



**The competence of the European Court of Human Rights to order restitutio in integrum and specific orders as remedial measures in the case 46221/99**

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## **EXECUTIVE SUMMARY**

*The main question of this report is whether the European Court of Human Rights is competent, if it finds a breach of the Convention, to order or recommend the Defendant State to take certain measures to remedy the consequences of the breach. The more specific question of this report is what the appropriate remedies would be in the case of Applicant versus the Defendant State.*

*This report concludes that the European Court of Human Rights is indeed competent to direct states to take measures in order to remedy a breach of the Convention. In the present case the appropriate remedy for the Court would be the immediate release of the Applicant and his free transfer to a place of his own choosing by means readily made available to him. Subsidiary, the prohibition of the execution of the death penalty to which the Applicant was sentenced may be requested.*

*The arguments supporting this conclusion are as follows. Foremost, the proposed remedial measures mirror well-established principles of general international law. The principle of *restitutio in integrum* - restoring the situation as it existed prior to the breach - is acknowledged by the Court, but never put to practice. The Court has found itself competent to rule on matters of 'just satisfaction' in an increasing number of situations, but has refrained from developing the content of that very 'just satisfaction'. This non-development is seriously undermining the institutional balance and legitimacy of the European human rights system. Comparably, interim measures - while lacking an explicit treaty basis - have been ruled by the Court for the benefit of the parties and as inherent to the judicial task of any court. It is also significant that two other human rights (quasi-)judicial bodies, the United Nations Human Rights Committee and the Inter-American Court of Human Rights, do rule on remedial measures according to the principles of general international law. These bodies have ruled *restitutio in integrum* and specific orders on several occasions. Furthermore, any objections invoking provisions of the domestic legal order are not of any relevance for determining the competence of the Court.*

*The report suggests different ways in which the Court could use its competence.*



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## **ABBREVIATIONS**

ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
IACHR	Inter-American Convention of Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILC	International Law Commission
PCIJ	Permanent Court of International Justice



## INTRODUCTION

### *Statement of the Facts*

This report is based on the following statement of facts. On 15 February 1999 agents acting on behalf of Turkey (hereinafter: the Defendant State) seized Mr. Abdullah Öcalan (hereinafter: Applicant) from Kenya and took him, against his apparent will, to the Defendant State. There, charges were brought against Applicant and he was detained. Subsequently, Applicant was brought before the State Security Court of the Defendant State and sentenced to death. Subsequent appeals were rejected finalising the verdict. As to now, the capital punishment has not been carried out. Meanwhile, Applicant has been granted asylum by Italy.

The Defence Counsel of the Applicant argues that the seizure of the Applicant constitutes a breach of the right to liberty and security in the sense of Article 5 of the European Convention of Human Rights (ECHR). Furthermore, the Defence maintains that the conditions of the arrest, the transfer and the detention of Applicant were contrary to the prohibition of torture as laid down in Article 3 ECHR. Moreover, the judicial procedures before the State Security Court of the Defendant State did not grant Applicant the guarantees of a fair trial to which he is entitled according to Article 6 ECHR. Lastly, the death sentence in this case is, thus the Defence Counsel, incompatible with the right to life in the sense of Article 2 ECHR.

For the purpose of this report it is assumed that the facts mentioned above are true and that the qualification of these facts by the Defence Counsel is indeed correct.

### *Scope of Inquiry*

This report examines the following questions. Is the European Court of Human Rights competent, if it finds a breach of the Convention, to order or recommend the Defendant State to take certain measures to remedy the consequences of the breach? And if so, what would be the appropriate remedy considering the respective breaches?

### *Outline of the Report*

This report starts with an overview of the relevant rules of general international law pertaining to remedies for breach of international law. In Chapter 2 the competence and the practice of the European Court of Human Rights (hereinafter: ECtHR, or the Court) with regard to



granting remedies will be examined. An important part of this Chapter consists of a comparison with the competence and practice of two other human rights regimes: the Inter-American Court of Human Rights and the United Nations Human Rights Committee. Chapter 3 discusses the question what would be the appropriate remedy in case of a violation of Articles 2, 3, 5 and 6. The latter part of this Chapter looks into the formulation of these remedies. Chapter 4 provides an overall conclusion.



## CHAPTER 1 - REMEDIES IN INTERNATIONAL LAW

### *1.1 Forms of reparation*

This Chapter provides an overview of the general rules of international law on remedies. These rules are important since, as will be argued in Chapter 2, the competence of the ECtHR should be construed in the light of general international law. It is a well-established principle of international law that a breach of an international obligation entails the duty to make adequate reparation. This reparation may take different forms. This report will focus on two kinds of reparation only: *restitutio in integrum* and specific orders.

*Restitutio in integrum* (or: restitution in kind) is the form of redress, which requires the removal of consequences of the breach and the re-establishment of the situation, which would in all probability have existed if the wrongful act had not been committed. *Specific orders* compel the wrongdoing state to act in a particular way. The orders can take the form of a negative injunction or the requirement of specific performance. The former type of specific order demands the wrongdoing state to refrain from causing damage or breaching an obligation in the future, while the latter demands the implementation of a certain treaty or contractual obligation, or the adoption of certain preventive conduct.<sup>1</sup>

*Restitutio in integrum* and specific orders are not the only forms of redress. *Compensation* or *damages* (*dommages-intérêts*) is frequently granted when restitution in kind is impossible or undesirable. The injured party receives a sum that equals the value of the loss of the status quo ante and may even receive additional compensation, making up for any extra costs resulting from the temporary interruption of the situation before the breach. If it is difficult to express the damage resulting from the breach in monetary terms, or if the injured party deems pecuniary compensation undesirable, *satisfaction* may be the appropriate remedy. Examples of satisfaction are apologies expressed by the wrongdoing state, or assurances as to the future. Another form of reparation may be a *declaratory judgement*. The mere recognition by an international forum that a breach has actually occurred is then thought of as adequate redress.<sup>2</sup>

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<sup>1</sup> Christine D. Gray, *Judicial Remedies in International Law*, Oxford: Clarendon Press, 1987, p. 13 and 16 resp.

<sup>2</sup> The classification is Brownlie's, *Principles of International Law*, Oxford: Clarendon Press, 1990 (4<sup>th</sup> ed.), pp. 457-465



## ***1.2 Restitutio in integrum as general principle of law***

According to the International Law Commission (ILC) in its Commentary on the Draft Articles as adopted by the Commission on First Reading in 1996 'restitution in kind is the first of methods of reparation available to a state injured by an international wrongful act'.<sup>3</sup> The general principle that a State responsible for a wrongful act is under an obligation to 'wipe out' all the consequences of a breach, is most closely conformed to by restitution in kind. Logically therefore, thus the International Law Commission, restitution in kind comes before any other form of reparation.<sup>4</sup>

This legal logic is also recognised by others. Chen asserts:<sup>5</sup>

"The judicial essence of responsibility is that it imposes an obligation upon every subject of law who commits an unlawful act to wipe out all the consequences of that act and to re-establish the situation which would, in all probability, have existed if that act had not been committed. *It is a logical consequence flowing from the very nature of law and is an integral part of every legal order*".

Apart from the logical primacy of restitution in kind there is another argument to be made to award this kind of reparation its principal place. Remedies in general, in the absence of a collective sanctioning or enforcement authority, uphold the public interest or legal order by punishing or deterring wrongdoing.<sup>6</sup> Restitution in kind, more specifically, fulfils the same function. More so, would the consequences of an international wrongful act remain unredressed, or would it possible to simply 'buy off' the consequences of such act, then the norm breached would be devoid of any meaning. Restitution in kind therefore has a regulating effect.<sup>7</sup>

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<sup>3</sup> Commentary on Draft Article 43 (7), par. 1. The ILC defines *restitutio in integrum* quite narrowly: the mere 're-establishment of the situation that existed before the wrongful act was committed'. This definition does not include compensation for any loss suffered as *integrative* compensation. Nevertheless, this definition does not preclude additional compensation for *lucrum cessans*. The Commentary can be found at Cambridge University's Lauterpacht Research Centre for International Law, ([www.law.cam.ac.uk](http://www.law.cam.ac.uk)), last visited 19 April 2000

<sup>4</sup> Commentary on Draft Article 43 (7), par. 3. The ILC apart from restitution in kind defines three other forms of reparation: compensation, satisfaction, and assurances and guarantees of non-repetition (Draft Article 42, jo. Artt. 44, 45, 46).

<sup>5</sup> Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge: Grotius Press, 1987, p. 389, (emph. added)

<sup>6</sup> Dinah Shelton, *Remedies in International Human Rights Law*, Oxford: Oxford University Press, 1999, p. 49

<sup>7</sup> R.A Lawson, 'Internationale rechtspraak in de Nederlandse rechtsorde', in *Handelingen Nederlandse Juristen-Vereenigen*, 129<sup>e</sup> jaargang (1999-I), pp.1-133, p. 80



### ***1.3 Specific orders***

The same argument can be made for negative injunctions and specific performance. Specific orders too, and maybe more so than *restitutio in integrum*, can have a disciplining and ordering function in upholding the international legal order. This is especially true in cases where a wrongful act is still in progress when claims for remedies are made. Specific orders may then be indistinguishable from the primary obligation of the wrongdoing state to cease the wrongful act.<sup>8</sup>

### ***1.4 State practice***

The primacy of restitution in kind is substantiated by state practice. The restitution in kind rule was most clearly confirmed by the Permanent Court of International Justice (PCIJ) in the 1928 *Chorzów Factory* case.<sup>9</sup> According to the Court:

"The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that the reparation must as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."

Later, in the *Temple of Preah Vihear* case the International Court of Justice (ICJ) again ruled in favour of *restitutio in integrum*.<sup>10</sup> The Court found that Thailand had to leave the unlawfully occupied temple area and restore any religious objects, which it had removed. Subsequent case law seems to be rare. Critics argue that this lack of case law undermines the primacy of the restitution in kind rule, or denies its very existence.<sup>11</sup> However, this is not the case. There are quite a number of cases in which parties have chosen other forms of reparation only after the *constat*, that restitution in kind could not be effected.<sup>12</sup> More importantly, the

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<sup>8</sup> Theoretically, specific orders as remedies are different from the obligation to cease unlawful conduct in the sense that the latter obligation results directly from the breach and constitutes a primary obligation, while specific orders as remedies are secondary rules coming into play only as an effect of the occurrence of the wrongful act and are dependent on any claims by the injured state. In practice, this distinction is often blurred in cases of wrongful acts of a continuing character or in cases where the breach incurs *erga omnes* responsibility. Comp. ILC Commentary on Draft Article 43 (6)

<sup>9</sup> *Case of Chorzów Factory (Claim for Indemnity)*, 1928 PCIJ Series A, No. 17.

<sup>10</sup> *Temple of Preah Vihear (Cambodia v. Thailand)*, 1962 ICJ 6

<sup>11</sup> Gray, *op. cit.*, p. 13

<sup>12</sup> See *inter alia* 'British Claims in the Spanish Zone of Morocco', 1 May 1925, *Reports of International Arbitral Awards*, vol. II, pp. 621-625 and 651-742; 'Religious Property Expropriated by Portugal', 4 September 1920, *Ibid.*, vol. I, pp. 7ff; 'Walter Fletcher Smith', *Ibid.*, vol. II, p. 918; 'Heirs of Lebas de Courmont', 21 June 1957, *Ibid.*, vol. XIII, p. 764



primacy of restitution in kind is confirmed by the attitudes of the parties concerned. States have often insisted upon claiming restitution, regardless of the improbabilities or difficulties of such a claim.<sup>13</sup>

All in all, there is no contradiction in acknowledging the fact that other forms of reparation occur more frequently than restitution in kind, while at the same time recognising that restitution in kind is the very first remedy to be sought.<sup>14</sup>

As for negative injunctions and specific performance, little state practice can be found in which specific orders are issued as remedies *per se*. The *Trail Smelter* arbitration is unique in its order of a negative injunction - that Trail Smelter should refrain from causing damage in the future.<sup>15</sup> Notably, the provision for such an order was stated in the *compromis*. Specific performance was ruled by the Inter-American Court of Human Rights and the United Nations Human Rights Committee on several occasions (see below paragraph 2.4 *infra*). Other occurrences of specific performance as reparation only are rare<sup>16</sup>.

However, there is important case law when it comes to breaches that are in still in progress at the time when remedies are sought. The *Case Concerning United States Diplomatic and Consular Staff in Tehran* is a case in point. After finding that Iran had violated its international obligations, the Court decided that the Government of Iran:<sup>17</sup>

"[...] must immediately take all steps to redress the situation resulting from the events of 4 November 1979 and what followed from these events, and to that end:

(a) must immediately terminate the unlawful detention of the United States Chargé d'Affaires and other diplomatic and consular staff and other United States nationals now held hostage in Iran, and must immediately release each and every one and entrust them to the Protecting Power [...];

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<sup>13</sup> 'Forest in Central Rhodopia', claim of Greece, *Reports of International Arbitral Awards*, vol. III, p. 1047; 'Mexican Oil Expropriation', claim of the United Kingdom, in *The Grotius Society: Transactions for the year 1957*, vol. 43, p. 27; 'Anglo Iranian Oil Company', request of the United Kingdom, *ICJ Pleadings, Anglo-Iranian Oil Company Case*, p. 124; 'Barcelona Traction', claim of Belgium, *ICJ Pleadings, Barcelona Traction, Light and Power Company, Limited*, vol. I (1962), p. 183, par. 373

<sup>14</sup> Commentary on Draft Article 43 (7), par. 3

<sup>15</sup> 3 RIAA 1905

<sup>16</sup> In two Postal Treaty cases the payment of interest for overdue payments, as required by the Postal Treaty, was claimed and in one case granted. Gray, in our opinion rightly, points out that this kind of specific performance is just another award of damages. Gray, *op. cit.*, p. 16.

<sup>17</sup> *Case concerning United States Diplomatic and Consular Staff in Teheran (United States v. Iran)*, 1980 ICJ 3, at 44-45



(b) must ensure that all the said persons have the necessary means of leaving Iranian territory, including means of transport;

(c) must immediately place in the hands of the Protecting Power the premises, property, archives and documents of the United States Embassy in Tehran and of its Consulates in Iran;

The Court demanded not only specific performance from Iran, it also issued a negative injunction:<sup>18</sup>

"[...] no member of the United States diplomatic or consular staff may be kept in Iran to be subjected to any form of judicial proceedings or to participate in them as a witness"

In sum, it seems that specific orders, both commissive and ommissive, have a small but authoritative basis in state practice provided the orders are made while the wrongful act is still continuing.

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<sup>18</sup> Id.



## CHAPTER 2 - REMEDIES IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS

### *2.1 The ECHR and general principles of international law*

The rules and general principles part of general international law also apply to human rights regimes. Because a system of 'tit for tat'-like countermeasures would be unacceptable in cases of individual human rights violations, international human rights law has created innovative compliance mechanisms. The European Convention on Human Rights is no exception. It provides for elaborate procedures, which allow victims to seek remedies for injuries resulting from human rights infringements.<sup>19</sup> Nevertheless, provisions of general international law concerning remedies are still relevant for the *sui generis* legal order of the European Convention. The European Court of Human Rights confirmed this in its *Ringeisen* judgement. The Court referred to international law to sustain its view on how and when to apply Article 50 (old).<sup>20</sup> In the *Neumeister* case the Court confirmed its earlier judgement.<sup>21</sup>

### *2.2 Scope of Article 41 ECHR: competence and content*

Under Article 41 ECHR the European Court has the power to award 'just satisfaction'.<sup>22</sup>

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

In determining the scope of this Article, two dimensions need to be distinguished. One deals with the cases in which the Court is *competent* to apply Article 41, the other deals with the *content* of 'just satisfaction'.

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<sup>19</sup> Shelton, *op. cit.*, p. 49

<sup>20</sup> *Ringeisen*, 22 June 1972, A 15, par. 18. "It would be a formalistic attitude *alien to international law* to maintain that the Court may not apply Article 50 (Article 50) save on condition that it either rules on the matter by the same judgement which found a violation or that this judgement has expressly kept the case open."(emph. added).

<sup>21</sup> *Neumeister*, 7 May 1974, A17



### **2.2.1 Determining the competence of the Court**

The appropriate point of departure for interpreting a treaty text is a literal reading of the text itself.<sup>23</sup> The Court is competent to award 'just satisfaction', whatever that may be at this point, when there's a breach of the Convention ('a decision or a measure [...] completely or partially in conflict with the obligations arising from the present Convention'); some sort of damage has occurred; and a causal link exists between the breach and the damage ('[...] reparation to be made for the consequences of this decision or measure').

Another stipulation is that the consequences of the violation cannot be fully repaired according to the internal law of the state concerned, i.e. when a state's municipal law 'allows only partial reparation'. This phrase at first sight seems to delimit the competence of the Court quite strictly. But what if a state allows for partial reparation, but refuses to grant it? What if a state does not allow for reparation at all?

The Court has some latitude in deciding to award 'just satisfaction' due to the inclusion of the phrase 'if necessary'. This enables the Court to take into consideration the special circumstances of the particular case at hand.<sup>24</sup>

Assessing the competence of the Court therefore demands examining its case law. Rulings concerning Article 50 (old) started relatively late. It was not until 1972, in the *Ringeisen* and in the *Vagrancy* cases, that the Court ruled on two Article 50 (old) claims.<sup>25</sup> Because at that time no 'subsequent practice' had developed yet, the Court had recourse to the *travaux préparatoires*. In the *Vagrancy*-case the Court found that text of Article 50 (old) ECHR was derived from provisions of certain dispute settlement treaties, notably the 1921 German-Swiss

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<sup>22</sup> With the entry into force of Protocol No. 11 on 1 November 1998 a restructured European Convention of Human Rights came into operation. Article 50 was renumbered Article 41 and for editorial reasons slightly amended. This text will refer to these Articles either as Article 41 or Article 50 (old).

<sup>23</sup> Article 31 of the 1969 Vienna Convention on the Law of Treaties

<sup>24</sup> Peter van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, Den Haag: Kluwer Law International, 1998 (3<sup>rd</sup> ed.), p. 178

<sup>25</sup> In three earlier cases where the issue of remedies emerged the Court either found no violation, or the matter was settled. See Shelton, *op. cit.*, p. 154



Treaty on Arbitration and Conciliation (Article 10) and the 1928 Geneva General Pact for the Pacific Settlement of Disputes (Article 32). The Court found that:<sup>26</sup>

"[...] the treaties from which the text of Article 50 (Article 50) was borrowed had more particularly in view cases where the nature of the injury would make it possible to wipe out entirely the consequences of a violation but where the internal law of the State involved precludes this being done."

However, in the same paragraph the Court extended its powers. It found that it was also competent to adjudicate on just satisfaction in cases where restitutio in integrum was simply impossible by the very nature of the breach.<sup>27</sup> In the *Ringeisen*-case the Court went even further still. It found itself competent in cases in which restitutio in integrum was indeed possible, the national legal system actually provided for full reparation, but in which the state concerned refused to grant such reparation.<sup>28</sup>

"There can be no doubt that for the Court to be able to give application to Article 50 (Article 50), there should be a need to do so (French: "il y ait lieu"; or, in the English text, "if necessary"); but this necessity exists once a respondent government refuses the applicant reparation to which he considers he is entitled"

The *portee* of this judgement can hardly be overstated. The Court has weighed the relevance of effective human rights protection against the importance of the internal law of the state concerned and decided in favour of the former. In the *Neumeister*-case, the Court had, after separating the issue of 'just satisfaction' from the merits of the case, to adjudicate the issue of remedies for the third time. The Court decided the claim in 1974 and reaffirmed the *Ringeisen* judgement.<sup>29</sup> However, as will be shown in paragraph 2.3.4, the Court has at the same time maintained that it has no competence to direct or even recommend a liable state to take certain measures.

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<sup>26</sup> *Vagrancy* case, 10 March 1972, A 14, par. 20

<sup>27</sup> "Nevertheless, the provisions of Article 50 (Article 50) which recognise the Court's competence to grant to the injured party a just satisfaction also cover the case where the impossibility of restitutio in integrum follows from the very nature of the injury; indeed, common sense suggests that this must be so a fortiori. The Court sees no reason why, in the latter case just as in the former, it should not have the right to award to the injured persons the just satisfaction that they had not obtained from the Government of the respondent State", *Vagrancy* case, par. 16

<sup>28</sup> *Ringeisen*, A 15, par. 22

<sup>29</sup> *Neumeister*, par. 41



In sum, the Court has found that it is competent to award 'just satisfaction' in the following instances. In cases where the Court has found a breach in regard of which full reparation in the form of restitution in kind is impossible due to the very nature of the injury the Court is competent to award 'just satisfaction', regardless whether the state in breach is willing or able to allow reparation (*Vagrancy*-ruling). In cases where restitutio in integrum is indeed possible, but where the liable state is unable (*travaux préparatoires* and literal reading Article 41) or unwilling (*Ringeisen*-case) to grant reparation the Court also has the powers to apply Article 41. Only in cases where full reparation is possible and where the state concerned is able and willing to do so, should the Court refrain from adjudicating on just satisfaction claims.

### ***2.2.2 Determining the content of 'just satisfaction'***

Now that the competence of the Court to apply Article 41 has been determined, a discussion of the actual content of 'just satisfaction' is due. A literal reading, an interpretation of the text 'in accordance with the ordinary meaning to be given to the terms of treaty' is not of much help.<sup>30</sup> 'Just satisfaction' has been regarded as a remedy for injury to a *state's* honour or dignity, and has mostly taken the form of non-pecuniary redress.<sup>31</sup> As such it is not clear what measures are covered by these terms with regard to *human rights* violations. The exact content of 'just satisfaction' thus remains unclear looking at the ordinary meaning only. The context of the Convention does not offer any clarification either. Worth mentioning though, is the wording of Article 5 (5) which in cases of Article 5 violations grants a right to 'compensation' *vis-à-vis* national authorities, the violation of which may be the basis of a separate complaint before the European Court of Human Rights, which then may lead to the application of Article 41. The difference in wording between 'compensation' and 'just satisfaction' suggests that because the former term is commonly used to refer to financial redress in case of material or non-material damages, the latter phrase must refer to a more extensive kind of remedy.

Subsequent rulings reveal that in cases where Article 41 applies, the Court has either awarded pecuniary compensation or found that the mere pronouncement of a breach constituted sufficient redress. The case law on this subject does not provide a clear *systematique* on the question of when pecuniary compensation is awarded and when declaratory judgements are

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<sup>30</sup> Article 31 of the 1969 Vienna Convention on the Law of Treaties

<sup>31</sup> Gray, *op. cit.*, p. 153; Brownlie, *op. cit.*, pp. 460ff



deemed satisfactory.<sup>32</sup> The question that arises next is whether the content of 'just satisfaction' could be extended to include the indication by the Court, through recommendations or otherwise, to the liable state to award the injured party *restitutio in integrum* or to order specific performance or negative injunctions.

The drafting history of Article 50 (old) reveals that the idea of a Court capable of issuing orders or recommendations was initially preferred by some. At the 1948 Congress of Europe, where the idea of a European human rights system emerged, the Congress delegates expressed their desire for a Court of Justice with 'adequate sanctions' for the implementation of a European human rights Charter.<sup>33</sup> But the idea of a powerful Court competent to prescribe not only monetary compensation, but also able to require penal or administrative action by the state concerned, was clearly not universally accepted. The Committee of Experts on Human Rights therefore suggested to the Committee of Ministers of the Council of Europe the adoption of what later became Article 50 of the European Convention on Human Rights.<sup>34</sup> The reliance on arbitration instruments was induced by the expectation that adjudication before the Court would primarily inter-state in nature, rather than based on individual communications.<sup>35</sup>

However, taken into account the subsequent development of the European human rights regime, notably the scarcity of inter-state complaints and the plethora of individual communications, turning to the *travaux préparatoires* for evidence as to what exact measures 'just satisfaction' may contain seems to be rather irrelevant. This is confirmed by the fact that as far the question of determining the competence of the Court to award just satisfaction is concerned, the *travaux* were only taken as a starting point from which the Court progressively departed. In several cases the Court has explicitly recognised and affirmed the principle of *restitutio in integrum*. In the *Piersack* case it ruled:<sup>36</sup>

“[...] the Court will proceed from the principle that the applicant should as far as possible be put in the position he would have been in had the requirements of Article 6 (Article 6) not been disregarded.”

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<sup>32</sup> Van Dijk and Van Hoof, *op. cit.*, p. 250ff; D.J. Harris, M. O'Boyle en C. Warbrick, *Law of the European Convention on Human Rights*, London: Butterworth, 1995, p. 685; Gray, *op. cit.*, p. 156

<sup>33</sup> Shelton, *op. cit.*, p. 148f

<sup>34</sup> Montserrat Enrich Mas, 'Right to Compensation under Article 50', in R. St. MacDonald et al.. *The European System for the Protection of Human Rights*, Dordrecht: Martinus Nijhoff, 1993, p. 777f

<sup>35</sup> Shelton, *op. cit.*, p. 150



Moreover, in the case of *Papamichalopoulos and others vs. Greece* and more recently in the case of *Akdivar vs. Turkey* the Court found that the principle of restitutio in integrum was binding on states:<sup>37</sup>

“The Court recalls that a judgement in which it finds a breach imposes on the respondent State a legal obligation to put an end to such breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (*restitutio in integrum*).”

One thing is evident though: any other forms of redress other than pecuniary compensation or a declaratory judgement, notably restitutio in integrum and specific orders, have so far not been ruled by the Court. This peculiarity of affirming the principle of restitution in kind, while at the same time refusing to actually grant it, can be explained by the inherent impossibility of most cases: the sheer impossibility of restoring the *status quo ante* because of the nature of the breach. Examples of this kind of inherent impossibility are cases that concern rights of an abstract content, such as the freedom of expression, which are difficult to remedy in the full sense.<sup>38</sup> Another example is a case in which somebody is unlawfully arrested, but released before the Court is able to decide the case.<sup>39</sup> With regard to such cases nothing else can be done but to affirm the breach and to award financial compensation. However, and this is very important, the inherent impossibility to award restitutio in integrum in some, perhaps even in most cases, cannot in itself preclude the Court from imposing or recommending restitutio in integrum in other cases where the liable state is unwilling or unable to restore the original situation.

### ***2.3 Reasons to understand 'just satisfaction' as including restitutio in integrum and specific orders***

Now that it has been argued that there is no proper reason to delimit the meaning of 'just satisfaction' to financial compensation or declaratory judgements, it may be appropriate to

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<sup>36</sup> *Piersack* case, 23 October 1984, A 85, par. 12

<sup>37</sup> *Papamichalopoulos and others vs. Greece*, 25 October 1995, A 330, par. 34 en *Akdivar vs. Turkey*, 1 April 1998, file no. 99/1995/605/693, par. 47

<sup>38</sup> In the *Sunday Times* case the Court ruled: “The intrinsic nature of the wrong - an interference with freedom of expression prevents such [restitutio in integrum] reparation”, 6 November 1980, A 38, par. 13



discuss a number of reasons why the Court could, perhaps even should, understand 'just satisfaction' in such a way to include restitutio in integrum and specific orders.

### ***2.3.1 Non-development would undermine the human rights system***

As seen in the previous chapter, one reason for awarding restitution in kind such a principal place is the deterring and ordering function it performs. More so, as seen in the first part of this chapter, in international human rights regimes. Accordingly, it follows that the denial, or the non-development of an effective remedy could have a serious negative impact on the institutional competence and legitimacy of the European human rights system: 'Continued respect for and acceptance of the exercise of judicial power depends on preserving the perceived and actual fairness and integrity of the system'.<sup>40</sup>

Especially in situations where state governments are directly involved, the instrument of an effective remedy is essential. Shelton argues that 'remedies and sanctions thus affirm, reinforce, and reify the fundamental values of society. [...] Impunity, particularly governmental immunity that leaves human rights victims without a remedy, calls into question the integrity of human rights norms and the rule of law'.<sup>41</sup>

Even more specifically, in situations where a pattern of human rights violations is discernible, that is, when governments time and again allow or carry out human rights violations, the fairness and integrity of the system is at stake.

### ***2.3.2 Restitutio in integrum is a general principle of international law***

As demonstrated in Chapter 1 restitutio in kind is a principle of general international law. It is such a well-established principle for more than one reason. One ground are the logical underpinnings explaining the primacy of the principle to restore as far as possible the situation as it existed before the breach. The ILC stresses this point. Another argument accounting for the principle place of restitution in kind is also mentioned in the previous paragraph: its importance for maintaining a just legal order. It is therefore not surprising that this general principle is substantiated by state practice.

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<sup>39</sup> In *Ringeisen* for example: "but [the compensation paid] does not in any way thus acquire the character of *restitutio in integrum*, for no freedom is given in place of the freedom unlawfully taken away", 22 June 1972, A 15, par. 21

<sup>40</sup> Shelton, *op. cit.*, p. 50

<sup>41</sup> *Ibid.*, p. 52



Taking into account the fact that the European Court of Human Rights itself has recognised that the international law is governing, or at the very least relevant for, the application of Article 41 the Court respectfully should award 'just satisfaction' in terms of restitution in kind when appropriate. This would be in complete conformity with international law at large. As will be shown in paragraph 2.4.2, both the United Nations Human Rights Committee and the Inter-American Court of Human Rights find themselves obliged to apply general international law in this regard.

### ***2.3.3 Similarity with interim measures***

There is an important similarity between aspects of *restitutio in integrum* and specific orders on the one hand, and interim measures on the other. Although interim measures do not have an express basis in the Convention itself, the Rules of the Court do provide for them. Rule 39 of the Rules of Court allows the Court to 'indicate to the parties any interim measure which it considers should be adopted in the interests of the parties [...]'. The underlying reason for allowing the Court to take provisional measures, although an express treaty provision is lacking, may very well be that it is an inherent duty of the judge to preserve the situation when necessary, preventing a court to be presented an irreversible situation.<sup>42</sup>

The same arguments could be made for *restitutio in integrum* or specific orders. These measures too do not have an explicit basis in the Convention, and they too could be ruled by the Court for the benefit of the parties concerned. The competence to indicate specific measures to remedy a breach, like interim measures, could be said to be inherent in the duty to adjudicate. After all, it is very hard to understand why the Court provides for interim measures, while at the same time it is so disinclined to direct states to take certain measures once a breach has actually been found.

### ***2.3.4 Relation to municipal legal order not problematic***

Time and again the Court has refused to direct a liable state to take certain measures. The Court has even been very reluctant to merely recommend states what to do.<sup>43</sup> Its line of

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<sup>42</sup> Lawson, *op. cit.*, p. 46

<sup>43</sup> *Airey*, 6 February 1981, A 41; *Winterwerp*, 27 November 1981, A 47; *LeCompte, Van Leeuwen en De Meyere*, 23 June 1981, A 43; *Pakelli*, 25 April 1983, A 64; *Albert and LeCompte*, 24 October 1983, A68; *McGoff*, 26



argument is that it has no competence to do so and that it is up to the state in question to choose the means to live up to its international obligations.<sup>44</sup> This view must be rejected, however.

Because domestic and international legal systems are distinct and neither system has supremacy over the other, a state cannot call upon its own law as a justification for not living up to its international obligations.<sup>45</sup> The Permanent Court of Arbitration, the Permanent Court of International Justice, and the International Court of Justice have produced a consistent jurisprudence in this respect.<sup>46</sup> No act of legislation, or any other source of internal rules and decision-making can prevail over or limit the scope of international responsibility. Domestic concerns, consequently, no matter how grave, cannot alter the fact that restitution in kind is the principal means of reparation in international law.

The question that arises next is whether and to what extent an international body could effect any form of restitution. It is quite clear that on the international level municipal acts, either administrative, legislative, or judicial, can be nullified or invalidated. In the *Legal Status of Eastern Greenland* case for instance, the Permanent Court of International Justice decided that certain declarations made by the Norwegian government constituted 'a violation of the existing legal situation and are accordingly unlawful and invalid'.<sup>47</sup> According to the ILC then with regard to the question of implementing restitution in kind, 'all that international law – and international bodies – are normally fit or enabled to do with regard to *internal* legal acts, provisions or situations is to declare them to be in violation of international obligations and as such sources of international responsibility and further to declare the duty of reparation. Such reparation requiring, as the case may be, invalidation or annulment of internal legal acts [...]'. Therefore, in situations where restitutio in integrum is possible there is no international *de jure* obstacle for the Court to indicate what the necessary measures for restitutio in integrum would be, regardless of the municipal legal order of the state concerned. Any problems arising at the domestic level, should be seen as mere *de facto* problems, incapable of derogating from the international legal obligations.

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October 1984, A 83; *Pauwels*, 26 May 1988, A 135; *B. vs. United Kingdom*, 9 June 1988, A 136; *Bozano*, 18 December 1986, A 111; *Soering*, 1989, A 161

<sup>44</sup> Van Dijk en Van Hoof, *op. cit.*, p. 258

<sup>45</sup> Comp. Article 27 of the 1969 Vienna Convention on the Law of Treaties.

<sup>46</sup> Brownlie, *op. cit.*, p. 36

<sup>47</sup> *Legal Status of Eastern Greenland*, 5 April 1933, PCIJ, Series A/B, No. 53, p. 75



## ***2.4 Remedies in other human rights regimes***

The argument put forward above, that the ECtHR is competent to order restitutio in integrum and specific orders, is supported by the practice of other judicial organs. This part of the report discusses the competences of the United Nations Human Rights Committee and of the Inter-American Court of Human Rights to order different forms of reparations. In line with the delineation of this report, this part confines to the competences concerning restoration of the prior situation and specific orders. Compensatory awards will not be considered.

### ***2.4.1 United Nations Human Rights Committee***

The International Covenant on Civil and Political Rights (hereinafter: ICCPR, or the Covenant) in many respects is comparable to the European Convention on Human Rights. In contrast to Article 41 of the ECHR, the ICCPR does not provide for an explicit provision on reparation. However, the United Nations Human Rights Committee (hereinafter: the Committee) has developed a practice on reparation on the basis of Article 2(3) of the Covenant and Article 5(4) of the First Optional Protocol.

#### *Article 2(3) of the Covenant and Article 5(4) of the First Optional Protocol*

The First Optional Protocol to the International Covenant on Civil and Political Rights enables the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of the rights set forward in the Covenant. Individuals who claim to be a victim are entitled to submit a written communication to the Committee after they have exhausted all the domestic remedies.

According to Article 5(4) the Committee is entitled to give a final view concerning the individual case. Article 5(4) provides:

‘The Committee shall forward its views to the state party concerned and to the individual’

It might be thought that this provision and its implementation by the Committee, is less relevant for the understanding of the powers of the ECtHR since these views are not binding. But although the Committee is not a court of law, it has stated that:<sup>48</sup>

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<sup>48</sup> Selected decisions of the Human Rights Committee under the Optional Protocol II, pp. 1-2



‘[I]t applies the provisions of the Covenant and the Optional Protocol in a judicial spirit and performs functions similar to those of the European Court of Human Rights’

Although the Committee lacks the authority of a normal court, such as the ECtHR, its views gain their authority from their inner qualities of impartiality and objectiveness. The views of the Committee can be read in the same manner as those of for example the ECtHR. They consist of all the judicial necessities that are essential to compare and apply them. Though the views are not immediately binding on a state party, they provide a basis and reference for the appreciation of a state’s compliance. This is supported by two international obligations. Firstly, the obligation to remedy a violation that has been identified and determined. Secondly, the obligation to co-operate with the Committee, since the states became a member of the Optional Protocol.<sup>49</sup> In two death penalty cases against Barbados, the Committee has given an indication of the standing it attributes to its views. In the case of *Bradshaw v. Barbados* and in *Robertson v. Barbados* the Committee has declared that:<sup>50</sup>

‘[I]t is an obligation for the State Party to adopt appropriate measures to give legal effect to the views of the Committee as to the interpretation and application of the Covenant in particular cases arising under the Optional Protocol’

Consequently a state party is obliged under international law to comply with the views of the Committee. For this reason the practice of the Committee can be compared with, and is relevant to, the European Court.

When the Committee gives its final view under Article 5(4) of the Protocol, it combines this with the obligation resting on a state to provide for an effective remedy as stated in Article 2(3) of the Covenant. According to Article 2(3) sub(a) a state party must:

‘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 a person acting in an official capacity’

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<sup>49</sup> “Pocar, ‘Legal Value of the Human Rights Committee’s Views (1991-1992)’ *Canadian Human Rights Yearbook*, pp. 119-123.

<sup>50</sup> Both cases can be found in the G.A.O.R., 49<sup>th</sup> Session, Supplement No. 40 (A/49/40), Report of the Human Rights Committee, p.305.



Consequently, although the ICCPR does not provide for an explicit provision on reparation like Article 41 ECHR, it can be concluded from the recent practice of the Committee that it has developed a manner to place an obligation on the state party to provide for an effective remedy.

The practice of the Committee shows that it gives specific recommendations to the state parties. The following cases will illustrate this.

In the case of *Price vs. Jamaica* it was held that the victim's trial was in violation of Articles 14(3) and 6 of the Covenant. The counsel of Mr. Price, without consulting with his client, had not put forward any grounds for appeal. The Committee was of the opinion that Mr. Price should have been informed that his counsel was not going to submit any grounds in support of the appeal. The Committee stated in its final view that Mr. Price was not effectively represented on appeal and came to the conclusion that this was in violation of Article 14(3). Article 6 was also violated because the imposition of the death sentence did not respect all the provisions of the Covenant and was therefore unlawful. The Committee stated that since the Jamaican government already commuted the death sentence this could be considered as the appropriate effective remedy, according to Article 2(3).<sup>51</sup>

In the case of *Adams vs. Jamaica* it was held that the treatment the victim suffered during the pre-trial detention and his staying at St. Catherine's prison was inhuman and in violation of Article 7 and 10(1) of the Convention. Article 7 protects the individual against cruel and inhuman treatment, Article 10(1) places an obligation on the state to treat all persons deprived of their liberty with humanity and respect for the inherent dignity of the human person. The crime committed by the victim was eventually not considered by the government a crime that is punishable by way of a death sentence. Therefore, the Committee concluded in its final view that the appropriate effective remedy, according to Article 2(3), should entail compensation.<sup>52</sup>

In the case of *Johnson v. Jamaica* it was held that the victim's trial was a violation of Article 14(3) and 14(5) of the Covenant. The victim had alleged a violation of those articles, because of an unreasonable long delay between his conviction and the dismissal of appeal. The Committee came to the conclusion that Article 14(3) and 14(5) were indeed violated, inasmuch as the delay in making the trial transcript prevented the victim from having his

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<sup>51</sup> No. 572/1994

<sup>52</sup> No. 607/1994



appeal determined. Accordingly there was also a breach of Article 6 because not all of the provisions of the Covenant were respected in this case. Aware of the commutation of the victim's death sentence, the Committee considered in its final view that the measure of *clemency* would be the appropriate effective remedy.<sup>53</sup>

Accordingly the cases make clear that when the Committee finds violations of the Covenant, it can and does specify the appropriate measures required to remedy the injuries suffered by the victim. In the *Johnson v. Jamaica* case the Committee has given a very specified recommendation by stating that the appropriate measures would be to grant the individual clemency. This case is a leading example of many other cases where a violation was found of Article 6 and other provisions of the Covenant in relation to the death penalty.<sup>54</sup>

By specifying the appropriate effective remedy, the Committee does not only state when or if a violation has occurred, but describes how the breach must be remedied. By giving a specified recommendation considering the appropriate measures, it limits the free allocation of measures that a state can choose to remedy the violation.

In doing so, the Committee appears to take into account the principles that govern reparations in international law. The Committee presents in its views a re-establishment, as far as possible, of the existing situation prior to the violation (*restitutio in integrum*). Only if this is no longer possible, it envisages compensation for the violation suffered by the victim.

Contrary to the ECtHR the Committee does not consider compensation for the victim the only effective remedy it can include in its views. The Committee takes into account the international law governing the principles of the effective remedy and does provide for the *restitutio in integrum*.

#### **2.4.2 Inter-American Court of Human Rights**

The Inter-American Court of Human Rights (hereinafter: the IACtHR, or the Court) is part of a legal system that is comparable to that of the European Court of Human Rights. This is true in two respects: first, the IACtHR monitors the compliance of the different member states with regard to human rights. Plaintiff in the procedure is the Inter-American Commission on Human Rights, which is comparable to the Commission under the *old* European Convention

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<sup>53</sup> No. 588/1994

<sup>54</sup> *Perkins vs. Jamaica* (No. 733/1997) and *Whyte vs. Jamaica* (No. 732/1997)



of Human Rights.<sup>55</sup> Second, both legal systems have a regional character, which means that the legal norms are more precise and the compliance of these rules is monitored in a stricter manner than in a legal regime with global effect. To answer the question whether the ECtHR is competent to require *restitutio in integrum*, it is therefore recommendable to examine the competences of the IACtHR in this field. These competences may have an exemplary function for the ECHR in view of the facts of the case and the remedies relevant to the Applicant.

The following questions are dealt with below: the competences of the IACtHR under Article 63(1) of the American Convention of Human Rights (hereinafter: IACHR, or American Convention); the application of general international law; the superior level of *restitutio in integrum*; the practice of the IACtHR and the opinion of the IACtHR about the ECtHR.

#### *Competences of the IACtHR under Article 63(1) of the American Convention*

Article 63(1) of the American Convention governs the competences of the Court when a human right of this Convention has been infringed. The Article reads:

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

Obviously, the IACtHR has a more extensive competence and obligation under Article 63(1) ACHR than only to give a declaration that a right is infringed.<sup>56</sup>

The obligation of the Court under Article 63(1) ACHR has two components: one that refers to the behaviour of the responsible state in the past and one that concerns the behaviour in the future. With reference to the future the Court has to rule that the responsible state grants the enjoyment of the infringed right to the victim. From the wording of Article 63(1) this is an absolute obligation as long as the violated right still is reparable. With reference to the past

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<sup>55</sup> Since the entry into force of Protocol No. 11 on 1 November 1998 the Commission of the ECHR no longer exists.

<sup>56</sup> M. van Emmerik, 'Schadevergoeding bij schending van mensenrechten: Hoe ver ligt San José van Straatsburg?', in *NJCM-Bulletin – Nederlands Tijdschrift voor de Mensenrechten*, jaargang 20 (1995), No. 3, p. 304.



the Court has the competence to require the reparations of the consequences of the violation from the responsible state and to ask for a *fair* compensation of the damage.<sup>57</sup>

*The application of general international law*

Article 63(1) only constitutes the *formal* basis for the award of the possible forms of reparation: in a concrete case the Court interprets this article in the light of the norms of international law of responsibility.<sup>58</sup> This fact is important for the present case. If the IACtHR considers itself to be bound by its obligations under customary law, the ECtHR would have no proper reason for evading the same obligations in the present case. There is no difference in the texts of the American Convention and the European Convention of Human Rights that would warrant different treatment of customary international law. The IACtHR indicates in its pronouncements that it came to its standard concerning the award of reparations through the incorporation of general international law in Article 63(1).<sup>59</sup> In most of the cases, the Court first starts, within the paragraphs that elaborate on the types of reparations, with citing the relevant norms of international law. By doing so, the Court acknowledges the superior ranking of the *international* law of responsibility (as elaborated below).

In the more recent cases the Court explicitly states that Article 63(1) ACHR contains one of the fundamental principles of international law (*i.e.* to award restitution) and that all aspects of the obligation to make reparation are governed by international law.<sup>60</sup> The Court therefore is of the opinion that Article 63(1) merely is a reflection of the standard following (customary) international law of responsibility. In the case of *Aloeboetoe* the Court speaks explicitly of codification of customary law in Article 63(1) ACHR.<sup>61</sup>

The IACtHR argues that it is under an obligation of customary international law to award restitution. As noted in Chapter 1 the international law of responsibility requires *restitutio in integrum*, that is the restoration of the prior situation and the reparation of the consequences

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<sup>57</sup> *Aloeboetoe et al.*-case, Reparations, 10 October 1993, par. 46

<sup>58</sup> e.g. *Velasquez Rodriguez*-case, Compensatory Damages, 21 July 1989, par. 31

<sup>59</sup> *Ibid.*, par. 25. Also: *El Amparo*-case, Judgement on the Reparations, 14 September 1996, par. 15

<sup>60</sup> See *El Amparo*-case, Judgement on the Reparations, par. 14 and 15; *Neira Alegria*-case, Judgement on the Reparations, 19 September 1996, par. 36 and 37, *Caballero Delgado and Santana*-case, Judgement on the Reparations, 29 January 1997, par. 15 and 16; and *Blake*-case, Judgement on the Reparations, 22 January 1999, par. 31 and 32



of the violation. The IACtHR, however, has not been consistent in its own interpretation of *restitutio in integrum*. From quite a broad definition of *restitutio in integrum* it has gradually turned to a more restrictive one. In the earlier cases the Court used the broad definition that *restitutio in integrum* not only consisted of restoration of the prior situation, but also of the reparations of the consequences of the violation and of the indemnification for patrimonial and non-patrimonial damages, including emotional harm.<sup>62</sup> The Court, thus, interpreted *restitutio in integrum* as a generic term, which included several elements of reparation. This broad definition however was not compatible with the meaning of *restitutio in integrum* in (customary) international law as defined in Chapter 1.

In more recent cases the Court implicitly recognised that *restitutio in integrum* had to be defined as the restoration of the prior situation and the reparation of the consequences of the violation.<sup>63</sup> In its narrow interpretation *restitutio in integrum* had to be seen apart from other types of reparation. For example, in the *Blake*-case the Court stated:<sup>64</sup>

'Reparation is the generic term which consists of different forms through which a state can perform his international obligation (...): *restitutio in integrum*, indemnification, satisfaction, guarantee of non-repetition, among others'

In the *Castillo Paez*-case and the *Blake*- case the Court held that *restitutio in integrum* was not the only type of reparation, because there were cases where *restitutio in integrum* was not possible, sufficient or adequate.<sup>65</sup>

#### *The superior level of restitutio in integrum*

In the newer cases the Court explicitly gave *restitutio in integrum* a superior level compared to other forms of reparation. In the *El Amparo*-case, for instance, the Court held:<sup>66</sup>

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<sup>61</sup> *Aloeboetoe*-case, Reparations, 10 September 1993, par. 43.

<sup>62</sup> *Godinez Cruz*, Compensatory Damages, 21 July 1989, par. 24; and *Velasquez Rodriguez*, Compensatory Damages, 21 July 1989, par. 26.

<sup>63</sup> *Loayza-Tamayo*, Judgement on the Reparations, 27 November 1998, par. 85; *Castillo Paez*, Judgement on the Reparations, 27 November 1998, par. 48; *Suarez Rosero*, Judgement on the Reparations, 20 January 1999, par. 41 and *Blake*, Judgement on the Reparations, 22 January 1999, par. 31.

<sup>64</sup> *Blake*, Judgement on the Reparations, 22 January 1999, par. 31.

<sup>65</sup> *Castillo Paez*, Judgement on the Reparations, 27 November 1998, par. 69; *Blake*, Judgement on the Reparations, 22 January 1999, par. 42.

<sup>66</sup> *El Amparo*, Judgement on the Reparations, 14 September 1996.



'Inasmuch as the rule of restitutio in integrum cannot be enforced in cases in which the right to life has been violated, reparation to the victim's next of kin and dependents must take alternative forms, such as pecuniary compensation.'

In the *Caballero Delgado and Santana case* the Court assumed as well that restitutio in integrum had to be respected first, and that the award of other forms of reparation was only permitted if restitutio in integrum was impossible.<sup>67</sup> Paragraph 17 of this judgement reads:

'Restitutio in integrum being impossible in the instant case, inasmuch as it concerns a violation of the right to life, it is necessary to seek alternative forms of reparation, such as pecuniary compensation (...)'

For the primacy of restitutio in integrum in international law refer to Chapter 1.

### *The practice of the IACtHR*

The Court has interpreted its competences under the title 'reparations' in seventeen judgements, of which four consisted of interpretations of earlier judgements.<sup>68</sup> The effectively chosen remedies for restitutio in integrum depended primarily on the nature of the human rights that had been infringed.

Most of the cases up to now referred to persons that had been arrested by the police of the concerned state and that disappeared under diffuse circumstances after their arrest. In these cases their death had to be assumed after some time. These so called 'disappearance cases' have in common that the responsible state violated the right to life (Article 4 ACHR) with the consequence that the restoration of the prior situation, was *a priori* out of discussion. These cases nevertheless are of importance when comparing them with the present case of Applicant

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<sup>67</sup> *Caballero Delgado and Santana*, Judgement on the Reparations, 29 January 1997

<sup>68</sup> *Godinez Cruz*, Compensatory Damages, 21 July 1989; *Velasquez Rodriguez*, Compensatory Damages, 21 July 1989, *Godinez Cruz*, Interpretation of the Judgement of Compensatory Damages, 1990; *Velasquez Rodriguez*, Interpretation of the Judgement of Compensatory Damages, 1990; *Aloeboetoe et. al.*, Reparations, 10 September 1993; *Gangaram Panday*, 21 January 1994; *El Amparo*, Judgement on the Reparations, 14 September 1996; *Neira Alegria et al.*, Reparations, 19 September 1996; *Caballero Delgado and Santana*, Judgement on the Reparations, 29 January 1997; *Garrido and Baigorria*, Reparations, 27 August 1998; *Loayza-Tamayo*, Judgement on the Reparations, 27 November 1998; *Castillo Páez*, Reparations, 27 November 1998; *Suarez-Rosero*, Judgement on the Reparations, 20 January 1999; *Blake*, Judgement on the Reparations, 22 January 1999; *Suarez-Rosero*, Interpretation of the Judgement on the Reparations, 29 May 1999; *Loayza-Tamayo*, Interpretation of the Judgement on the Reparations, 3 June 1999; *Blake*, Interpretation of the Judgement on the Reparations, 1 October 1999



because the Court consistently awarded specific performances as reparation of the consequences of the violation.

The Court indicated specific measures that the responsible state should perform as 'reparation of the consequences of the violation of right and freedoms'<sup>69</sup>. It considered, for example, itself competent to order the investigation of the facts related to the involuntary arrest or disappearance and the punishment of the agents responsible for the violation. This specific performance the Court ruled in almost every case up to now.<sup>70</sup> In the *Blake*-case the Court ordered the adoption of domestic legislation, to make sure the facilities necessary for the investigation and the punishment.<sup>71</sup> In the *Velasquez Rodriguez*-case the Court also held that in principle it could require a public statement condemning the human rights infringement.<sup>72</sup>

In other cases, where the victims still were alive, the Court for example assumed the competence, additionally to the orders mentioned above, to ask the responsible state to release the victim. The Court from the beginning indicated that the revindication of the victim was a specific performance it could require.<sup>73</sup> This reparation has been ordered in the *Loayza-Tamayo*-case. In that case the Court even went further and ruled that the responsible state had to reinstate the victim in the teaching service. An other special performance the Court asked so far was the deletion of a criminal record, as we will see in the *Suarez-Rosero*-case. In one of the newest cases, the *Cesti Hurtado*-case, the Court ruled that the military process of Mr. Cesti Hurtado had to be annulled.<sup>74</sup> In the *Castillo Petruzzi*-case there had to be guaranteed a new process because the fair trial requirement had been violated.<sup>75</sup> These last two cases, however, are not in the reparations phase yet and it has to be seen if the Court will require more specific performances then.

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<sup>69</sup> *Velasquez Rodriguez*, Compensatory Damages 21 July 1989, par. 32 and 33, *Godinez Cruz*, Compensatory Damages 21 July 1989, par. 30 and 31.

<sup>70</sup> E.g. in the disappearance case *Garrido and Baigorria*, 27 August 1998, in the Judgement no. 4., and in *Suarez-Rosero*, Judgement on the Merits, 12 November 1997, in the Judgement no. 6, repeated in *Suarez-Rosero*, Judgement on the Reparations, 20 January 1999, par. 80.

<sup>71</sup> *Blake*, Judgement on the Reparations, 22 January 1999, in the Judgement no. 5.

<sup>72</sup> *Velasquez Rodriguez*, Compensatory Damages, 21 July 1989, par. 32 and 33.

<sup>73</sup> *Id.*

<sup>74</sup> *Cesti Hurtado*, Judgement on the Merits, 29 September 1999, in the Judgement no. 8.

<sup>75</sup> *Castillo Petruzzi et al.*, Judgement on the Merits, 30 July 1999, in the Judgement no. 13.



It is noteworthy that the Court in any case did not tolerate the excuse of a responsible state, that it could not perform the reparatory measures required because of its domestic law. In the *El Amparo*-case, for instance, the Court in paragraph 15 held:<sup>76</sup>

'[...] the obligation to make reparation is governed by international law in all of its aspects, [...] which are not subject to modification or suspension by the respondent State through invocation of provisions of its own domestic law.'

A few cases deserve special attention, because they concern similar infringements of human rights as in the case of Applicant. One of these is the case of *Suarez-Rosero*.<sup>77</sup> Mr. Suarez-Rosero was arrested in Ecuador in June 1992 under the supposition of being a member of an international drug traffic-organisation. The officers who arrested him had no warrant from the competent authority, nor was the arrest issued in *flagrante delicto*. During the interrogation at the police office Mr Suarez-Rosero was not allowed to speak to an attorney. After the questioning he was held *incommunicado* for one month. He then was transferred to another detention centre until a national court would issue an order to the contrary. In January 1994 Suarez' request to have the preventive detention against him revoked was denied.

In July 1995 the Supreme Court of Justice ordered the release on a temporary basis of Mr Suarez-Rosero to await his final judgement. Only by April 1996 he was released. Finally, by the final judgement of the Supreme Court of Justice Suarez was sentenced to two years imprisonment and was fined for two thousand times the minimal living wage. At no time Suarez was summoned to appear before a competent judicial authority to be informed of the charges brought against him.

In the Judgement on the merits<sup>78</sup> the IACtHR found a violation of Article 7 and 8 ACHR (judicial guarantees - comparable to Article 6 ECHR), because of the several defaults in the procedure (*e.g.* because of the arrest without a lawful inquiry, because Suarez has not been brought promptly to a court and because of the lacking presumption of innocence).

Furthermore the Court held that Article 5 ACHR had been violated (comparable to Article 3 ECHR). Finally Article 2 ACHR, which states that new domestic legislation must be in

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<sup>76</sup> See also *Garrido and Baigorria*, Reparations, 27 August 1998; par. 42; *Loayza-Tamayo*, Judgement on the Reparations, 27 November 1998, par. 86; *Castillo Páez*, Reparations, 27 November 1998, par. 49, *Suarez-Rosero*, Judgement on the Reparations, 20 January 1999, par. 42 and the most recent *Blake*-case, Judgement on the Reparations, 22 January 1999, par. 32

<sup>77</sup> *Suarez-Rosero*, Judgement on the Reparations, 20 January 1999.

<sup>78</sup> *Suarez-Rosero*, Judgement on the Merits, 12 November 1997.



accordance with the requirements set out by the Convention, had been breached by one of the articles of the Criminal Code of Ecuador. In the judgement on the merits the Court already laid the obligation on Ecuador to investigate, identify and punish the responsible agents.<sup>79</sup> In its judgement on the reparations,<sup>80</sup> the IACtHR once again was concerned with this last obligation and reaffirmed it with the order that domestic legislation had to be adopted to ensure the facilities necessary for the punishment. The Court further stated, that because the domestic trial had violated the Articles 7, 8, 25 and Article 1 ACHR it had the competence under Article 63(1) ACHR to order not to enforce the fine levied on Suarez and to expunge his criminal record and his record with the National Council on Narcotics and Psychotropic Substances.<sup>81</sup> The Court considered itself competent to directly require measures that have to be effectuated in the national legal order.

The second case that is of interest for the present submission, is the case *Loayza-Tamayo*. Elena Loayza-Tamayo was a Peruvian professor who was arrested in February 1993 under the supposition of collaboration with a subversive group. She was held *incommunicado* for ten days and subjected to torture, cruel and degrading treatment. During her arrest she was neither allowed to contact her family nor to see an attorney. Her family, on the other hand, was not informed about her arrestment. Mrs. Loayza-Tamayo was judged by two courts: first, she was prosecuted for the crime of high treason by a military court and second, she was tried for terrorism by a civil court. Both judgements were issued although Loayza-Tamayo continued to deny her membership of the subversive group. In both trials the case was dealt by several instances. During and after those proceedings Loayza-Tamayo stayed in detention. Her appeal to expunge the judgement of the civil court because of the principle *non bis in idem*, was dismissed by the Peruvian Supreme Court of Justice.

In September 1997 the IACtHR followed the Commission's findings and held in its judgement on the merits that Article 5 ACHR (personal integrity) and Article 7 ACHR (personal liberty - comparable to Article 5 ECHR - including also judicial guarantees) were infringed. Additionally it found a violation of Article 8 ACHR (judicial guarantees - comparable to Article 6(1) ECHR). Already in this judgement the IACtHR required the release of Mrs. Loayza-Tamayo, although it had not elaborated yet on any other form of

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<sup>79</sup> Ibid., in the Judgement no. 6.

<sup>80</sup> *Suarez-Rosero*, Judgement on the Reparations, 20 January 1999, par. 77-80.

<sup>81</sup> Id., par. 76.



reparation.<sup>82</sup> This specific performance was based on Loayza-Tamayo's double jeopardy.<sup>83</sup> Peru performed its obligation already one month after this order.

As usually the IACtHR ruled in a second judgement on the other forms of reparation.<sup>84</sup>

The Court found that the release of Loayza-Tamayo, which was already effectuated by the time of the judgement on the reparations, was insufficient to repair all consequences of the violation of the human rights.<sup>85</sup> With this statement the Court stressed once more the importance of the restoration of the prior situation and the reparation of the consequences of the infringement.

Loayza-Tamayo had been held in prison under the worst conditions, had not been allowed any communication with her family and had been tortured. Therefore, the Court took additional kinds of reparations than the release into consideration. The aim was certainly to rehabilitate Loayza-Tamayo and to integrate her in the society. The Court came to the conclusion that Peru had to reinstate Loayza-Tamayo in the teaching service of public institutions.

Additionally Peru had to guarantee the professor the full enjoyment of her right to a pension, including the period of almost three years of detention.

Furthermore Peru had to adapt its legislation to ensure that no adverse decision issued during the trial of Loayza-Tamayo in the civil courts would have any legal effects. Thus, the IACtHR ordered the specific performance of adaptation of domestic legislation, that it had already considered as possible remedy in the cases *Velasquez Rodriguez* and *Godinez Cruz*. As a correlated measure the Court asked Peru to change its legislation concerning the 'crime of terrorism' and the 'crime of high treason'. And as a last specific performance, already ruled in other cases, the Court requested an investigation of the facts of the case as well as the identification and punishment of the responsible agents. The award of compensatory damages in this case will not be further discussed.

The Court in this judgement first worked with a new concept, namely the *proyecto de vida* (project of life).<sup>86</sup> In principle the project of life has to be compensated with a pecuniary damage. Although this chapter does not focus on compensatory elements, the concept will nevertheless be discussed, because the Court held that the reparation of the project of life is

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<sup>82</sup> *Loayza-Tamayo*, Judgement on the Merits, 17 September 1997, par. 84

<sup>83</sup> Paragraph 84 of the judgement reads: 'As a consequence of the violation of the rights in the Convention, particularly the prohibition of double jeopardy to the detriment of M.E. Loayza-Tamayo and pursuant to Article 63(1), the Court considers that the State of Peru must in accordance with its domestic legislation, order the release of M.E. Loayza-Tamayo within a reasonable time.'

<sup>84</sup> *Loayza-Tamayo*, Judgement on the Reparations, 27 November 1998

<sup>85</sup> *Id.*, par. 123

<sup>86</sup> *Id.*, par. 144ff.



essential and comes close to *restitutio in integrum*.<sup>87</sup> The concept is correlated to the 'self-actualisation of a person, grounded in individuality' and it protects the foreseeable future life of the victim. It is violated in the case that the individual course of life has undergone a change because of the violation of human rights. The *proyecto de vida* was infringed in the case of Mrs. Loayza-Tamayo because 'the violations [of the human rights] prevented [Mrs Loayza-Tamayo] from the realisation of her personal and professional goals by obliging her to interrupt her studies and move abroad, away from her normal environment, to live in isolation and in economic hardship, under severe physical and psychological stress.'<sup>88</sup> It seems as if the Court would only hold the *proyecto de vida* infringed in cases 'demonstrating irreparable loss or severe impairment of the opportunities for personal development'. The Court itself considered in *Loayza-Tamayo*, as we have already seen, that the reparation of the *proyecto de vida* would come close to the ideal of *restitutio in integrum*. Nevertheless, in its judgement the Court seemed unable to translate the injury into economic terms and therefore awarded no compensation for the violation of the *proyecto de vida*. This unsatisfying ruling has been criticised by Judge De Roux Rengifo.<sup>89</sup>

#### *The opinion of the IACtHR about the ECtHR*

In different cases the IACtHR cites the approach with regard to rules and procedures of the European Convention on Human Rights as an example. The Court indicated in the *Honduran Disappearance-cases*, that the obligation concerning reparations was also laid down in Article 41 ECHR. In some cases, the Court compared the jurisprudence of the European Court to come to a decision over its own legal questions. In the cases of *Neira Alegria et al.* and *El Amparo* the IACtHR cited judgements by the ECtHR, in which the ECtHR only ruled that there had been an infringement of human rights.<sup>90</sup> Nevertheless the IACtHR ordered the investigation of the facts and awarded compensation. The Court clearly had the intention to perform comparative studies with a comparable court. In the more recent *Blake* case the IACtHR cited the aforementioned ECtHR *Ringeisen*-case.<sup>91</sup> It is noteworthy that the IACtHR used this case in the context of potential methods of interpretation of a judgement: one could

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<sup>87</sup> Id., par. 151.

<sup>88</sup> Id., par. 152

<sup>89</sup> Partially dissenting opinion of Judge de Roux Rengifo. He suggested to award a specific amount of US\$ 25.000 for the violation of the *proyecto de vida*. According to this Judge, the total amount of compensation, to be paid to Mrs Loayza-Tamayo, therefore would have been US\$ 124,190.30 (instead of US\$ 99,190.30).

<sup>90</sup> *Neira Alegria*, 19 September 1996, par. 56 and *El Amparo*, Judgement on Reparations, 14 September 1996, par. 35



say that it concerned a rather general legal question. The Court surely was of opinion, that the ECtHR had to regard a similar standard to the one followed itself. The *Blake*-case gives the impression that the Court makes an effort to compare its standards to the ones of the ECtHR. It is mentioned nowhere why the IACtHR often cites judgements by the ECtHR. Why does the Court not make reference to findings of the Commission of the African system of protection of human rights? Obviously the Court has chosen for comparison with the European legal regime because it considers itself related to the ECtHR. In this view there is no legal argument why the ECtHR, on its part, should not take the findings of the IACtHR into consideration either.

#### ***2.4.3 Conclusion about the regimes of the United Nations Human Rights Committee and the Inter-American Court of Human Rights***

In the two paragraphs above (2.4.1 and 2.4.2) the report examined the competences to order reparations of the United Nations Human Right Committee and of the Inter-American Court of Human Rights. Although there are some formal differences (for example between 'views' and 'judgements') the similarities are more numerous. Most importantly the two judicial institutions use the same source for their competence to award reparation. Both seem to be obliged to regard international (customary) law. The Committee implicitly takes into account the rules of international law whenever awarding reparations in a concrete case, while the IACtHR even explicitly holds that it is generally bound by those rules. This implies that both judicial bodies do not consider themselves free to choose their own standard concerning reparation. In doing so, they follow the international standard that the situation prior to the violation has to be restored and the consequences of the infringement are to be repaired (*restitutio in integrum*).

In their case law it is indeed observable that the Committee and the IACtHR made effort to restore the prior situation as good as possible. It seems, for instance, as if the Committee would rule that the death sentence had to be commuted had this not already been done by the responsible state. The IACtHR, on the other hand, ordered the release of a person after an unlawful arrestment to restore the prior situation (*Loayza-Tamayo*-case). Only in cases where the situation prior to the infringement already was re-established (e.g. *Price vs. Jamaica*,

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<sup>91</sup> *Blake*, Judgement on Reparations, 22 January 1999, par. 18 and 19



decided by the Committee) or where the restoration had turned to be impossible (*e.g.* in all disappearance cases decided by the IACtHR) the two bodies required other remedies. These specific orders had to repair the consequences of the infringement. Both judicial bodies ruled on specific performances several times. The Committee, for instance, asked Jamaica to guarantee clemency in the case *Johnson vs. Jamaica*. The IACtHR required adaptations of domestic legislation, investigations and punishment of the ones responsible for a violation of human rights.

Both judicial bodies do not consider themselves as deciding in isolation on the cases submitted. The Committee as well as the IACtHR compared its functions and competences with the ones of the European Court of Human Rights. They clearly are interested in a uniform regime governing the award of reparations. Following this line of reasoning, it is questionable whether the European Court could maintain its own interpretation of its competence without regarding the findings of other human rights regimes.



## CHAPTER 3 - APPROPRIATE REMEDIES IN THE CASE OF APPLICANT

Now that the relevant norms of international law in general and the question of reparation in the European human rights system at large have been discussed, it is time to turn to the particular aspects of the present case. Assuming that Applicant was indeed arrested and transferred to the Defendant State in breach of Article 5 ECHR, that the conditions of his arrest, transfer and detention were a violation of Article 3 ECHR, and that the judicial procedures in the Defendant State did not constitute a fair trial in the sense of Article 6 ECHR, the question arises as to the appropriate remedy of these particular violations. Following the analysis presented in this report the appropriate remedy in this case would be a ruling by the Court ordering the immediate release of the Applicant and his free transfer to a place of his own choosing by means readily made available to him. The execution of the death penalty to which Applicant was sentenced should in any case be declared prohibited by the Court. Only for pressing reasons should the Courts consequential orders be substituted for recommendations.

### *3.1 Immediate release and unhindered transfer*

As shown in the previous chapters *restitutio in integrum* is the principal form of redress. The primacy of restitution in *integrum* is partly explained by legal logic. The logical outcome of wiping out all the consequences of an unlawful arrest would mean the immediate release of the detainee. Re-establishing the situation as it existed prior to this particular violation would also demand the unhindered transfer of the detainee to a place of his choosing and providing the means to do so. Not doing so would not restore the liberty and security of person that was violated by the illegal arrest.

State practice as well unmistakably points at immediate release and free transfer as the appropriate remedy in case of an unlawful arrest. It was confirmed internationally and put to practice by the ICJ in the *Iranian Hostages*-case. Following the unlawful detention of American nationals the International Court of Justice ruled that the confinement must be terminated at once, and that the detainees must be released.<sup>92</sup> As demonstrated earlier in this report the Inter American Court of Human Rights has also ruled to this effect in the *Loayza-*

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<sup>92</sup> See above paragraph 1.4



*Tamayo* case.<sup>93</sup> This particular remedy was also ruled by the African Commission on Human and Peoples' Rights in the case of the *Constitutional Rights Project vs. Nigeria*. The Commission found that fundamental rights of the prisoners were violated and recommended that the Government of Nigeria set the persons wrongfully imprisoned free.<sup>94</sup>

Other authorities that support this conclusion are set forth in the submissions of the Defence Counsel of 12 March 1999 and 29 October 1999.

All in all, ordering the immediate release and free transfer to a place of the Applicant's will would constitute nothing more than the internationally well-established principle of restitution in integrum. The European Court is, as shown above in Chapter 2, competent to rule in this manner and should indeed do so.

### ***3.2 Prohibiting the execution of the death penalty***

If, for whatever reason, the Court would not order the Defendant State to take the aforementioned remedial measures, it should at least prohibit the execution of the death penalty. This specific order would be an appropriate remedy considering the violation of Articles 3 and 6 ECHR and its repercussions on Article 2.

#### ***3.2.1 Consequence of the violation of the Articles 3 and 6 for Article 2 ECHR***

Article 2(1) of the European Convention states :

'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a Court following his conviction of a crime for which this penalty is provided by law'

Although Article 2 allows for the application of capital punishment, this is only permissible under certain conditions. It follows from other provisions of the Convention that not every death penalty pronounced by a court is permitted under the Convention. Firstly, the judicial decision must have been preceded by a fair and public hearing by an independent and impartial court as described in Article 6 ECHR. Secondly, the punishment must be in proportion to the crime committed and the selection of the place and manner of punishment must not amount to inhuman or degrading treatment, as stated in Article 3 ECHR. Thirdly,

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<sup>93</sup> See above paragraph 2.4.2



according to Article 7 ECHR the crime must have been punishable by death at the moment the crime was committed. Lastly, according Article 14 ECHR no discrimination is permitted when the death sentence is imposed and in seeking pardon.<sup>95</sup>

Consequently, no death penalty is permitted under the Convention if it is imposed in violation of these articles. Article 2(1) allows the death penalty only when it is *provided by law*. Therefore, the death penalty needs to be provided by the domestic law of a state party. More importantly it also has to comply with the articles of the Convention since the provisions of the Convention are part of *law* in terms of Article 2 ECHR. Thus, when provisions of the Convention, like Articles 3 and 6, are violated the death penalty will lack lawful basis and will be considered unlawful.

#### *Article 3 ECHR*

Since Article 2(1) permits state parties to retain the death penalty, one could not immediately conclude that the imposition of the death penalty is in violation of Article 3. However, the treatment suffered by the victim during the arrest or detention can by itself be in violation of Article 3. If the punishment is not in proportion to the committed crime or if the manner or place of the punishment is in violation of Article 3 the imposition of the death penalty will no longer be considered as lawful and therefore no longer protected by Article 2(1) ECHR. Consequently, Article 2(1) is violated if a breach of Article 3 is determined.

#### *Article 6 ECHR*

According to Article 6(1) of the Convention everybody is entitled to a fair and public hearing before an independent and impartial tribunal established by law. These procedural guarantees need to be respected when the death penalty is imposed. If the punishment was declared by a tribunal which lacks the authority by law or lacking the safeguards of being independent or impartial the death penalty will be considered unlawful and therefore no longer protected by Article 2(1).

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<sup>94</sup> Communication 60/91, *Constitutional Rights Project v. Nigeria (in respect of Wahab Akamu, G. Adegade and others)*, in 8th Annual Report of the ACHPR 1994-1995, ACHPR/8TH/ACT/RPT/XVI, Annex IX

<sup>95</sup> Van Dijk and Van Hoof, *op. cit.*, p. 303



### ***3.2.2 Other developments affecting the validity of the death penalty***

Besides the importance of Article 2(1) in relation to Articles 3 and 6 of the Convention, other developments in Europe support the view that the Court should not allow the death penalty. Because the Court has to take its judicial decision taking into account the general views adopted in Europe, it also has to consider the developments supporting the abolition of the death penalty.

The pace of abolition of the death penalty has accelerated in the past twenty years. Sixty-three states in the world have abolished the death penalty for all crimes. Another sixteen have abolished the death penalty for all crimes, but for exceptional crimes like wartime crimes. Besides those states that have abolished the death penalty by law, many others have *de facto* done so. This means that they retain the death penalty by law, but have not carried out death sentences for ten years or longer, or have made an international commitment not to do so. The tendency towards abolition is not only reflected by the many states who refrain from applying the death penalty but also by international treaties., for example the Second Optional Protocol to the International Covenant on Civil and Political Rights and Protocol No. 6 to the European Convention on Human Rights and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty.

There are many reasons to be found why this tendency towards abolition became so important and has developed in a relative short period. One of them is that the death penalty relates to the right to life, a fundamental human right respected in most of the national constitutions and by many international treaties relating to or concerning human rights. In relation to this many people support the argument that the death penalty is an extreme example of torture, a form that violates human rights and therefore an illegitimate form of punishment. Secondly, there is no scientific evidence proving that the rate of crimes threatened with the death penalty is lower in states where the death penalty is still applied. Thirdly, experience has shown that the executions of the death penalties often happen with an unacceptable degree of arbitrariness and discrimination. Lastly, the death penalty is irreversible and the risk of judicial error can never be entirely ruled out, leaving a chance that innocent people are executed.

#### *The development towards abolition of death penalty is particularly strong in Europe*

While the European Convention on Human Rights reserves the right of a state to impose capital punishment on condition that this punishment was provided for in its legislation and subsequent confirmed by a court of law, since the adoption of the Convention certain



developments have affected the pre-existing ideas to carry out the death penalty as protected by Article 2. At the end of 1970 the Committee of Ministers was invited by the Parliamentary Assembly to consider capital punishment as 'inhuman' and to elaborate an Optional Protocol to the ECHR abolishing the death penalty.<sup>96</sup> Also the conferences of Ministers of Justice of the Council of Europe stated that Article 2(1) ECHR no longer reflected the public opinion in Europe. As a result the Committee of Ministers mandated in 1982 the Committee on Human Rights to design an additional protocol to the European Convention on Human Rights abolishing the death penalty.<sup>97</sup> Protocol No. 6 of the ECHR entered into force on 1 March 1985. Article 1 of Protocol No. 6 states:

‘The death penalty shall be abolished. No one shall be condemned to such penalty or executed.’

The Protocol directly prohibits capital punishment instead of obliging states to act through the introduction of national legislation. State parties are not allowed to make reservations when ratifying the Protocol. This Protocol is ratified by 34 states. Most of the state parties did abolish the death penalty already in their domestic law when they ratified this Protocol, consequently the Protocol did not contribute something new. The intention to abolish the death penalty, however, is of great importance to those states that still retain the death penalty. States seeking membership of the Council of Europe must subscribe to a firm commitment to put into effect an immediate moratorium on the death penalty. Within a fixed time period they eventually have to abolish the death penalty (mostly three years) and ratify the Protocol. Especially to the countries of Eastern Europe, like the Ukraine, Russia and Slovakia, this is a serious obligation leading to major chances. These conditions are now part of the fundamental commitments which membership to the ECHR implies.<sup>98</sup> The first Summit of the Council of Europe (Vienna, 1993) confirmed the responsibility of the Council in ensuring compliance with the commitments accepted by all member states.<sup>99</sup> At the second Summit of the Council of Europe in 1997 the heads of states and governments called for the universal abolition of the death penalty and in the meantime of the maintenance of the existing commitment to place a

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<sup>96</sup> Parliamentary Assembly Resolution 727 (1980) and Recommendation 891 (1980)

<sup>97</sup> *1983 Explanatory Report on Protocol No. 6 to the ECHR concerning the abolition of the death penalty (No. 114)*, Council of Europe Publishing

<sup>98</sup> Commentary by H.C. Kruger, Deputy Secretary General of the Council of Europe, *The Death Penalty Abolition in Europe*, Council of Europe, May 1999, p. 75.

<sup>99</sup> Vienna Declaration, ([www.coe.fr/eng/std/vienna.htm](http://www.coe.fr/eng/std/vienna.htm)), last visited 19 April 2000



moratorium to the death penalties in Europe. At the Second Summit the Council of Europe stated:<sup>100</sup>

‘We call for the Universal abolition of the death penalty and insist on the maintenance, in the meantime, of existing moratoria on executions in Europe.’

At the 102nd Session of the Committee of Ministers in 1997 the Committee of Ministers of the Council of Europe took note of the progress made and instructed their Deputies to continue active pursuit of the implementation of decisions adopted at the Second Summit. Moreover they confirmed the priority given to the abolishment:<sup>101</sup>

‘they stressed there that priority should be given to obtaining and maintaining a moratorium on executions, to be consolidated as soon as possible by complete abolition of the death penalty.’

Thus the abolishing of the death penalty has become a fundamental principle to the Council of Europe entailing a core commitment for the state parties, and the candidate state parties to fulfil the obligation to place a moratorium and finally total abolishment.

This commitment is not only relevant for the remaining candidates and new members, but also for the old state members. The Parliamentary Assembly and the Committee of Ministers have been able to put political and other pressure on states that still kept the death sentence without responding to the moratorium. By the examination of an applicant and by monitoring compliance with the commitments of state members, they have insisted frequently that the states move towards the abolition and ratification of the Protocol. The recent ratification of the Optional Protocol No.6 by Greece and Estonia shows that the policy of the Council of Europe has gained success. Moreover, some state members who abolished the death penalty already in their domestic law are now moving towards the ratification of Protocol No. 6 (for instance Belgium). Other state parties who no longer apply the death penalty *de facto* (in practice) are now heading for the abolishment *de jure* and ratification of the Protocol.

It is stated therefore by many authors that Europe can almost be regarded as a *de facto* death penalty- free zone.<sup>102</sup> It also becomes clear that the legal and political mechanism of the

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<sup>100</sup> ([www.coe.fr/summit/declaration.htm](http://www.coe.fr/summit/declaration.htm)), last visited on 19 April 2000

<sup>101</sup> ([www.coe.fr/cm/session/1998/jc102.htm](http://www.coe.fr/cm/session/1998/jc102.htm)), last visited on 19 April 2000

<sup>102</sup> Commentary by R. Wohlwend, Member of the Liechtenstein delegation to the Parliamentary Assembly of the Council of Europe, 'The efforts of the Parliamentary Assembly of the Council of Europe', Council of Europe, May 1999, p. 55



Council of Europe are used to go forward considering this issue, the process towards abolition is irreversible. Moreover it would be in contravention of the general policy in Europe and of the commitment of a state party to the ECHR to execute a person while the state had already *de facto* abolished the death penalty.

It is not only the Council of Europe who requires prospective state parties to undertake the abolition of the death penalty. The European Union has even made abolition of the death penalty a pre-condition for membership. Both, the Council of Europe and the European Union, have agreed to work together concerning the total abolishment.

### **3.2.3 Conclusion**

According to Article 2(1) of the Convention state parties are permitted to retain the death penalty when it is *provided by law*. It follows from other provisions of the Convention, for example Article 3 and 6, that not every death penalty pronounced by a court is permitted. The death penalty has to comply with the conditions provided for in those articles. If a breach of the Convention is determined the death penalty will no longer be regarded as *provided by law*. Taking into account Article 2(1) of the Convention it shows that this Article is without any practical meaning due to the influence caused by the Optional Protocol No. 6. During the years the general tendency to abolish the death penalty in Europe has become a primary goal for the European Council and the Parliamentary Assembly.

The European Court has to take its judicial decisions respecting the general ideas and developments living in Europe. The Court should therefore order that the death penalty should not be executed. The application of Article 2(1) ECHR and the general development in Europe towards abolition show that the death penalty is no longer accepted.

### **3.3 Formulating the remedy**

Now that the appropriate remedies have been established, this report turns to the question of how the Court should formulate the remedies concerned. Two aspects are distinguished: one looks upon the degree of specificity of the judgement, the other regards the question whether the decision should be a consequential order or a mere recommendation.

We shall discuss the pros and contras of each aspect separately, leaving the ultimate decision regarding the formulation of the remedy to the Defence Counsel - it is a decision requiring



insight in the political relations between the Court, the Committee and the relevant state parties, as well as a decision requiring procedural expertise concerning feasibility.

### ***3.3.1 Degree of specificity***

The state parties to the European Convention undertake according to Article 46 of the European Convention to abide by the final judgements of the Court. According to Article 46(2) the judgements of the Court are transmitted to the Committee of Ministers. The Committee is to supervise the execution of the ruling. In cases of just satisfaction the Committee has verified if the responsible state has indeed compensated the applicant. The Committee also examines if the defendant state has taken sufficient measures to prevent identical breaches. As the Courts rulings are not always very precise, the supervision of the judgements is to some degree dependent on the political willingness of the Committee of Ministers<sup>103</sup>.

Although the proposed remedy of prohibiting the execution of the death penalty does not allow for any specificity - capital punishment is either prohibited or not - , the primary remedial measures of immediate release and free transfer very much do. A date of release or an ultimatum may be set, a final destination may be selected, even additional safeguards may be ordained.

#### *Arguments in favour of suggesting a specifically formulated judgement*

Should the Court formulate a highly detailed judgement the Committee of Ministers would have a well defined yardstick to measure compliance. Another effect of a very precise judgement by the Court is that it leaves little room for political interference. This would strengthen the *res judicata* of the Courts ruling.

#### *Arguments against suggesting a specifically formulated judgement*

One the other hand, a somewhat less particularised ruling leaves the Defendant State at least some room to execute the final judgement in its national legal order through means of its own choosing. This would also uphold to a degree the notion of national sovereignty and may in the end increase the chance of compliance with the Court's judgement.

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<sup>103</sup> Lawson, *op. cit.*, p. 88



### **3.3.2 Consequential orders or recommendations**

As shown above, according to Article 46 state parties have to abide by the Court's final judgements. The Court's judgements are not only morally, but also legally binding under international law upon the states that are parties to a particular case. The Court's ruling may in our opinion take two distinct forms: consequential orders or recommendations.

#### *Arguments in favour of a judgement containing consequential orders*

As this report has demonstrated there is good reason for the Court to declare itself competent to direct the Defendant State to take remedial measures and to release the Applicant and guarantee his free transfer. The Court may also prohibit the execution of the death penalty. In cases where 'just satisfaction' was awarded the Court in its judgement explicitly stated the amount of financial compensation to be paid. Accordingly, there is no reason why the Court's ruling should be less consequential in cases where 'just satisfaction' contains the remedies proposed above.

#### *Arguments in favour of a judgement containing recommendations*

In the past the Court has shown itself very reluctant to direct a liable state to take certain measures.<sup>104</sup> Ordering the Defendant States to take the proposed remedial measures may be over-stretching the flexibility of the Court. As with interim measures, the Court has ruled that it can only indicate, but not enforce these measures.<sup>105</sup>

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<sup>104</sup> See above at 2.3.4

<sup>105</sup> *Cruz Varaz*, 20 March 1991, A 201



## CHAPTER 4 - CONCLUSIONS AND RECOMMENDATIONS

The main question of this report is whether the European Court of Human Rights is competent, if it finds a breach of the Convention, to order or recommend the Defendant State to take certain measures to remedy the consequences of the breach. This question was asked while the Applicant's case against the Defendant State was pending before the Court concerning alleged breaches of Articles 2, 3, 5 and 6 of the European Convention. Assuming that these breaches will be upheld by the Court, the more specific question of this report is what the appropriate remedies would be in the aforementioned case.

This report concludes that the European Court of Human Rights is indeed competent to direct states to take measures in order to remedy a breach of the Convention. There are a number of reasons for arguing that the Court should actually order or recommend states to take remedial measures.

One of the most important reasons why the Court could and should direct states to restore the situation as it existed before the breach, is that this so called *restitutio in integrum* is a well established principle of general international law. As demonstrated in Chapter 1 of this report *restitutio in integrum* is logically the principal form of reparation. This primacy is substantiated by state practice. Moreover, *restitutio in integrum* plays an important role in upholding the international legal order by punishing or deterring wrongdoing. The same argument goes for specific orders: negative injunctions and specific performance. Although few instances of specific orders exist, the relevant case law is quite authoritative. Notably, the Court has confirmed that these provisions of general international law are relevant for the legal order of the European Convention.

Article 41 of the European Convention furnishes the Court with the competence to afford 'just satisfaction' in cases where the state concerned allows only partial reparation. Consequent case law, discussed in Chapter 2, reveals that the Court considers itself competent *inter alia* in cases where the defendant state is unwilling to award reparation. This comprehensive interpretation of the Court with regard to its competence to apply Article 41 is not matched by a similar interpretation as to the content of 'just satisfaction'. Paradoxically, while acknowledging the principle of *restitutio in integrum*, the Court has at the same time



delimited the meaning of 'just satisfaction' to financial compensation and declaratory judgements. This denial or non-development of 'just satisfaction' is undermining the institutional competence and legitimacy of the European human rights system. Refusing to direct states to take remedial measures so as to restore the *status quo ante* is threatening the fairness and integrity of the human rights regime at large. This disinclination is even harder to understand in the light of interim measures - also lacking an explicit treaty bases - the Court has previously indicated. Any objections on part of the Defendant State invoking provisions of municipal law are incapable of derogating from the international legal norm at hand.

Two other human rights institutional bodies, the United Nations Human Rights Committee and the Inter-American Court of Human Rights, have developed important case law regarding *restitutio in integrum* and specific orders. As demonstrated in paragraph 2.4, both bodies refer to rules of international law as governing issues of reparation. The Human Rights Committee does so implicitly, while the Inter-American Court explicitly holds that it is bound to follow the international norm that the situation prior to the breach has to be restored and that the consequences of the breach are to be repaired. Significantly, both institutions compare their functions and competence with those of the European Court of Human Rights, indicating the importance of a uniform regime governing the award of reparations.

For all these reasons, this report concludes that in the present case the appropriate remedy for the Court would be the immediate release of the Applicant and his free transfer to a place of his own choosing by means readily made available to him. In our opinion there is very good reason for the Defence Counsel to respectfully ask the Court to rule to this effect. Subsidiary, the prohibiting of the execution of the death penalty to which the Applicant was sentenced may be requested. The question whether the judgement should be very detailed or rather open-ended, as well as the question whether the judgement should consist of a consequential order or a recommendation is ultimately to be decided by the Defence Counsel.



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