conventions duly ratified or approved, following their official publication, apply in municipal law as long as they remain internationally binding with respect to the Portuguese State.*”

<sup>29</sup> Article 9 par. 1 of the Constitution: “*The generally recognized rules of international law are regarded as integral parts of federal law.*” The Constitution was adopted on 1 October 1920.

<sup>30</sup> Article 25 of the Basic Law of 23 May 1949: “*The general rules of public international law form part of the Federal law. They take precedence over the laws and directly create rights and duties for the inhabitants of the Federal territory.*” The term “general rules” roughly means the most widespread rules of international customary law and general principles in the sense of Art. 38 cl. 1 lit c) of the ICJ Statute.

<sup>31</sup> Constitution of 25 April 2011.

<sup>32</sup> See also I. SEIDL-HOHENVELDERN, “Transformation or Adoption of International Law into Municipal Law”, 12 *ICLQ* 1, 1953, pp. 88-124.

stated, many countries do not fit entirely into either of the two systems and have features of both. This holds particularly true with respect to the applicability of human rights treaties.

## 2. Factor 2.- Status: hierarchy of human rights treaties within domestic legal orders

25. There are several possible situations in this respect: a first case is when national legal orders may contain an explicit reference to international human rights treaties. In other cases, their status has to be deduced from the general domestic rules concerning international law.<sup>33</sup> Finally, in some cases, the national legal order remains silent on the legal status of international treaties; this is the case of Austria,<sup>34</sup> Chile,<sup>35</sup> Georgia,<sup>36</sup> Nicaragua,<sup>37</sup> Panama,<sup>38</sup> Peru<sup>39</sup> or Uruguay.<sup>40</sup> In such a case, unwritten rules, customary law and the case-law of national, mainly constitutional, courts have to be consulted to help determine whether and under which conditions international human rights treaties form part of the domestic legal order, and what their status is. In Italy, the Constitutional Court interpreted Article 117.1 of the Constitution as establishing that international human rights treaties and, in particular, the European Convention on Human Rights, is an “intermediary norm”, halfway between constitutional and ordinary norms.<sup>41</sup>

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<sup>33</sup> See M. CRAVEN, “Legal Differentiation and the Concept of Human Rights Treaties in International Law”, 11 *EJIL* 3, 2999, pp. 489-519. The most classical situation of this type occurs when the incorporation clause relates to international treaties as such, without invoking human rights instruments specifically. As international human rights treaties are, after all, international treaties, albeit treaties endowed with certain particular features, such a regulation entails their incorporation into the domestic legal order. This has the advantage of doing away with the need to determine which treaties have to be considered as human rights treaties, since the same regulation is applied to all treaties regardless of their subject matter.

<sup>34</sup> See Article 9 of the Constitution.

<sup>35</sup> There is no specific reference to the status of international treaties, although the individual rights recognised by the Constitution and international treaties ratified and in force are to be respected (Article 5). Article 5 of the Constitution was modified in 1989. The Chilean Constitutional Court has interpreted this provision and held that it does not establish the supremacy of international human rights treaties over the Constitution, see Constitutional Court, judgment of 8 April 2002, Rol N°346.

<sup>36</sup> Constitution of 24 August 1995, Article 6.

<sup>37</sup> Article 46 of the Constitution of Nicaragua (of 19 November 1986), which refers to several human rights treaties (the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the American Convention on Human Rights; the Article also refers to the Universal and American declarations on Human Rights) was interpreted by the Supreme Court of Nicaragua. The Court recognised that the human rights treaties contained in Article 46 of the Constitution have constitutional status. Therefore, they have a superior legal value with respect to other national laws. The Court further stated that with the recognition of the constitutional status of human rights treaties, the national courts and the public administration in general were obliged to respect, protect, and fulfil the rights mentioned in those treaties. Consequently, the judicial guarantees contained in those treaties were directly applicable and enforceable before these state institutions, see SC, Constitutional Chamber, judgment 57-2010, 2 March 2010, Oxford Reports on International Law (ILDC) 1802.

<sup>38</sup> The Constitution, adopted in 1972, establishes in Article 4 a general reference to International Law, while Article 129 refers to the role of the Ombudsperson in protecting individual rights recognized by the Constitution and the international human rights treaties in force.

<sup>39</sup> The Constitution, of 29 December 1993, contains no specific provision, but the fourth final provision enounces that “[R]ules concerning the rights and freedoms recognized by this Constitution are construed in accordance with the Universal Declaration of Human Rights and international treaties and agreements on those rights, which have been ratified by Peru”.

<sup>40</sup> Constitution of 1967. There is no specific Article on the status of international treaties or international law in the national legal order.

<sup>41</sup> Italy, Constitutional Court, Criminal Proceedings against Paolo Dorigo, Constitutional review, No 113/2011; ILDC 1732, (IT 2011).

26. When there is a specific provision on the status of international human rights treaties, there are several possible scenarios. Some constitutions make it clear that international human rights treaties shall prevail over domestic law. However, this does not provide a clear reply to the issue of whether the treaty prevails over the constitution as well. This is the case for example in Bolivia,<sup>42</sup> Colombia<sup>43</sup> and Guatemala,<sup>44</sup> where domestic courts have interpreted the relevant provisions and considered that they mean that international human rights treaties have the same status as the constitution. The Constitution of Bulgaria stipulates that ratified and promulgated international treaties “shall have primacy over any conflicting provision of the domestic legislation” (Article 5 par. 4). It is however uncertain how this provision has been interpreted and applied in practice. The Constitution of Bosnia and Herzegovina gives the European Convention on Human Rights priority over every other law,<sup>45</sup> although this is quite a particular case. Indeed, it is the Constitution which establishes the supra-constitutional status of the international treaty, but the Constitution is itself part of an international treaty, the Dayton agreement. The constitution of Moldova (Article 4)<sup>46</sup> establishes that priority shall be given to international regulations on human rights over national laws.<sup>47</sup>

27. In several countries, constitutions themselves explicitly establish that human rights treaties have constitutional status, such as in Argentina (Section 75.22),<sup>48</sup> Brazil,<sup>49</sup> Ecuador,<sup>50</sup> Dominican Republic<sup>51</sup> and Venezuela.<sup>52</sup> Mexico has also certain specific features: after the 2011 reform, the Constitution does not establish that international human rights have the same status as the Constitution, but Article 1 seems to place the treaties in the “bloc of constitutionality” which, in case of conflict, would give priority to the norm most favourable to the protection of individual human rights.<sup>53</sup> A similar solution

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<sup>42</sup> Article 13 of the Constitution.

<sup>43</sup> Article 93 of the Constitution.

<sup>44</sup> Article 46 of the Constitution.

<sup>45</sup> Article II.2. The Constitution is Annex 4 to the General Framework Agreement for Peace in Bosnia and Herzegovina, signed on 14 December 1995.

<sup>46</sup> Constitution of 29 July 1994

<sup>47</sup> *Draft Report on case-law...*, CDL-DI(2004)005.

<sup>48</sup> The Constitution was adopted on 1 May 1853 and has been amended several times, the last one in 1994. Article 75.22 establishes that treaties and concordats have a higher place in the hierarchy than laws. It also adds that: The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Pact on Economic, Social and Cultural Rights; the International Pact on Civil and Political Rights and its empowering Protocol; the Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Woman; the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments; the Convention on the Rights of the Child; in the full force of their provisions, they have constitutional hierarchy, do not repeal any section of the First Part of this Constitution and are to be understood as complementing the rights and guarantees recognized herein. They shall only be denounced, in such event, by the National Executive Power after the approval of two-thirds of all the members of each House. In order to attain constitutional hierarchy, the other treaties and conventions on human rights shall require the vote of two-thirds of all the members of each House, after their approval by Congress. has been interpreted several times”. The Supreme Court of Argentina has stated that some Human Rights Treaties, such as the International Covenant on Economic, Social and Cultural Rights have the same status as the Constitution, see Supreme Court of Argentina, judgment, 22 October 2004, CODICES ARG-2004-3-003.

<sup>49</sup> Article 5. LXXVIII.

<sup>50</sup> Constitution of 28 September 2008, Article 84.

<sup>51</sup> Constitution of 26 January 2010, Article 74.

<sup>52</sup> Constitution of 30 December 1999, Article 23.

<sup>53</sup> See E. FERRER MACGREGOR, “Interpretación conforme y control difuso de convencionalidad: el nuevo paradigma para el juez mexicano”, *Estudios Constitucionales*, No. 2, 2011, pp. 531-622.

exists in the Constitution of Romania.<sup>54</sup> Article 20 of the Constitution states that “*where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions*” (par. 2). The status of human rights treaties has also been extensively discussed in the Czech Republic. Up to 2001, international human rights treaties were reserved a special position within the legal order, as they were the only treaties that were directly incorporated. Moreover, they were granted identical status to that of constitutional laws. In 2001, the incorporation clause was expended to all ratified and promulgated international treaties but, at the same time, these treaties were given a sub-constitutional status. As this could result in incorporated human rights treaties having their legal status downgraded, the Constitutional Court of the Czech Republic declared in 2002 that human rights treaties ratified prior to the constitutional amendment would not be affected by the change in the regulation.<sup>55</sup> This decision, however, has given rise to criticism, as it risks introducing double standards into the area of human rights treaties.<sup>56</sup>

28. A third scenario concerns constitutions which make it clear that treaties have a legal status above domestic law or, rather, that in case of a conflict with domestic law, international treaties should prevail,<sup>57</sup> but not necessarily over the domestic constitution.<sup>58</sup> Thus, for instance, the Constitution of the Russian Federation stipulates that “*if an international treaty of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty shall apply*” (Article 15 par. 4).<sup>59</sup> A similar provision can be found in the constitutions of Albania (Article 122),<sup>60</sup> Armenia (Article 6),<sup>61</sup> Azerbaijan (Article 151 states that international treaties do not take precedence over conflicting constitutional provisions and acts accepted by way of referendum),<sup>62</sup> Bulgaria (Article 5),<sup>63</sup> Costa Rica (Article 7),<sup>64</sup> Croatia (Article 134), the Czech Republic (Article 10), ),<sup>65</sup> the Czech Republic (Article 10),<sup>66</sup> El Salvador (Article 144), Estonia (Article 123, although Estonia may not conclude international treaties which are in conflict with its Constitution),<sup>67</sup> France (Article 55),<sup>68</sup> Georgia (Article 6, as long as the international treaties do not contradict the Constitution),<sup>69</sup>

<sup>54</sup> Constitution of 21 November 1991.

<sup>55</sup> See award 403/2002 Coll.

<sup>56</sup> See F. KŘEPELKA, “Nesamozřejmě hierarchie práva a vstup ČR do EU“, *Soudní rozhledy*, 2003, No. 6, pp. 181-185.

<sup>57</sup> There is some debate in the doctrine as to whether such a regulation implies legal hierarchy (superiority) or simply priority of the application. As laws found incompatible with international treaties do not become invalid but are simply inapplicable in certain cases, the latter seems to be the case.

<sup>58</sup> See on the issue of hierarchy between international law and domestic constitutional law A. PETERS, “Supremacy Lost: International Law meets Domestic Constitutional Law”, *ICL-Journal*, vol. 3, 2009, pp. 170-198.

<sup>59</sup> Constitution of 12 December 1993.

<sup>60</sup> Constitution of 28 November 1998.

<sup>61</sup> Constitution of 5 July 1995.

<sup>62</sup> Constitution of 12 November 1995.

<sup>63</sup> Constitution of 12 July 1991.

<sup>64</sup> Although the Constitutional chamber of the Supreme Court has suggested that human rights treaties could even have supra-constitutional status, see judgment of 1 July 2013, *Pavón Murillo v. Tribunal Supremo Electoral*.

<sup>65</sup> Constitution of 22 December 1990.

<sup>66</sup> Constitution of 16 December 1992.

<sup>67</sup> Constitution of 28 June 1992.

<sup>68</sup> Constitution of 4 October 1958.

<sup>69</sup> Constitution of 24 August 1995. However, Article 6 was changed in 2001.

Germany (Article 25),<sup>70</sup> Greece (Article 28),<sup>71</sup> Honduras (Article 16), the Netherlands (Article 94),<sup>72</sup> Poland (Article 91), Poland (Article 91),<sup>73</sup> and “the Former Yugoslav Republic of Macedonia” (Article 118).<sup>74</sup> In all these instances, it is not entirely clear whether domestic courts will indeed grant priority to international law even over the domestic constitution.

### 3. Factor 3: Direct and indirect effect and the interpretation clauses in domestic constitutions

29. Even if treaties are part of the law of the land, as is the case for international legal norms in monist systems, or after having been transformed into domestic law, as is the case in dualist systems, they cannot always be directly applied. The “direct effect” of international law (notably of the provisions of international treaties) is another legal factor which shapes the relevance of a human rights treaty in the domestic legal order, and of great importance for the domestic judiciary in particular. The term “direct effect” is understood in this Report as the legal mechanism through which enables a domestic body (especially a court) to apply an international rule directly; this application can render a rule of domestic law which is not in conformity with international law illegal.

30. The issue of direct effect raises profound questions in the field of the separation of powers, the principle of legality, and democracy. These constitutional aspects have contributed to the conflation of the question of direct effect with that of the incorporation of international rules into the domestic legal order. Notably in the Anglo-American constitutional tradition, direct effect is often regarded as a *pre-condition* of the incorporation of a treaty into the domestic legal order. In the continental tradition, in contrast, the incorporation of international law is considered as the first step, with direct effect being an ensuing, secondary question. A treaty provision can form part of the domestic legal order without being directly applicable by the domestic courts.

31. The Netherlands Constitution takes this condition of applicability expressly into account by stipulating that only treaty provisions “which may be binding on all persons” (*i.e.* which are self-executing<sup>75</sup>), may be applied by the courts and then have priority over conflicting domestic law.<sup>76</sup> From the legal history of the European Convention on Human

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<sup>70</sup> Constitution of 23 May 1949.

<sup>71</sup> Constitution of 11 June 1975.

<sup>72</sup> Constitution of 24 August 1815; the fundamental rights were added by the constitutional reform of 1983. Article 94 of the Netherlands Constitution explicitly grants precedence to international treaties only over statutes, but prevailing scholarship and case-law supports the view that Article 94 applies also to the Constitution itself. If the parliament determines that a treaty conflicts with the Constitution and, under Article 91(3), approves a treaty by a 2/3 majority, courts are able to let that treaty prevail over the constitution; if parliament does not determine such a conflict and hence does not approve a treaty by a 2/3 majority, that would implicitly mean that the domestic courts could review a decision of parliament against the constitution, which is not allowed under Article 120 of the Constitution.

<sup>73</sup> Constitution of 2 April 1997.

<sup>74</sup> Constitution of 17 November 1991.

<sup>75</sup> In the countries of the European Union, the meaning and scope of this concept have been influenced to a large extent by developments in the case-law of the Court of Justice of the European Union.

<sup>76</sup> Articles 93 and 94 of the Constitution. Only such provisions of international law may be invoked before courts in the Netherlands. Whether and to what extent a provision of international law is self-executing, is determined in the last instance by the Dutch court before whom such a provision is relied upon, unless the provision concerned states explicitly that it is self-executing, which rarely is the case. Courts in the Netherlands have, in general, given a rather restrictive interpretation to the concept of 'self-executing'. According to the prevailing jurisprudence in the Netherlands, international law provisions are 'binding on all

Rights it appears that its drafters intended its substantive provisions to be self-executing in those Contracting States where they form part of the domestic legal order.<sup>77</sup> In conformity therewith, the courts in, e.g., Belgium, France, Germany and the Netherlands directly apply the provisions of the ECHR and its Protocols. In Sweden, where the ECHR is considered as part of domestic law, the distinction between provisions which are self-executing and provisions which are not does not seem to play any significant role. In the United Kingdom, the Human Rights Act of 1998 enumerates the provisions of the ECHR and its Protocols which the courts and other public authorities have to apply.

32. The implementation of human rights treaties in the domestic arena is often achieved by an interpretation of domestic law taking into account the relevant provisions of these treaties. This may supplement the “direct effect” or even constitute an alternative to it, and is therefore sometimes referred to as the ‘indirect effect’ of international (human rights) law. Clashes between domestic law and international law can thus be reduced through such “harmonising” interpretation (see the developments on this in Chapter III.A).

4. Factor 4: Legislation enabling the reception of human rights treaties and monitoring bodies decisions into the domestic legal order

33. Finally, an important number of countries have adopted specific laws in order to facilitate or enable the implementation of international human rights treaties in domestic law and to avoid repetitive cases. Adoption of enabling legislation is both a legal factor fostering the implementation of international human rights obligations and an effect of the ratification of international human rights treaties. Many different types of legislation could be considered as part of this “enabling legislation” factor. Particularly relevant in this respect is the existence of specific legal provisions that facilitate the reception of the judgments of the European or the Inter-American Court of Human Rights into the domestic legal order.<sup>78</sup>

34. Concerning the judgments of the European Court of Human Rights (hereafter: ECtHR), a very important category of legislation are laws permitting the reopening of a case after a breach has been declared by the European Court. This is an exception to the principle of *res judicata* in the national arena. States which have adopted such law in

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persons' in the sense of Articles 93 and 94 of the Constitution, if their wording and contents make them appropriate for application by a domestic court in cases in which private parties are involved. This appropriateness is assessed on the basis of the following criteria: a) the character of the provision concerned; b) its contents and scope; c) its wording; and d) the necessity of an implementing regulation for its effect. As an example, the Administrative Jurisdiction Division of the Council of State held Article 25 of the International Covenant on Civil and Political Rights (the right to take part in the conduct of public affairs and the right to vote) to be self-executing' as to its contents. In applying that provision, the Council of State held the exclusion from the right to vote of persons who were declared by a court decision unfit to conduct legal acts, to violate that treaty provision (Administrative Jurisdiction Division of the Council of State, judgment of 29 October 2003, AB 2003, 463, para 2.5 ([www.raadvanstate.nl](http://www.raadvanstate.nl))).

<sup>77</sup> See Council of Europe, *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights*, 8 vols., The Hague: Nijhoff 1975-1985, Vol. V, p. 26-27, 34-35, 66-67, 74-75.

<sup>78</sup> The Netherlands was considered as a model by the Parliamentary Assembly of the Council of Europe (PACE), because Dutch parliamentarians have to be briefed on the implementation of judgments, also those against other countries than the Netherlands, see PACE, Committee on Legal Affairs and Human Rights, *Implementation of judgments of the European Court of Human Rights*, (“Pourgourides Report”), Doc. 12455 of 20 Oct. 2010, para. 202.

the criminal field are, e.g., Germany,<sup>79</sup> Bulgaria,<sup>80</sup> and Italy.<sup>81</sup> Laws enabling the reopening of domestic proceedings have also been adopted in civil and administrative proceedings, although many countries oppose strongly to this possibility based on the *res judicata* principle.<sup>82</sup> In some cases, once the European Court of Human Rights has issued its judgments, national courts have considered that already existing national provisions gave sufficient legal basis to reopening the proceedings.<sup>83</sup> The Strasbourg Court considered that “where an individual (...) has been convicted by a court that did not meet the Convention requirements of independence and impartiality, a retrial or a reopening of the case, if requested, represents in principle an appropriate way of redressing the violation. However, the specific remedial measures, if any, 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 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”<sup>84</sup>. The Court further stated that the reopening of the case was “*the most appropriate way*” of redressing the violation,<sup>85</sup> but would not avoid the payment of moral damages.<sup>86</sup>

35. Domestic “enabling” provisions in member states of the Inter-American system are numerous; sometimes they even appear at constitutional level (see Article 93 of the Ecuadorian Constitution), although most of the time they have statutory status. This is

<sup>79</sup> Para. 359 No. 6 German Code of Criminal Procedure. Since 2007, a re-opening of domestic judicial procedures after a judgment of the ECtHR is also possible in civil procedure, labour law suits, administrative law, and in various special judicial procedures (§3 580 No. 8 ZPO; 79 ArbGG; 179 SGG; 153 VwGO; 134 FGO).

<sup>80</sup> Art. 362 Code of Criminal Procedure -see also Bulgarian Supreme Court of Cassation, *Prosecutor General v VS, Judicial review*, Judgment no 293, Criminal case no 988/2006; ILDC 1139 (BG 2007) 24 July 2007. After *Al-Nashif and others v Bulgaria* (ECtHR, judgment of 20 June 2002), the Supreme administrative Court of Bulgaria ordered the reopening of proceedings on the basis of Article 231.1 of the Code of Civil Procedure.

<sup>81</sup> Court of Cassation (First Criminal Section), *Somogyi*, Appeal, No 32678 ILDC 560 (IT 2006) 3 October 2006, para. 6; Constitutional Court, *Criminal Proceedings against Paolo Dorigo*, Constitutional review, No 113/2011; ILDC 1732 (IT 2011) 94 *Rivista di diritto internazionale* (2011) 960, 7 April 2011. The case of Italy, in which the *Azzolini* Law provides that the Presidency of Italy's Council of Ministers shall coordinate the execution of ECHR's judgments, can be considered as an example of a specific law to implement the ECtHR case-law. In the case of *Paolo Dorigo*, the Italian Constitutional Court further considered that a decision of the European Court of Human Rights against Italy required the reopening of criminal proceedings as a consequence of Article 46 of the ECHR, *Criminal Proceedings against Paolo Dorigo*, Constitutional review, No 113/2011; ILDC 1732 (IT 2011).

<sup>82</sup> The debate is still ongoing in, for example, Poland, where the Supreme Court has decided that a final judgment of the European Court of Human Rights is not a ground for reopening of civil proceedings according to the Polish Code of Civil Procedure, although, in some cases, the reopening is the only possible way to redress the infringement of the European Convention (see Supreme Court of Poland, 30 November 2010, III CZP 16/10).

<sup>83</sup> See for instance the judgment of the Finnish Supreme Court of 31 May 1995, where it examined an application for annulment of a judgment in a civil case where one of the parties did not have the opportunity to comment on documents submitted by the other party. The Supreme Court annulled the judgment by virtue of Chapter 31, section 7, paragraph 4 of the Code of Judicial Procedure according to which judgments manifestly based on misapplication of the law may be annulled. The Supreme Court based its decision on Article 6 of the Convention and the case law of the European Court of Human Rights relating to the importance of adversary proceedings (SC HD 1995:95).

<sup>84</sup> ECtHR, 12 May 2005 [Gr. Ch.], *Öcalan v Turkey*, para. 210.

<sup>85</sup> ECtHR, 2 juin 2005, *Claes v Belgium*, para. 53.

<sup>86</sup> ECtHR, 26 January 2006, *Lungoci v. Romania*. See on this E. LAMBERT, « La réouverture des procédures judiciaires internes suite à un arrêt de la Cour EDH », in G. COHEN-JONATHAN, J.-F. FLAUSS, and E. LAMBERT-ABDELGAWAD, *De l'effectivité des recours internes dans l'application de la convention européenne des droits de l'homme*, IIDH, Nemesis-Bruylant, Bruxelles, 2006, pp. 195-256.

the case, among others, of Colombia, where the Law on State responsibility (*Responsabilidad Patrimonial del Estado*) establishes a procedure to implement the payment of compensation decided by the Committee on Human Rights in respect of the ICCPR as well as the reports of the Inter-American Commission of Human Rights.<sup>87</sup> Costa Rica adopted Act No. 6889 in 1981, which contains the seat agreement between the government and the Inter-American Court of Human Rights, and enounces that the judgments of the Court will have the same effect in the domestic legal order as judgments issued by the domestic courts. In Guatemala, Decree No. 512 establishes the need to promote the implementation of the judgments issued by international courts applicable to the State. In Peru, the Procedural Constitutional Code of 2004 (Act No. 2823) establishes that the decisions issued by international jurisdictions with competence in respect of Peru will not be subject to any further requirement to be applicable in the domestic legal order; Act No. 27775 establishes the procedure to follow to implement the judgments issued by international courts.

36. When such legislation exists, the domestic legal order becomes a factor facilitating the implementation of international human rights obligations, particularly the respect for international monitoring bodies' decisions. However, this does not imply that the judgments are always perfectly implemented and that there is no resistance from national authorities (see in this respect the section on conflicts in Chapter III).

#### **B. International law factors influencing the legal effect of human rights treaties in domestic law**

37. Elements of international law influence the internal effect and application of international human rights treaties in domestic law. Under international law, States are obliged to fulfil their international legal obligations, laid down in treaties to which they are parties and in binding decisions of international bodies whose competence they have recognised. This obligation becomes an increasingly comprehensive one, as international law covers an ever larger area of legal relations that traditionally fell under the sovereignty of the State. International human rights law is a clear example of this. The European Convention on Human Rights quite frequently implies that Contracting Parties have to amend or supplement their legislation, in particular as a result of the case law of the ECtHR, which in many cases gives a dynamic interpretation of the obligations laid down therein. The Inter-American Court of Human Rights is well-known for its audacious approach to the application and the interpretation of the American Convention on Human Rights and for its broad judgments concerning reparation measures.

38. Among the legal factors existing in international law, section 1 will explore the special features of international human rights treaties as such. The particularities of the regional systems under study and the International Covenant on Civil and Political Rights will be analysed under Sections 2, 3 and 4.

##### **1. Human Rights treaties as special treaties under international law**

39. States may not invoke their domestic law as a justification for not complying with their obligations under international law; on the contrary, States have to ensure that their

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<sup>87</sup> Act No 288 (5 July 1996) which does not refer to the IACtHR's judgments.

domestic law is in conformity with their international legal obligations.<sup>88</sup> This is the rule applicable to all International treaties and other international legal obligations. However, International human rights treaties do not always fit perfectly well within the general international law applicable to all international treaties. Thus, for example, the main goal of international human rights treaties, the *effective* protection of the human rights laid down in the treaty concerned, has led to the consequence that the concept of reciprocity does not have its place in those treaties,<sup>89</sup> as it does in other international treaties. Indeed, the direct beneficiaries of international human rights treaties are not the state parties but the individuals themselves.

40. International human rights law further establishes the obligation for each State party to use all the means at its disposal to give effect to the rights recognised in the treaty. States are free to choose the ways and means of implementing their international legal obligations, provided that the result is in conformity with those obligations. They are saddled with an obligation of result and not only with an obligation of conduct. In this respect, the principle of subsidiarity is essential, putting upon the States the main responsibility to ensure respect for and to redress an alleged violation of a human rights treaty. In order to turn the idea of subsidiarity into reality, there should be effective ways and means at the domestic level to implement the human rights provisions concerned. In the case of those provisions that are of a self-executing character or have been transformed into provisions of domestic law which are justiciable, an effective domestic legal remedy implies the possibility of bringing an action by an individual or a group before a court, providing that the court has the power to examine the alleged violation against the benchmark of the treaty. If a violation is found, measures of enforcement must be provided for. The principle of exhaustion of domestic remedies applies as a means to ensure the powers of national judges to interpret the international human rights obligations in the first place and to avoid duplication.

## 2. Factors particularly present in the European system of human rights

41. The European system of human rights has specific features that are also relevant for the impact these rights have on national legal orders. First, it is the system in which all States belonging to the regional organisation are also parties to the Convention. Second, it has the only compulsory international human rights judicial mechanism where individual may file applications directly to the Court since the entry into force of Protocol 11 (1998). The ECHR contains several elements to enhance its impact on national law: Article 32 grants exclusive and final jurisdiction to the ECtHR to interpret the ECHR; according to Article 46, States undertake to abide by the final judgment of the ECtHR; in addition, the ECtHR has developed several specific powers to give maximum effect to its case-law.

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<sup>88</sup> Articles 26 en 27 of the Vienna Convention on the Law of Treaties (VCLT). Under Art. 27 VCLT, “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”. See also Articles 3 and 32 of the ‘Articles on responsibility of States for internationally wrongful acts’ drafted by the International Law Commission (annexed to Resolution 56/83 of the General Assembly of the United Nations), and the comments on those articles, *Yearbook of the International Law Commission* 2001, Vol. II, Part Two, p. 36-38 en 94.

<sup>89</sup> ECtHR, 18 Jan. 1978, *Ireland v. UK*, No 5310/71, para. 239: “Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a ‘collective’ enforcement”. See also the contributions on this issue in CDL-STD(2005)042-e, *The Status of International Treaties on Human Rights*.

42. Once it has received an application, the ECtHR can see to it that there will not be a further obstacle in its examination. Based on Article 34.2 ECHR, which refers to the general duty of the States to ensure effectiveness of the ECHR, the ECtHR has identified a positive obligation on the part of the authorities of the State to help in the establishment of the facts and to investigate them if necessary in the countries concerned.<sup>90</sup> By amendment of its internal Rules in 2004, a new Rule 44B, entitled “failure to comply with an order of the Court” was introduced, which holds that “[W]here a party fails to comply with an order of the Court concerning the conduct of the proceedings, the President of the Chamber may take any steps which he or she considers appropriate”.

43. The ECtHR has also gained influence on developments after it has issued a judgment. Even though according to Article 46, effects of the judgments are only *inter partes* and the system is based on the examination of each individual complaints, the growing flux of applications has forced the ECtHR to develop a mechanism of pilot judgments which has an impact on similar situations that have not (yet) been brought before it. It also has given itself a certain say on the implementation of its former judgments to avoid future human rights violations.<sup>91</sup> This has been further reinforced by the process of reform and the adoption of protocols 15 and 16 to the ECHR (see further examples in Chapter II.A.2).

### 3. Factors particularly present in the Inter-American system of human rights

44. The Inter-American system does not enjoy a compulsory mechanism by all member States of contentious jurisdiction. There is a two-step individual complaints system and individuals only have standing to lodge a petition to the Commission (Article 44 American Convention on Human Rights, hereafter also referred to as ACHR), which may examine the case and draw up a (preliminary) report on the merits (Article 50 ACHR; Article 44 of the Rules of Procedure)<sup>92</sup>. If the matter has not been settled, the Commission may either issue a final report, which is published (Article 47 of the Rules of Procedure)<sup>93</sup> or refer the case to the Court (provided that the State concerned has accepted the Court’s jurisdiction).<sup>94</sup> Both the State concerned and the petitioner can give their views on the question of referral (Article 44(3) of the Rules of Procedure). The Commission has developed guiding criteria for the decision whether to refer or not: “The Commission shall give fundamental consideration to obtaining justice in the particular case, based, among others, on the following factors: a. the position of the petitioner; b. the nature and seriousness of the violation; c. the need to develop or clarify the case-law of the system; and d. the future effect of the decision within the legal systems of the Member States.” (Article 45(2) of the Rules of Procedure). The Commission thus performs a major filtering function, which also accounts for the small number of Court

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<sup>90</sup> Art. 34 sentence 2: “The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.” See, e.g., ECtHR, *Gorgiev v “the former Yugoslav Republic of Macedonia”*, judgment of 19 April 2012, no. 49382/06, para. 43.

<sup>91</sup> According to Article 46, paras. 4, 5 and 6 of the ECHR, as amended by Protocol 14 (2010).

<sup>92</sup> As adopted in 2013.

<sup>93</sup> Art. 51(1) ACHR formulates this as follows: “set forth its opinion and conclusions concerning the question submitted for its consideration”.

<sup>94</sup> The entire procedure of referral is regulated in Articles 45-46 of the Rules of Procedure of the Inter-American Commission of Human Rights, as of 22 March 2013 in force since 1 Aug. 2013.

judgments. However, since 2001, the referral to the Court seems to be more the rule than the exception.<sup>95</sup>

45. The Inter-American system of human rights displays features which may also further the implementation of its judgments in the domestic legal arena. Article 2 of the ACHR offers a unique basis for the Inter-American Court of Human Rights (hereafter also referred to as IACtHR), by providing for a formal statement to reinforce its powers towards the States parties.<sup>96</sup> Under the title “domestic legal effects”, it states that “Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.” The IACtHR has made a qualitative step by using this Article to control the compatibility of legislation and even declaring in its judgments that such legislation is no longer valid. But there is a condition for the IACtHR to exercise this control over an Act: it has to be legislation of “immediate application” to the case.<sup>97</sup> The IACHR has used this possibility with huge consequences in all the cases of adoption of “amnesty” laws, such as in the *Barrios Altos* case (see *infra*, chapter II.A.2) and the case of *La Cantuta v. Peru*,<sup>98</sup> as well as in the famous judgment *Almonacid Arellano v. Chile*,<sup>99</sup> among others.

46. The American continent has often been confronted with overall *défaillance* of the national judicial systems. It is therefore important that the ACHR, in its Article 46, offers a larger legal basis for possible exceptions to the rule of the exhaustion of domestic remedies than those existing in the European system. The rule will not apply when “a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.” From the outset, the IACtHR has approached the rule of the exhaustion of domestic remedies in a more flexible way than its European counterpart, understandable from the point of view of the historical and political context in which the IACtHR had to operate in its first twenty years of activity. The IACtHR has interpreted the role of the exhaustion of domestic remedies in the most favorable way to the victims.<sup>100</sup> The European Court, on its part, has developed a well-established case-law and has applied the rule of exhaustion of domestic remedies to both the type of remedies that should be exhausted, and the content of the complaints made by the applicants before the national courts.<sup>101</sup>

<sup>95</sup> See Open Society Justice Initiative, *From Judgment to Justice. Implementing International and Regional Human Rights Decisions* (New York Open Society Foundations 2010), 80.

<sup>96</sup> Article 2 ACHR states that “[W]here the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms”.

<sup>97</sup> IACtHR, *International responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention*, Advisory Opinion, OC 14-94, paras. 41-43.

<sup>98</sup> IACtHR, 29<sup>th</sup> November 2006, Series C, No. 162.

<sup>99</sup> IACtHR, judgment of 26 September 2006, Series C, No. 154. See also the developments in Chapter II.A.2.

<sup>100</sup> See L. BURGORGUE-LARSEN, A. UBEDA DE TORRES, *The Inter-American Court of Human Rights. Case-law and Commentary*, Oxford, 2011, pp. 138 and ff.

<sup>101</sup> The ECtHR has stated that it should not have to address issues which are new compared to the procedure followed in the national arena, nor should it scrutinise the case more carefully than the judicial authorities have been given the opportunity to do on a national level. The complaint “intended to be made subsequently to the [European] Court must first have been made – at least in substance – to the appropriate

47. Finally, the IACtHR has played a key role in building up the control and supervision of its judgments. It has done so through its case-law, as there was no formal authorisation in the ACHR in this respect. This, together with the large scope of the reparations measures awarded (see Chapter II), has had an important impact on the implementation of its case-law.

4. Factors particularly present in the International Covenant on Civil and Political Rights.

48. The system set up by the International Covenant on Civil and Political Rights (hereafter also referred to as Covenant) is different from the two regional systems analysed, as it does not have a judicial supervisory body which may issue judgments. Therefore, it could be considered that, in comparison with the European and American Conventions on Human Rights, the Covenant and its monitoring mechanism is weaker. However, several factors may foster the implementation of the Covenant.

49. According to one of the United Nations Human Rights monitoring bodies, the basic principle governing domestic application of international human rights treaties is that “the States [when becoming party to such a treaty] are deemed to submit themselves to a legal order in which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction”.<sup>102</sup> It has further stated that the central obligation in relation to these treaties is for States parties to give effect to the rights recognised therein.<sup>103</sup> The United Nations human rights system adopts a broad and flexible approach which allows that the particularities of the legal and administrative systems of each State, as well as other relevant considerations, be taken into account..

50. The obligation to perform *bona fide* a treaty ratified by the State (*pacta sunt servanda*) is mentioned in Article 26 of the Vienna Convention on the Law of Treaties.<sup>104</sup> The principle of good faith generates, first, a duty to take into account the international obligations existing in the treaty, and second, a duty to cooperate with the Human Rights Committee (hereafter also referred to as HRC) set up under the Covenant.<sup>105</sup> Against the background that international (even judicial) decisions are hardly enforceable through coercive measures, it has been asserted that the fact that the HRC views do not have the force of binding law, does not play a decisive role in international practice; states

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domestic body, and in compliance with the formal requirements and time-limits laid down in domestic law”. See, among other, ECtHR, *Selmouni v. France* [GC], judgment of 28 July 1999, para. 74; *Schenk v. Germany*, decision on admissibility, 9 May 2007. It has also added that it is “appropriate that the national courts should initially have the opportunity to determine questions of the compatibility of domestic law with the Convention and that, if an application is nonetheless subsequently brought before the Court, it should have the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries” (ECtHR, *Burden v. the United Kingdom* [GC], judgment of 29 April 2008, no. 13378/05, para. 42). The arguments put by the parties before the national courts should be on the same lines as those put before the ECtHR (ECtHR, *A and others v UK* [GC], judgment of 19 February 2009, no. 3455/05, para. 154).

<sup>102</sup> United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment 9.

<sup>103</sup> *Ibidem*.

<sup>104</sup> Art. 26 VCLT states: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

<sup>105</sup> HRC, *General Comment* No 33, para. 15.

comply (or do not comply) for reasons which are not only formal ones.<sup>106</sup> In some cases, the Covenant and the Human Rights Committee's views may be followed in the same manner as other human rights treaties, in spite of their different features.<sup>107</sup>

## II. THE ROLE OF INTERNATIONAL HUMAN RIGHTS TREATIES MONITORING BODIES IN IMPLEMENTING HUMAN RIGHTS TREATIES

51. A proper and effective implementation of international human rights treaties requires states parties to implement and give effect to the decisions of international monitoring bodies adopted on the basis of these treaties. The monitoring bodies evaluate the compatibility of the national legal order with the international treaties concerned, after the national authorities have had the possibility to address this issue. In this sense, they perform a centralised interpretation of the treaties' provisions, which has its own particularities in each of the three systems selected for the purposes of this Study.

### A. The European system of human rights

#### 1. Effects of the case-law of the ECtHR

52. Judgments issued by the European Court are binding and *res judicata inter partes*.<sup>108</sup> However, the Court has made it clear that the States have to respect the interpretation given in its judgments in other cases to the relevant extent.<sup>109</sup>

53. A judgment of the Court normally contains two elements: first, the statement of a violation or non-violation of the Convention, and second, in case of violation, a section on "just satisfaction" (Article 41 ECHR). The "just satisfaction" can cover pecuniary and non-pecuniary damages. Five conditions must be met for the Court to award just satisfaction: (1) There must have been a violation; (2) the internal law of the condemned state "allows only partial reparation to be made" (Article 41); (3) the complainant must have requested the satisfaction; (4) there must be a causality between violation and

<sup>106</sup> M. NOWAK, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edition N.P. Engel), Kehl: 2005, para. 40.

<sup>107</sup> Kenya, for instance, had a dualist model of application of international treaties, which had therefore to be transformed into national law before they could be enforced by the domestic courts. In 2010, Kenya introduced a new Constitution introducing a monist model of application of international law, rendering the need for a specific act of incorporation superfluous. The State had ratified the Covenant in 1972, had not adopted any implementing legislation. Nevertheless, the High Court of Kenya applied the Covenant in spite of the lack of implementing legislation. It did so in a landmark case concerning torture, in which it referred to international standards to fill in the gaps of the domestic legal order, restricting the definition of torture adopted in the 1963 Constitution; see Kenya, High Court, judgment, 21 July 2010, ILDC 1543. This case shows that the implementation of the Covenant in domestic law may also depend on how the State concerned addresses other international human rights treaties. The United States, when ratifying the Covenant in 1992, stated that it did so with the understanding that the treaty was not self-executing. This was later confirmed by the Supreme Court in *Sosa v. Alvarez-Machain*, where it clearly stated that the United States ratified the Covenant under the express understanding that the treaty itself did not create enforceable rights in domestic courts. See US, SC, 542 US 692 (2004), ILDC 117.

<sup>108</sup> Article 46(1) ECHR: "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties."

<sup>109</sup> See, among many others, *A and others v UK*. The ECtHR affirms that the States enjoy a margin of appreciation, but even when it is very wide, it is not unlimited: "it is for the Court to rule whether, inter alia, the States have gone beyond the "extent strictly required by the exigencies" of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision" (ECtHR, *A and others v. UK* [GC], judgment of 19 February 2009, app. no. 3455/05).

damage, and (5) the award must be “necessary” (cf. Article 41 ECHR). The financial amount of the satisfaction is at the discretion of the Court. The Court also pronounces itself on costs and expenses, although this is not explicitly mentioned in Article 41.

54. The judgment requires the State Party to cease the violation and, when measures are available and have been requested by the individual, to repair it. The ECtHR may order individual measures, such as the release of a detained person,<sup>110</sup> the return of property,<sup>111</sup> the performance of additional investigations on the circumstances of the death of a victim,<sup>112</sup> or the reopening of legal proceedings in cases where the domestic courts have not met the requirements of independence and respect for the right to a fair trial.<sup>113</sup> The ECtHR’s competency for such measures has been contested by pointing to the division of labour between the ECtHR and the Committee of Ministers, with the latter being competent for the supervision of the execution of the ECtHR’s judgments. However, the ECtHR has developed its power to order the state to take specific measures to remedy the violation based on Articles 19, 41 and 46 of the Convention.

55. The ECtHR has, since *Broniowski v. Poland*,<sup>114</sup> issued so-called *pilot judgments* in situations of systemic problems in the legal order of member states (such as large-scale expropriations, tenant law, inhuman detention conditions, and the lack of remedies against lengthy judicial proceedings or detention conditions). The objective of a pilot judgment is to induce the State to remove the systemic problem and to resolve the issue on the domestic level. In a pilot judgment, the ECtHR not only finds a violation in the concrete case and determines that this results from a systemic problem in the State, but in addition may impose an obligation to take general measures to remove the systemic defect, often within a determined deadline. In view of such pilot judgments, the ECtHR may, if appropriate, adjourn pending parallel “repetitive cases” (Rule 61(6) of the Rules of Procedure). It will do so if this does not result in gross unfairness.

56. Moreover, the State has to adapt its law and practice so as to prevent violations in future cases. This more general obligation can be said to flow from the international legal obligation of non-repetition under Article 30 par. b), of the Articles on State Responsibility (2001).<sup>115</sup> The adaptation can require measures by all branches of government: the legislative, the executive, and the judiciary.

57. Finally, concerning the impact on third States, a judgment does not have a formal *erga omnes* effect, but deploys a *de facto* orientating effect for third member states.<sup>116</sup> The UK Supreme Court ruled that the British institutions must follow a “clear and

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<sup>110</sup> ECtHR [GC], judgment of 8 April 2004, *Assanidze v Georgia*, no 71503/01 (the Court ruled “unanimously that the respondent State must secure the applicant’s release at the earliest possible date”).

<sup>111</sup> ECtHR [GC], judgment of 23 January 2001, *Brumărescu v Romania*, no 28342/95.

<sup>112</sup> ECtHR, judgment of 2 December 2010, *Abuyeva and others v Russia*, no 27065/05, para. 243: The Court “considers it inevitable that a new, independent, investigation should take place. Within these proceedings, the specific measures required of the Russian Federation in order to discharge its obligations under Article 46 of the Convention must be determined in the light of the terms of the Court’s judgment in this case, and with due regard to the above conclusions in respect of the failures of the investigation carried out to date.”

<sup>113</sup> See above para 32.

<sup>114</sup> ECtHR, *Broniowski v. Poland* [GC], judgment of 22 June 2004, No 31443/96, paras. 188 et seq. Since 2011, rule 61 of the Rules of the ECtHR.

<sup>115</sup> Drafted by the International Law Commission (annexed to Resolution 56/83 of the General Assembly of the United Nations).

<sup>116</sup> Cf., e.g. German Constitutional Court, 2 BvR 2365/09, of 4 May 2011, para. 89: “*faktische Orientierungs- und Leitfunktion*”.

constant jurisprudence of the Strasbourg court” (which included the case-law against other contracting states).<sup>117</sup>

## 2. Supervision of the execution of judgments by the Committee of Ministers

58. Under Article 46(2) of the ECHR, “[t]he final judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution.” The Committee of Ministers (hereafter referred to as CoM) is a “political” plenary organ of the Council of Europe in which each State has one representative with an equal vote.<sup>118</sup>

59. In 2006, the CoM has adopted Rules for the supervision of the execution of judgments and of the terms of friendly settlements.<sup>119</sup> Under Rule 6, the CoM examines not only whether any just satisfaction has been paid, but also whether the State has taken individual measures to cease the violation and to restore, as far as possible, the *status quo ante* for the victim. The CoM also examines whether general measures have been adopted. The CoM requires the respondent State to submit an action plan within six months (Rule 7). Since 1987, the CoM adopts interim resolutions to inquire about the state of progress of the execution of the judgment and to make suggestions for execution (Rule 16). The CoM has developed these resolutions into memoranda which contain more precise instructions, as well as information to help the State clarify the measures to be adopted and draw up the action plan. All the resolutions are public, although the procedure itself is confidential. When the CoM determines that the state concerned has fully executed the judgement, it adopts a final resolution under Rule 17.

60. Under Rule 4(1), the CoM “shall give priority to supervision of the execution of judgments in which the Court has identified what it considers a *systemic problem*” (“enhanced supervision”). The cases which, from the outset, come under “enhanced supervision” are: cases requiring urgent individual measures; pilot judgments; judgments otherwise disclosing major structural and/or complex problems as identified by the ECtHR and/or by the CoM; and interstate cases. As of 1 December 2012, 22 % of the 1,335 reference cases pending before the CoM for supervision of their execution were classified under enhanced supervision.<sup>120</sup> Other cases are to be dealt with under “standard supervision”.

61. Since 2006, tripartite meetings between the CoM, the Parliamentary Assembly of the Council of Europe (hereafter referred to as PACE) and the European Commissioner for Human Rights on the execution are being held.<sup>121</sup> In 2008, the CoM recommended that States “designate a coordinator— individual or body—of execution of judgments at the national level, with reference contacts in the relevant national authorities involved in the execution process”.<sup>122</sup> In response to this recommendation, some member States created national institutions dedicated to monitoring compliance with both adverse

<sup>117</sup> UK Supreme Court, *Cadder v Her Majesty's Advocate (Scotland)*, Appeal judgment, [2010] UKSC 43; ILDC 1614 (UK 2010) 26 October 2010, para. 45.

<sup>118</sup> Art. 10 and 13-21 of the Statute of the Council of Europe.

<sup>119</sup> Rules of 10 May 2006.

<sup>120</sup> CoM, Annual report 2012, p. 22.

<sup>121</sup> CoM Declaration, Sustained Action to Ensure the Effectiveness of the Implementation of the European Convention on Human Rights at National and European Levels, Dec-19.05.2006E.

<sup>122</sup> CoM Recommendation (2008)2 “On Efficient Domestic Capacity for Rapid Execution of Judgments”, 6 Feb. 2008.

judgments and the ECHR more broadly.<sup>123</sup> In addition, twelve states have indicated that they possess procedures to inform national parliamentarians of adverse judgments by the ECtHR.<sup>124</sup> In a Resolution of 22 January 2013, the PACE requested the States to set up “comprehensive strategies”, provide action plans, consider establishing a national body solely for the execution of the ECtHR’s judgments, and also underlined the need for an increased role of national parliaments.<sup>125</sup> Under Rule 9 of the CoM, the Committee “shall consider any communication from the injured party with regard to payment of the just satisfaction or the taking of individual measures.” The supervision of payment of just satisfaction has been simplified, placing the responsibility on the applicants to inform the CoM in case of problems within a two months delay.<sup>126</sup>

62. National human rights institutions (NHRIs) could play a crucial role in improving execution, because they could both “domesticise” the debate over how to give effect to the ECHR, and at the same time “Europeanise” the domestic human rights discourse.<sup>127</sup> Protocol No. 15 to the ECHR adds a new paragraph to the ECHR preamble, in which the principle of subsidiarity is mentioned, and which also states that the contracting parties have a margin of appreciation in implementing the ECHR.<sup>128</sup>

63. All these changes have eroded the initially strict separation of powers between the ECtHR and the CoM concerning the execution of judgments.<sup>129</sup> Protocol No. 14 to the ECHR, in force since 1<sup>st</sup> June 2012, introduced a new judicial mechanism to promote execution of judgments: the infringement proceeding under Articles 46(4) and (5) of the ECHR. The CoM can (with a two thirds majority) refer to the ECtHR (sitting as Grand

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<sup>123</sup> An example is the United Kingdom’s Parliamentary Joint Select Committee on Human Rights. The Joint Committee on Human Rights consists of twelve members appointed from both the House of Commons and the House of Lords and is charged with considering human rights issues in the UK but cannot take up individual cases. The mandate is not limited to the ECHR (<http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/role> ). Until 2010, only six parliaments (those of Croatia, Finland, Hungary, Romania, Ukraine, and the UK) had indicated that they had created a special body for supervising the implementation of judgments. See A. DRZEMCZEWSKI, “The Parliamentary Assembly’s Involvement in the Supervision of the Judgments of the Strasbourg Court”, *Netherlands Quarterly of Human Rights* 28 (2010), pp. 164-178; Open Society Justice Initiative, *From Judgment to Justice. Implementing International and Regional Human Rights Decisions* (New York Open Society Foundations 2010), 55.

<sup>124</sup> Austria, Bosnia and Herzegovina, Croatia, Cyprus, Germany, Hungary, Italy, the Netherlands, Norway, Sweden, Switzerland, and the United Kingdom. See PACE, Committee on Legal Affairs and Human Rights, *Implementation of Judgments of the European Court of Human Rights*, Progress Report (“Pourgourides Report”), Doc. 12455 of 20 Oct. 2010. An example is Italy’s Azzolini Law of 2006, which provides that the Presidency of Italy’s Council of Ministers shall coordinate the execution of ECHR judgments. See also above footnote 78.

<sup>125</sup> The report explicitly mentioned Bulgaria, Greece, Italy, Moldova, Poland, Romania, Russia, Turkey and Ukraine as States with deficiencies. The resolution was based on a report which had suggested two measures: a national agent for the execution and a dual system of parliamentary control of execution (national parliaments as the primary instrument and PACE monitoring as a back-up). Report of the PACE Committee on Legal Affairs and human rights (rapporteur: S. Kivalov), *Ensuring the viability of the Strasbourg Court: structural deficiencies in states parties*, 7 January 2013 (Doc. 13087).

<sup>126</sup> CoM, *Annual Report 2012*, p. 37.

<sup>127</sup> Open Society Justice Initiative, see reference in note 95, 56.

<sup>128</sup> Art. 1 of Protocol No 15, 30 November 2011 (Steering Committee for Human rights (CDDH), Doc. CDDH(2012)R76, Addendum III).

<sup>129</sup> This appeared clearly in ECtHR [GC], *Verein gegen Tierfabriken (VgT) v. Switzerland* (No. 2), judgment of 30th June 2009, no 32772/02. This case concerned the non-execution of a judgment of 2001 by Switzerland. Although the ECtHR sustained that the CoM had an exclusive power to supervise the execution of its judgments under Article 46 of the ECHR, the Court held that it may indicate the most appropriate means to implement a judgment.

Chamber) the question whether a State party has failed to fulfil its obligation to abide by the final judgment. Such a second judgment does not re-open the question of the substantive violation of the ECHR which gave rise to the first judgment. Introduced as a deterrent measure, the procedure's mere existence and the threat of using it should constitute an incentive to execute the ECtHR's judgments.<sup>130</sup> Since the introduction of this mechanism, no single infringement proceeding has been conducted.<sup>131</sup>

## B. The Inter-American System of Human Rights Protection

### 1. Effects of judgments and Commission's reports

#### a. The Inter-American Court's judgments

64. If the Court finds that there has been a violation of the Convention, "the Court shall rule that the injured party be ensured the enjoyment of his or her right or freedom that was violated. It shall also rule, if appropriate, that 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" (Article 63 ACHR). Ensuring the enjoyment of rights, as mentioned in Article 63, means that the Court will, first, decide on whether a violation has occurred, and second, if so, require the state to bring to an end the violation (which reflects the obligation of cessation and non-repetition in the sense of the general international law on state responsibility).<sup>132</sup> The second competence of the Court mentioned in Article 63 ACHR, namely its power to rule on a "remedy", has been understood as referring to the general principle of customary international law that every violation of an international norm which results in harm creates the obligation to make adequate reparation.<sup>133</sup>

65. The "remedy" of Article 63 of the ACHR has been understood very broadly in the Court's practice. In fact, the remedial scheme used by the Inter-American Commission and Inter-American Court has been considered "to be among the most comprehensive and progressive, and as it has evolved over time".<sup>134</sup> The Court has ordered integral restitution (*restitutio in integrum*) such as the return of property or of territory; release of a prisoner; return to place of residence; reinstatement in employment, etc. When a reinstatement of the *status quo ante* is not possible, sufficient, or appropriate, the Court has (alternatively or additionally) ordered pecuniary compensation both for direct and indirect material and for moral damages suffered. It also rules on costs and expenses. There is a broad range of other remedies which may be categorised under different headings: the obligation to amend legislation (which involves the legislature); the obligation to execute or enforce domestic court judgments (which concerns the

<sup>130</sup> *Explanatory report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, amending the control system of the Convention of 12 May 2009, para. 100.

<sup>131</sup> In August 2012, the NGOs European Human Rights Advocacy Centre and Memorial Human Rights Centre requested the CoM to initiate an infringement proceeding in relation to the noncompliance of Russia with the ECtHR judgment *Isayeva v Russia* of 24 February 2005 (relating to Chechnya), app. no. 57950/00. The NGOs relied on Rule 9(2) of the CoM rules of Procedure: "The Committee of Ministers shall be entitled to consider any communication from non-governmental organisations, as well as national institutions for the promotion and protection of human rights, with regard to the execution of judgments under Article 46, paragraph 2, of the Convention."

<sup>132</sup> IACtHR, *Aloeboetoe v. Surinam (Reparations)*, Series C No. 15, 10 September 1993.

<sup>133</sup> IACtHR, *Velásquez Rodríguez v. Honduras (Compensatory Damages)*, 1989, para. 25 (citing, *inter alia*, Permanent Court of International Justice (CPJI), *Factory Chorzow (Jurisdiction)*, 1927 PCIJ at 21, and *Factory Chorzow (Merits)*, 1928 PCIJ at 26).

<sup>134</sup> Open Society, see note 95, p. 65.

administration), and the obligation to annul or otherwise lift domestic judgments, more directly addressed to the judiciary.

66. “The judgment of the Court shall be final and not subject to appeal” (Article 67 ACHR). Article 68(1) ACHR states: “1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties. A judgment creates an obligation to implement or execute it. This obligation can be based on Article 67 and 68, and additionally flows from Article 2 ACHR, the general obligation of the State parties to “give effect” to the rights and freedoms enshrined in the Convention. This general provision requires the states to adopt “legislative or other measures.” The Court here relies on an *effet-utile* interpretation: “The States Parties to the Convention must guarantee compliance with treaty provisions and their effects (*effet utile*) at the level of their respective domestic norms. This principle is applicable (...) also with regard to the procedural norms, such as those referring to compliance with the decisions of the Court (...) The provisions contained in the said articles must be interpreted and applied so as to ensure that the protected guarantee is truly practical and effective”.<sup>135</sup> This formula, which seems to be borrowed from the ECtHR,<sup>136</sup> also underlines the obligation to fully and effectively implement judgments of the Court.

67. A judgment of the Inter-American Court has no binding effect on other States Parties. However, under Article 69 of the ACHR, any judgment “shall be transmitted to the States Parties to the Convention.” Arguably, this conventional obligation implies that the other States Parties are under an obligation to take note or even to take into account judgments rendered against another State Party. Such an obligation can also be based on the general obligation to give effect to the Convention rights (Article 2 ACHR).

#### b. Effects of the Commission’s decisions and follow-up

68. The Commission’s confidential reports under Article 50 and the published opinions under Article 51 are not legally binding, because they are not judgments.<sup>137</sup> However, all member States of the Organization of American States (hereafter referred to as OAS) – as parties to the OAS Charter and, additionally, in some cases, to the ACHR – are obliged to make every effort to comply with the Commission’s recommendations in individual cases. The legal basis of this obligation is the principle of good faith (Article 26 and 31(1) of the Vienna Convention on the Law of Treaties).<sup>138</sup> Article 48 of the Commission’s Rules of Procedure (2013) regulates the follow-up as follows:

“1. Once the Commission has published a report on a friendly settlement or on the merits in which it has made recommendations, it may adopt the follow-up measures it deems appropriate, such as requesting information from the parties and holding hearings in order to verify compliance with friendly settlement agreements and its recommendations.

2. The Commission shall report on progress in complying with those agreements and recommendations as it deems appropriate.”

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<sup>135</sup> IACtHR, *Baena Ricardo et al v Panama* (competence), Series C No 104, 28 November 2003, para. 66.

<sup>136</sup> ECHR, *Airey v. UK*, No. 6289/73, 9 Oct. 1979, para. 24.

<sup>137</sup> Nevertheless, some scholars call them “judgments”, e.g. M. J. CAMILLERI, V. KRSTICEVIC, “Making International Law Stick: Reflections on Compliance With Judgments in the Inter-American Human Rights System”, in *Protección internacional de derechos humanos y Estado de derecho. Studia in honorem Nelson Mandela* (Bogotá Grupo Editorial Ibáñez 2009), pp. 235-247 (p. 238).

<sup>138</sup> IACtHR, *Loayza-Tamayo vs. Peru*, Merits, Judgment of September 17, 1997, Serie C No. 33, paras. 79-81.

69. In its compliance reports, the Commission uses three categories: total compliance, partial compliance, and pending compliance.

70. A separate issue are the legal effects of precautionary measures (*medidas cautelares*) which can be issued by the Commission in case of a danger of irreparable harm to preserve the *status quo*. The Colombian Constitutional Court accepted these measures as binding, with the argument that the Commission is a court-like body (*órgano cuasi-jurisdiccional*).<sup>139</sup> This reasoning would apply *a fortiori* to final reports of the Commission. However, courts in Argentina,<sup>140</sup> Venezuela<sup>141</sup> and Mexico have not accepted the Commission reports as binding.<sup>142</sup>

## 2. Supervision of the execution of its judgments by the IACtHR

71. The ACHR does not contain a specific provision on the execution or the implementation of IACtHR's judgments or on the supervision and monitoring of that execution. But Article 65 states that "It [the IACtHR] shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations." This provision is repeated in Article 30 of the IACtHR's Statute,<sup>143</sup> and has been interpreted by the Court as implying that the supervision of compliance falls, in the first instance, with the Court itself.

72. Along that line, the IACtHR has assumed this implied power as part of its explicit jurisdictional powers. In *Baena Ricardo et al v Panama (competence)* of 2003, the IACtHR justified its authority through the interpretation of the mentioned provisions, and also by way of comparison and in contrast to the model established by the ECHR.<sup>144</sup> In that judgment, the Court rejected Panama's argument that the monitoring competence should fall upon the OAS General Assembly.<sup>145</sup> In its Annual Report of 2012, the Court stated that: "The authority to monitor its judgments is inherent in the exercise of its jurisdictional powers, and its legal basis can be found in Articles 33, 62(1), 62(3) and 65 of the ACHR, as well as in Article 30 of the IACtHR's Statute."<sup>146</sup>

<sup>139</sup> IACtHR, *Gutiérrez Soler v Colombia*, judgment of 12 September 2005, Series C No 132; Constitutional Court of Colombia, Constitutional petition, No 524/2005; ILDC 1014 (CO 2005) 20 May 2005, paras 6-7.

<sup>140</sup> It seems that the Supreme Court of Argentina has recently changed its views in this respect. In the case *Carranza Latrubesse, Gustavo c/ Estado nacional*, it considered the reports issued by the Inter-American Commission under Article 51 of the ACHR as binding for Argentina, see Supreme Court of Argentina, X. 568.XLIV, C.594.XLIV, judgment of 6 August 2013.

<sup>141</sup> See, on the general position concerning the Inter-American Commission and Court, Venezuela, Constitutional Chamber, Supreme Court, judgment No 1942 of 15 July 2003 (*Impugnación de artículos del Código Penal, Leyes de desacato*).

<sup>142</sup> M. J. CAMILLERI, V. KRSTICEVIC, *op. cit.*, p. 238.

<sup>143</sup> Art. 30 Statute of the Court: "The Court shall submit a report on its work of the previous year to each regular session of the OAS General Assembly. It shall indicate those cases in which a state has failed to comply with the Court's ruling. It may also submit to the OAS General Assembly proposals or recommendations on ways to improve the Inter-American system of human rights, insofar as they concern the work of the Court."

<sup>144</sup> IACtHR, *Baena Ricardo et al v Panama (competence)*, Series C No 104, 28 November 2003, part. D (paras. 84-104).

<sup>145</sup> *Ibid.*, esp. para. 88.

<sup>146</sup> Annual Report of the Inter-American Court of Human Rights (2012), p. 13.

73. Since 2001, the IACtHR has systematically published orders of its President, the aim of which is to monitor the level of compliance with its judgments.<sup>147</sup> Since 2008, the IACtHR conducts compliance hearings. The procedure for monitoring compliance with the IACtHR's judgments, which had evolved through the IACtHR's practice, in 2009 has been codified in Article 63 of the IACtHR's Rules of procedure (in force since 1 January 2010):

"1. The procedure for monitoring compliance with the judgments and other decisions of the Court shall be carried out by means of the submission of reports by the State and observations to those reports by the victims or their legal representatives. The Commission shall present observations to the State's reports and to the observations of the victims or their representatives. 2. The Court may require from other sources of information relevant data regarding the case in order to evaluate compliance therewith. To that end, the Tribunal shall also require expert declarations or reports it considers appropriate. 3. When it deems appropriate, the Tribunal may convene the parties to a hearing in order to monitor compliance with its decisions. 4. Once the Tribunal has obtained all the relevant information, it shall determine the state of compliance with its decisions and issue the pertinent orders."<sup>148</sup>

74. Monitoring compliance comprises two stages: first, the collection of information on compliance activities, and second, the assessment of whether the State's measures indeed fulfil the orders made in the judgment. In the first stage the IACtHR asks the state to submit a detailed report on what it has actually done to comply with the judgment, within a period specified by the IACtHR in the operative paragraphs of the judgment on the merits. The IACtHR also seeks information from the Inter-American Commission and the victims (or their representatives). This stage is normally a written procedure, sometimes accompanied by hearings, which are normally public, "unless the Tribunal deemed it appropriate that they be in private" (Rule 15 of the IACtHR's Rules of Procedure).<sup>149</sup> In the second stage, the IACtHR uses this information to assess the degree of compliance. It informs the State about what it needs to do. It also informs the OAS General Assembly about problems (Article 65 of the ACHR). Compliance problems may be raised not only in the regular annual session of the OAS General Assembly but also in special sessions.

75. It could be argued that the issue of non-compliance is ultimately a political matter, not a legal one.<sup>150</sup> However, the drafters of the ACHR seemed to have rejected such a scheme (in the Court's reading of the *travaux préparatoires* to the Convention).<sup>151</sup> In the

<sup>147</sup> L. BURGORGUE-LARSEN, A. UBEDA DE TORRES, *The Inter-American Court on Human Rights. Case-law and commentary*, Oxford: 2011, chapter 8, para. 11.

<sup>148</sup> Article 63 Rules of Procedure of the Inter-American Court of Human Rights as of 31 Jan. 2009, Procedure for monitoring compliance with the Judgments and other decisions of the Court.

<sup>149</sup> Rules of Procedure of the Inter-American Court of Human Rights of 31 January 2009. The Court's practice is to order private hearings in three situations: implementation of provisional measures; when the state does not provide full information; when the victims do not provide full information. See L. BURGORGUE-LARSEN, A. UBEDA DE TORRES, *The Inter-American Court on Human Rights. Case-law and commentary*, Oxford: 2011, chapter 8, para. 12.

<sup>150</sup> S. DAVIDSON, *The Inter-American Human Rights System* (Dartmouth Aldershot etc.: 1997), p. 226: As "the issue of non-compliance is essentially one to be resolved by the General Assembly, it will be apparent that the question becomes a political matter to be determined through the political processes of the OAS."

<sup>151</sup> IACtHR, *Case of Baena Ricardo et al v Panama* (competence), Series C No 104, 28th November 2003, para. 66, paras 89-90.

last few years, the Presidents of the Commission and the IACtHR speak before the General Assembly, although this only confirms the resolutions that have previously been adopted by the Permanent Council. Indeed, the role that the General Assembly could have played as a mechanism of collective human rights protection in the Inter-American system has been considerably weakened. The reason is simple: no State wants to supervise other States or be supervised by them.<sup>152</sup>

### C. The case of the United Nations Human Rights Committee (HRC)

#### 1. Effects of the HRC's views and conclusions

76. Article 28 of the International Covenant on Civil and Political Rights establishes a Human Rights Committee consisting of eighteen members, serving in their personal capacities. Under the First Optional Protocol (hereafter referred to as OP I), States Parties to the Covenant which have likewise ratified OP I, recognise the competence of the HRC to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. The procedure of the Committee for individual communications is laid out in Article 5 OP I to the Covenant.<sup>153</sup> The HRC is no court, and it is not empowered to issue "judgments." Article 5(4) of the OP I describes the decisions of the Committee as "views" (in French the term is *constatations* and in Spanish *observaciones*). The views of the HRC do not have the formal quality of judgments and are not binding. Domestic courts have frequently and consistently rejected any formally binding quality of the views, for example in Austria,<sup>154</sup> Sri Lanka,<sup>155</sup> Spain,<sup>156</sup> Ireland,<sup>157</sup> and France.<sup>158</sup>

77. The HRC's General Comment No. 33 of 5 November 2008, explains the legal status of the views as follows:<sup>159</sup> "While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the HRC under the OP I exhibit some important characteristics of a judicial

<sup>152</sup> L. BURGORGUE-LARSEN, "The powers of the Court to monitor compliance with its judgments", in L. BURGORGUE-LARSEN, A. UBEDA DE TORRES, *The Inter-American Court on Human Rights. Case-law and commentary*, Oxford: 2011, pp.171-192, para. 8.07, footnote 33.

<sup>153</sup> "1. The Committee shall consider communications received under the present Protocol in the light of all written information made available to it by the individual and by the State Party concerned.

2. The Committee shall not consider any communication from an individual unless it has ascertained that: (a) The same matter is not being examined under another procedure of international investigation or settlement; (b) The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.

3. The Committee shall hold closed meetings when examining communications under the present Protocol.

4. The Committee shall forward its views to the State Party concerned and to the individual."

<sup>154</sup> Austrian Supreme Court, *Peterer v Land Salzburg and Austria*, Appeal judgment, 1Ob8/08w; ILDC 1592 (AT 2008) 6 May 2008, paras.7-9.

<sup>155</sup> Supreme Court of Sri Lanka, *Singarasa v Attorney General*, Application for judicial review, SC Spl (LA) No 182/99; ILDC 518 (LK 2006) 15 September 2006, para. 21.

<sup>156</sup> Spanish Constitutional Court, *José Luis PM v Criminal Chamber of the Supreme Court*, Constitutional appeal (*recurso de amparo*), Judgment of the Constitutional Court; ILDC 1794 (ES 2002) 3 April 2002, para. 17.

<sup>157</sup> Supreme Court of Ireland, *Kavanagh v Governor of Mountjoy Prison*, Appeal Decision, (2002) 3 IR 97; (2002) 2 ILRM 81; (2002) IESC 13; ILDC 488 (IE 2002), para. 36.

<sup>158</sup> French Conseil d'Etat, *Hauchemaille v France*, Judicial review, No 238849; ILDC 767 (FR 2001) 11 October 2001, para. 22.

<sup>159</sup> "The obligations of state parties under the optional protocol to the international covenant on civil and political rights" (CCPR/C/GC/33).

decision.”<sup>160</sup> The views of the HRC under the OP I represent an authoritative determination ...”<sup>161</sup> “Due to its composition, its independence and, importantly, its practice in examining State reports and individual communications procedures, the HRC has garnered an international reputation that imparts great moral authority to its decisions that a State party has violated ICCPR rights.”<sup>162</sup>

78. Because the views are not legally binding judgments, the HRC does not possess an explicit competence to ensure their enforcement. However, the authority to monitor the effect of its views is an implied power of the HRC.<sup>163</sup> “The legal norms on which the treaty bodies pronounce themselves are binding obligations of the States parties, and therefore the pronouncements of the treaty bodies are more than mere recommendations that can be readily disregarded because a State Party disagrees with the interpretation adopted by the HRC or with its application to the facts.”<sup>164</sup> Moreover, States Parties cannot simply ignore them, but have to consider them in good faith (*bona fide*). On the other hand, “they are not debarred from dismissing them, after careful consideration, as not reflecting the true legal position with regard to the case concerned. Not to react at all to a finding by the HRC, however, would appear to amount to a violation of the obligations under the ICCPR.”<sup>165</sup> The legal consequence is that member states are under the obligation to take the HRC’s final views into consideration in good faith.

## 2. Follow-up action

79. The legal basis for follow-up action, including the obligation for the State concerned to provide follow-up information and cooperate with the HRC, is Article 2(3) of the Covenant: “Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (...).” The remedy mentioned refers to a remedy under domestic law of the member state. However, the HRC relies on this provision as a legal basis for the obligation of the member states’ to inform the HRC about the measures taken to give effect to the Committee’s view in cases where the HRC found a violation of the Covenant.<sup>166</sup> Implicitly, Article 2(3) ICCPR is thus used by the HRC as the legal basis

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<sup>160</sup> *Ibid.*, para. 11.

<sup>161</sup> *Ibid.*, para. 13.

<sup>162</sup> M. NOWAK, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edition N.P. Engel), Kehl: 2005, para. 40.

<sup>163</sup> M. SCHMIDT, “Follow-Up Mechanisms Before UN Human Rights Treaty Bodies and the UN Mechanisms Beyond”, in A. F. BAYEFISKY (ed.), *The UN Human Rights Treaty System in the 21<sup>st</sup> Century* (Kluwer Law International The Hague etc.: 2000), pp. 233-249 (p. 234).

<sup>164</sup> International Law Association, *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies*, 2004:Berlin, para. 15.

<sup>165</sup> C. TOMUSCHAT, “Human Rights Committee”, in R. WOLFRUM (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press online: 2013), para. 14.

<sup>166</sup> HRC, General Comment No 33, para. 14. This General Comment quotes the standard formula used in its views where a violation has been found: “By becoming a party to the Optional Protocol the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. In this respect, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee’s views.”

for a quasi-binding quality of the views, binding in the sense that they require follow-up measures upon a violation found by the HRC.<sup>167</sup>

80. In 1990, the HRC created the mandate of the Special Rapporteur for Follow-up on Views, for a two years (renewable) term.<sup>168</sup> The Rapporteur's duties were later formalised and modified in the HRC Rules of Procedure. The current mandate is circumscribed in Rule 101 of the HRC Rules of Procedure of 2005: "1. The HRC shall designate a Special Rapporteur for follow-up on views adopted under article 5, paragraph 4, of the OP, for the purpose of ascertaining the measures taken by States parties to give effect to the Committee's Views. 2. The Special Rapporteur may make such contacts and take such action as appropriate for the due performance of the follow-up mandate. The Special Rapporteur shall make such recommendations for further action by the HRC as may be necessary. 3. The Special Rapporteur shall regularly report to the HRC on follow-up activities. 4. The HRC shall include information on follow-up activities in its annual report."<sup>169</sup>

81. The HRC has described the activity of the Special Rapporteur in General Comment No. 33: "That member, through written representations, and frequently also through personal meetings with diplomatic representatives of the State party concerned, urges compliance with the Committee's views and discusses factors that may be impeding their implementation. In a number of cases this procedure has led to acceptance and implementation of the Committee's views where previously the transmission of those views had met with no response."<sup>170</sup> Rule 103 of the HRC Rules of Procedure foresees that the information provided by the States Parties relating to follow-up activities is, as a rule, not confidential but public, "unless the HRC decides otherwise". Failure by a State party to implement the views of the HRC in a given case becomes public also through the publication of the HRC's decisions, *inter alia* in its annual reports to the General Assembly of the United Nations, on a country-by-country basis.<sup>171</sup> It can be said that the HRC "gives ample publicity to the follow-up in its annual reports."<sup>172</sup> In its recent reports, the HRC has provided a complete statistical breakdown of the position with regard to all cases in which it has found a violation to exist.

82. In the absence of a formal legal obligation to execute the HRC's views, the obligation to provide information on measures taken by the State in order to implement the views functions as a subsidiary tool. Therefore, the failure to provide such information is a specific type of non-compliance with the views. Indeed, in each view that finds a violation, the HRC requests information from the State concerned. It normally uses the following wording: "The HRC wishes to receive from the State Party, within 180 days, information about the measures taken to give effect to the Committee's views."<sup>173</sup> This deadline for the State Parties to provide follow-up information could be considered too

<sup>167</sup> H. M. NOWAK, U.N. Covenant on Civil and Political Rights: CCPR Commentary (2nd edition N.P. Engel), Kehl: 2005, para. 36. According to him, this is "a special feature of the Committee's case law"; "Article 2(3) also serves as a substitute for the Committee's inability to order the State party concerned to remedy the violation found by a specific form of reparation, including monetary compensation to the victim."

<sup>168</sup> Report of the HRC, A/45/40 (1990), Vol. I, at 144-145 and Vol. II, Annex XI.

<sup>169</sup> Rules of 2005.

<sup>170</sup> HRC, General Comment No. 33, para. 16.

<sup>171</sup> HRC, General Comment No. 33, para. 17.

<sup>172</sup> C. TOMUSCHAT, "Human Rights Committee", in R. WOLFRUM (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press online: 2013), p. 35.

<sup>173</sup> Since a general decision of 31 October 1994, this time limit is usually 90 days (see CCPR/C/52/R.10, para. 1).

strict. If information is received from the State Party, this is routinely transmitted to the author, who is given two months to comment on the State Party's submission. A summary of the State Party's response and author's comments is presented by the Special Rapporteur in the form of interim reports. Since 1997, this update on information received between sessions, including recommendations on further action is discussed in principle in public session by the HRC. However, at the HRC's request, to date such discussions have remained private. A summary of these reports is then published in a Committee's Annual Report to the General Assembly. Since 1994, follow-up activities have been reflected in a separate chapter, now generally chapter 6, of the Annual Report.<sup>174</sup>

83. Five types of answers by the State concerned may be distinguished: (1) indication of willingness to implement the views; (2) arguments on factual errors of the case, (3) challenges of the HRC's legal reasoning; (4) argument that no domestic legal basis for the implementation of the HRC's decisions or for granting compensation to the victim was lacking, so that the HRC's recommendations could not be acted upon; and (5) refusal to consider the HRC's views as binding and indication that compensatory payments to the victim(s) or other remedies had been effectuated *ex gratia*.<sup>175</sup> In all such cases, the HRC regards the dialogue between the HRC and the State Party as on-going with a view to implementation. The Special Rapporteur for the Follow-up of Views conducts this dialogue, and regularly reports on progress to the Committee.

84. The views are received differently in the different domestic legal orders. Most states have not enacted special enabling legislation under which the decisions of UN Human rights treaty bodies and regional human rights instances are given legal status. Peru is an exception, because it adopted an enabling law in 1985, which was, however, rescinded by the government of President Alberto Fujimori in 1996.<sup>176</sup> Colombia is another exception<sup>177</sup>.

### III. THE ROLE OF DOMESTIC COURTS IN THE IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS TREATIES

85. The distribution of competences between the legislator, the executive and the courts varies greatly depending on the monist or dualist approach of the country concerned, on the internal effect of the specific international legal provision, on the status of international human rights treaties and on the powers of the courts. Concerning the different roles played by national authorities, there is a joint responsibility between the executive, the legislative and the judiciary in implementing international human rights treaties.

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<sup>174</sup> Committee on the elimination of racial discrimination (CERD), Follow-up procedure of the Human Rights Committee and the Committee against Torture (CERD, Sixty-seventh session 2 to 19 August 2005, CERD/C/67/FU/1), para. 7.

<sup>175</sup> M. SCHMIDT, "Follow-Up Mechanisms Before UN Human Rights Treaty Bodies and the UN Mechanisms Beyond", in A. F. BAYEFISKY (ed.), *The UN Human Rights Treaty System in the 21<sup>st</sup> Century* (Kluwer Law International The Hague etc.: 2000), pp. 236-37.

<sup>176</sup> M. SCHMIDT, "Follow-Up Mechanisms Before UN Human Rights Treaty Bodies and the UN Mechanisms Beyond", in A. F. BAYEFISKY (ed.), *The UN Human Rights Treaty System in the 21<sup>st</sup> Century* (Kluwer Law International The Hague etc.: 2000), p. 241.

<sup>177</sup> Enabling law adopted in 1996, see *supra*, chapter I.A.4, paras. 33-35.

86. Even though the international human rights treaties, once they are part of the domestic legal order and their provisions have a self-executing character, may be directly applied by the courts, this does not alter the fact that, internationally, the State as such and not its judiciary is responsible for the correct and timely implementation of its international legal obligations. However, if the legislator or executive, as the case may be, fails to take the required action, in a monist system, the courts, in concrete cases put before them, may directly apply the international legal provision, provided it has a self-executing character. If that would bring its ultimate decision in conflict with one or more provisions of national law, it depends on the status of the international legal norm concerned within the domestic legal system whether the conflict may be solved by either leaving the conflicting provision of national law out of application by making a “harmonising interpretation” of the domestic norm with the international provisions or, if this is not possible, by declaring it null and void.<sup>178</sup>

87. This chapter will analyse two separate albeit interrelated questions: the role of domestic courts in implementing international human rights treaty provisions (A) and their role when implementing judgments of the international courts and decisions of the monitoring bodies decisions under the three international human rights treaties concerned (the European Convention on Human Rights, the American Convention on Human Rights and the International Covenant on Civil and Political Rights) (B).

#### **A. The role of domestic courts in implementing International human rights treaties provisions**

88. Domestic courts, when reviewing the compatibility of domestic legislation with the respective Conventions and the Covenant, reinforce their role as protectors of human rights at the domestic level and carry out a type of “diffuse review of compatibility”,<sup>179</sup> as opposed to the international review carried out by the international courts and monitoring bodies themselves. The latter serves to ensure uniformity in the interpretation (and therefore is considered as a “concentrated review of compatibility” between domestic legislation and the treaties themselves).

89. When implementing the human rights treaties in their respective national context, domestic courts have to face any possible conflicts or tensions arising from reviewing the compatibility of the specific provision either with the constitution itself (section 1) or with national legislation (section 2).<sup>180</sup>

##### **1. The conflict between an international human rights treaty provision and the constitution**

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<sup>178</sup> The British Human Rights Act of 1998, in Article 3, paragraph 1, even contains an obligation for the courts, to the extent possible, to apply this interpretation method in relation to the ECHR: ‘primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights’. This obligation also includes the obligation to take the case law of the ECtHR into account.

<sup>179</sup> See reference *supra*, para. 4

<sup>180</sup> A possible variant could be conflicts between the provisions of two incorporated international treaties, for example a conflict between the human right of access to an impartial tribunal (Art. 6 ECHR) and a bilateral headquarters agreement between a host state and an international organisation, requiring the state to grant immunity to the organisation. As in most countries, such treaties would have the same legal force within the domestic legal order, the general principles – *lex posterior derogat priori*, *lex specialis derogat generali* – would apply, though their application may not be an easy one.

90. The situation is quite complicated when the conflict arises between an international treaty and the constitution or, where they exist, constitutional (organic) laws. Such a conflict is a delicate one, as it confronts the highest normative instruments of a country with instruments adopted at the international level. States therefore seek to avoid such conflicts, if possible. One of the tools that serves this purpose is the provision which prohibits the ratification of treaties that contradict the constitution. Such a provision can be found, for instance, in the Constitution of Armenia (Article 6). A variant of this provision, found in the Constitution of Ukraine (Article 9), stipulates that “the conclusion of international treaties that contravene the Constitution /.../ is possible only after introducing relevant amendments to the Constitution”. Finally, in some countries, such as the Czech Republic, France and the Netherlands, a preliminary review of the compatibility of international treaties to be ratified with the constitution is required or at least available to decrease the risk that two incompatible norms, both of an important nature, would exist in the same legal order.

91. If such conflict-avoiding tools fail, national organs, especially courts will need to find a *solution* to the conflict. Two main options are available: the first one consists in the harmonisation of the conflicting provisions by carrying out a consistent interpretation; the second one is based on the hierarchy of norms, which implies either the disapplication of domestic law or ignoring the international human rights treaty.

92. The first option is explicitly advocated for in many constitutions, as the “interpretation clauses” foster an interpretation of human rights that is both in conformity with the constitution itself and with the international treaties in force. These clauses influence the approach to the “catalogue” of human rights, favouring the integration of human rights existing in international treaties into the fundamental rights list contained in the constitution. An example is the Constitution of Romania (Article 20): “*constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to*” (par. a)). Another example is the British Human Rights Act (Article 3, paragraph 1). Maybe the most paradigmatic examples have been the Portuguese Constitution (Article 16.2) and the Spanish Constitution (Article 10.2),<sup>181</sup> which have influenced many of the constitutions in Latin America (as is the case for Colombia,<sup>182</sup> the Dominican Republic,<sup>183</sup> Ecuador,<sup>184</sup> Mexico<sup>185</sup> or Peru<sup>186</sup>).

93. While certainly preferable, this option may only be open for use in some cases, its application being impossible in case of direct incompatibility. In such a case, the second option – that of giving preference to one of the sources – would need to be resorted to. It is quite probable that national courts, guardians of the integrity of the national legal order, would have a tendency to favour the constitution, especially if it granted a higher level of protection of human rights. This would entail that national courts are under the obligation to take into account the international human rights provisions in good faith, and, therefore, must interpret domestic constitutional law as far as possible consistently

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<sup>181</sup> See G. MARTINICO, “Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts”, *EJIL*, 23, 2012, pp. 401-424.

<sup>182</sup> Article 93.

<sup>183</sup> Article 74.4.

<sup>184</sup> Article 172.

<sup>185</sup> Article 1.

<sup>186</sup> Fourth final provision.

with the international human rights treaties. The Supreme Court of Mexico has recently interpreted in this sense the 2011 constitutional reform, stating that Article 1 does not entail that the international human rights treaties have a higher legal force than the Constitution, but that the most favourable norm for the individual should prevail when the national judge exercises his or her diffuse review of the compatibility of the treaty and national law. There is no *a priori* on what norm prevails; it depends on their contents.<sup>187</sup>

94. Chile has given a different type of scenario. The American Convention on Human Rights prohibits in its Article 13.4 prior censorship, except for the sole purpose of regulating access for the moral protection of childhood and adolescence. Chile has been the subject of numerous cases before the Inter-American Court of Human Rights concerning precisely the issue of freedom of expression and the use in the country of the so called “laws on contempt” (*leyes de desacato*), which permitted prior censorship and were based on the Constitution. In this case, there was a direct clash between a provision of the American Convention on Human Rights and the Constitution of Chile, which could only be solved when Chile changed its Constitution in order to eliminate prior censorship.

95. The Supreme Court of Brazil has also faced the issue of the compatibility between the Constitution and international human rights treaties. In a judgment 2008, it had to decide whether the provisions of the American Convention on Human Rights and the International Covenant on Civil and Political Rights, that prohibited detention for debt, overrode the Brazilian legislative provisions prescribing detention of defaulter depositaries, despite the fact that this type of detention was authorised by the Constitution of Brazil. Until 2010, the dominant understanding had been that human rights treaties were, as for any other kind of treaty, equivalent to ordinary legislation, any new or more specific piece of legislation establishing and regulating the imprisonment of the unfaithful depositary could supersede the ACHR or the Covenant. The Supreme Court had also established<sup>188</sup> that if the ACHR clashed with the Constitution, the ACHR was not applicable. In its judgment of 2010, the Supreme Court changed its established case-law and decided to interpret that, as the Constitution merely contained an authorisation to the general prohibition of civil imprisonment, this issue was eliminated of the Brazilian legislation because of the existing ban in the ACHR and the Covenant.<sup>189</sup>

2. The possible conflict between an international human rights treaty provision and a domestic legal regulation (*in abstracto* control) or general policy

96. There are many examples of this type of conflict. International human rights treaties which are incorporated into domestic legal orders can clash with domestic legal regulations. Many national constitutions foresee the risk of a conflict between

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<sup>187</sup> After the Inter-American Court’s decision in the case *Radilla Pacheco* (IACtHR, *Radilla Pacheco v Mexico*, judgment of 23 November 2009, Series C No. 209), the Supreme Court, in its judgment of 14 July 2011, file 912/2010, had decided that all Mexican domestic courts had to exercise a review of compatibility between the American Convention on Human Rights and the national legal order and that all the judgments issued by the Inter-American Court against Mexico were binding on all the State authorities. In another judgment, decided in September 2013 (SC 293/2011), the Supreme Court redefined its position and considered that in case of conflict between an international human rights provision and domestic law, the most favorable norm should be applied, either international or domestic.

<sup>188</sup> Brazil, Supreme Court, Habeas corpus, 72.131-1, 23 November 1995.

<sup>189</sup> Brazil, Supreme Court, judgment of 3 December 2008, ILDC 1375 (BR 2008). In this judgment, the human rights treaties were considered to have supra legislative status,

international treaties and domestic laws, declaring usually that the former shall prevail.<sup>190</sup> For instance, the Constitution of Hungary gives the Constitutional Court the power to “annul any piece of legislation or any constituent provision which conflicts with an international agreement” (Article 24), although such treaties do not become part of the Hungarian legal system (Article Q).

97. There are specific cases which have had an important impact on the national legal order, mainly concerning the amnesty laws in Latin America. Peru illustrates well the overall conflict of a domestic law and the ACHR and the role of national courts on this very delicate issue. The *Barrios Altos* is a well-known case in this area.<sup>191</sup> The Peruvian situation under former President Fujimori was particularly complicated because of the constant opposition and confrontation between national courts, on the one side, and the government, on the other. Indeed, courts openly opposed governmental acts considered to be against the Constitution. In *Barrios Altos*, in spite of the adoption of Act No. 26479 (the first amnesty decree), the court in charge of the case decided that this was not applicable to criminal cases already pending since the amnesty law violated constitutional guarantees as well as the American Convention on Human Rights. This led to the adoption of a second amnesty decree, Act No. 26942, “directed to interfering with legal actions in the *Barrios Altos* case”. The new legislation expressly declared that the amnesty could not be scrutinised by any jurisdiction and that it was of compulsory application to all national courts.<sup>192</sup> This was not the only occasion of a direct confrontation between the government and the Peruvian courts in the 1990s. The case of *Constitutional Court v. Peru* revealed the harassment suffered by the members of the Peruvian Constitutional Court for opposing the so called “auto-coup” led by Fujimori<sup>193</sup>. Many national courts in Latin America have followed this path, not applying amnesty laws or declaring them void.<sup>194</sup> The Federal Supreme Court of Brazil has been an exception in this respect. In 2010, it had to decide on the constitutionality of the Amnesty

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<sup>190</sup> See *supra* chapter I. A. 1 and 2.

<sup>191</sup> IACtHR, *Barrios Altos v. Peru*, judgment of 14 March 2001, Series C, No. 75; IACtHR, Order of 22 September 2005, supervision of the execution of the *Barrios Altos* and *La Cantuta v Peru* cases, judgment of 29 November 2006, Series C No. 162.

<sup>192</sup> After the departure of Fujimori in Peru, the amnesty provisions, declared incompatible with the ACHR by the IACtH, were left with no effect and were finally abolished.

<sup>193</sup> The case relates to the fact that, in 1993, President Fujimori dissolved the Congress and dismissed many of the judges of Supreme Courts, promulgating by referendum a new Constitution which was meant to allow immediate presidential re-election, previously forbidden. He therefore ran for the elections in 1995 after 5 years as President of the Peruvian State. However, the constitutionality of the legal basis for Fujimori admission's as suitable candidate for re-election was raised before the Constitutional Court. Pressure and harassment towards the Constitutional Court was quite severe, even including judicial proceedings and charges against some of the judges. See a detailed account in IACtHR, *Constitutional Court v. Peru*, judgment of 31 January 2001, Series C, No. 71.

<sup>194</sup> In Chile, the 1978 amnesty decree law is not applied in practice as the Chilean Supreme Court has ruled consistently that the amnesty decreed by the military government in 1978 was inapplicable to war crimes or crimes against humanity, and that these crimes were not subject to the statute of limitations, Supreme Court of Chile, Criminal Chamber, *Molco Case*, No. 559-2004, 13 December 2006, paras 19-20; see also in Argentina, the Supreme Court decided that the ACHR imposed upon Argentina the duty to prosecute the perpetrators of crimes against humanity. Specifically, the majority found that ‘the subjection of Argentina to Inter- American jurisdiction prevents the principle of the “irretroactivity” of criminal law from being invoked as a basis for refusing to comply with the duties assumed with regard to the prosecution of grave human rights violations’. This notion, together with the court’s decision to apply the jurisprudence of the Inter-American Court as an essential guideline for interpreting the ACHR, even when the cases were not decided against Argentina, was essential to consider that the amnesty laws (*leyes de obediencia debida y de punto final*) were not applicable because they sought to leave unpunished grave violations of human rights, these laws were contrary to the ACHR and the ICCPR and were therefore unconstitutional, *Simón and ors v Office of the Public Prosecutor*, Appeal judgment, S. 1767. XXXVIII; ILDC 579 (AR 2005), 14 June 2005.

Law adopted during the dictatorship and its compatibility with the international obligations to investigate, prosecute and punish as established by the ACHR and the Inter-American Court. The IACtHR had already issued the judgments in *Barrios Altos* and in *Almonacid-Arellano v Chile*,<sup>195</sup> in which it had established that amnesties for gross violations of human rights bar victims' access to justice and sustain impunity.<sup>196</sup> In spite of these arguments, the Brazilian Federal Supreme Court decided that the Amnesty Law was not as such contrary to the Constitution and the international obligations of Brazil.<sup>197</sup>

98. In Europe, from an overall perspective and within the framework of the ECHR, pilot judgments tend precisely to identify an overall *défaillance* and to establish a more permanent solution beyond the individual case, asking therefore the States to change a general policy or a piece of legislation, even though the responsibility to do this does not often rely only on domestic courts. Related to this issue and concerning the reactions of domestic authorities in this respect, the United Kingdom has recently been the centre of a serious conflict, which was accompanied with threats of withdrawing from the European Convention on Human Rights. The *Hirst*<sup>198</sup> saga is one which, even though the legislation could have been brought in conformity with the ECHR quite easily, has become a highly politicised issue. The Lower House and the House of Lords of the United Kingdom refused to change their policy towards prisoners who are currently denied the right to vote in all elections in the UK, including general elections, the European Parliament elections and local elections. The UK has been considered in non-compliance for over eight years, with the accompanying follow-up procedure before the Committee of Ministers.<sup>199</sup>

<sup>195</sup> Judgment on preliminary objections, merits, reparations and costs, Series C No 154, 26 September 2006. The case concerned the extrajudicial killing of a professor in September 1973 by state police forces of the Pinochet regime. The Inter-American Court found that the killing constituted a crime against humanity and that the non-prosecution of those responsible by operation of the 1978 amnesty decree law constituted a violation of the ACHR.

<sup>196</sup> In 2008, the Brazilian Federal Supreme Tribunal ruled that the ICCPR and the ACHR—international human rights treaties to which Brazil had acceded—have a 'supra-legal' status in Brazil (see *Banco Itaú v Armando Luiz Segabinazzi*, Decision of the Federal Supreme Tribunal on the merits of an individual constitutional complaint procedure, RE 349/703-1, 3 December 2008). Hence—although inferior to the Constitution—norms contained in these treaties have precedence over and render inapplicable all other diverging domestic norms, including those in force by the time of Brazil's accession. This is the exact case of the relation between the ICCPR and the ACHR, on one side, and the Amnesty Law, on the other. The latter law runs counter to the interpretation of both treaties according to the UN Human Rights Committee, the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights, see *Oxford Reports on International Law* — ILDC 1495 (BR 2010).

<sup>197</sup> Brazil, Supreme Court, Federal Council of the Brazilian Bar Association v President of the Republic and National Congress, Plea of breach of fundamental precept, Supreme Court decision 153; ILDC 1495 (BR 2010), 29 April 2010.

<sup>198</sup> ECtHR, *Hirst (No 2) v UK* [GC], judgment of 6 October 2005.

<sup>199</sup> On 7 April 2006, the United Kingdom authorities presented an action plan for the enforcement of the judgment to the Council of Europe's Committee of Ministers (CM)<sup>2</sup>. The authorities undertook to conduct a two stage consultation process, with a view to introducing before Parliament the necessary legislative reform. However, legislative reform has not been followed through. The CM adopted an Interim Resolution in December 2009 in which it expressed serious concern about the substantial delay in implementing the judgment and urged the United Kingdom authorities to rapidly adopt the necessary measures. In a decision of June 2011 concerning the case, the CM noted, among other things, that the judgment *Greens and M.T.* (ECtHR, judgment of 23 November 2010) had become final and that the United Kingdom authorities had until 11 October 2011 to introduce legislative proposals with a view to the enactment of an electoral law to achieve compliance with the Court's judgments in *Hirst (No. 2)* and *Greens and M.T.* The ECtHR granted an extension of six months at the request of the UK authorities to take into account the *Scoppola v Italy (No 3)* (a case similar to that of *Greens and MT*) to the Grand Chamber, announced on 22 May 2012. On 22 November 2012, the Government published a draft Bill, the *Voting Eligibility (Prisoners) Draft Bill*. The Bill has not yet been adopted.

## B. The role of domestic courts in implementing decisions of international human rights treaties monitoring bodies:

99. In the case of the European and American Conventions, there is a special relationship with national courts because of the interactions between the European and the Inter-American Courts and national courts in the interpretation of the European and American Conventions. This allows for a “dialogue of judges”,<sup>200</sup> which includes mutual references to case-law of the European and Inter-American Courts, on the one hand, and national courts, on the other, not only when such cross-citations have a positive impact and promotes understanding, but also when they lead to debate or oppose judicial solutions.

100. In Europe, domestic courts have ruled on the effects of the judgments of the ECtHR in the domestic legal order from their own perspective. There are, in particular, different views on the question of whether the judgment binds the State as a whole, and the particular obligations stemming for each organ of the State. This implies that the ECHR, as interpreted by the ECtHR, can be directly enforceable. The German Constitutional Court issued the landmark decision *Görgülü*, in which it stated that the judgments of the ECtHR “must be taken into account”, but only within the limits of the German Constitution. This means that domestic authorities and courts must in principle strive to integrate the ECtHR’s judgments into the German legal system and must apply them. They may depart from a judgment, but in that case they must provide reasons for the non-application. Unjustified departure from or non-application of a judgment of the ECtHR is sanctioned under German constitutional law: an applicant could introduce a constitutional complaint with the argument that his or her “parallel” fundamental right as guaranteed by the German Constitution has been violated through the non-application of a judgment of the ECtHR.<sup>201</sup>

101. The Italian Court of Cassation held that the judgments of the ECtHR deploy a *preciso obbligo giuridico del giudice nazionale italiano* (“A precise legal obligation for the national Italian judge”).<sup>202</sup> In contrast, the Spanish Constitutional Court emphasised that the judgments of the ECtHR possess only a “potestad declarativa” (declaratory power”) and are not enforceable in the Spanish legal order.<sup>203</sup> It held, however, that the Spanish authorities and courts are obliged to interpret Spanish law in conformity with these judgments, especially when interpreting parallel fundamental rights also guaranteed in

<sup>200</sup> There is an important body of academic literature on this topic; from a general perspective, see, among others, A.-M. SLAUGHTER, ‘A Global Community of Courts’ (2003) 44 *Harvard International Law Journal* 191; A.-M. SLAUGHTER, *A New World Order* (2004); C. BAUDENBACHER, ‘Foreword: Globalization of the Judiciary’ (2003) 38 *Texas International Law Journal* 397; R. H BORK, *Coercing Virtue: The Worldwide Rule of Judges* (2003). In Europe, the ECtHR publishes a series entitled a “Dialogue between judges” since 2006, accessible in its website (<http://www.echr.coe.int>); on the situation in Europe see also E. BRIBOSIA, A. ÚBEDA DE TORRES, L. SCHEECK (eds), *L’Europe des cours*, Bruylant, Brussels, 2010; on the dialogue between the ECtHR and the IACtHR, see L. BURGORGUE-LARSEN, *El diálogo judicial*, Mexico, Porrúa, 2013; R. CANOSA USERA, P. A. FERNANDEZ SANCHEZ, J. GARCIA ROCA, P. SANTOLAYA, *El diálogo entre los sistemas Europeo y Americano de derechos humanos*, Civitas, Madrid, 2012.

<sup>201</sup> German Constitutional Court, *Görgülü*, Individual constitutional complaint, BVerfG, 2 BvR 1481/04; ILDC 65 (2004) 111 *Entscheidungen des Bundesverfassungsgerichts* (BVerfGE) 307–332; (2004) *Neue Juristische Wochenschrift* (NJW) 3407–3412, 14 October 2004.

<sup>202</sup> Court of Cassation (First Criminal Section), *Somogyi*, Appeal, No 32678 ILDC 560 (IT 2006) 3 October 2006, para. 10.

<sup>203</sup> Spanish Constitutional Court, *Fuentes Bobo v Public Prosecutor and Televisión Española SA*, Appeal judgment of the Constitutional Court, no 197/2006; ILDC 997 (ES 2006) 3 July 2006, paras. 31-33.

the Spanish Constitution.<sup>204</sup> The debate in Spain has been fostered by the recent implementation by the Spanish Court of the judgment of the ECtHR *Del Rio Prada*,<sup>205</sup> which concerned the invalidation by the Strasbourg judges of the so called in Spanish domestic law as the *Parot* doctrine. In the *Parot* case,<sup>206</sup> a decision delivered by the Spanish Supreme Court in 2006, the Supreme Court changed its former interpretation of the Law on prison benefits, considering that every single conviction had to be taken into account separately in order to calculate the right to have one's prison sentence reduced for work done in prison. Therefore, if the person had been convicted for several assassinations, each of them imposing several years of prison, the right to a reduction in the prison sentence was to be calculated on the total amount of years (which in some cases could be of more than 400 years, depending on the number of crimes committed). In practice, it implied that those persons convicted for very serious offences (such as terrorists, serial killers or others) could not benefit from a reduced prison sentence and would have to stay in prison the maximum number of years established by the Criminal Code (30 years). Ms Del Rio Prada, whose years had been calculated following this cumulative method and had not had access to prison benefits, was considered wrongly deprived of this legal right. The ECtHR requested, apart from the payment of damages, her early release. In spite of the lack of specific procedure to implement the ECtHR decisions in Spain, the relevant Court (the *Audiencia Nacional*) promptly executed the ECtHR judgment and released the applicant.<sup>207</sup>

102. The Czech Constitutional Court held that the Strasbourg judgments against the Czech Republic are binding on the state, by force of the ECHR and additionally by virtue of the Czech Constitution.<sup>208</sup> The Bulgarian Supreme Administrative Court stated more specifically that the European Court's judgments are addressed to all public authorities of the Bulgarian State at all levels. Although Article 46 ECHR left the means of execution to the discretion of the state, it must in any case be effective and achieve the desired result.<sup>209</sup>

103. The debate in the Inter-American system has been strongly influenced by the Inter-American Court in the *Almonacid Arellano case v. Chile*:

“The Court is aware that domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the Judiciary must exercise a sort of “conventionality control”

<sup>204</sup> Ibid., para. 34.

<sup>205</sup> ECtHR, *Del Rio Prada v. Spain*, 10 July 2012.

<sup>206</sup> Spanish Supreme Court, STS 197/2006, 28 February 2006.

<sup>207</sup> This has also given rise to another consequence: as the *Parot* doctrine affected some 80 other prisoners in a parallel manner, the Spanish authorities ordered their progressive release *ex officio* based on the ECtHR's decision

<sup>208</sup> Czech Constitutional Court, *Červeňáková and others v Regional Court in Ústí nad Labem and District Court in Ústí nad Labem*, Decision on Constitutional Complaint, II ÚS 604/02; ILDC 877 (CZ 2004) Sb n u ÚS 7/2004, 26 February 2004, para. 26.

<sup>209</sup> Bulgarian Supreme Administrative Court, *Al-Nashif v National Police Directorate at the Ministry of the Interior*, Judicial review, Judgment No 4332; ILDC 608 (BG 2003) Administrative Case No 11004/2002, 8 May 2003, para. 9.

between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention."<sup>210</sup>

104. However, this approach has not avoided conflicts in individual cases. Some domestic courts have given examples of good compliance, establishing the importance to conduct a review of conventionality (compatibility between the Convention and the domestic law) which goes hand in hand with a review of constitutionality.<sup>211</sup> In some other cases, compliance is more conflicted.

105. In the case *El Frontón*, prosecution of crimes and the notion of crimes against humanity were at stake.<sup>212</sup> Peru was considered in breach of its duty to investigate and sanction those responsible for the deaths of inmates in the prison in 1986. Several cases were consequently introduced and criminal proceedings were reopened; however, some of the accused introduced complaints with the Peruvian Constitutional Court against the reopening of criminal proceedings.<sup>213</sup> On 14 June 2013, the Constitutional Court decided to award partially the protection requested, because the court had wrongly considered the facts of *El Frontón* as crimes against humanity.<sup>214</sup>

106. Colombia has given examples of a very interesting dialogue of judges.<sup>215</sup> In one of the many cases relating to the Colombian conflict, the Inter-American Court did not

<sup>210</sup> IACtHR, *Almonacid Arellano v. Chile*, judgment of 26 September 2006. Series C No. 154, par. 124.

<sup>211</sup> See, e.g., Peruvian Constitutional Court, *Callao Bar Association v Congress of the Republic*, Constitutional Review, Case No 00007-2007-PI/TC; ILDC 961 (PE 2007) 19 June 2007, para. 37: the Constitutional Court of Peru stated the obligation to amend domestic legislation to be in compliance with the Constitution, the ACHR and the interpretation given by the IACtHR. See also Constitutional Court of Dominican Republic (Pleno), No 4, *Juventud Nacional Comprometida, Inc and others v Dominican Republic*, Cordero Gómez (intervening) and others (intervening), Direct constitutional complaint procedure, BJ 1131.34, ILDC 1095 (DO 2005), 9th February 2005, Supreme Court of Justice [SCJ]. The Court stated in an *obiter dictum* that the case law of the IACtHR is part of the *Bloque de Constitucionalidad*.

<sup>212</sup> The case related to the riots which took place in several prisons in Peru in June 1986 and the fact that the IACtHR had condemned Peru for disproportionate use of lethal force by the State in the *Durand Ugarte case v. Peru* (IACtHR, *Durand Ugarte v. Peru*, Merits, judgment 16 August 2000, Series C No. 68).

<sup>213</sup> The application raised the fact that the prosecution according to the Peruvian Criminal Code was time barred. Over 20 years had passed and therefore statutory limitations applied. According to domestic law, no criminal procedure could be opened at this stage.

<sup>214</sup> The Constitutional Court had to decide in this case, among other issues, whether the facts could be qualified as crimes against humanity and therefore, no statutory limitations could possibly be applied in prosecuting this case, leading to rejecting the *amparo* complaint filed. The Constitutional Court referred, in order to decide this case, to the case-law of the IACtHR concerning Peru, which did not pronounce itself on the qualification of the facts as crimes against humanity, and to the Venice Commission *amicus curiae* opinion produced in 2011 (CDL-AD(2011)041), which gave feedback on the different practice followed by European countries while facing past crimes against humanity and on the present definition of crimes against humanity in international law. It is unclear how Peru is going to comply with the IACtHR's case-law after such a decision.

<sup>215</sup> This dialogue and exchanges contained in quotes and references made by the Inter-American Court in many judgments, such as, among others, IACtHR, *Case of Las Palmeras v. Colombia*. Merits, judgment of December 6, 2001. Series C No. 90; IACtHR, *Case of the 19 Tradesmen v. Colombia*. Merits, Reparations and Costs. Judgment of July 5, 2004, Series C No. 109; IACtHR, *Case of Gutiérrez-Soler v. Colombia*. Merits, Reparations and Costs, judgment of September 12, 2005 Series C No. 132; IACtHR, *Case of the Mapiripán Massacre v. Colombia*, Merits, Reparations and Costs, judgment of September 15, 2005. Series C No. 134; IACtHR, *Case of the Pueblo Bello Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of January 31, 2006. Series C No. 140; IACtHR, *Case of the Ituango Massacres v. Colombia*. Preliminary Objection, Merits, Reparations and Costs, judgment of July 1, 2006 Series C No. 148; IACtHR,

hesitate to praise the Colombian Constitutional Court for having incorporated international law, including international humanitarian law within the constitutional bloc of Colombia, and for ensuring the effectiveness of remedies.<sup>216</sup> The Inter-American Commission has stated many times that the conditions deriving from the state of siege in Colombia “which has been in effect almost without interruption for several decades have become an endemic situation which has hampered, to a certain extent, the full enjoyment of civil freedoms and rights in that, among other things, it has permitted trials of civilians by military courts”. It recommended therefore that the State put an end to this situation but, in face of the lack of a global measure, it has commended the work of the Constitutional Court.<sup>217</sup> As an example of direct opposition, the Venezuelan Supreme Tribunal of Justice held that a judgment of the IACtHR can deploy effects only if they are in conformity with the Constitution of Venezuela<sup>218</sup>; as a consequence, it considered that rulings of the IACtHR cannot, as such, be enforced in Venezuela (they would be “*inejecutable*”).<sup>219</sup>

107. Ultimately, the European and the Inter-American Courts, evaluating the compatibility of the national legal order with the respective Conventions after the national courts have had the possibility to address this issue, could promote a certain modification in the separation of powers principle, “validating” or “encouraging” the decisions of national courts which annul or rule against a governmental or legislative measure or sanctioning the State when this has not been done in accordance to its compatibility test. The *Zielinski Pradal v. France* case became paradigmatic in the European system, as the ECtHR decided in last resort that the State, through its Parliament, had taken a decision which, although based on “national interest”, was against the ECHR.<sup>220</sup> The protection of human rights, according to the ECtHR, required supervising the views adopted by the French legislature when considering the measures to adopt to protect the interests at stake. The Court limited the margin of appreciation of the State, considering that the intervention decided by the Parliament, which had effects on ongoing judicial proceedings, was not in conformity with the European Convention on Human Rights.<sup>221</sup>

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*Case of the Rochela Massacre v. Colombia*. Merits, Reparations and Costs, judgment of May 11, 2007. Series C No. 163; IACtHR, *Case of Escué-Zapata v. Colombia*. Merits, Reparations and Costs, judgment of July 4, 2007, Series C No. 165 ; IACtHR, *Case of Valle-Jaramillo et al. v. Colombia*. Merits, Reparations and Costs, judgment of November 27, 2008, Series C No. 192.

<sup>216</sup> IACtHR, 15 September 2005, *Mapiripán Massacre v. Colombia*, Series C, No. 134. para. 115. See Colombia, Constitutional Court, judgment C-225/95 of May 18, 1995.

<sup>217</sup> See IA Com HR, Annual report, 2011, chapter V, on Colombia.

<sup>218</sup> Venezuelan Supreme Tribunal of Justice, *Solicitor General of the Republic v Venezuela*, Final award on jurisdiction, No 1939 (File No 08-1572); ILDC 1279 (VE 2008) 18 December 2008, paras 40, 43, 48.

<sup>219</sup> *Ibid.*, para. 58.

<sup>220</sup> The complaint was introduced by several applicants for problems in the implementation of an agreement signed between the State and several trade unions. They complained that the State, by means of retrospective legislation adopted by Parliament, had affected a pending lawsuit, rendering the proceedings unfair. The ECtHR considered that the circumstances of the case did not make it possible to assert that the intervention of the legislature had been foreseeable, seeing that the dispute had been over the application of an agreement that had been discussed and adopted under a prescribed procedure by the employers and trade unions concerned. The application of the new legislative change by the domestic courts had made it pointless to continue the proceedings and concluded to a breach of Article 6 of the ECHR.

<sup>221</sup> ECtHR, *Zielinski Pradal v France*, judgment of 28 October 1999, appl. No. 24846/94, 34165/96 and 34173/96.

## CONCLUSIONS

108. International human rights treaties play a very important role today, since virtually all states are bound by one or more of them. This is particularly true in Europe and in Latin America, due to the existence of regional human rights systems within the Council of Europe and the Organization of American States.

109. Even though human rights treaties are international treaties, they include certain special features which lead to an increased interplay between the national and the international levels. There is no uniformity in the way states implement these treaties; they may adopt different models and they are influenced by multiple factors pertaining to the historical, political and legal culture of the country.

110. From a legal point of view, there are several decisive factors affecting the implementation of international human rights treaties in domestic law. These can be either domestic or international. The domestic legal factors encompass the adherence of the state to a monist, dualist or mixed approach to international law; the legal status of human rights treaties in the domestic legal order; the direct or indirect effect granted to international treaties by the domestic legal order and, potentially, the adoption of domestic legislation which facilitates the implementation of human rights treaties. The international legal factors are linked to the absence of reciprocity of human rights treaties, to some particularities of the European and American Conventions on Human Rights, which have their own judicial supervisory mechanism, as well as to the universal scope of the International Covenant on Civil and Political Rights and the role of its monitoring body, the Human Rights Committee.

111. Implementation of international human rights treaties is a task for all national authorities. A special place is, however, reserved for domestic courts. In many cases the legislature will have to adopt a new law or the administration will have to take a new decision.

112. The Venice Commission considers that courts are key actors in ensuring the protection of fundamental rights and freedoms by making a dynamic use of the powers left to them by international human rights treaties and by exercising the review of the compatibility of domestic legislation with these treaties. Domestic courts might be confronted with cases involving a conflict between domestic law and an international human rights treaty. In some cases, they will be able to settle these conflicts by interpreting domestic legislation in such a way as to bring it into conformity with the provision of international law (the so-called 'harmonising interpretation'). They may do so on the presumption that the legislator or the executive intended to implement the State's relevant international legal obligation correctly. In other cases, domestic courts might decide to settle the conflict by not applying the domestic legal act or by favouring the provision which is the most favourable to the protection of human rights.

113. [The tools domestic courts have at their disposal to implement international human rights treaties come both from the domestic and from the international arena. International treaties supplement domestic law, offering additional legal sources that may be interpreted and applied by domestic courts. Their implementation can no longer

be explained purely on the basis of hierarchical relations; both legal orders (international and domestic) pursue the same goal (implementation of human rights) and mutually complement each other. The lack of a clear reply to the issue of the hierarchy of norms implies the need to search for solutions to possible conflicts of domestic and international norms.] There are also tensions between the case-law of domestic courts in the domestic arena and the case-law of international human rights courts on the same topic. International courts such as the European and the Inter-American Convention also have a crucial role to play in the implementation of international human rights treaties. The two regional courts conduct a review of the compatibility of the domestic law and the respective Conventions, and this review goes often hand in hand with the review of conventionality and of constitutionality performed by many domestic courts.

114. In the face of non-compliance of the other State authorities, it is the judicial system that should set in motion the machinery to guarantee the enjoyment of the right, because under domestic law the judiciary is the ultimate guarantor of fundamental rights. There is a risk, however, that this may create, at the same time, a certain shift from the separation of powers principle, the judge acquiring competences which traditionally belong to the legislator or to the government. This may also happen when applying other types of international treaties, but, in the context of the ECHR, the ACHR and the Covenant, the particular impact on the protection of rights in the domestic arena is particularly visible.