Faculty of Law
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The relationship between international and national law:

Re-visiting concepts of dualism and monism

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DOCTORAL DISSERTATION

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To the memory of my mother,
Rannveig Gísladóttir (1932-2020)

Abstract

The relationship between international and national law is increasingly being tested by jurisdictions and decisions of international courts. International courts have multiplied in the last two decades and have become permanent and active participants in the international arena. States and international organizations have considered the establishment and jurisdiction of such dispute settlement bodies vital for the enforcement of international law obligations of both states and individuals. States have undertaken an international obligation to comply with decisions of international courts. Particularly, in light of the enhanced role of international courts with respect to the enforcement of human rights and individual criminal responsibility, their jurisdiction and decisions have required major implementation at the national level.

The authority of international courts calls for a theoretical understanding of the relations between international and national law. In only a short time, their authority has put into the spotlight fundamental principles of international law, such as human rights, criminal responsibility of individuals for international crimes, states' responsibility, enforcement by international actors, and remedies. These areas of law are inter-dependent, both in substance and space. International human rights and individual criminal responsibility for serious crimes are matters of international law, undertaken and enforced at the international level, but to be realized at the national level. At both levels, every day practice illustrates the dire need of a theoretical understanding of the multilayered situation. Conventional application of established legal doctrines has often proved to be conflicting and unsatisfactory. Facing the dilemma, a grander strategy is needed.

This thesis presents a study on this new phenomenon from a variety of perspectives. The six publications included study international legal norms that seek to activate domestic legal system, enforcement of international courts, and implementation at the national level (in particular in the Nordic countries). These studies are mainly in the area of international human rights, international humanitarian law, and international criminal law. The summary places the published text in a theoretical, historical and analytical context. The primary theoretical foundation of the relations between international and national law are the theories of dualism and monism. While set out in the nineteenth century, the theories have remained the main foundation for the kinship. The summary revisits and tests the components of these theories in light of the case studies. It concludes that the reliance of the theories is problematic, as their key foundations do not hold. This situation has real-world ramifications as actors with major interests at hand, primarily individuals, find themselves at times trapped, and left with a false promise of law.

Abstract

Kansainvälisten tuomioistuinten toimivalta ja päätökset koettelevat yhä enenevässä määrin kansainvälisen ja kansallisen oikeuden rajoja. Kansainvälisten tuomioistuinten määrä on moninkertaistunut viime vuosikymmenten aikana, ja niistä on tullut yhä pysyvämpiä ja aktiivisempia toimijoita kansainvälisellä areenalla. Valtiot ja kansainväliset järjestöt ovat katsoneet, että tällaiset tuomioistuimet ovat elintärkeitä valtioiden ja yksilöiden kansainvälisoikeudellisten oikeuksien ja velvollisuuksien toteutumisen kannalta. Useimmat valtiot ovat myös antaneet suostumuksensa noudattaa tuomioistuinten päätöksiä. Etenkin ihmisoikeustuomioistuinten ja kansainvälisten rikostuomioistuinten päätösten toimeenpaneminen on usein vaatinut merkittäviä uudistuksia kansallisella tasolla.

Kansainvälisten tuomioistuinten toimivallan ymmärtäminen vaatii kansallisen ja kansainvälisen oikeuden välisten suhteiden teorioimista. Tämä toimivalta on lyhyessä ajassa asettanut valokeilaan kansainvälisen oikeuden perustavanlaatuisia periaatteita ja kysymyksiä, kuten ihmisoikeudet, yksilön rikosvastuun kansainvälisistä rikoksista, valtiovastuun, kansainvälisten toimijoiden toimeenpanovallan ja oikeussuojakeinot. Nämä oikeudelliset kysymykset ovat toisiinsa liitoksissa niin substanssin puolesta kuin tilallisestikin. Ihmisoikeudet ja yksilön rikosvastuu kansainvälisistä rikoksista ovat kansainvälisoikeudellisia kysymyksiä, joista päätetään kansainvälisellä tasolla, mutta ne toimeenpannaan kansallisella tasolla. Päivittäiset käytännöt molemmilla tasoilla osoittavat tarpeen tämän monikerroksisen tilanteen teoreettiselle ymmärtämiselle. Olemassa olevien oikeudellisten doktriinien perinteinen soveltaminen on usein osoittautunut ristiriitaiseksi ja epätyydyttäväksi. Ongelmaan vastaaminen vaatii laajempaa strategiaa.

Väitöskirjassa tarkastellaan tätä ilmiötä useasta näkökulmasta. Väitöskirjan ytimen muodostavissa kuudessa artikkelissa tutkitaan kansainvälisiä oikeussääntöjä, jotka pyrkivät toimimaan kansallisen oikeusjärjestelmän kautta, kansainvälisten tuomioistuinten toimeenpanovaltaa, ja niiden päätösten implementoimista kansallisella tasolla (etenkin Pohjoismaissa). Artikkelien tapaustutkimukset koskevat pääosin ihmisoikeuksia, humanitaarista oikeutta ja kansainvälistä rikosoikeutta. Väitöskirjan johtopäätösluku asettaa näiden tutkimusten tulokset teoreettiseen, historialliseen ja analyyttiseen kontekstiin. Kansainvälisen ja kansallisen oikeuden suhteiden teoreettisen perustan muodostavat dualismi ja monismi. Vaikka ne on luotu 1800-luvulla, nämä teoriat ovat säilyttäneet asemansa oikeusteoriassa. Väitöskirjan johtopäätösluvussa tutkitaan ja testataan näiden teorioiden eri osia väitöskirjan tapaustutkimusten valossa. Väitöskirjassa tullaan siihen tulokseen, että näihin teorioihin tukeutuminen on ongelmallista, koska niiden perusta ei enää ole vakaa. Tällä on käytännön vaikutuksia, sillä toimijat, ennen kaikkea yksilöt, joiden intressit ovat vaakalaudalla, jäävät usein vangiksi oikeuden valheellisten lupausten väliin.

Contents

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List of abbreviations

CoM	Council of Europe Committee of Ministers
CJEU	Court of Justice of the European Union
DRC	Democratic Republic of Congo
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EEC	European Economic Community
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IACHR	Inter-American Convention on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
ILC	International Law Commission
ILDC	International Law in Domestic Courts
IMT	International Military Tribunal
PJIJ	Permanent Court of International Justice
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNSC	United Nations Security Council
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

List of original publications

This thesis consists of the following original publications:

I. 'The ICJ Armed Activity Case - Reflections on States' Obligation to Investigate and Prosecute Individuals for Serious Human Rights Violations and Grave Breaches of the Geneva Conventions', Nordic Journal of International Law, Volume 78, No. 4, 2009, 581-598.

II. Guðrún Gauksdóttir and Thordis Ingadottir, 'Compliance with the Views of the UN Human Rights Committee and the Judgements of the European Court of Human Rights in Iceland', in Asbjörn Eide, Jakob Th. Möller and Ineta Ziemele (eds), *Making Peoples Heard, Essays on Human Rights in Honour of Gudmundur Alfredsson* (Martinus Nijhoff Publishers 2011).

III. 'The Role of the International Court of Justice in Enforcement of the Obligation of States to Investigate and Prosecute Serious Crimes at the National Level', Israel Law Review (Cambridge University Press) / Volume 47 / Issue 02 / July 2014, 285-302.

IV. 'Just Satisfaction and the Binding Force of Judgments: Article 41 and 46 of the European Convention on Human Rights', translation of 'Sanngjarnar bætur og bindandi áhrif dóma' in Björg Thorarensen (ed), Mannréttindasáttmáli Evrópu, meginreglur, framkvæmd og áhrif á íslenskan rétt (Mannréttindastofnun Háskóla Íslands, Lagadeild Háskólans í Reykjavík, Bókaútgáfan Codex 2017).

V. 'The Implementation of the Rome Statute of the International Criminal Court in the Nordic Countries: A New Approach to Criminalization of International Crimes', in Astrid Kjeldgaard (ed), *Nordic Approaches to International Law* (Brill/Nijhoff, 2018).

VI. 'Enforcement of Decisions of International Courts at the National Level', in André Nollkaemper and August Reinisch (eds.), *International Law in Domestic Courts: A Casebook* (Oxford University Press 2018).

Summarising report

> *It has to be considered that with this the Icelandic legislator has underscored, that despite given legal effect to the human rights convention, this country is built on the fundamental principle of dualism.*
>
> Supreme Court of Iceland, Prosecutor v. Jón Ásgeir Jóhannesson and Tryggvi Jónsson, Judgment May 21 2019[1]

1. Introduction

Understanding the relationship between international and national law has become of great importance. Enhanced international cooperation relentlessly tests traditional order and brings into the spotlight various challenges, both in practice and theory. In everyday practice, governments, legislators, judges and international officials alike commonly face issues relating to the relationship. Implementation and compliance have become a major undertaking, in both the public and private sectors. Terms like EU law, international human rights, international criminal law, and international courts have become stable terminology in daily discussion by the legal profession and the public.

Several developments have brought the issue into focus.[2] Foremost, the last few decades have seen the multiplication of treaty making and norm setting. Today, the United Nations Treaty Series has over 50,000 registered treaties.[3] Furthermore, following the end of the Cold War, the Security Council has adopted numerous resolutions in the area of peace and security, addressed to United Nations 193 member states. Norm setting by non-state actors is also flourishing. For example, the financial crises 10 years ago has led to major regulatory changes called for by international professional bodies.

Raising various issues about the relationship between international and national law, treaties increasingly require implementation at the national level. The 1949 Geneva Conventions on international humanitarian law were a milestone in the history of treaty law and obligations, due to such an unprecedented obligation.[4] Today, it is the rule rather than the exception that

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[1] Translation and italics by author.

[2] For general discussion, see Tanja E Aalberts and Thomas Gammeltoft-Hansen (eds), *The Changing Practices of International Law* (Cambridge University Press 2018).

[3] UN Treaty Series: Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations, Cumulative Index No. 54, UN New York 2017.

[4] Jean Simon Pictet, Frédéric Siordet and Internationales Komitee vom Roten Kreuz (eds), *Commentary on the Geneva Conventions of 12 August 1949, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2. repr, International Committee of the Red

a treaty requires implementation. Exceeding that, representing major evolutions with respect to treaty making, implementation and enforcement, integrated treaty regimes have emerged. A vivid example is the treaties of the European Union, its comprehensive legislative function and the principle of direct effect and primacy of EU law.

With the multiplication of treaty making and increased activities of international organizations, international adjudication has flourished. International courts have evolved with developments in international relations, prioritization of adjudication over other forms of international dispute settlement, new legal regimes, and enhanced participation of various actors at the international level.[5] The change has happened fast. Following the establishment of the first permanent international court in 1899, the Permanent Court of Arbitration, few adjudicative institutions existed. This changed rapidly in the last two decades. As of 2020, about 30 international courts were operating and have now established themselves as permanent and active international actors. These courts differ widely with respect to jurisdiction, and parties are as varied as states, international organizations, trade territories, businesses, and individuals. The issues can include boundary disputes, pollution, investments, subsidies to domestic production, immunity of heads of state, legality of nuclear weapons, protection of intellectual property rights, human rights and war crimes. Importantly, the large majority of courts' decisions require implementation and measures at the national level.

The increase in the number of courts is also followed by an increase in the number of cases referred to them. Karen Alter writes that by 2017, international courts had collectively issued over 37,000 judgments, more than 90 percent rendered since the fall of the Berlin Wall.[6] To illustrate, in the century-long history of the Permanent Court of International Justice (PCIJ) and its successor, the International Court of Justice (ICJ), never has the court been as busy, with a record of 20 pending cases at the end of 2020. However, no court is facing as high increase in cases as the human rights courts, the European Court of Human Rights (ECtHR) with 62,000 pending applications at the end of year 2020.

Cross 2006) 353; International Committee of the Red Cross (ed), *Commentary on the Third Geneva Convention: Treatment of Prisoners of War* (Cambridge University Press 2021) 1848.

[5] Anna Spain, 'Integration Matters: Rethinking the Architecture of International Dispute Resolution' (2010) 32 University of Pennsylvania Journal of International Law 1; Cesare Romano, Karen J Alter and Yuval Shany, 'Mapping International Adjudicative Bodies' in Cesare Romano, Karen J Alter and Yuval Shany (eds), *The Oxford handbook of international adjudication* (First edition, Oxford University Press 2014).

[6] Karen J Alter, 'The Multiplication of International Courts and Tribunals After the End of the Cold War' in Cesare Romano, Karen J Alter and Yuval Shany (eds), *The Oxford handbook of international adjudication* (First edition, Oxford University Press 2014) 64.

Similarly, in a short time the nature of cases before international courts have changed dramatically. Today, their decisions reflect the fact that human rights and international criminal law have become dominant areas of public international law. Hence, the individual in international law has become their primary subject. This evolution is reflected in the large number of courts having the sole mandate for enforcing states' human rights obligations and individual criminal responsibility for serious international crimes. The progressive development which has taken place with respect to such enforcement by international courts can be prescribed in three ways: direct access of individuals to regional human rights courts, prosecution of individuals before international criminal courts, and the adoption of the complementarity principle of the International Criminal Court (ICC).

Fast modifications come with growing pains. International law and organization have become frequent targets in public debate and political circles. The critics come from diverse groups. On one hand, international law and organization are being criticized for not doing enough, for failing to uphold rule of law and respond to immediate world crises. On the other hand, they are criticized for doing too much and for having unchecked powers, even leading some national leaders to ignore or denounce international obligations. International courts are not being spared in this fray. Inevitably, such a powerful authority in global governance will cause political commotion.[7] This can be seen by various recent attempts to block the workings of international courts. Some of these attempts make the headlines, such as the African Union charge that the ICC is biased against African states, with Burundi even leaving the Court. Leaders of governments in states renowned for democracy and justice (such as ministers in United Kingdom and Iceland) have publicly called for the nation to re-consider or even to withdraw from the European Convention on Human Rights (ECHR) and the jurisdiction of the ECtHR.[8] Other resistance is conducted quietly behind the scenes, through states' few remaining control mechanisms over these institutions, such as their budget and elections.[9] The Inter-American Court of Human Rights (IACtHR) fights for its day-to-day operation, in face of radical budget cuts. Proceedings of the

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[7] Armin von Bogdandy, Ingo Venzke and Thomas Dunlap, *In Whose Name? A Public Law Theory of International Adjudication* (First edition, Oxford University Press 2014); Karen J Alter, Laurence R Helfer and Mikael Rask Madsen (eds), *International Court Authority* (First edition, Oxford University Press 2018).

[8] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11, 14 and 15, 4 November 1950, ETS 5; Mikael Rask Madsen, Pola Cebulak and Micha Wiebusch, 'Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts' (2018) 14 International Journal of Law in Context 197.

[9] Randall W Stone, *Controlling Institutions: International Organizations and the Global Economy* (Cambridge Univ Press 2011); Thordis Ingadottir, 'The Financing of International Adjudication' in Cesare Romano, Karen J Alter and Yuval Shany (eds), *The Oxford handbook of international adjudication* (First edition, Oxford University Press 2014).

Appellate Body of the World Trade Organization have reached a critical state, with no body member at the end of 2020, due to the USA blockade of new appointments.

Changed environment comes with legal challenges as well. The international legal framework was in large part adopted in a different era of the traditional Westphalian state system, with predominant diplomatic procedures and relatively few defined legal regimes. Now the system is being tested to meet new world of technology and globalization, free movement, integrated and/or inter-dependent geographical territories, new international and transnational legal regimes, and new actors.[10] Often the framework is far from complete or even in-consistent, reflecting some pragmatic fixes along the way rather than adjustments based on systematic or methodological consideration.[11] Interpretation of treaties has become a major discipline, balancing the need to interpret the terms of a treaty in good faith, and in light of the object and purpose of the agreement, but also in light of its current general context.[12] Before international courts, provisions on jurisdiction and remedies are being reread and retested. Is an order of provisional measure by the ICJ regarding a halt of execution of an individual binding on relevant national authorities? Can the European Court of Justice decide that a resolution of the Security Council of the United Nations (UNSC) violates human rights? Does a UN member state, not a party to the ICC, have an obligation to cooperate with the ICC in situations referred to the court from the Security Council? Can a decision of the ECtHR regarding a violation in a single case apply equally to the other 167 pending cases owing to identical situations, or even to 80,000 people in equivalent circumstances?

The national legal framework is equally being tested. Implementation of international obligations has become a major undertaking. In a new era of enforcement by international courts, the spotlight has also been turned to compliance by states. Engagement of national institutions, the executive,

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[10] On the transformation of international law, see for example Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford Univ Press 2009); Terence C Halliday and Gregory C Shaffer, *Transnational Legal Orders* (2015); Tanja E Aalberts and Thomas Gammeltoft-Hansen (eds), *The Changing Practices of International Law* (Cambridge University Press 2018); Patrick Capps and Henrik Palmer Olsen (eds), *Legal Authority beyond the State* (Cambridge University Press 2018); Rebecca Schmidt, *Regulatory Integration across Borders: Public-Private Cooperation in Transnational Regulation* (Cambridge University Press 2020); Nico Krisch (ed), *Entangled Legalities beyond the State* (Cambridge University Press 2022).

[11] On this point, see Robert Kolb, *Theory of International Law* (Hart Publishing 2016) 194–215.

[12] See Article 31 of the Vienna Convention on Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, entered into force 27 January 1980 (VCLT). The 'living instrument doctrine' applied at the ECtHR has received a lot of scholarly attention, as well as political, see European Court of Human Rights, *The "living instrument" doctrine: Background Paper by ECtHR - Judicial Seminar 2020: The Convention as a Living Instrument at 70*. See also ICJ, *Case concerning the Gabčíkovo-Nagymaros Project* (Hungary and Slovakia), Judgment, I.C.J. Reports 1997, p. 7.

domestic courts and parliaments, is often needed. The changed legal environment at the national level, due to practice from legal regimes such as the EU, has surely prepared some states for such an engagement and dialogue. At the same time, it is not always easy. As with the international legal framework, the national legal framework was not designed for this kind of engagement, and neither was its theoretical framework, doctrine nor practice. Far from all countries have national laws on how to treat international law in general or decisions of international courts.[13] Domestic culture also matters. Most practitioners at the national level have limited knowledge about international law, and at least in many civil law countries, have in the last two decades also become less and less accustomed to applying sources other than statutes and regulations. Suddenly, international law is highly relevant at the national level and old theories on the relationship between international and national law are being tested. Frequently the legal reasoning becomes more than a mere technical exercise, as the deep ideological difference between the theories is as relevant today as it was a century ago.[14]

2. Background and objectives

The aim of this study is to examine this fast-developing area of law and explore the relation between international and national law. It will do so by focusing on the two main theoretical foundations for the relationship between international and national law, dualism and monism. These century-old theories have continued to be the dominant scholarly theories on the topic, and importantly, the theories are still being used as a point of reference in practice as well, by legislators, litigators and judges alike. I will analyze the four fundamental concepts of the theories, *sources of law*, *object of law, subjects of law*, and *hierarchy of law*, and explore whether these concepts still hold. That analysis is based on six comprehensive case studies, primarily in the area of international human rights, international humanitarian law, and international criminal law. The study will reveal that the classical notions of dualism and monism are no longer suitable labels for describing the relationship between international and national law.

The thesis is highly timely. It comes at a time when a theoretical understanding is considered most valuable, i.e. in 'a period of dramatic change':

> When the legal order confronts new challenges in a period of dramatic

[13] Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press 2011) 4.

[14] On dualism and other theories in the context of the relation between national and international courts, see Yuval Shany, *Regulating Jurisdictional Relations Between National and International Courts* (Oxford University Press 2007) 78–106.

> change, conventional assumptions may need to be identified, and their intellectual credentials examined. At such a time, the reflective detachment of jurisprudence makes a most vital contribution, as the most fundamental questions concerning law's nature and role must be addressed.[15]

Such a conjuncture may also lead to theory development, as '[c]risis and theory change also go hand in hand'.[16] Indeed, Kuhn's famous argument of the 'crisis science' is well fitting:

> Crisis science, for Kuhn, is a special period when an existing paradigm has lost the ability to inspire and guide scientists, but when no new paradigm has emerged to get the field back on track. The transition to a crisis is almost like a phase transition, like the change of a substance from solid to liquid during melting. For whatever reason, the scientists in a field lose their confidence in the paradigm. As a consequence, the most fundamental issues are back on the table for debate. Amusingly, Kuhn even suggests that during crisis scientists tend to suddenly become interested in philosophy, a field that he sees a quite useless for normal science.[17]

The novelty of the research and its contribution is to revisit and reevaluate the dominant theories of relationship between international and national law. The foundations of the theories of dualism and monism are tested against case studies on recent practice at both at international and national levels. The study illustrates that the challenges being faced in practice, and the impact and practical implications of the theories today are far greater than commonly acknowledged. The contribution is significant in various ways, on both a practical and theoretical level. As to the former, it provides a study that is highly relevant for national and international practitioners, whether they are private litigants, public officials or officials of international organizations. The study systematically reviews foundations of theories which are being referred to within their practice, but commonly in a very generalized, vague and even inaccurate manner. Practice is problematic as it illustrates taken-for-granted perspectives and fails to notice, understand and acknowledge some major contradictions and inapplicability of the old theories to important legal questions at hand. The theoretical importance of the thesis is that it delivers

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[15] Nigel E Simmonds, *Central Issues in Jurisprudence: Justice, Laws, and Rights* (Fifth edition, Sweet & Maxwell/Thomson Reuters 2018) 1–2.

[16] Ian Hacking, 'Introductory Essay' in Thomas S Kuhn, *The structure of scientific revolutions* (Fourth edition, The University of Chicago Press 2012) xxvii.

[17] Peter Godfrey-Smith, *Theory and Reality: An Introduction to the Philosophy of Science* (University of Chicago Press 2003) 82; see discussion on crisis science in Thomas S Kuhn and Ian Hacking, *The Structure of Scientific Revolutions* (Fourth edition, The University of Chicago Press 2012) 66–91.

new scholarly information and arguments that will help people to understand the relationship between international and national law. At the same time, it concludes that application of the theories of dualism and monism are riddled with contradictions as some of their fundamental concepts do not hold.[18] These findings are based on in depth case studies and analysis, going beyond generalizations and reservations now sometimes made about the applicability of the theories.[19]

The thesis also has a wider theoretical relevance. Addressing the main issue, it will also contribute to the ongoing discussion on individuals and international organizations as participants in international law. The novelty of the research and contribution is that it inherently looks at these areas as interlinked area of the study. Importantly, there is still no established normative framework for the individual in international law. General theories on the individual as an object or subject of international law have for long been criticized as not reflecting participation of individuals in international law.[20] The same criticism has been raised with respect to the lack of a normative framework of the legal personality of international organizations in international law, including international courts and the Security Council.[21]

The case studies also contribute to other areas of law. They are valuable contribution to international humanitarian law, international criminal law and human rights law. They contribute as well to the more focused area of workings of international courts, in particular remedies, which is an under-researched area of law, and implementation of the Rome Statute of the International Criminal Court at the national level.[22] Illustrating the significant

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[18] According to Kuhn: "Theories should be accurate in their predictions, consistent, broad in scope, present phenomena in an orderly and coherent way, and be fruitful in suggesting new phenomena or relationships between phenomena", Hacking (n 16) xxxi.

[19] A structure of a scientific theory requires that the hypotheses has a strong empirical support, as '[t]heories, in short, unify, and they do so almost always by going beyond, beneath, and behind the phenomena that empirical regularities report, to identify underlying processes that account for the phenomena we observe', Alexander Rosenberg and Lee C McIntyre, *The Philosophy of Science: A Contemporary Introduction* (Fourth edition, Routledge, Taylor & Francis Group 2020) 106–7.

[20] Rosalyn Higgins, 'Participants in the International Legal System', *Problems and process: international law and how we use it* (Clarendon Press 1994) 48–55; Jan Klabbers, '(I Can´t Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors' in Andrea Bianchi (ed), *Non-state actors and international law* (Ashgate Pub Co 2009); Antônio Augusto Cançado Trindade, *The Access of Individuals to International Justice* (Oxford University Press 2011) 1–16.

[21] Tarcisio Gazzini, 'Personality of International Organizations' in Jan Klabbers (ed), *Research handbook on the law of international organizations* (Edward Elgar 2014); Nigel D White, *The Law of International Organisations* (Third edition, Manchester University Press 2017) 105–120.

[22] Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 3, entered into force 1 July 2002, as last amended 2010 [Rome Statute of the International Criminal Court].

contribution of the case studies on these subjects, several key authorities already cite them in leading publications.[23]

The thesis reflects major developments in this century. It is also no accident that it also covers my professional career in international law. The topic more or less covers what has been my studying, working and personal processing in the last 20 years, whether as a student, an academic researcher or as a government employee. It reflects my own personal journey, having been able to be in the eye of the storm, in very different capacities. In 1999 I started as a young academic at a renowned international university, New York University, in the capital of the United Nations, with the mandate of making the promise of the ICC realizable, along with hundreds of other optimistic and enthusiastic participants at the famous Preparatory Committee meetings of the court. Six years later, I found myself working for one of the smallest governments of the world, Iceland, working on the immense task every national administration is facing, to implement the state's ever enlarging international obligations at the national level. The mandate required participation in state meetings on human rights at international organizations, such as Council of Europe and United Nations, witnessing firsthand the interlinked reality of international law and politics, whether with respect to norm setting or enforcement. Later, as an academic at a small university in Reykjavik, I was back full time in international research groups, and my research this time reflected the changed environment and ever increased interrelation of national and international law. As to research on international courts, the focus had shifted from finding and mapping out the emerging structural components to their multilayered

[23] See for instance following references to the case studies in: Gentian Zyberi, 'The International Court of Justice and Applied Forms of Reparation for International Human Rights and Humanitarian Law Violations' (2011) 7 Utrecht Law Review 204; Annelen Micus, *The Inter-American Human Rights System as a Safeguard for Justice in National Transitions: From Amnesty Laws to Accountability in Argentina, Chile and Peru* (Brill Nijhoff 2015); Jeremy Sarkin, 'The Interrelationship and Interconnectness of Transitional Justice and the Rule of Law in Uganda: Pursuing Justice, Truth, Guarantees of Non-Repetition, Reconciliation and Reparations for Past Crimes and Human Rights Violations' (2015) 7 Hague Journal on the Rule of Law 111; Isabella Risini, *The Inter-State Application under the European Convention on Human Rights: Between Collective Enforcement of Human Rights and International Dispute Settlement* (Brill Nijhoff 2018); Kristin M Haugevik and Ulf Sverdrup, 'Ten Years On: Reassessing the Stoltenberg Report on Nordic Cooperation' (University of Iceland Press 2019); Noam Lubell, Jelena Pejic, Claire Simmons, *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice* (International Committee of the Red Cross (ICRC)/Geneva Academy of International Humanitarian Law and Human Rights 2019); Jacopo Roberti di Sarsina, *Transitional Justice and a State's Response to Mass Atrocity* (Springer Berlin Heidelberg 2019); William E Adjei, 'The Development of Individual Criminal Responsibility Under International Law: Lessons from Nuremberg and Tokyo War Crimes Trials' (2020) 25 Journal of Legal Studies; Florian Jessberger and Gerhard Werle, *Principles of International Criminal Law* (Fourth edition, Oxford University Press 2020); Xiangxin Xu, *Responsibility to Ensure: Sponsoring States' Environmental Legislation for Deep Seabed Mining and China's Practice* (Brill Nijhoff 2021).

function, authority, legitimacy, and impact. As to human rights courts and international criminal courts in particular, the full focus had turned to complementarity and compliance.

The focus of the thesis also combines with my interest in international law. I have always had a great interest in the function of international law. Who are the actors, what is the procedure of things, and are they working? This interest has brought me to research and writings on international organizations, international courts, international criminal justice, human rights, and reparation. And now to this topic on the relationship between international and national law. My work in the last 15 years has brought the focus to the domestic level. For some time, I have been standing with one foot in international law and the other in domestic law and have found the scholarship and practice often do not fully reflect the transformation that both international and national law have undergone. While these fields have in many ways merged, at times they are still seen and treated as separate entities, like different planets circulating in the solar system. Major developments in the field, such as EU law, it is somewhat written off as 'sui generis'. 'International lawyers' are often isolated in their respective field, only engaged with each other and each other views. Huge developments in international law have also kept them busy adapting to new fields of law. 'Domestic lawyers' are similarly isolated in their national practice. Few students chose courses on international law at university, mainly those with an interest in diplomatic careers at the foreign office or exotic work in international organizations. Few had expected that international law would become highly relevant in day-to-day legal work at the national level. Certainly, the universities are making progress, but the reality still remains that of those 50 years old and over, the majority of whom are in the leading legal positions in academia, judiciary and government, and law firms, few of them studied international law, if they ever did, in an entirely different era. The case studies reflect this segregation and at times divergent views. Is international law being undermined, or on the other hand, is sovereignty being threatened? Alternatively, will a dynamic discussion lead to positive developments? I am inclined to believe in the last option.[24]

As to my background, I should also make the following disclosure. I am like the majority of international lawyers described by Andrea Bianchi: I have been educated and trained in doing the law versus thinking about the law.[25] I come from branch of academia which was conservative and positivist (and still is). Furthermore, I come from a legal culture in which theory and practice are

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[24] I fully endorse to the following observation: 'And there seem to be a wisdom in Professor Reisman's approach of review: while recognizing that a challenge to international adjudicative and arbitral decision is perceived as an attack on international law, he also thinks of review as "an integral part of group of dynamics, not an irregular or rare occurrence" and as a result of the structure of the world political context.'; Maarten Bos, *A Methodology of International Law* (North-Holland 1984) 344.

[25] Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (First edition, Oxford University Press 2016) 5–7.

looked at as separate entities, the former considered at most to be a topic of interest for isolated scholarly debate and of little or no practical application. So, I have come a long way. When studying practice and doing the case studies (which I am trained to do) the relationship between theory and practice simply kept surfacing. And for me it concerned more than the rather technical issues of how states implement international law (such as via 'incorporation', 'implementation', etc.), leaving me with questions concerning the core concepts of the theories, their qualifications, and whether their application today stood up to scrutiny. Mindful of Martti Koskenniemi's description of the common pitfall of the 'modern international lawyer', I was dared to adopt a different strategy:

> There is this dilemma. In order to avoid the problems of theory, the lawyer has retreated into doctrine. But doctrine constantly reproduces problems which seem capable of resolution only if one takes a theoretical position.[26]

This focus also gives me an opportunity to pause and reflect that law and practice are influenced by choices. These are often overlooked or even forgotten in the fast-paced environment, with the current legal culture of traditional approach to law, and the positive strict method. This culture has been so well described by Bianchi:

> This attitude goes hand in hand with the denial that there may be hidden structure in the law, or values underlying its rules that may unveil the existence of policy choices and preferences.[27]

This applies to adjudication as well. Reflective of the strict positivism, the impartiality of a judge is commonly described as being 'judge's commitment to the substance of the law as neutral and objective rules whose formal validity guarantees their distance from "politics" whether in the guise of power, interest or ideology'. [28] Inevitably, the work of judges may involve a 'subjective evaluation' of the law.[29] A good example is when judges are deciding on the protection of human rights, as such rights are defined in both treaties and national legislation in terms of great generality.[30] Similarly, determining the

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[26] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005) 3.

[27] Bianchi (n 25) 23.

[28] Martti Koskenniemi, *The Politics of International Law* (Hart 2011) 285.

[29] ibid.

[30] 'When judges come to apply such highly general provisions, are they of necessity thrown back upon questions concerning the general welfare, public policy, and the common good? Or is there some sense in which they could honestly claim to be working out the implications of this or that abstractly stated right?', Simmonds (n 15) 288–9.

relationship between international and national law requires an understanding of different legal orders, often without much legislative guidance.[31] Hence there are hidden choices within practice and normative orientation and the background of practitioners has a great relevance.[32] As Jan Klabbers reminds us, 'judges are human – all too human, perhaps – and that their humanity (or the absence thereof) affects their reasoning and their decisions'.[33]

In the same way, my background also determined the choice of theories to analyze, i.e., self-centered pragmatism. Despite interesting later theories on the relationship between international law and national law, dualism and to some extent monism were simply the ones that were running through my case studies and kept surfacing. That should not come as a surprise. Whether in textbooks on international law or national jurisprudence, the traditional theories of dualism and monism are still presented as the primary ones, hence they inevitably became the source of guidance for daily practitioners. And that is certainly true for the legal tradition that I come from: Iceland, were legislators and judges still refer to dualism without any reservations.

In making the choice of focusing on these two theories, I found solace in Panu Minkkinen's message that 'Before you can break the rules, you have to know what the rules are', i.e., if one wants to break away from tradition, one needs to fully know and understand it. I adamantly share Minkkinen's view, expressed as his response to critics that he had focused too much on nineteenth and early twentieth century German jurisprudence in his thesis:

> But the 'dead German men' are there for a reason. They are present in my work because they represent a tradition that I am trying to break away from. It is the 'baggage' of tradition that even a critic inevitably carries with her. Because to be critical is always to be critical of something, and as long as a given approach maintains a critical relationship with whatever it is a departure from, then the tradition will impose itself on the critical researcher in one way or another.[34]

Finally, I should also underline that the thesis is not 'a critique for its own sake'.[35] I firmly believe that the presentation, reliance and promotion of theories not reflecting reality and needs, at best illustrate indifference, and at worst negatively affects or even blocks realization of agreed norms as well as

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[31] Jan Klabbers, 'Judging Inter-Legality' in Jan Klabbers and Gianluigi Palombella (eds), *The challenge of Inter-Legality* (Cambridge University Press 2019) 346.

[32] Thordis Ingadottir, 'Election of Judges: International Criminal Court (ICC)' [2019] Max Planck Encyclopedias of International Law [MPIL] paras 42–5.

[33] Klabbers, 'Judging Inter-Legality' (n 31) 340.

[34] Panu Minkkinen, 'Critical Legal "method" as Attitude' in Dawn Watkins and Mandy Burton (eds), *Research methods in law* (Second edition, Routledge 2018) 150.

[35] Bianchi (n 25) 141–2.

hampering theoretical evolvement. As so well stated by Ronald Dworkin, '[e]mpirical disagreement about law is hardly mysterious … But theoretical disagreement in law, disagreement about the law's grounds, is more problematic'.[36] One needs to be remindful that a theory is created to address ongoing phenomenon and questions, that theories impact practice and vice versa, and a key feature of a theory is that it is used to justify actions:

> When someone claims to have a philosophy, for her it is a *template* and a *tool*. She uses it to regard, interpret, and react to the world – hoping to understand the world in a special way … Her philosophy is a lens through which she views the world, perhaps explaining to herself what she sees and experiences. Her philosophy can be a *manual* to guide her actions. She might be able to use it, often and widely: no matter what challenges she meets in life, she might hope that her philosophy will supply answers. It can also give her confidence about how best to describe and respond to the world.[37]

When that world has significantly changed and hence altered the theory's foundation and conditions, the theory should be studied in that historical perspective, and presented and valued in that light, rather than being relied on, directly or indirectly, and invoked to address a different situation and different needs.[38] By facing and accepting such a situation, new theories may evolve. As argued by Thomas S. Kuhn, 'science does and must continually strive to bring theory and fact into closer agreement', and it is only in time of crisis that it is likely that 'scientific revolutions' will take place, 'when the first tradition is felt to have gone badly astray'.[39]

3. Methodology

This thesis is a study on the relationship between international and national law that adopts monism and dualism as its conceptual and theoretical framework. In writing the summary of the thesis, I applied theoretical analysis

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[36] Ronald Dworkin, *Law's Empire* (Repr, Hart 2010) 5.

[37] Stephen Cade Hetherington, *What Is Epistemology?* (Polity 2019) 4.

[38] As described by Gilles Deleauze and Félix Guattari: 'The concept is therefore both absolute and relative: it is relative to its own components, to other concepts, to the plane on which it is defined, and to the problems it is supposed to resolve; but it is absolute through the condensation it carries out, the site it occupies on the plane, and the conditions its assigns to the problem'; Gilles Deleuze and Félix Guattari, *What Is Philosophy?* (Columbia University Press 1994) 21.

[39] Kuhn and Hacking (n 17) 80, 86. Ian Hacking summarizes Kuhn's theory on 'the structure of scientific revolutions' as the following: 'normal science with a paradigm and a dedication to solving puzzles; followed by serious anomalies, which lead to a crisis; and finally resolution of the crisis by a new paradigm', Hacking (n 16) xi.

by studying the concepts of theories of dualism and monism, and by critically studying whether the foundations of the theories can still hold in light of practice. The thesis draws from doctrinal and qualitative research methods and involves case studies on practice of international courts and implementation at the national level. Hence, the thesis is a legal study that adopts the conceptual framework that theory and practice are two sides of the same coin.[40] Theories are not isolated academic endeavor, they are meant to address and impact practice.[41]

I found the approach of revisiting the foundations of the theories of dualism and monism: the concepts of sources of law, subjects of law and object of law, to be important for several reasons. The usage of the terms theories of dualism and monism has become very slippery, either referring to theoretical, political, or practical questions (and sometimes, referring to something only known by the user). On top of that, the theories are often being referred to in a generalized, arbitrary or even incorrect way, let alone with consideration of their basic theoretical reasoning. In general, the foundations of the theories have been given little attention. Discussion on the theories is commonly limited on how international law is received at the national level, omitting the theories´ reasoning for their positions of such an application. Often the focus is on the normative and constitutional approaches; the theories on monism and dualism are broadly described as representing two distinct approaches to the reception of international law in the domestic legal orders, one pro-internationalist and the other defending sovereignty of states.[42] My approach was to revisit the theoretical basis of the theories, acknowledging their foundations and allowing deeper research into their qualifications. That focus was also very fitting for the case studies on hand, international courts, the individual between international and national law, and implementation of human rights and international humanitarian law at the national level. Into the bargain, by analyzing the qualifications of these century-old theories, at the same time I was discussing highly relevant issues of law today, sources, subject and object.

As described above, various rationales justify the choice of theories for the theoretical framework of the thesis. From the viewpoint of methodology, the selection fits well the common strategy of applying a dichotomy for an

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[40] Bianchi (n 25) 164–165.

[41] William Twining, *Globalisation and Legal Theory* (Northwestern University Press ed, Northwestern University Press 2001) 54; Anne Peters, 'The Merits of Global Constitutionalism' (2009) 16 Indiana Journal of Global Legal Studies 397, 401.

[42] For a discussion of the theories as constitutional, normative and political theories, see Davíd Thór Björgvinsson, *The Intersection of International Law and Domestic Law: A Theoretical and Practical Analysis* (Edward Elgar Publishing 2015) 26–37; Paul Gragl, *Legal Monism: Law, Philosophy, and Politics* (First edition, Oxford University Press 2018) 99–212.

analysis.[43] Monism and dualism were and still are presented at opposite poles; understood as universalism versus particularism, considered as black and white on the canvas of legal order. States are described as having only two choices, either they are said to follow monism or dualism. Applying this methodology, the thesis will focus on the key components of the theories, as they stand in their purest form, hence enabling an organized analysis of key concept and development.

The context of the theories makes their comparison also convenient. One needs to be careful of the doctrine of 'incommensurability', the possibility that theories are not fully comparable due to different standards and language as they get their meaning from the context they occur.[44] The theories at hand were written at close to the same time and by authors with similar backgrounds. The authors addressed relatively similar situations and challenges, living in the same geographical, cultural and political context.[45] At the same time, there are always limits to what different theories can communicate to each other.[46] Both theories are written in relation to authors´ general theories on law and the state, with larger scope and focus than addressing only the relationship between national and international law. Similarly, the authors are not addressing each other directly. For instance, in his critique on the theory of dualism, Kelsen does so largely without referring to Triepel´s writings.[47]

The approach of analyzing the foundations of monism and dualism acknowledges the historical dimension of law. The theories of monism and dualism were created by philosophers of a different era of law and problems. The theory of today requires such a history as it gives an understanding of how today's challenges are related to the challenges of the past and how we can understand them better.[48] Hence, a historical view of international legal ideas and the problems they were designed to answer may provide new perspectives

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[43] For an excellent account of the meaning, value and limits of using a dichotomy to read theories on international order, see Armin von Bogdandy and Sergio Dellavalle, 'Universalism and Particularism: A Dichotomy to Read Theories on International Order' in Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit (eds), *System, order, and international law: the early history of international legal thought from Machiavelli to Hegel* (First edition, Oxford University Press 2017).

[44] Hacking (n 16) xxx–xxxiii; on the concept of 'incommensurability' in theory of science, see Godfrey-Smith (n 17) 91–6, 236.

[45] There is a broad agreement that both legal and non-legal context are import factors in comparative law, Gerhard Dannemann, 'Comparative Law: Study of Similarities or Differences?' in Reinhard Zimmermann and Mathias Reimann (eds), *The Oxford handbook of comparative law* (Oxford University Press 2006) 417–8.

[46] Kuhn and Hacking (n 17) xxxi.

[47] For instance in his book on General Theory of Law & State, Kelsen does not once cite writings of Triepel, but writings of Dionisio Anzilotti and Oppenheim, Hans Kelsen, *General Theory of Law & State* (Transaction Publishers 2006).

[48] Richard Rorty, 'Philosophy in America Today' (1982) 51 The American Scholar 183, 189.

on the current situation. Benjamin Straumann even writes that by adopting a deep historical view: '[n]o longer the slaves of some defunct political or legal theorists, international lawyers and international legal thinkers are now in a position to make up their own minds'.[49] And one needs be mindful of how theories come about. Fernando Savater writes that theories do not come from nowhere or because of lack of interpretations, rather they are made to search for knowledge, challenge deep-rooted vocabulary and free one from forced entrenched clarifications.[50] Theories of the past as well as today must be understood in that context.

This thesis has been built on articles rather than being a monograph. Each article is independent of the other and the reader can opt to read any number of them. That format allowed me to work on each article and relevant case study more independently than otherwise. In that manner the work also benefitted from being done as part of my contribution to several research projects as well as work done for the government. In that way I was able to present findings and test arguments along the way in various forums, which I believe the studies have benefitted from immensely.

The final thesis on revisiting and reevaluating the key concepts of the theories of dualism and monism developed along with the empirical research project. At the time of conducting the case studies, the focus was on the individual in international law, international courts and enforcement of international law at the national level. Only as the case studies progressed was the decision taken to analyze them in light of monism and dualism. My approach fits a methodology common in empirical research, that the influence of existing theories should be minimal when starting a data collection, and that a researcher should:

> go into the field with hypothesis or 'foreshadowed problems', but caution these have to be responsive to what the researchers finds; hypothesis and theories may be completely revisited in the face of more interesting or conflicting data which runs counter to the researchers´ expectations.[51]

The reader should also bear in mind that the thesis is built on a study on the practice of a certain area of law and certain actors. Therefore, the study can

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[49] Benjamin Straumann, 'Series Editors' Preface' in Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit (eds), *System, order, and international law: the early history of international legal thought from Machiavelli to Hegel* (First edition, Oxford University Press 2017) viii.

[50] Fernando Svater, 'Mia idea para filosofia' in Róbert Jack and Karl Jaspers (eds), Haukur Ástvaldsson (tr), *Hvað er heimspeki? tíu greinar frá tuttgustu öld [What is philosophy? Ten articles from the twentieth-century]* (Hugvísindastofnun Háskóla Íslands 2001) 44.

[51] Mandy Burton, 'Doing Empirical Research: Exploring the Decision-Making of Magistrates and Juries' in Dawn Watkins and Mandy Burton (eds), *Research methods in law* (Second edition, Routledge 2018) 69.

only be seen as one piece of the puzzle with respect to the many issues arising with respect to how international and national law relate to each other. At the core of the study are in-depth analyses on practice with respect to three international courts, the ICJ, ECtHR and the ICC. The choice provides a strong basis for the thesis as the courts represent different types of international courts and authority. The ICJ is a principal organ of the United Nations, deciding on inter-state disputes and each case is dependent and constrained by different jurisdictional requirements. The ECtHR has a great jurisdictional advantage, being the exclusive authority at the international level to decide on the ECHR and endowed with compulsory jurisdiction over all member states of Council of Europe, and open jurisdiction to individuals making claims against the same states. The ICC is an independent international organization, a treaty-based body established by its member states for the sole purpose of creating an international authority to investigate, prosecute and sentence individuals for serious crimes. The institutional and jurisdictional differences of these courts give the study valuable material to explore. Inevitable the different nature of these courts may raise different problems with respect to enforcement and relations between international and national law. However, by studying enforcement by different courts at the national level brings out commonalities and differences, otherwise often missed in studies following 'disciplines' of law. Enforcement by different international courts tests the relationship between international and national law and because of the doctrine of obligatory compliance with decisions of international courts, states are prompt to respond in a decisive way, enabling systematic study of that practice.

The areas of law under focus are international human rights, international humanitarian law, and international criminal law. The scope of the case studies sharpens the analysis as it relates to well established fields of norms and enforcement. As to the former, the ensemble is concerned with harmonized norms common to both national and international law, human rights and individual criminal responsibility for serious crimes. As to the latter, it relates well to codified areas of international law, with explicit provisions regarding obligations of states to implement relevant rights and obligations at the national level, consent to jurisdiction of international courts, binding effect of their decisions, as well as consent to international enforcement mechanism of such decisions. Hence the case studies focus on areas of law with well-established and accepted norm setting, adjudication and enforcement mechanisms.[52] This is a scenario with close kinship between international and national law and given the consensus on norms and enforcement, one assumes a happy marriage.

[52] In a way, areas which could be considered to be regimes or even 'quasi-constitutional structures', whether from the point of view of institutions or power of norms. On ideas of quasi-constitutional structures and structuring power of norms within theories of constitutionalism, see Bianchi (n 25) 48–50.

At the same time, the focus on human rights and international criminal responsibility provides an interesting contrast for the thesis. The substantive provisions of relevant treaties could not have been written more differently, and as a result, they entail different sources of judicial discretion and authority. While the definitions of human rights in treaties are very general, the provisions of crimes in the Rome Statute of the International Criminal Court are extremely detailed. For example, ECHR contains general provisions on rights, largely adopting similar provisions from the UN Universal Declaration of Human Rights.[53] Neither organization adopted a commentary on the provisions. This is echoed at the national level as well.[54] In contrast, the Rome Statute of the International Criminal Court has very detailed definitions on crimes and the commentary on those provisions, Element of Crimes, which was subject to lengthy negotiations among states parties, 'shall be consistent with [the] Statute', and 'assist the Court in the interpretation and application' of relevant articles, cf. Article 9 of the Rome Statute.[55]

Few words need to be said about the choice of national jurisdictions. First of all, there is a big focus on the Nordic countries in one of the case studies. That choice is simply because of access to sources and the background of the researcher. Such a case study was also timely, as the countries were undergoing a major change in their domestic legislation and in that process many fundamental questions of the relationship between international and national law was brought to the surface and had to be dealt with publicly. I believe that the research is therefore a valuable contribution to the thesis. In addition, the case study on the practice of the Nordic countries can be seen as recent practice from countries with a strong public profile as supporters of international human rights and international criminal justice.[56] These

[53] Universal Declaration of Human Rights (10 Dec. 1948), U.N.G.A. Res. 217 A (III) (1948).

[54] For instance, when the ECHR was made national legislation in Iceland 1994, there was no commentary on what the relevant rights entailed. Similarly, when the Icelandic constitution was amended in 1995 to include a human rights chapter, which provisions were based on the ECHR and UN human rights conventions, there was no commentary or description of the adopted rights.

[55] International Criminal Court, Elements of Crimes, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B; International Criminal Court, ICC-PIDS-LT-03-002/11_Eng (last amended 2010).

[56] Hanne Hagtvedt Vik and others, 'Histories of Human Rights in the Nordic Countries' (2018) 36 Nordic Journal of Human Rights 189; Thordis Ingadottir, 'The Implementation of the Rome Statute of the International Criminal Court in the Nordic Countries: A New Comprehensive Criminalization of Serious Crimes' in Astrid Kjeldgaard-Pedersen and Københavns universitet (eds), *Nordic approaches to international law* (Brill Nijhoff 2018). Recently the Nordic states have included human rights in their foreign policy priorities. For example, Iceland was a member of the UN Human Rights Council 2018-9, and Denmark 2020-2.

countries are small states.[57] They have civil law systems, come from Scandinavian Legal realism, and still adhere to positivism with emphasis on statutory law as the main legal source.[58] The Nordic states are commonly described as following the principle of dualism.[59] At the same time, like some other states, these countries are finding themselves at a constitutional crossroads, for a range of factors, including close encounters with regional legal regimes, in this case the European Union (Denmark, Finland and Sweden) and European Economic Agreement (Iceland and Norway).[60] In the last few years, there has been an increased interest in the 'Nordic approach to international law'.[61]

One of the case studies explores practice in Iceland. Like the study of the Nordic countries, due to my educational and legal background, practical and qualitative reasons explain this choice. In addition, just as Iceland is considered to be the world's greatest genetic laboratory, a similar claim can be made about our research at hand. The tiny population of the country (350,000), the governance of a small state, and easily accessible and identifiable practice makes it an excellent subject for observation and analysis.[62] Also to the benefit of the study, the government has a strong foreign

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[57] Small states are considered a category in international relations, argued as profitable for study due to various reasons, Iver B Neumann and Sieglinde Gstöhl, 'Introduction: Lilliputians in Gulliver´s World?' in Christine Ingebritsen (ed), *Small states in international relations* (University of Washington Press ; University of Iceland Press 2006) 16–23; Wouter P Veenendaal and Jack Corbett, 'Why Small States Offer Important Answers to Large Questions' (2015) 48 Comparative Political Studies.

[58] Johan Strang, 'Scandinavian Legal Realism and Human Rights: Axel Hägerström, Alf Ross and the Persistent Attack on Natural Law' (2018) 36 Nordic Journal of Human Rights 202. On Nordic law and legal tradition, see Jaakko Husa, Kimmo Nuotio and Heikki Pihlajamaki, 'Nordic Law - Between Tradition and Dynamism' (2008) Working Paper Series *Tilburg Institute of Comparative and Transnatinal law*; Pia Letto-Vanamo and Ditlev Tamm, 'Cooperation in the Field of Law' in Johan Strang (ed), *Nordic cooperation: a European region in transition* (Routledge 2016).

[59] Björgvinsson (n 42) 48–52.

[60] Joakim Nergelius, 'The Nordic States and Continental Europe: A Two-Fold Story', *Nordic and other European constitutional traditions* (Martinus Nijhoff 2006).

[61] Jan Klabbers, 'Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties' 69 Nordic Journal of International Law; Thomas Elholm and Birgit Feldtmann (eds), *Criminal Jurisdiction: A Nordic Perspective* (1. edition, DJØF Publishing 2014); Astrid Kjeldgaard-Pedersen and Københavns universitet (eds), *Nordic Approaches to International Law* (Brill/Nijhoff 2018); Anthea Roberts and others (eds), *Comparative International Law* (Oxford University Press 2018); Lydia Lundstedt and Stockholms Universitet (eds), *Investigation and Prosecution in Scandinavia of International Crimes* (Stockholm Institute for Scandinavian Law 2020); Hanne Hagtvedt Vik and others, *Nordic Histories of Human Rights* (Routledge 2021). See also the project *UiO:Nordic*, a large research project which seeks to promote new knowledge about the Nordic countries in an international context.

[62] On the legal and political system in Iceland, see Thordis Ingadottir and Rán Tryggvadottir, 'Researching Icelandic Law', [2010] GlobaLex, New York University School of Law.

and domestic policy on human rights and justice. At the same time, practitioners hold homogeneous views on the relations between international and national law, i.e., the country is 'adhering to the theory of dualism'. Due to this firm position the actual practice becomes very interesting to observe. In addition to this quality of the sample, the case study has additional value. First, the case study is based on my in-depth analysis of remedies awarded by the ECtHR in general (Article 41) and the binding nature of its decisions (Article 46). Hence, the case study on Iceland was undertaken in that larger context, giving the study a qualitative value. Secondly, the study brings to the surface the mechanism initiated at the national level following a judgment by the ECtHR, all the nuts and bolts of such enforcement, including the engagement and role of various players at the national level, the different legal issues involved, and the political forces that come to play out in such enforcement. This analysis is only made possible due to an in-depth study of primary and secondary sources. By focusing on Iceland, I can allow myself to study enforcement of all the decisions of the ECtHR relating to one jurisdiction and relating to various types of measures. The study also relates to a long period of time, the enforcement taking place in several legal frameworks of ECHR at both the international and the national level, with different political and legal actors and priorities. Altogether, due to the richness in the detail, the study provides a meaningful analysis for the thesis.

During the work on the thesis, I used different methods for different parts. The main methodology applied in the case studies was traditional doctrinal research, also commonly described as dogmatic methodology research. The research method is well established in law, even described as the 'mother's milk to academic lawyers'[63] and as the 'default method among scholars of international law'.[64] Moreover, some scholar consider the research method a prerequisite for any other analysis of law, such as comparative law

[63] Christopher McCrudden, 'Legal Research and the Social Sciences', Law Quarterly Review 122 (2006), 632, at 634, cited by Jan M Smits, 'What Is Legal Doctrine? On The Aims and Methods of Legal-Dogmatic Research' in Rob van Gestel, Hans-W Micklitz and Edward L Rubin (eds), *Rethinking legal scholarship: a transatlantic dialogue* (Cambridge University Press 2017) 208.

[64] Jörg Kammerhofer, 'International Legal Positivist Research Methods' in Rossana Deplano and Nikolaos K Tsagourias (eds), *Research methods in international law: a handbook* (Edward Elgar Publishing Limited 2021) 97. Kammerhofer considers this more due to culture of orthodoxy and legal socialization rather than of conscious choice. Applying Kelsen´s Pure Theory of Law, he proposes a 'New Doctrinal Scholarship' employing two methods and supporting the third: '(1) Legal scholarship is primarily an analysis of the macro- and micro-structures of its chosen legal order; (2) interpretation is re-cast as frame-determination of possible meanings; (3) it can help establish 'writings for practitioner use". He argues that an orthodox scholarship and practice expect one answer from doctrinal interpretation, which 'creates an almost irresistible pull to engage in effort at (interstitial and subconscious) law-making. New Doctrinal Scholarship, in contrast, must resist this pull; it will be less specific, but this disadvantage is outweighed by a greater scholarly precision in cognition: it will be able to say something meaningful about the law beyond apology or utopia'; ibid 106–8.

and theoretical analysis.[65] The objective of the method is to analyze and describe valid law through identification, systemization, and interpretation.[66] Jan M Smits describes the method as the following:

> It is probably best described as research that aims to give a systematic exposition of the principles, rules and concepts governing a particular legal field or institution and analyses the relationship between these principles, rules and concepts with a view to solving unclarities and gaps in the existing law.[67]

In most of the case studies I used qualitative approaches to empirical legal research. Qualitative approaches to empirical legal research require direct observation, interviews and reviews of various documents.[68] It was valuable for some of the case studies at the national level, with respect to Iceland and the Nordic countries, that I was able to analyze original documents and build the study on firsthand materials, i.e., national legislation, the draft legislative bills in each country (with commentaries), and national courts' decisions. This gave the case studies authentic and rich context. As to the qualitative approach, the research also benefitted from my 'insider participation' in some of the undertakings. I was the author of the draft of the Icelandic legislation implementing the Rome Statute of the International Criminal Court and the Geneva Conventions of 1949 and protocols from 1977. That task required direct observation and consultations with a range of stakeholders, including ministries, parliament, NGOs and the International Committee of the Red Cross. The work also benefitted from that I had participated in all the meetings of the Preparatory Committee of the International Criminal Court (1999-2003). Furthermore, as a former legal official at the Icelandic Ministry of Justice, I was at that time (prior to the case studies) working on compliance and implementation of the decisions of the ECtHR with respect to Iceland. During the period 2013-2019 I was a member of the Icelandic Committee on Reopening Cases, and in that capacity, I decided on applications regarding

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[65] Smits (n 63) 209; Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research methods in law* (Second edition, Routledge 2018) 10.

[66] Terry Hutchinson and Nigel J Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83, 110–2; Ian Dobinson and Francis Johns, 'Legal Research as Qualitative Research' in Michael McConville and Wing Hong Chui (eds), *Research methods for law* (Second edition, Edinburgh University Press 2017) 21; Hutchinson (n 65) 13–6. On criticism that the dogmatic methodology can give an answer to "what the law is", see Andreas Bloch Ehlers and Kristian Cedervall Lauta, 'Juridisk metode og retskilder: Findes "gældende ret"?' in Mikkel Jarle Christensen and others (eds), *De juridiske metoder: ti bud* (Hans Reitzel 2021).

[67] Smits (n 63) 210.

[68] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford handbook of empirical legal research* (Reprint, Oxford University Press 2013) 927-9.

requests for reopening cases based on findings by the ECtHR. Finally, I served for eight years on the Judicial Council of Iceland (2009-2017), an administrative body responsible for the governance and joint administration of all district courts in Iceland. The work entailed hands on experience and deliberation of key issues of any judiciary: judicial independence, legitimacy, efficiency, and public trust.

The focus of the research and the research questions required me to abandon the more traditional focus and structure by the 'disciplines' or 'branches' of international law. The thesis takes place between various fields of international law, such as state responsibility, international organizations, subjects of international law, human rights, international criminal law, and of course the field of relationship between international and national law. The method can best be described by applying by analogy the description by Paul Roberts of interdisciplinary in legal research:

> Interdisciplinary research, then, involves two or more 'disciplines' working together in a beneficial way. Notice that the disciplines themselves are not necessarily the intended or actual beneficiaries. We should take the hint by stipulating that our primary focus and concern will be whether, and how, the researcher benefits from inter-disciplinarity, whether or not the disciplines themselves are improved or even affected by their mutual engagement.[69]

There is also more to it than that. As practice operates today, and as described above, former defined disciplines or divisions of law are harder to keep. I can fully endorse calls to researchers to transcend such distinctions and not to allow disciplinary taxonomies to hamper or stand in the way of the needs of the study at hand.[70] The study of the International Law Commission on *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* illustrates the challenges caused from various classifications of international law.[71] As a response to the increase in specialized rules and rule-systems and emergence of various regimes of international law, the authors highlight the Vienna Convention on Law of Treaties 'principle of systematic integration', found in article 31(3)(c) of the convention:

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[69] Paul Roberts, 'Interdisciplinarity in Legal Research' in Michael McConville and Wing Hong Chui (eds), *Research methods for law* (Second edition, Edinburgh University Press 2017) 92.

[70] Eric C Ip, 'Globalization and the Future of the Law of the Sovereign State' 8 International Journal of Constitutional Law 636.

[71] *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, finalized by Martti Koskenniemi, The Erik Castrén Institute Research Reports 21/2007, para 410-480.

> Without the principle of "systemic integration" it would be impossible to give expression to and to keep alive, any sense of the common good of humankind, not reducible to the good of any particular institution or "regime".[72]

The thesis is built on theory of positive law, as a primary legal theory of both national and international law today.[73] Such an approach also fits the theories which are subject of my study, which are products of positivist scholars.[74] At the same time, in light of the focus of the thesis, one should be aware of the reservation that needs to be made. I have described the transformed international law system today, transcending boundaries and subjects. At the same time the authority and dominance of legal positivism is described as '[growing] apace with the rise and crystallization of the Westphalian state system and the dominance of territorially large, multicultural states'.[75] Furthermore, in a study with a large focus on human rights and international criminal law, other theories of laws are of relevance and need to be acknowledged. Some argue that '[n]atural law has a peculiar way of being everywhere and nowhere in the body of international law today'.[76] The statement fits well humanitarian law and human rights law. Natural law is the primary underpinning of these areas of law, based on humanitarian concern and moral authority rather than state interest. This background is well reflected in the some of the treaties studied in the case studies. The preambles of the 1899 and 1907 Hague Conventions stipulate that:

> ... the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the

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[72] ibid para 480.

[73] Stephen Hall, 'Researching International Law' in Michael McConville and Wing Hong Chui (eds), *Research methods for law* (Second edition, Edinburgh University Press 2017).

[74] Some other key followers followed natural law, such as the monism Hersch Lauterpacht. He harshly criticized the positivist doctrine: 'Even if it had not been proven that the theoretical implications of the positivist teaching are a postulate not realized in the writings of the positivists themselves, and even if the positivist doctrine in international law had not been shown to be inconsistent with the practice of States which it professes to follow, its ultimate conclusion in the field of the actual application of international law through the instrumentality of judicial settlement would in themselves signify its futility as a legal theory'; Hersch Lauterpacht, *The Function of Law in the International Community* (1st pbk. ed, Oxford University Press 2011) 73.

[75] Carrie-Ann Biondi, 'The Legacy of Ancient and Medieval Legal Thought for Modern Legal Philosophy' in Fred D Miller, Mahesh Ananth and Enrico Pattaro (eds), *A history of the philosophy of law from the ancient Greeks to the scholastics* (Second edition, Springer 2015) 377.

[76] Geoff Gordon, 'Natural Law in International Legal Theory: Linear and Dialectical Presentation' in Anne Orford, Florian Hoffmann and Martin Clark (eds), *The Oxford handbook of the theory of international law* (First edition, Oxford University Press 2016) 280.

> usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.[77]

And one hundred years later these words are echoed in the opening paragraphs of the preamble of the Rome Statute of the International Criminal Court:

> *Conscious* that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,
>
> *Mindful* that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.

Hence, natural law is the underpinning of major human rights and humanitarian law today. International criminal tribunals today are even described by some as using in partly a naturalist thinking, cloaked in positivist arguments. The harsh criticism of sources of law applied at the Nuremberg Trial is well documented, being criticized of having failed to apply the legal principle of *nullum crimen, nulla poena sine praevia lege poenali*. The trial of Eichmann in Jerusalem was subject to same objection, although met with fierce counter arguments from philosophers such as Hanna Arendt, writing that 'if a crime unknown before, such as genocide, suddenly makes its appearance, justice itself demands a judgment according to a new law'.[78] Similar debate is taking place today with respect to state immunities for serious crimes. In his dissenting opinion in *Jurisdictional Immunities of the State*, Judge Cançado Trindade criticized the methodology applied by the majority in the following words:

> In order to try to justify the upholding of State immunity even in the circumstances of the cas d'espèce, the Court's majority pursues an empirical factual exercise of identifying the incongruous case law of national courts and the inconsistent practice of national legislations on the subject-matter at issue. This exercise is characteristic of the methodology of legal positivism, over-attentive to facts and oblivious of values. … Such positivist exercises are leading to the fossilization of international law, and disclosing its persistent underdevelopment,

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[77] Hague Convention (II) With Respect to the Laws and Customs of War on Land and its Annex: Regulation concerning the Laws and Customs of War on Land, 29 July 1899, Reprinted in 1 AJIL 129 (1907); International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, Reprinted in 2 AJIL 90 (1908).

[78] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books 2006) 254.

> rather than its progressive development, as one would expect. … Words, words, words . . . Where are the values?[79]

Finally, as already revealed, I have worked on human rights and so-called international criminal justice for some time. I come from that background and I believe that law is an important instrument in realizing such goals, although far from the only one, and far from perfect. Inevitably this background will influence my approach and analyses. At the same time, I am fully aware of the critique that human rights, international humanitarian law and international courts are facing, some I find justified and some not, whether with respect to selectivity, legitimacy and effectiveness.[80] I hope the thesis, with its scholarly engagement, will be a constructive contribution to that debate.

4. Articles

Six articles and book chapters were written for the thesis. They look at enforcement of international law before international courts and its effect on the relationship between international and national law. All articles relate to very recent practice, at both the international and national levels.

The first article I wrote for the thesis is *The ICJ Armed Activity Case - Reflections on States' Obligation to Investigate and Prosecute Individuals for Serious Human Rights Violations and Grave Breaches of the Geneva Conventions*.[81] The article was written in 2009 and I was starting my journey on studying in what way international courts were used to enforce states' international obligation to investigate and prosecute individuals for serious international crimes at the national level. At the time, all the focus was on the role of the international criminal courts in this respect, in particular the role of the ICC via its complementarity jurisdiction. Given my earlier research and writings on international criminal justice and reparations in international law, I thought it pertinent to explore first the practice of the ICJ with respect to this enforcement at the national level – how the issue was dealt with in traditional

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[79] *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, p. 99, Dissenting Opinion of Judge Cançado Trindade, para 293-4.

[80] Examples of critique being: Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap Press of Harvard University Press 2012); Eric A Posner, *The Twilight of Human Rights Law* (Oxford University Press 2014); Christine Schwöbel-Patel (ed), *Critical Approaches to International Criminal Law: An Introduction* (Routledge 2014); While more optimistic voices being: Beth A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009); Kathryn Sikkink, *Evidence for Hope: Making Human Rights Work in the 21st Century* (Princeton University Press 2017).

[81] Thordis Ingadottir, 'The ICJ Armed Activity Case – Reflections on States' Obligation to Investigate and Prosecute Individuals for Serious Human Rights Violations and Grave Breaches of the Geneva Conventions' (2009) 78 Nordic Journal of International Law 581.

inter-state setting, rather than in the later forums of international criminal courts. The obligation to investigate and prosecute individual for serious crimes had been established in international law for decades, either as a primary obligation or as a secondary one in form of reparations. All along ICJ had jurisdiction to adjudicate such obligation. Such as study was also pertinent, as while plenty had been written on the contributions of the ICJ to international humanitarian law in general and state responsibility, no attention had been paid to this particular issue in the workings of the Court.

The case at hand, the *Armed Activity Case*, was the perfect object of study for this purpose.[82] The case regarded horrific crimes committed in the reckless war in the Democratic Republic of Congo, crimes which are the primary examples of when states have an obligation to investigate and prosecute those individuals responsible. In the case, the ICJ was relieved of its common jurisdictional straightjacket as to sources of law, and was in the rare position to have jurisdiction to apply numerous treaties and customs to the case at hand. The Court found that in the Democratic Republic of Congo the Uganda's troops committed, among other offences, grave breaches of international humanitarian law, as well as serious human rights violations. So, given the nature of the crimes in the case and states obligation to investigate and prosecute such crimes, how did the case deal with such enforcement at the national level?

In the article, I addressed the issue in two ways. Firstly, I examined it with respect to the state's obligation to prosecute individuals as a secondary obligation, i.e., inherent in a state's obligation to make reparations for an international wrongful act. Secondly, I explored it with respect to a state's obligation to prosecute individuals as a primary obligation, undertaken in the Geneva Conventions and human rights treaties. The article concludes that despite the clear obligation of a state to enforce individual criminal responsibility for the acts at hand in the *Armed Activity Case*, and the rare occurrence of having a case of this nature reaching the jurisdiction of the ICJ, the opportunity to address it and enforce it was largely missed. And it was not to the fault of the jurisdiction of the Court or international law on the subject, it was due to the choice of the parties in the case and their pleadings. A claim of obligation to prosecute was included in the original pleadings but dropped at the end of the proceedings, much to the dismay of some of judges, as voiced in one of the separate opinions, and inevitably to the frustration of the researcher, who was eager to see the issue dealt with by the Court.

This came as a surprise to me. As analyzed in the article, the obligation to investigate and prosecute serious crimes was well established in international law, both as a primary and secondary obligation, and in a case dealing with such heinous crimes, at times when a fight against impunity was at the top of the agenda of states and the international community, this was left out. I was

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[82] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* Judgment, I.C.J. Reports 2005, p. 168.

eager to explore the issue further and did that in a comprehensive study on *The Role of the International Court of Justice in Enforcement of the Obligation of States to Investigate and Prosecute Serious Crimes at the National Level*.[83] In the article the jurisprudence of the Court was analyzed with respect to three matters: states' obligation to investigate and prosecute serious crimes at the national level; national criminal jurisdiction with respect to prosecution of serious crimes, as well as immunities from that jurisdiction; and states' obligation to co-operate in criminal matters with other jurisdictions. The study of the case law of the Court illustrates that the Court has adjudicated some key issues relating to national prosecutions. Some of the Court's findings have without doubt enhanced the enforcement of prosecution at the national level, such as the judgement of the Court in *Questions Relating to the Obligation to Prosecute or Extradite*, while others have not, like the judgements in *Arrest Warrant of 11 April 2000* and *Jurisdictional Immunities of the State*.[84] At the same time, the cases demonstrate a great reluctance by states to use the ICJ as a channel to enforce the obligations of states to prosecute at the national level. This is evident in their submissions, which hardly ever include the duty of a state to prosecute, even as a primary obligation, much less than as a secondary obligation as a form of reparation. This practice is surprising given the nature of these cases, the clear international obligation undertaken by states to prosecute, and the undisputed obligation of states to give satisfaction for the injury caused, which includes penal action against the individuals whose conduct caused the internationally wrongful act. This is also in great contrast with the great emphasis states give to the issue of prosecutions of individuals for serious international crimes in other international forums, such as regarding establishment of international criminal courts, as well as the large doctrinal work on remedies in recent years, both with respect to Draft Articles on State Responsibility as well as Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[85] States simply did not want this role of an enforcer of international law at the national level in inter-state proceedings. I also concluded that states have lately shown more interest in

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[83] Thordis Ingadottir, 'The Role of the International Court of Justice in the Enforcement of the Obligation of States to Investigate and Prosecute Serious Crimes at the National Level' (2014) 47 Israel Law Review 285.

[84] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, p. 99; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422.

[85] Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc A/RES/60/147 (2005).

using the Court as an avenue for enforcement of specific actions at the national level. At the same time the Court has proved more willing to utilize its powers for such implementation, while its selectivity in relying on the established doctrine of 'full reparations', as the Court famously set out in *Factory at Chorzów*, and other principles of state responsibility remains.[86] In this traditional inter-state area of firmly established substantive law and enforcement obligations, the case study illustrated reality of political policy choices and sovereignty considerations.

I continued exploring the role of international courts in enforcement of individual criminal responsibility in international law in *The Implementation of the Rome Statute of the International Criminal Court in the Nordic Countries: A New Approach to Criminalization of International Crimes.*[87] It is commonly stated that the complementarity principle of the ICC has had a major impact on domestic legislation with respect to criminalization of serious international crimes and hence making states better equipped to investigate and prosecute such crimes. In the study I went beyond these general statements and explored the legislation in the Nordic Countries. In the last few years, most of them have implemented major new domestic legislation on genocide, crimes against humanity, and war crimes: Norway and Finland in 2008, Sweden in 2014 and Iceland at the end of 2018. The study reveals that although the countries had ratified most treaties on international humanitarian law decades ago, including the Geneva conventions of 1949 and 1977, the implementation of those treaties was fragile, in some cases none. Hence, major implementation took place with the new legislation. As explained in the preparatory documents of the domestic legislation, indeed, the Rome Statute of the International Criminal Court was a major catalyst for this undertaking. The states were eager to qualify for the complementary jurisdiction of the ICC, i.e., that their legislation was updated and hence they were considered to be able to prosecute those crimes themselves. The decisions of the Appeals Chamber of ICTR in *The Prosecutor v. Michel Bagaragaza*, was also relevant. The Court found the legislation in Norway did not qualify for having cases sent from the tribunal.[88] The study of the new Nordic legislation illustrates the multilayered relationship between international and national law. For states to be able to investigate and prosecute serious international crimes at the national level, the domestic legislation needs to be equipped to do that. The study of the Nordic legislation

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[86] *Factory at Chórzow*, Judgment by the Permanent Court of International Justice on 26 July 1926 in Case No. 8, Jurisdiction, 1927, P.C.I.J., Series A, no 17, p. 29.

[87] Ingadottir, 'The Implementation of the Rome Statute of the International Criminal Court in the Nordic Countries: A New Comprehensive Criminalization of Serious Crimes' (n 56).

[88] International Criminal Tribunal for Rwanda, The Appeal Chamber, *The Prosecutor v. Michel Bagaragaza*, Case No. ictr-2005-86-PT, Decision on Rule 11bis Appeal of 30 August 2006. The ICTR assessment was made against rule 11bis of the Court's Rules of Procedure and Evidence, which regarded transfer of proceedings from the Court to national criminal jurisdiction.

reveals how different approaches can be taken, even among countries that share a common legal structure and traditions. What happened with the new Nordic legislation is that the body of the national law became much more detailed and implemented international crimes and terminology into national law. In some of the countries, the national legislation is given more weight, relying less on open references to international law. Some of the Nordic counties adopted a progressive approach to the criminalization of international humanitarian law, while others adhered to traditional law. The new Nordic legislation reflects a divergent position on the effect of international law at the national level. This is reflected in their choices of entry into force of the new legislation, retroactive applicability, the jurisdiction of their domestic courts, and statute of limitation. While facing competing principles at the national and international level, some of the choices made reflect a firm position on applicability of international law at the national level.

As to the question of the role of international courts with respect to the enforcement of human rights at the national level, I did two country specific studies, both with respect to Iceland. The earlier one is *Compliance with decisions of the European Court of Human Rights and the views of the Human Committee in Iceland* and the second one was *Just satisfaction and the binding force of judgments: Article 41 and 46 of the European Convention on Human Rights*.[89] Enforcement of decisions of human rights tribunals give rise to several issues. In particular, the unique standing of the individual before these bodies calls into play the relationship between national and international law. In particular, this relationship is put to a test following a decision by a human rights court finding a violation by a state. While decisions of international human rights bodies cannot quash national legislation or annul a decision taken by national authorities, inevitably, compliance may require such measures at the national level. In this context, the article explores Iceland's compliance with decisions of the ECtHR and the United Nations Human Rights Committee. In the later study on Article 41 and 46 of the ECHR, I explored in detail the types of remedy the ECtHR has awarded and how findings of the Court have developed greatly in this respect. Just satisfaction awarded by the Court often tests the relationship between national and international law, because for the complainant to receive *restitutio in integrum*, general and or specific measures at the national level are often needed. The nature of remedies and the binding force of the decisions of the Court also test compliance by states and access of individuals to enforce

[89] Gudrun Gauksdottir and Thordis Ingadottir, 'Compliance with the Views of the UN Human Rights Committee and the Judgments of the European Court of Human Rights in Iceland' in Asbjørn Eide and others (eds), *Making peoples heard: essays on human rights in honour of Gudmundur Alfredsson* (Martinus Njhoff 2011); Thordis Ingadottir, 'Just Satisfaction and the Binding Force of Judgments: Article 41 and 46 of the European Convention on Human Rights' in Björg Thorarensen (ed), *Mannréttindasáttmáli Evrópu: meginreglur, framkvæmd og áhrif á íslenskan rétt* (Second edition, Bókautgafan Codex ; Mannréttindastofnun Háskóla Íslands, Lagadeild Háskólans í Reykjavík 2017).

decisions of the ECtHR at the national level in case of non-compliance. The chapter illustrates that even in the case of the ECHR, which enjoys strong legal standing in all member states, structural and political gaps exist in enforcement at the national level.

The last study in the thesis was the *Enforcement of decisions of international courts at the national level*.[90] The study is a case study and selection of the cases was based on the database International Law in Domestic Courts (Oxford University Press). The cases come from numerous national jurisdictions and relate to enforcement of decisions of various international courts: ICJ, international criminal courts (International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), and ICC), and regional human rights courts (ECtHR and IACtHR). This wider focus was fitting for this last part of the study, following earlier case studies of specific international courts and specific national jurisdictions. The study reveals different position of both domestic and international courts with respect to enforcement at the national level. For instance, the study reveals what a powerful role the Security Council of the United Nations has played with respect to the enforcement of decisions of the international criminal tribunals at the national level, as domestic courts consider its power trump any domestic legal hurdles to enforcement, a view not as widely shared with respect to enforcement of decisions of other international courts. The study also illustrates states' often different views on the relationship between international law and national law, and many of the cases demonstrate an individual's difficulties in enforcing decisions of international courts at the national level.

5. This thesis and other research

A considerable amount has been written on the relations between international and national law. The issue has generated a good deal of debate both among those who are researching the basic concept of what law is, and also among those analyzing concepts such as legal orders.[91] In the last two decades, integrated regional and national legal regimes, such as the EU, have certainly contributed to the abundance of research. Lately plurality of legal

[90] Thordis Ingadottir, 'Enforcement of Decisions of International Courts at the National Level' in André Nollkaemper and others (eds), *International law in domestic courts: a casebook* (First edition, Oxford University Press 2018).

[91] There are also interesting recent contributions on topics such as 'legal space', 'interlegality' and 'multiscalar governance' in the field of social sciences, see e.g., Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Updated edition, 4 print, 1 paperback print, Princeton University Press 2008); Irus Braverman and others, *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford University Press 2015); Alfred C Aman and Carol J Greenhouse, *Transnational Law: Cases and Problems in an Interconnected World* (Carolina Academic Press 2017).

regimes within the international level alone has also rekindled the debate on the theoretical framework of the order. Many writings are based on the pillars of dualism and monism, arguing for universalism or particularism. The theories of monism and dualism are subject of some of the research, commonly being deplored or rejoiced.

The key concept of dualism and monism can be described as follows. Dualism claims that the relationship between international and national law is kinship between independent legal systems. According to the theory, international and national law are two distinct and separate legal orders, each one with its own legal characteristics. There are three fundamental factors that distinguished international law from national law: they have different sources; they have different subjects and finally they have different objects. However, monism holds that all legal orders and all bodies of law are a single and unified system, with no difference in source of validity, substance and subjects.

Following the publication of the theories of dualism and monism in the late nineteenth and early twentieth century they were subject to some scholarly debate. Heinrich Triepel's presentation of his theory of dualism in his 1899 work on *Völkerrecht und Landesrecht*,[92] was soon fiercely criticized by Hans Kelsen in his arguments for legal monism. However, in general, it is difficult to ascertain how much attention these theories received at the time. It can even be maintained that the theories and the debate was limited to the attention of few. Heiskanen writes that the monism-dualist debate was characteristically a European debate, and others have even described it as a 'fundamentally German one'.[93]

Some scholars became fervent supporters of the theories, such as Oppenheim and Anzilotti with respect to dualism, and Lauterpact with respect to monism. Others were highly critical of both theories. Responding to the 'much-debated question of the relation between international law and municipal law', Edwin Borchard criticized both theories, stating that both 'schools are partly right and partly wrong'.[94] And as to application of international law at the national level, Borchard points out in his criticism of dualism:

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[92] Heinrich Triepel, *Völkerrecht Und Landesrecht* (Hirschfeldt 1899).

[93]Veijo Heiskanen, *International Legal Topics* (Lakimiesliiton Kustannus 1992) 6. I find it remarkable that Triepel's fundamental publication on dualism, *Völkerrecht und Landesrecht*, has still not been translated into English. I find it also notable that in his book on *The Concept of Law*, the British legal philosopher H. L. Hart (1907-1992) does not even mention the theories of monism and dualism. Surely, the opportunity was there, having a specific chapter on international law (although he did not consider it 'law' properly), having one of the leading UK scholars in the center of the debate, Hersch Lauterpacht, and as the Hart was discussing the work of Kelsen on different legal issues; HLA Hart, *The Concept of Law* (Third edition, Oxford University Press 2012).

[94] Edwin Borchard, 'The Relation between International Law and Municipal Law' (1940) 27 Virginia Law Review 137, 140.

> The dualists are especially concerned to prove that international law cannot be invoked in municipal courts, quite a different matter. Courts constitute only one agency of the State. Although the dualists will admit that many of the rules of treaty and international law are devised for and accrue to the benefit of individuals, they nevertheless insist that only States may become spokesmen for these rules and advantages. Confronted by the fact that several treaties confer on individuals the right to bring personal actions against States, as in the Central American Court of Justice of 1907 and in the abortive international prize court, they maintain that this is an exception to the general rule.[95]

In his 1956 publication *Transnational Law,* Philip C. Jessup's criticized the existing theories on the relationship between national and international law as too narrow and argued for a concept of transnational law built on a pragmatism approach.[96] To Jessup, traditional terminology, such as international law or private international law, was 'misleading' and 'inadequate' to describe rules governing transnational situations. He opted for:

> the term "transnational law" to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.[97]

Jessup presented various examples ('dramas'), 'universality of human problems', illustrating that 'transnational situations, then, may involve individuals, corporations, states, organizations of states, or other groups. … There are rules, or there is law, bearing upon each of these situations. There may be a number of applicable legal rules and they may conflict with each other'.[98] In solving the problem he criticized traditional classifications and accompanying theories:

> Perhaps it is some innate instinct for orderliness which leads to the human mind endlessly to establish and to discuss classifications and definitions and to evolve theories to justify them. In international law one may be a monist or a dualist, a positivist, a naturalist, or an eclectic. The intellectual process is essential, but it involves dangers. The more wedded we become to particular classification or definition, the more our thinking tends to become frozen and thus to have a rigidity which hampers progress toward the ever-needed new solutions of problems

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[95] ibid 139.

[96] Philip C Jessup, *Transnational Law* (Yale University Press 1956).

[97] ibid 2.

[98] ibid 3–4.

> whether old or new. Conflicts and laws are made by man. So are the theories ... [99]

In his critique of existing conceptual and doctrinal framework, Jessup sought the support in writings of Benjamin Cardozo:

> Law and obedience to law are facts confirmed every day to us all in our experience of life. If the result of a definition is to make them seem to be illusions, so much the worse for the definition; we must enlarge it till it is broad enough to answer to realities.[100]

Jessup suggested a pragmatic and problem-oriented attitude:

> The use of transnational law would supply a large storehouse of rules on which to draw, and it would be unnecessary to worry whether public or private law applies in certain cases. We may find that some of the problems that we have considered essentially international, inevitably productive of stress and conflict between governments and peoples of two different countries, are after all merely human problems which might arise at any level of human society – individual, corporate, interregional, or international. In spite of the vast organizational and procedural differences between the national and the international stage, if we find there are common elements in the domestic and the international dramas, may not the greater experience with the solution of the former aid in the solution of the latter?[101]

In his review of monism and dualism, the British scholar Gerald Fitzmaurice, in his book on *The General Principles of International Law*, published in 1957, rejected the dualist-monism debate, and maintained that the conditions in which a discussion as to whether the dualist or monist view is correct, did not exist, there were flaws in the basic reasoning of both theories

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[99] ibid 7.

[100] ibid. Citing Benjamin N Cardozo, The Nature of the Judicial Process (New Haven, Yale University Press, 1921) 127.

[101] ibid 15–6. In recent years, Jessup's terminology and vision of law has gained great interest, reflected by the symbolic title of Cambridge's new 'Studies in Transnational Law', launched in 2017, and theoretical interest such as the recent large publication celebrating the 60th anniversary of Jessup's publication, describing that 'transnational law emerges as a conceptual framework and method laboratory for a critical reflection on the forms, fora and processes of law making and law contestation today', Peer Zumbansen, 'Introduction, Transnational Law, with and beyond Jessup' in Peer Zumbansen (ed), *The many lives of transnational law: critical engagements with Jessup's bold proposal* (Cambridge University Press 2020).

that therefore made the whole controversy unreal.[102] Like Borchard, Fitzmaurice approached the issue with less theoretical consideration and more as a pragmatic matter; each order is supreme in its own sphere and conflict may arise.[103]

The debate soon halted with a sharp decline in scholarly contributions on the subject.[104] Then following the little interest in the topic for decades, it started to gain scholarly attention in the 1990s. In one of the more comprehensive contribution on the topic, *International Legal Topics*, Heiskanen's criticism is that pragmatism had become the dominant style of legal analyses with respect to the subject of the relation between international and national law, in which the question of the relation is considered to be a practical rather than a theoretical problem.[105] Heiskanen was highly critical of this approach and argued that international legal scholarship no longer took the debate on dualism and monism seriously.[106] He criticized international scholars harshly for turning to pragmatism in their legal analysis on the relation between international and national law.[107] Heiskanen described the substitution of doctrine for theory and how pragmatism introduces two substitute doctrines: transformation and incorporation. The former substitutes for dualism; the latter substitutes for monism.[108] Heiskanen is critical of both doctrines of transformation and incorporation. According to him:

> Both remain silent about whether the state is bound to apply international law no matter what, or whether there are circumstances in which the state may legitimately refuse the application of international law … doctrines of transformation and incorporation seem to provide inadequate basis for international law in any case. The fact that the applicability of those doctrines is limited to the municipal sphere seems bound to undermine the whole discipline of international law and render international law generally inconsequential, including the municipal sphere … As a consequence, the doctrine of transformation subordinates international law to constitutional law … in the end, international law is not only "unified" with municipal law but also subordinated to it. As a result, there are as many legal systems as there are municipal legal systems … the application of incorporation

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[102] Gerald Fitzmaurice, *The General Principles of International Law: Considered from the Standpoint of the Rule of Law* (Brill/Nijhoff 1957) 84–85.

[103] Malcolm N Shaw, *International Law* (Sixth edition, Cambridge University Press 2008) 132–133.

[104] Heiskanen (n 93) 5.

[105] ibid 11.

[106] ibid 5.

[107] ibid 11.

[108] ibid 12.

> doctrine makes it practically impossible to establish a consistent international legal practice.[109]

In the last decade numerous empirical research projects have been undertaken. In 2014, the Venice Commission published the *Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts*.[110] Similarly, in 2016 the International Law Association published a report on *Mapping the Engagement of Domestic Courts with International Law*, primarily setting out different methods and techniques domestic courts use in their 'engagement' with international law.[111] A large important project at the University of Amsterdam, International Law in Domestic Courts (ILDC) operates in collaboration with Oxford University Press, a major database on decisions of national courts which cite international law. Indeed, one of the case studies in this thesis is a contribution to that collaboration. Another major research project of relevance for some of the case studies used in this thesis was DOMAC, a joint research undertaking by various universities on exploring the impact of international courts on domestic proceedings in cases of serious crimes. Then some comparative studies have been made, such as by Davíd Thór Björgvinsson who examined practice in Iceland and selected Nordic countries. In his publication, *Intersection of International Law and Domestic Law: A Theoretical and Practical Analysis*, he analyses monism and dualism in the context of doctrines such as direct effect, transformation and consistent interpretation, concluding that traditional theories on dualism and monism are still relevant, but falling short in 'grasping the complexity of the different ways in which the legislator and the courts have given effect to international law at the domestic level'.[112] Some inter-disciplinary scholars, such as Marlene Wind and other colleagues of hers at iCourts at the University of Copenhagen, have also made interesting contributions on practice at the national level.[113] Some high profile court cases have led to a spate of commentaries, most notably the *Meddelín v. Texas* before the US Supreme Court.[114]

Echoing the views of Heiskanen, some scholars propose a more theoretical approach in analyzing the relationship. With contributions from several leading academics, the stated aim of *New Perspectives on the Divide Between*

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[109] ibid 21–3.

[110] Venice Commission, European Commission for Democracy Through Law, 'Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts' (Council of Europe, 2014).

[111] Antonios Tzanakopoulos, 'Final Report: Mapping the Engagement of Domestic Courts with International Law' (International Law Association, 2016).

[112] Björgvinsson (n 42).

[113] Marlene Wind (ed), *International Courts and Domestic Politics* (Cambridge University Press 2018).

[114] *Medellín v Texas*, Appeal Judgment, Docket No 06-984, 552 US 491 (2008), 128 S.Ct. 1346 (2008); ILDC 947 (US 2008).

National and International Law is to go beyond empirical studies on the relationship between positive international law and national law and study the theoretical relationship.[115] The editors of the book Nijman and Nollkaemper criticize that 'modern scholarship has become pragmatic, inductive, and largely anti-theoretical'.[116] To them:

> The pragmatic approach has come at a cost. Whatever the pitfalls of the theoretical conceptions of monism and dualism, at least they provided observers with a perspective on how to understand the relationship between international and national law and, in their normative dimensions, with a view on the direction in which that relationship should evolve.[117]

The aim of the book was to 'increase our understanding and thus contribute to leading international law theory away from current pragmatism towards a new perspective which is grounded in practice yet reaches beyond mere pragmatism, recognizing the importance of more conceptual and normative perspectives on the evolution of the relationship between national and international law'.[118] Based on eleven contributions from several scholars, Nijman and Nollkaemper identify three trends which they consider have 'eroded the divide between international and domestic law': the emergence of common values in domestic and international law, the dispersio of authority away from centralized nation state and deformalization in light of many informal faces of international law authority.[119] Furthermore, in light of this finding, the editors considers three questions determine their perspectives on future development: the nature and limit of the concept of law itself; the role of normative argument; and the consequences thereof for the position of the domestic judge.[120]

A theoretical analysis of the relationship between international and national law has also benefitted from research within the school of legal pluralism, with contributions from scholars like Paul Schiff Berman.[121]

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[115] André Nollkaemper and Janne Elisabeth Nijman (eds), *New Perspectives on the Divide between National and International Law* (Oxford University Press 2007).

[116] André Nollkaemper and Janne Elisabeth Nijman, 'Introduction' in André Nollkaemper and Janne Elisabeth Nijman (eds), *New perspectives on the divide between national and international law* (Oxford University Press 2007) 2.

[117] ibid 3.

[118] ibid.

[119] André Nollkaemper and Janne Elisabeth Nijman, 'Beyond the Divide' in André Nollkaemper and Janne Elisabeth Nijman (eds), *New perspectives on the divide between national and international law* (Oxford University Press 2007) 342–354.

[120] ibid 354–359.

[121] Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (Cambridge University Press 2012).

Echoing Jessup's critique and methodology described above, Berman criticizes current approaches analyzing multiple legal or quasi-legal regimes, arguing for an alternative jurisprudence. Berman structures his arguments following 'common responses' to legal hybridity as either 'sovereign territorialism' versus 'universalism'. He comments that these approaches may sometimes be useful in addressing overlapping norms, but that they come with serious shortcomings.[122] Berman argues that isolated legal jurisdictions are things of the past and there is a dire need of alternative jurisprudence, reflecting a world where a single act or actor is potentially regulated by multiple legal or quasi-legal regimes. He criticizes that '[l]aw often operates based on a convenient fiction that nation-states exist in autonomous, territorially distinct spheres and that activities therefore fall under the legal jurisdiction on only one regime at a time'.[123] At the same time he argues that 'we should be wary of pinning our hopes on legal regimes that rely either on reimposing sovereigntist territorial insularity or on striving for universals'.[124] He consider such strategies sometimes normally undesirable and more fundamentally that they will be unsuccessful.[125] In a wonderful account, he compares responses by lawyers and legal academics to the hybrid reality to the joke on a 'streetlight effect':

> a police officer sees a drunk man searching in vain under a streetlight for his keys and asks whether he is sure he lost them there. The drunk replies, no, he lost them across the street. The officer, incredulous, asks then why he is searching here, and the drunk replies, "the light is so much brighter here".[126]

As an alternative response to legal hybridity he proposes:

> we might deliberately seek to create or preserve spaces for productive interaction among multiple, overlapping legal systems by developing procedural mechanisms, institutions, and practices that aim to manage, without eliminating, the legal pluralism we see around us.[127]

Berman states that his 'alternative jurisprudence' is 'fundamentally both cosmopolitan and pluralist'. The former term refers to his understanding that the framework should include and recognize multiple communities, 'both local and global, terrtorial and epistemic', however, without any demand of

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[122] ibid 18. By using this structure, Berman describes himself as a 'lumper' versus a 'splitter', i.e., by 'lump together a variety of different scholarly positions into broader categories', ibid 20. Not once in his book does he refer directly to dualism and monism, or Kelsen and Triepel.

[123] ibid 4.

[124] ibid 10.

[125] ibid.

[126] ibid 44.

[127] ibid 10.

harmonization or hierarchy. His term pluralist refers to his vision that the framework needs to embrace wide understanding of the concept of law, including more sources than 'officially sanctioned governmental edicts or formal court documents', hence including also normative demands of non-state actors.[128]

Holding a similar pluralistic view, William Twining considers that 'globalization and interdependence challenge "black box theories" that treat nation states or societies or legal systems as discrete, impervious entities that can be studied in isolation either internally or externally'.[129] According to him, 'a picture of law in the world must deal with a much more complex picture involving established, resurgent, developing, nascent and potential forms of legal ordering'.[130] Twining considers that a conceptual framework for analysis of 'legal transplants, imposed law and regional legal regimes' could be developed from social theory, i.e. Boaventura de Santos's concept of interlegality, and could include the following:

> (a) typology or typologies of norms;
> (b) a typology of agglomerations of norms (eg systems, orders, codes, collections, …)
> (c) a typology of relations and of interactions between, among, and within agglomerations of norms (eg symbiosis, competition, conflict, prioritization …).[131]

A theoretical contribution on the relationship between international and national law is also being made within the agenda of constitutionalism of international law. Different from legal pluralism, constitutionalism argues for unity of the global order.[132] As a response to globalization and overlapping and competing regimes, constitutionalism identifies and argues for constitutional principles in the international level. With focus on the unity of the global order and subjects of international law, some key elements of constitutionalism are considered to have major bearing on the relationship of international and national law. For instance, one of the leading scholars on constitutionalism, Anne Peters, describes that an important element of constitutionlization is the changed understanding of state's sovereignty and status of individuals in international law:

> [T]he principle of sovereignty is being ousted from its position as a Lettbegründung (first principle) of international law. The normative status of sovereignty is derived from humanity, that is, the legal

[128] ibid 11–12.

[129] Twining (n 41) 51.

[130] ibid.

[131] ibid 230.

[132] Klabbers, Peters and Ulfstein (n 10) 18.

> principle that human rights, interests, needs, and security must be respected and promoted. This normative status is also the telos of the international legal system … State sovereignty is foundational for international law only in an ontological sense, because the states' mutual respect for each other's sovereignty constitutes the "horizontal" system of juxtaposed actors, and governs international lawmaking activity. A humanized state sovereignty implies responsibility for the protection of basic human rights and the government's accountability to humans. When human needs are taken as the starting point, the focus shifts from states' rights to states' obligations vis-á-vis natural persons, and a state that does not discharge these duties has its sovereignty suspended. … The ongoing process of humanizing sovereignty is the cornerstone of the current transformation of international law into a system centered on individuals.[133]

With empirical analysis Anne Peters argues that states' constitutions are globalized both in form and substance. At the same time, she concludes various tension and contradictions exist between state constitutional law and international law.[134] She consider that constitutionalization may compensate for such 'deconstitutionalization' at the national level.[135] Globalization has put state and state constitution under strain, and reality of collaboration with international organizations and non-state actors has altered some governmental functions:

> All this has led to "governance" which is exercised beyond the states' constitutional confines. This means that state constitutions can no longer regulate the totality of governance in a comprehensive way. Thus, the original claim of state constitutions to form a complete basic order is defeated. … Therefore, if we wish to preserve the basic principles of constitutionalism, we must ask for compensatory constitutionalization on the international plane.[136]

Anne Peters also describes that constitutionalistic reading of international law overcomes older approach of focusing too much on top-down enforcement (and often the lack thereof), by focusing more on the substance of the rules rather than their formal sources and hierarchy.[137] She pleads that in a current time of new deniers of international law, who argue for non-legal character of

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[133] Peters, 'The Merits of Global Constitutionalism' (n 41) 398–9.

[134] Anne Peters, 'The Globalization of State Constitutions' in André Nollkaemper and Janne Elisabeth Nijman (eds), *New perspectives on the divide between national and international law* (Oxford University Press 2007) 305–6.

[135] ibid 307–8.

[136] Peters, 'The Merits of Global Constitutionalism' (n 41) 405.

[137] ibid 405–6.

international law due to lack of sanctions, such reading in particular is important.[138]

Monism and a unified legal order is championed in one of the more extensive contribution in the field in recent years, *Legal Monism: Law, Philosophy, and Politics* by Paul Gragl. In his book, Gragl defends the theory of monism against the competing theories of dualism and pluralism, and although 'monism has long gone out of fashion' he advocates for its revival.[139] Drawing on philosophical, epistemological, legal, moral and political arguments he argues that only monism under the primacy of international law takes the law and the concept of legal validity seriously. He considers that the key to understanding the relationship between allegedily different legal orders and their normative conflicts is by answering to the central question whether there is only one law, i.e. only one legal system, and at the end of his analysis he answer that question affirmatively. He considers theories such as dualism and pluralism fail to explain the relationship of different bodies of law and remain incapable of resolving normative conflicts. According to him:

> monism under the primacy of international law is not only epistemologically necessary and empirically better equipped to explain an describe the posititve law, but also morally superior to its comepetior theories. … In a time of political and legal fragmentation, it is therefore crucial that the Kelsenian notion of systemic unity of international and domestic law is not given up. On the contrary, it is now required more than ever.[140]

Some scholars are highly critical of the including monism and dualism in any analysis at all. Armin von Bogdandy argues that monism and dualism should cease to exist as doctrinal and theoretical notions for discussing the relationship between international and national law. According to him, the theories may continue to be useful in depicting a more open or more hesitant political disposition to international law. But from a scholarly perspective, he considers them to be 'intellectual zombies of another time and should be laid to rest, or "deconstructed"'.[141] He considers that such deconstruction could be made based on theory of legal pluralism, with a new construction of the doctrines of direct effect and consistent interpretation.[142]

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[138] ibid 405.

[139] Gragl (n 42) 3.

[140] ibid 341.

[141] Armin von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' (2008) 6 International Journal of Constitutional Law 397, 400.

[142] Similarly, concluding her extensive study on practice with respect to the International Labour Conventions and national law, Virginia A Leary writes that: 'Focus should perhaps be placed today not on the two theories as adequate explanations of the reality of the current situation but rather as a means

Recently, Jan Klabbers, Gianluigi Palombella and others argued that theoretical contributions should evolve around the concept on 'inter-legality'.[143] Just as they on consider that 'monism and dualism are no longer sufficient', they consider that pluralism and constitutionalism have also failed.[144] As the editors of the book on *The Challenge of Inter-Legality*, Klabbers and Palombella descripe the contribution as the following:

> inter-legality captures and describes the ways through which legal domains end up overlapping due to the interconnection of their substantive, material objects. It looks at law by changing the usual, traditional perspective, a perspective that is limited by the political, legal, and cognitive borders of a single self-contained system. One does not need the ascent to a juridical heaven of ready-made and principled justice – a deracinated, universalist standpoint – to realize that different legal orders may overlap normatively and reach beyond their own limits. On the contrary an inter-legality perspective simply happens to be taken as soon as the vantage point of the concrete affair under scrutiny – the case at hand – is taken seriously.[145]

The scholars underscore their approach is based within positive law and legal practice; 'the text of the law is understood as being composed of more than one system-sourced positive law … Interlegality stays firmly within the law, within legal thinking, within legal practice'.[146] The focus should be on the context of each case, with the relevant judge as the final arbitrator:

> being able to distinguish between several possible outcomes to find the ones that would better account for the plurality of reasons and claims involved in the issue. Hence, interlegality is a highly contextualized setting, philosophically hinting at the qualities of practical wisdom in the consideration of the issue from non-unilateral standpoints and available to critical scrutiny from the perspective of "others."[147]

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of refocusing discussion on what the nature of that interaction should be … As more such studies are undertaken, the time may arrive for reconsideration of theories concerning the relationship between international and national law'; Virginia A Leary, *International Labour Conventions and National Law: The Effectiveness of the Automatic Incorporation of Treaties in National Legal Systems* (M Nijhoff ; Distributors for the US and Canada, Kluwer Boston 1982) 166.

[143] Jan Klabbers and Gianluigi Palombella (eds), *The Challenge of Inter-Legality* (Cambridge University Press 2019). The focus of the book was limited to judicial setting.

[144] Jan Klabbers and Gianluigi Palombella, 'Introduction, Situating Inter-Legality' in Jan Klabbers and Gianluigi Palombella (eds), *The challenge of Inter-Legality* (Cambridge University Press 2019) 5–11.

[145] ibid 1–2.

[146] ibid 2.

[147] ibid 3.

So, just as Dworking created the imaginary judge named Hercules, composed of superhuman intellectual power and patience who accepted law as integrity,[148] the promoters of inter-legality put their faith in the judge as an interpreter of law and his or her virtue.[149] In the world of inter-legality the judge will apply the rules most apt to provide justice in the case at hand, being it rule of international law, domestic law or of other legal order.[150] Importantly, the scholars signal a compass for this exercise of interpretation, as they highlight the normative weight of the individual in international law, how most all international law affect individuals, and that it can no longer be considered acceptable when law is applied in a manner negatively affecting individuals.[151]

Martti Koskenniemi is critical of the general theoretical approach taken by scholars and considers that it weakens the normative force of law and ignore the reality of politics. He considers: '[n]either of the principal legal responses to regime-formation – constitutionalism and pluralism- is adequate … The task for international lawyers is not to learn new managerial vocabularies but to use the language of international law to articulate the politics of critical universalism'.[152] He argues that constitutionalism fails 'as there will be no consensus on hierarchy between various legal regimes in near future as there will be no consensus in regards to who should have a final say on this'.[153] At the same time:

> the problem with pluralism lies in the way it ceases to pose demands on the world. Its theorists are so enchanted by the complex interplay of regimes and a positivist search for an all-inclusive vocabulary that they lose the critical point of their exercise … Constitutionalism and pluralism are generalizing doctrines with an ambivalent political significance. Each may support and challenge the existing state of affairs. Together they provide alternative orientations to deal with, and to reduce, complexity. … But they are external, academic vocabularies that remain at a birds-eye distance from law as professional commitment, even a 'calling'.[154]

My thesis builds on existing scholarly contributions made on the dualism and monism as the theoretical foundations for the relationship between international and national law. At the same time, it contributes to this pre-existing research and advances the understanding of the relationship. The

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[148] Dworkin (n 36) 239.

[149] On quality of a judge and 'virtue jurisprudence', see Klabbers, 'Judging Inter-Legality' (n 31).

[150] Klabbers and Palombella (n 144) 15.

[151] ibid 13.

[152] Koskenniemi, *The Politics of International Law* (n 28) 331.

[153] ibid 349.

[154] ibid 353–4.

novelty is that the aim of the thesis is to zoom in and revisits the core qualification of the theories, sources of law – subject of law – object of law – hierarchy of law, and analyzes them systematically in an integrated manner. The analysis is based on comprehensive empirical research in central fields of international law today, international human rights, international humanitarian law and international criminal law, which engage states, international organizations and individuals alike. The integrated theoretical and empirical approach fits the context, as the theories on dualism and monism were presented as such by their authors.

6. The relationship between international and national law - Theories on dualism and monism

6.1 Background

The presentation and formulations of the primary theories of the relationship between international and national law, dualism and monism, was at its height in the period between 1900 and 1945. The historical and cultural context of these theories is important.[155] All concepts are intended to address a problem.[156] International law developed greatly around this time, along with the geopolitical events in the world, the rise and fall of many Western states within that period, with corresponding shift of powers, colonization as well as its demise.[157] At the same time, in Europe the internal state system changed profoundly, with aristocratic governments overtaken by the middle class, numerous revolutions, and both the German and Italian unifications of 1871.[158] The term 'nationalism' was invented in the last decade(s) of nineteenth century, and 1870 -1918 is described as a period of 'transformation of nationalism', contributed by the political and social changes (including unprecedented migrations and hostility to foreigners).[159] Nationalism took over eroding cultural systems of 'religious community' and 'dynastic

[155] On the importance of context in legal theory, see Deleuze and Guattari (n 38) 18–20; Ian McLeod, *Legal Theory* (Palgrave Macmillan 2012) 4–6.

[156] Deleuze and Guattari (n 38) 16.

[157] Dag Michalsen, *Rett, En Internasjonal Historie* (Pax forlag A/S 2011) 428-446; The title and subject of Koskenniemi's book is also illustrating of the period, Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge University Press 2002).

[158] On the German unification, see Christopher M Clark, *Iron Kingdom: The Rise and Downfall of Prussia, 1600 - 1947* (Penguin Books 2007); Randall Lesaffer and Jan Arriens, *European Legal History: A Cultural and Political Perspective* (Cambridge University Press 2009).

[159] EJ Hobsbawm, *Nations and Nationalism since 1780: Programme, Myth, Reality* (Second edition, Cambridge University Press 2012) 102.

realm'.[160] The period was then succeeded with 'the apogee of nationalism' 1918-1950.[161]

Positivism and legal codification movements found an ally in the emerging concept of the sovereign state: codification movements with demands and ambitions to abolish the mass of existing law and to create complete, clear and consistent domestic law system drawn from a single source and comprehensive to all. As well descriped '[t]hat meant that codification would have to take place at the level of the states, not at any 'universal level''.[162] In that manner '[t]he power of aristocratic judiciary would be broken' and the judge would only have to apply the law as codified and there would be no place for interpretation.[163] At the same time secularism would advance. In the late nineteenth century there was an increased conflict between secular movements and the Catholic Church across Europe, and notable the Kulturkampf in Germany was at its height at that time, a brutal culture war described as having shaped German politics and public life for generations.[164]

At the end of nineteenth century the concept of state sovereignty had become a firm foundation of the European state system and its modern law of nation.[165] Randall Lesaffer describes the three essential characteristics to the modern law of nations in the nineteenth and early twentieth century as the following: First, the sovereign states were the sole subjects of the law of nations, reflected in the doctrine of dualism; second, sovereign states were the sole law makers of law of nations; and lastly, sovereign states were the only enforcer of law of nations.[166] However, changes were on the horizon. At the beginning of twentieth century, the realization had taken hold that international law might affect domestic law.[167] In this period international

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[160] Benedict R O'G Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Revised edition, Verso 2016) 12.

[161] Hobsbawm (n 159) 131.

[162] Lesaffer and Arriens (n 158) 453.

[163] ibid.

[164] The 'brutality of Bismarck´s anti-Catholic campaign was unprecedented in the history of the state. … By the end of 1878 more than half of Prussia´s Catholic bishops were in exile or prison. More than 1,800 priests had been incarcerated or exiled and over 16 million marks´ worth of ecclesiastical property seized'; Clark (n 158) 568.

[165] The concept of a state, and hence national law, started to take hold in the sixteenth century and was completed in the nineteenth century. The term of sovereignty first appeared in 1576 and became the element of modern theory of the term, a crucial concept of the state and its relations with other such bodies: Sovereignty, is in the external relations of States, their independence from all foreign powers and the impermeability of the body of the State against all outside interference. Individual States emancipated themselves from traditional community ties rooted in the Holy Empire and Church and stood beside each other as subjects of legal rank and dignity within the international legal order; Wilhelm Georg Grewe, *The Epochs of International Law* (Michael Byers tr, Walter de Gruyter 2000) 165–7.

[166] Lesaffer and Arriens (n 158) 434.

[167] Jan Klabbers, *International Law* (Third edition, Cambridge University Press 2021) 325.

organizations were rising, along with numerous international regulatory institutions, with increased attention to their workings, at both the international and national level.[168] Then the concept of sovereignty and international law was marked by two world wars. The end of the First World War led to limitations on national sovereignty, changes to constitutional structures, a stronger position for individuals within the society, and attempts to create international legal community.[169] The inter-war period also witnessed the rise of legal realism challenging the positive approach and the idea of law as a set of neutral rules. The New Haven School of international law proposed the idea of a new public order of human dignity as a basic goal of the law, which should become a benchmark for any decision making.[170] Following the end of World War II, states created the United Nations, the most comprehensive international organizations compared with earlier times, with the goal to maintain peace. The horrors of the war and its brutality gave human rights and humanity attention, reflected in General Assembly's adoption of the Genocide convention on 9 December 1948 and the Universal Human Rights Declaration the following day. The four Geneva Convention of law of wars were adopted on 12 August 1949.[171]

With this background, the theories of dualism and monism are presented. Both theories come from Germany in late nineteenth and early twentieth century, in an environment, as described by Koskenniemi, attempts were made:

> to square the circle of statehood and an international legal order by lawyers trained in public law, often philosophically inclined, and coming from the widest range of political conviction. Nowhere was the challenge to international law posed more strongly than in Germany.

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[168] As to the latter organizations, cooperation of domestic administrative actors was considered central to their success, and the notion of 'international administration' included both international and domestic institutions when taking actions with transboundary significance. These approaches faded away in most standard international law texts after 1945; Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law and Contemporary Problems 15, 19–20.

[169] Grewe (n 165) 575–598.

[170] Bianchi (n 25) 97–8.

[171] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277, entered into force 12 January 1951; Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 U.N.T.S. 31, entered into force 21 October 1950; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 U.N.T.S. 85, entered into force 21 October 1950; Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949, 75 U.N.T.S. 135, entered into force 21 October 1950; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. 287, entered into force 21 October 1950.

> Nowhere did lawyers take more seriously the task of responding to that challenge, or develop more sophisticated theories to that effect.[172]

Indeed, during the nineteenth century and early twentieth century European jurisprudence is described to have 'reached its zenith' in which German lawyers played a great part.[173]

The theories of dualism and monism are signed by Professor Heinrich Triepel (1868-1946) and Professor Hans Kelsen (1881-1973), respectively.[174] Being born in Leipszig and Prague, respectively, the authors were in the center of dramatic events of continental Europe, from the collapse of the Empire, unified Germany, creation of first Austrian Republic, Weimar period and the world wars.[175] Their primary academics chairs, University of Berlin and University of Vienna, were located in landmark capitals in the history of Europe, international law, and major diplomatic events of the nineteenth century, e.g. Congress of Vienna 1814-5 and the Berlin Conference of 1884-5. Triepel was also living in the midst of political and culture change, in which Berlin was the center of various movements, such as the socialist movement, and cultural battles in which the conservative elite, 'the arbiters of public taste - from the Emperor William II to the rectors and professors of state-funded universities' fought for traditionalism.[176] Both scholars were also living in the midst of domestic constitutional and financial crises and facing fundamental questions of the foundation of a legal system and the state. [177] Indeed, both scholars published extensively on state law and the theory of the state, and Kelsen became most known for his general theory of law.[178] These theories became important foundations for their theories of dualism and monism.

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[172] Koskenniemi, *The Gentle Civilizer of Nations* (n 157) 181.

[173] Miloš Vec, 'From the Congress of Vienna to the Paris Peace Treaties of 1919' in Bardo Fassbender and others (eds), *The Oxford handbook of the history of international law* (First published in paperback 2014, Oxford University Press 2014) 654.

[174] As underscored by Deleuze and Guattari, 'concepts are and remained signed'; Deleuze and Guattari (n 38) 7–8.

[175] Arthur Jacobson and Bernard Schlink (eds), *Weimar: A Jurisprudence of Crisis* (Berkeley: University of California Press).

[176] Clark (n 158) 562–576. Illustrative is the opening in 1901 of the *Siegesallee* (Avenue of Victory) in Berlin, a chain of monumental statues of rulers, generals and senior statesmen from the reign, extending 750 meters along the main road of the capital Berlin; ibid 566–567. Example of the vibrance and change in Berlin at the time, the International Woman Suffrage Alliance was founded in Berlin in 1904.

[177] On Kelsen's participation in the constitutional debate, see Koskenniemi, Introduction, in Lauterpacht, *The Function of Law in the International Community* (n 74) xxx.

[178] For instance, Heinrich Triepel, *Unitarismus Und Föderalismus Im Deutschen Reiche: Eine Staatsrechtliche Und Politische Studie* (Tübingen: Mohr 1907); Heinrich Triepel, *Die Reichsaufsicht: Untersuchungen Zum Staatsrecht Des Deutschen Reiches* (Berlin: Springer 1917); Hans Kelsen, *General Theory of Law and State* (Lawbook Exchange 2003); Hans Kelsen, *Pure Theory of Law* (Lawbook Exchange 2005).

Both authors were active participants in public life, particularly Kelsen, who helped drafting the Constitution of new Austria (1918) and became a member of the Austrian Constitutional Court (1921-1930). Both were personally affected by the Nazi regime and rising anti-Semitism, Triepel's wife was of Jewish background, and Kelsen was born to a Jewish family. Indeed, Kelsen was removed from his academic post and later fled to the United States following harassment and a planned assassination. The same year Kelsen received a permanent appointment at the University of California, Berkeley, he was made a legal advisor to the United Nations War Crimes Commission in Washington, D.C., with the task of preparing the Nuremberg trials.[179]

While having different views with respect to the relationship between international and national law, Triepel and Kelsen agreed on some fundamental concepts of law. Firstly, their theories on dualism and monism were both theories of positive law, a leading theory at the time.[180] John Austin's theory on legal positivism strongly influenced scholars in the late nineteenth and early twentieth century. In his book on *The Province of Jurisprudence Determined*, published in 1832, a full-blown theory of legal positivism was presented in law for the first time. Opposing common natural-law approaches, Austin argued against any necessary connection between law and morality and transform law into a true science. To do this, he believed it was necessary to purge human law of all moralistic notions and to define key legal concepts in strictly empirical terms.[181] Kelsen theories are based on this position and his work is indeed considered to have renewed legal positivism.[182] The opening sentence in his book on *Pure Theory of Law* is that the 'Pure Theory of Law is a theory of positive law', following with harsh criticism that 'uncritically the science of law has been mixed with elements of psychology, sociology, ethics, and political theory'.[183] According to him '[t]he problem of law, as a scientific problem, is the problem of social technique, not a problem of morals'.[184] In fact Kelsen's fervent positivisms could not be further away from the commonly held view that monism is the theory of ideology of utopian dreamers of world peace. Kelsen wanted to free the concept of law from natural

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[179] A Javier Trevino, 'Transaction Introduction' in Hans Kelsen (ed), *General theory of law & state* (Transaction Publishers 2006) xxii–xxiii; Bardo Fassbender, 'Hans Kelsen (1881-1973)' in Bardo Fassbender and others (eds), *The Oxford handbook of the history of international law* (First published in paperback 2014, Oxford University Press 2014) 1168–70.

[180] Later in his life Triepel turned against positivism. Kelsen later gave partly into natural law elements, by his identification of 'basic norm' ('Grundnorm') as the basis for the validity of law; Kelsen, *Pure Theory of Law* (n 178) 110–116.

[181] This position and his concept of law as commands led Austin to argue that international law could not be considered 'law', but rather 'laws of positive morality', a view having particular influence upon British and Unites States legal thinking in the nineteenth century; Grewe (n 165) 506–7.

[182] Fassbender (n 179) 1167.

[183] Kelsen, *Pure Theory of Law* (n 178) 1.

[184] Kelsen, *General Theory of Law & State* (n 47) 5.

law as well as from the idea of justice. According to him the doctrine of natural law 'is concerned not with the cognition of positive law, of legal reality, but with its defense or attack, with a political not with a scientific task'.[185] Similarly, according to him justice was a highly subjective judgement, and even in cases were many individuals agreed on value it was no proof that these judgements were correct: 'Just as the fact that most people believe, or used to believe, that the sun turns around the earth, is, or was, no proof of the truth of this idea'.[186]

Furthermore, both Triepel and Kelsen come from a civil law background. Later in life, Kelsen made a great effort to argue that his theory of pure law applied equally to common law, by re-publishing and re-formulating his theory in English, *General Theory of Law and State*, 'as to enable it to embrace the problems and institutions of English and American law as well as those of the Civil Law Countries, for which it was formulated originally'.[187] Kelsen is considered to have been highly influential in Europe and Latin America.[188]

Importantly, Triepel and Kelsen also both shared a firm belief in international law as such and its binding authority. In that respect they differed greatly with Austin and other common law scholars which considered international law 'not law properly so called' but rather 'laws of positive morality', a debate largely settled in the late twentieth century.[189] Triepel's concept of 'common will of states' is considered to have been a major contribution to the doctrine of binding force of treaties and that states could not escape contractual obligations as a result of internal matters.[190] Based on his doctrine on the 'common will' of states as the basis of international law, international law formed a binding, independent order of law. Importantly, the doctrine, based on positivism, constructed an international law above particular state wills, in which only a unity of wills through a union of merging common wills of several or many States could be the source of international law: 'The international law formed in this way could only by nullified by a changes of the common will itself, not by a change of will of one of the individual wills contained within this common will'.[191] Furthermore, Triepel is described as the founder of the doctrine of law-making treaties, i.e. the making of a comprehensive law making treaties, subject to rules of statutory interpretation, v. treaties covering only a specific legal transactions.[192] His

[185] ibid 11.

[186] ibid 8.

[187] Trevino (n 179) xxxv.

[188] Fassbender (n 179) 1167.

[189] Grewe (n 165) 507.

[190] ibid 513–4.

[191] ibid 506–7.

[192] ibid 513.

doctrine of the 'common will of states' influenced treaty making permanently, law of treaties and the codification of international law in general.[193]

Triepel and Kelsen also published their theories at a time when there was keen interest among legal scholars to establish law within general science. The rise and dominance of positivism resulted in rigorous attempts to categorize law. Study of the subject of law was to be treated in similar way as subjects of natural science, a logical, a contained and an objective subject, being examined with technical microscope and presented accordingly. Following legal positivism and a firm belief in the analytical approach and classification, just as scholars in the natural science conducted their work on taxonomy, such as Carl Linnaeus's binomial nomenclature and Dmitri Mendeleje's periodic table of elements, various classifications were presented, including classification of international and national law, classification between primary and secondary rules, and, of course, Triepel's and Kelsen's theories on relationship between international and national law.[194] In this fashion, as their colleagues in natural sciences, Triepel and Kelsen presented their theories in a strict methodological and graphical manner.[195]

6.2 Key concepts of dualism and monism

Triepel's and Kelsens' theories of dualism and monism build largely on positions on sources of law, object of law, and subjects of law, all subject matters dominating international law up to this day. Both theories also address the issue of conflict of law.

Triepel presented his theory of dualism in 1899 in his work on *Völkerrecht und Landesrecht*.[196] Developing the consequences of the concept of sovereignty, Triepel depicted the relationship between international law and national law as a relationship between independent legal systems.[197] His theory is rooted in the notion of 'state will'. The source of national law is the will of the state itself while the source of international law is the 'common will' of states.[198] According to his theory international and national law are two distinct legal orders, each one with its own legal characteristics. Triepel

[193] ibid 513–4.

[194] See also Kelsen's emphasizing of law as science, Kelsen, *Pure Theory of Law* (n 178) 70–108.

[195] As an example, Alf Ross wrote: 'The task of the doctrinal study of law is to present an account of scientifically valid law. The accomplishing of this task presupposes that the account follows a certain system, that is, that a plan exists for the order and context in which the individual parts of the legal material are presented'; Alf Ross, Jakob v H Holtermann and Uta Bindreiter, *On Law and Justice* (Oxford University Press 2019) 242.

[196] Triepel, *Völkerrecht Und Landesrecht* (n 92).

[197] Jacobson and Schlink (n 175) 172.

[198] Gragl (n 42) 35.

claimed that his theory was empirically-based,[199] that there was actually no contact between the two legal orders, and hence no issue of conflict. According to him, there are three fundamental factors that distinguished international law from national law: they have different sources; they have different subjects and finally they have different objects. As to the first, sources at the national level are the ones of the state's lawmaker, i.e., based on state will, while sources of international law are treaties and customs, i.e., based on common will of states. As to the second, subjects of national law are individuals in their inter-relations or relation with the state, while subjects of international law are states. As to the final criteria, the two systems function on different levels and their material substance or content rarely overlap.[200] In the spirit of tables and graphs of natural sciences, Triepel describes the relations as following:

> Public international law and municipal law do not only represent distinct branches of the right, but are two circles which are intimate contact, but which never superimpose. Since the municipal law and international law do not govern the same field it is impossible that they will conflict.[201]

Among key followers of Triepel's theory of dualism was L. Oppenheim, regarded by some as the father of the modern discipline of international law and hard legal positivist school of thought. Other influential followers included the Italian scholar Dionisio Anzilotti, judge at the Permanent Court of International Justice.[202] In 1915, Oppenheim describes the theory of dualism as following:

> International law is a body of rules which exclusively concerns the relationship between the several civilized States; whereas the Municipal Law of every State is a body of rules which concerns the legal relations of the citizens with one another and also the legal relations between the citizens and the State. The sources of International Law are international customs and international conventions; whereas the sources of Municipal Law are customs which have grown up with the boundaries of that State, and statutes. For this reason, neither can International law per se create or invalidate Municipal Law, nor can Municipal Law per se create or invalidate International Law. International Law and Municipal are in fact two totally and essentially

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[199] Jan Klabbers, 'An Accidental Revolution: The ILO and the Opening Up of International Law' in Tarja Halonen and Ulla Liukkunen (eds), *International Labour Organization: Global Social Governance* (Dordrecht: Springer 2020) 127.

[200] Björgvinsson (n 42) 31–3; Gragl (n 42) 35–7.

[201] Triepel, *Völkerrecht Und Landesrecht* (n 92); Björgvinsson (n 42) 32, fn 45.

[202] Dionisio Anzilotti, *Lehrbuch Des Völkerrechts* (Berlin ; Leipzig : de Gruyter 1929).

> different bodies of law which have nothing in common except that they are both branches – but separate branches – of the tree of law.[203]

The theory of dualism became subject of harsh criticism, primarily by Hans Kelsen and his student Hersch Lauterpacht, who argued for a theory of monism.[204] According to them, all legal orders and all bodies of law are a single system, and within it international law has primacy over national law. Their theory on monism has been described by some scholars as a 'rejection of old concepts and an attempt to reconstruct international law and theory in a new and modern way, with the eye on for the position of the individual (freedom) in international law. This may be read as the discipline's response to crisis of democracy'.[205]

Kelsen argued the theory of dualism was absolutely untenable.[206] He considered dualism 'contradict the contents of law, since international law itself establishes a relation between its norms and the norms of different national legal orders'.[207] He criticized that the dualistic view that national and international law were simultaneously valid while with no relation, as a contradiction and untenable on logical grounds; in particular with respect to the subject matter of national and international law, the source of national and international law, and the reason of validity of national and international law.[208] Kelsen's theory of monism and the unity of national and international law is based on three pillars, arising from his analysis of positive international law. First, that most norms of international law receive their completion from the norms of national law, '[t]hus, the international legal order is significant only as part of a universal legal order which comprises also all the national legal orders'.[209] Second, as international law determines the territorial, personal and temporal spheres of validity of the national legal orders, it makes possible the coexistence of various states. And third, international law 'restricts the material sphere of validity of the national legal orders by

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[203] Cyril M Picciotto, *The Relation of International Law to the Law of England and of the United States of America (with Introduction by L. Oppenheim)* (1915); Heiskanen (n 93) 3.

[204] The theory of monism is traced to the workings of Hugo Krabbe (1859-1936) and Léon Duguit (1859-1929). On the origin of monism, see Gragl (n 42) 19–33.

[205] Nollkaemper and Nijman, *New Perspectives on the Divide between National and International Law* (n 115) 7.

[206] Gragl (n 42) 31–2. Kelsen's views were supported and presented by other members of the so-called Vienna School. For instance, in 1924 Josef Kunz proudly presented the views of the group before the British Grotius Society, with his paper on *On the Theoratical Basis of the Law of Nations*; Josef L Kunz, 'On the Theoretical Basis of the Law of Nations' (1924) 10 British Institute of International and Comparative law 115.

[207] Kelsen, *General Theory of Law & State* (n 47) 363.

[208] ibid 363–8.

[209] ibid 363.

subjecting them to a certain regulation of their own matters that could otherwise have been arbitrarily regulated by the State'.[210]

Kelsen also recognized other actors than states at the international level: individuals, international courts and international organizations. Kelsen claimed that the individual could both have direct rights and obligations under international law, listing examples to support the argument. At the same time, he acknowledged those were exceptional instances, but concluded:

> It is, however, only in exceptional cases that international law directly obligates or authorizes individuals. If this should become the rule, the borderline between international and national law would disappear.[211]

He also thought international courts and international organization could have a key role in norm making:

> The decisions of an international court are norms of international law, and so are also certain decisions of the Assembly of the League of Nations, which bind all members of the League and thus are analogous to statutes of national law. Nothing prevents the creation by treaty of a collegiate organ that is competent to pass majority resolutions binding for the signatories of the treaty. If the centralization effected by the treaty does not go too far, such decisions would still be norms of international law (without having at the same time the character of national law).[212]

Other components of Kelsen's theory of the legal norms are also relevant to his theory on the relation between international and national law. Kelsen had a strong view on the legal system, being made of both the subject norms and enforcement of such norms. His *General Theory of Norms* gives primary weight to the latter, 'sanctions', illustrated by that Kelsen wanted to call the sanction a primary norm:

> if we suppose that every general legal norm is a combination of two norms one of which decrees to be obligatory a certain behavior of the legal subject, and the other the performance of a specific coercive act on the part of the legal organ in the event of a violation of the first norm. I have called the latter norm the primary norm, and the former the secondary norm.[213]

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[210] ibid.

[211] ibid 348.

[212] ibid 366.

[213] Hans Kelsen, *General Theory of Norms* (Clarendon 1991) 56.

He argued that when both norms exist, they create a unity. At the same time, it was possible for the each of norms to be expressly formulated, also the one on sanction. 'This shows the decisive role which sanctions consisting in coercive play in that coercive order which is law'.[214] Furthermore, in Kelsen's *Pure Theory of Law,* the imposition of sanctions (or coercion) is presented as the result of the existence of hierarchy of norms. And according to him the requirements of the law are directed not at individuals but at the officials who operate the system.[215]

Kelsen's view on the efficiency and hierarchy within the legal system illustrates his views on that the theory had practical implications. Indeed, the presentations of theories on monism and dualism were not an isolated theoretical exercise, their content mattered with respect to practice at the national level. Hersch Lauterpacht stated that:

> Now the principle that international law is, without an express act of transformation, part of municipal law means in effect that rights and duties created by international law are directly applicable through the instrumentality of municipal courts and that, to that extent, individuals are subject of the law of nations.[216]

7. Case studies: theoretical challenges

The case studies of the thesis illustrate the rich and interwoven relationship between international and national law. That applies to sources of law, substance of law, and subjects, whether it be individuals, states, domestic and international courts, and political bodies of IGOs. All these subjects play a huge role, with respect to both national and international law. This reality and the various forms of relationship revealed does not match the conditions that are the foundations of the theories of dualism and monism.

The case studies illustrate also how practice is challenged by fundamental questions of the relationship between international and national law. At the international level, states have given international courts the authority to enforce international law, which entails states´ responsibility to comply. With the multiplication of cases before international courts, their authority is increasingly being exercised. Most often individuals are at the center of these cases. The fundamental principle of a state´s responsibility to make full reparation for injury and compliance is tested, as international courts´ decisions prompt reactions of various actors at the national level, governments, legislators, judges, and prosecutors alike. These actors are faced

[214] ibid 142.

[215] ibid 52.

[216] Hersch Lauterpacht, 'The Subjects of the Law of Nations' (1947) 63 The Law Quarterly Review 438, 443–4.

with the obligation of compliance in everyday practice, often in a national legal environment not apt to the task at hand. Conflicts arise at the national level between international obligations and national law, leading to thorough, often painstaking, search for a solution. Traditional doctrines of interpretation and implementation of international law can at times give sufficient working tools, sometimes not. At times, the primary actor at hand with a major interest, the individual, finds him/herself in an unsatisfactory position, playing a game of snakes and ladders. There is game of jurisdiction, and sometimes he or she can play, sometimes not.[217]

7.1 Sources of law

In the formative years of international law, views on the sources of law were liberal and included both international and national law. For instance, *Deutsches Staats-Wörterbuch* of 1870 listed the following sources of international law: treaties, protocol, declarations of the great powers, national law and statutes, jurisdiction of international courts, writing of law teachers and international customary law.[218]

Following their positivist conviction, Triepel´s and Kelsen´s understanding of sources of law was much narrower. However, even within that framework their understanding of sources of law differed in some fundamental respects. According to Triepel´s theory of dualism, national and international law have different sources of law: sources of international law are only customs and treaties, while sources of domestic law are limited to local customs and statutes. As a direct response to that argument, Kelsen argued that the understanding of source of law depended on two different connotations: on one hand the procedure in which norm is created and secondly, the reason why norms are valid.[219] Although Kelsen agreed that the method of lawmaking in international and national law might differ, he considered that there is no difference in principle and that norms created in a different way does not mean that the norms belong to a different independent legal systems. To him, the difference between custom and legislation was far greater than between a treaty and a contract of national law.[220] Moreover, since the validity of the state and hence its national law, is dependent on

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[217] I am borrowing the term 'game of jurisdiction' from Mariana Valverde and social legal studies, Mariana Valverde, 'Jurisdiction and Scale: Legal "Technicalities" as Resources for Theory' (2009) 18 Social & Legal Studies 139.

[218] Deutsches Staats-Wörterbuch (Expedition des Staats-Wörterbuchs Stuttgart 1870) vol XI, 76-96 at 94-6, cited by Vec (n 173) 666; Miloš Vec, 'Sources of International Law in the Nineteenth-Century European Tradition' in Samantha Besson and Jean D'Aspremont (eds), *The Oxford handbook on the sources of international law* (First edition, Oxford University Press 2017).

[219] Kelsen, *General Theory of Law & State* (n 47) 365.

[220] ibid 366.

international law, he considered that both share the same source of law.[221] Furthermore, Kelsen´s critique of the dualistic concept of sources of law also related to his claim that many norms of international law are incomplete and depend on supplementation by the norms of national law.[222] According to him, such 'transformation of international into national law' is dependent on the constitution of relevant state. Hence, in line with Kelsen´s strict positivism, he considered that the question of transformation of international law into national law could only be answered by positive law, neither by the nature of international and national law nor their relation.[223] If a constitution explicitly required such a transformation it would be needed, but if a constitution was silent on the issue, the relevant national courts could apply international law directly. A transformation of international law into national law depended also on the international law in question, as some norms could be applied directly, while others were not intended for such an application.[224]

7.1.1 Article 38(1)(c) of the Statute of the International Court of Justice – national law as source of international law

In line with the positivist view of Triepel and Kelsen, it is befitting to review the relations between international and national law in light of some of the sources listed in Article 38(1)(c) of the Statute of the International Court of Justice, the traditional listing of sources of international law and first point of reference in any discussion on the topic.[225] Of great interest, the listing is also identical to the listing in Article 38(3) of the Statute of the Permanent Court of International Court of Justice of 1920, contemporary with debate on theories of dualism and monism.[226]

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[221] ibid 369.

[222] ibid 343.

[223]ibid 379.

[224] ibid 378–9.

[225] Statute of the International Court of Justice, 26 June 1945, 1 U.N.T.S. xvi, entered into force 24 October 1945. Increasingly commentators consider the listing dated as various other sources have emerged to the list of sources of international law, Charlesworth, Hillary, 'Law-Making and Sources' in James Crawford and Martti Koskenniemi (eds), *The Cambridge companion to international law* (Cambridge University Press 2012) 189; Klabbers, *International Law* (n 167) 40–43.

[226] At its adoption, Article 38 of the Statute of the Permanent Court of International Justice was not meant to represent a doctrine of sources of international law in general, but was soon considered to set out such a doctrine, Malgosia Fitzmaurice, 'The History of Article 38 of the Statute of the International Court of Justice: The Journey from the Past to the Present' in Samantha Besson and Jean D'Aspremont (eds), *The Oxford handbook on the sources of international law* (First edition, Oxford University Press 2017) 182.

The listing of sources of international law, as set out in Article 38(1)(c) of the Statute of the International Court of Justice is broader than the concept of sources of both dualism and monism contain:

a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b) international custom, as evidence of a general practice accepted as law;
c) the general principles of law recognized by civilized nations;
d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The first two listed sources of international law, treaties and customs, are in harmony with the theories of dualism and monism. Even so, one needs to acknowledge that these two sources are often fused with national law. For example, the source of customary international law, is by definition state practice: 'international custom, as evidence of a general practice accepted as law'. In many cases that practice is a practice of 'national law', including national legislation and decisions of national courts. As concluded in the recent Draft Conclusions of the International Law Commission on the Identification of Customary International Law, 'state practice consists of conduct of the state, whether in the exercise of its executive, legislative, judicial or other functions'.[227] A good example is the principle of state immunity. As analyzed in *The Role of the International Court of Justice with Respect to Enforcement of States´ Obligation to Investigate and Prosecute Serious Crimes at the National Level*, great efforts have been made to define the concept of state immunity, both before national and international courts. To determine the content of the principle, international courts have scrutinized national legislations and practice before national courts.

The third source of 'general principles of law recognized by civilized nations', does not fit the criteria of dualism and monism. Even at the time of the adoption of Article 38(3) of the Statute of the Permanent Court of International Court of Justice, the source was not considered to have been an innovative doing, as such principles were considered to have been a major sources of inspiration for the 'founding fathers' of international law.[228] According to travaux préparatoires, the inclusion of the source was to add a source beyond the positive rules identified with treaties and customary law, as

[227] International Law Commission, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (United Nations, 2018) Conclusion 5. Yearbook of the International Law Commission, 2018, vol. II, Part Two.

[228] Alain Pellet and Daniel Muller, 'Article 38' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: a commentary* (Third edition, Oxford University Press 2019) 923.

the drafters 'knew there was more to international law than what was covered by "positive rules"'.[229]

Interestingly, the travaux préparatoires also reveal that the source was seen as essential for the needs of national lawyers, illustrating a fluidity of sources between national and international law at the time:

> This points to the rationale behind international law as precisely being to complement national law where seen by national lawyers as insufficient because relating to more than one State. In such cases, it may be supposed that national lawyers belonging to different national legal systems can be brought to seek the same international basis for the decision-making, even though no legal rules have yet crystallized. In 1920, national lawyers were in need of more answers from international law than there were positive rules to provide.[230]

General principles of law recognized by civilized nations have not gained much attention as a source of international law, and it is commonly described as having a little weight.[231] The current work of the International Law Commission of the United Nations dedicated on the source illustrates its regeneration. Fundamental principles of international law at the heart of the case studies of this thesis are based on this source of international law. For example, as described in chapter 7.3.3 of this thesis, individual criminal responsibility for international crimes has its origin in general principles of national law. Similarly, the principle of full remedies, as applied in international law, is based on that source of law.[232]

7.1.2 International law as a source of law at the national level

The case studies illustrate that in number of instances international law is a source of law at the national level, or as commonly stated, has direct effect. Such practice contradicts one of the primary foundations of dualism, that international law cannot be a source of law at the national level. At the same time it reflects the picture set out by the monist theory of Kelsen that international law can be a source of law at the national level.

International law as a source of law at the national level is well reflected in Article 7 of the ECHR and Article 15 of the ICCPR. According to these

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[229] Ole Spiermann, 'The History of Article 38 of the Statute of the International Court of Justice: 'A Purely Platonic Discussion'?' in Samantha Besson and Jean D'Aspremont (eds), *The Oxford handbook on the sources of international law* (First edition, Oxford University Press 2017) 172.

[230] ibid.

[231] Klabbers, *International Law* (n 167) 37–8.

[232] Dinah Shelton, *Remedies in International Human Rights Law* (Third edition, Oxford University Press 2015) 33.

provisions, when setting out the fundamental principle of no punishment without law, they make clear that there is no requirement of domestic criminalization when it comes to criminal responsibility for international crimes.

> Article 7: No punishment without law
> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Hence, international law on individual criminal responsibility for serious crimes can be a source of law at the national level. As discussed in *The Implementation of the Rome Statute of the International Criminal Court in the Nordic Countries: A New Approach to Criminalization of International Crime,* to date, the ECtHR has firmly supported this direct applicability of international law at the national level, cf. *Van Anraat* v. *the Netherlands* and *Kononov* v. *Latvia*.[233] The case study also illustrates that a number of Nordic countries relied on such an application, such as Finland and Sweden. At the same time, the case study illustrates a withdrawal of some states to this approach. In their new legislation on serious crimes, some of the Nordic states backed from earlier blank references to international law.[234] For instance, Sweden argued the need for such a change with reference to principle of legality and criticism of earlier approach as it 'involves a monistic element in our otherwise dualistic system':

> Stadgandet har kritiserats för att inte uppfylla legalitetsprincipen på ett tillfredsställande sätt. Andra synpunkter som har framförts gäller att folkrättsbrottet, genom sin utformning, kommit att innebära ett monistiskt inslag i vårt annars dualistiska system, vilket innebär att det i princip krävs författningsreglering för att folkrättsliga åtaganden ska kunna tillämpas nationellt.[235]

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[233] *Van Anraat* v. *the Netherlands* (App. No. 65389/09), 6. July 2010, paras. 80–92; *Kononov* v. *Latvia* (App. No. 36376/04), 17. May 2010.

[234] Ingadottir, 'The Implementation of the Rome Statute of the International Criminal Court in the Nordic Countries: A New Comprehensive Criminalization of Serious Crimes' (n 56) 126.

[235] Regeringens proposition 2013/14:146, Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser, 68.

In the same case study, the question of international law as a source of law was also dealt with in some of the states´ decisions on how to address the entry into force of the new legislation. The retroactivity of the new legislations was given a considerable thought in Norway and Iceland, due to their scarce or non-existent earlier legislation on the subject. Parliaments of both countries adopted retroactive entry into force of the legislation, due to the established international nature of the crimes and general provisions in the national penal codes which they considered could have covered most of the crimes. That approach was later rejected by the Norwegian Supreme Court, resulting in later amendments to the Norwegian legislation. The Norwegian Supreme Court, with its sitting president a former president of the ICTR, considered the retroactive application of the new law a violation of the Norwegian Constitution. Similarly, the Norwegian Supreme Court considered that it would be more onerous for the accused to be sentenced according to a provision describing conduct as genocide, crimes against humanity and war crimes, rather than under the general provision of the penal code.[236]

As illustrated in *The Implementation of the Rome Statute of the International Criminal Court in the Nordic Countries: A New Approach to Criminalization of International Crime*, direct applicability of international law at the national level is still relied on by states to some extent regarding serious international crimes. The two arguments given by states to retreat from such an application, the principle of legality and the principle of dualism, are interesting in light of legal development. As to the former principle, if anything, it should now be easier to apply international law at the national level, as international criminal law is much more defined area of law today compared to the fifties when the doctrine was for instance set out in ECHR, in particular following the adoption of the Rome Statute of the International Criminal Court in 1998. As to the latter, Sweden´s criticism of following a monistic approach in otherwise dualistic system, is interesting in light of the nature of the obligation at hand, individual criminal responsibility for international crimes and jurisdiction of an international court over individuals, as well as universal jurisdiction of national courts. The law at hand do not fit any concept of the theory of dualism, whether from the viewpoint of sources of law, object of law or subjects of law.[237] In a way, it is something of a

[236] Ingadottir, 'The Implementation of the Rome Statute of the International Criminal Court in the Nordic Countries: A New Comprehensive Criminalization of Serious Crimes' (n 56) 143. That firm stance by the Norwegian Supreme Court does not fit the profile of the constitutional tradition allegedly prominent in the region, where courts are described to show virtually unconditional deference to parliament; Jakob v. h. Holtermann, 'Conspicuous Absence and Mistaken Presence. A Note on the Ambiguous Role of Scandinavian Legal Realism in Nordic Approaches to International Law' in Astrid Kjeldgaard-Pedersen and Københavns universitet (eds), *Nordic approaches to international law* (Brill Nijhoff 2018) 224.

[237] In general, it is said that in the last two decades principles of monism have stridden into Swedish legislation as well as practice, in particular in the area of EU law and human rights, Ove Bring, 'Monism

contradiction to speak of the need to follow dualistic principles with respect to domestic legislation regarding individual criminal responsibility for international crimes. Such legislation reflects the same source of law, the same content, and the same subjects as international law, and provides for universal jurisdiction of these crimes, covering crimes outside the national territorial jurisdiction, committed by non-nationals and against non-nationals.

The decision whether international law can be a source of law and have a direct effect at the national level is also taken by international courts. The case studies illustrate that international courts are hesitant to consider international law as having a direct effect at the national level. Hence, the finding of Thomas Buergenthal that international courts are generally more reluctant than domestic courts to conclude that a treaty provision is directly applicable still seem to hold.[238] Of course famous exceptions exist. In 1928, the PCIJ addressed the issue head on in *Jurisdiction of the Court of Danzig*.[239] The Court, with one of the more fervent followers of dualism at the time sitting as president, Judge Anzilotti, concluded that international agreement could be directly applicable at the national level, if that was the intention of the parties to the treaty:

> It may be readily admitted that, according to a well established principle of international law, the Beamtenabkommen, being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts. ... The wording and general tenor of the Beamtenabkommen show that its provisions are directly applicable as between the officials and the Administration. ... According to its contents, the object of the Beamtenabkommen is to create a special legal régime governing the relations between the Polish Railways Administration and the Danzig officials, workmen and employees who have passed into the permanent service of the Polish Administration. That this special régime, according to the intention of the contracting Parties, is to be governed by the very provisions of the Beamtenabkommen, may be seen for instance from an analysis of Article 4 of the Beamtenabkommen.[240]

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och dualism i går och i dag' in Rebecca Stern (ed), *Folkrätten i svensk rätt* (1. uppl, Liber 2012) 36; Ove Bring, Said Mahmoudi and Pål Wrange, *Sverige och folkrätten* (Norstedts Juridik 2014) 60–65.

[238] Thomas Buergenthal, 'Self-Executing and Non-Self-Executing Treaties in National and International Law' (1992) 303 Collected Courses of the Hague Academy of International Law 340.

[239] *Jurisdiction of the Courts of Danzig* (Pecuniary claims of Danzig Railway officials who have passed into the Polish service, against the Polish Railways Administration), Advisory Opinion, March 3 1928, 1928 P.C.I.J. Series B No. 15).

[240] Ibid 17-18.

Similarly, in articulating its doctrine of direct effect, the European Court of Justice (ECJ) in *Van Gend en Loos* noted that 'to ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme, and the wording of those provisions', concluding that the Treaty on establishing the EEC created rights having direct effect and creating individual rights which national courts must protect.[241] Furthermore, the Court of Justice of the European Union (CJEU) has held that domestic constitutional law cannot decide how relevant state treats EU law.[242]

As analyzed in *Just Satisfaction and the Binding Force of judgments: Article 41 and 46 of the European Convention on Human Rights*, the ECtHR has not followed the ICJ and ECJ in this regard. Although the ECHR was adopted at the time when arguable some parties considered that the convention could be directly enforced at the national level, and even though since then all member states have given the convention legal effect at the national level, the ECtHR still makes no claim of direct effect of the convention or Court´s decision at the national level. At the same time ECtHR makes the claim that implementation at the national level ensures the rights protected and measures are taken to ensure compliance with decisions of the Court.

As illustrated in the case studies, some domestic courts approach the issue in the same manner as the judges of the ICJ, endorsing the concept of direct effect in cases in which that was the intention of the parties. The case study on *Enforcement of Decisions of International Courts at the National Level* is illustrative of this. For instance, in *Medellín v. Texas,* the US Supreme Court built its decision on the USA-American distinction between self-executing and non-self-executing treaties, the former being able to operate automatically at the domestic level as opposed to the latter.[243] For this purpose *inter alia* it analyzed the wording and purpose of Article 94 of the UN Charter, the relevance of the enforcement mechanism set up via the Security Council, the

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[241] Case 26/62 *Van Gend en Loos v. Nederlandse Administraitie der Belastingen*, p. 12. On this landmark decision, see J Weiler, 'The Community System: the Dual Character of Supranationalism', *Yearbook of European Law* I, 1981, 267, 274.

[242] On the reception of EU law into domestic law and the view that it represent a truly special case on the relationship between international and national law, see Sybe A De Vries, 'The Charter of Fundamental Rights and the EU´s "Creeping" Competences: Does the Charter Have a Centrifugal Effect for Fundamental Rights in the EU?' in Sionaidh Douglas-Scott and Nicholas Hatzis (eds), *Research handbook on EU law and human rights* (Edward Elgar Publishing 2017) 61–62; Klabbers, *International Law* (n 167) 333–5.

[243]See discussion by Thomas Buergenthal on that the USA distinction between self-executing and non-self-executing treaties is not unique to the USA, and that the courts of most monist states also apply this distinction; Buergenthal (n 238) 382. Virginia A Leary argues that there is a tendency for US courts to construe the concept of self-executing treaty provisions more narrowly than in some other states; Leary (n 142) 165.

intent of the drafters of the UN Charter, and then the intent of the USA at the time of ratification, concluding that the Article was not meant to be self-executing.

The ICJ had the opportunity to address the issue of direct effect again in its *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals*. In the decision, the Court referred to an obligation of result rather than an obligation on the USA to give direct enforceability to its decision. The Court also refers to the option for domestic law to give its decisions such an effect, irrespective of the intention of the parties to the treaty:

> The *Avena* Judgment nowhere lays down or implies that the courts in the United States are required to give direct effect to paragraph 153(9). The obligation laid down in that paragraph is indeed an obligation of result which clearly must be performed unconditionally; non-performance of it constitutes internationally wrongful conduct. However, the Judgment leaves it to the United States to choose the means of implementation … Nor moreover does the *Avena* Judgment prevent direct enforceability of the obligation in question, if such an effect is permitted by domestic law.[244]

As illustrated in *Enforcement of Decisions of International Courts at the National Level*, various domestic courts considered decisions of international courts have direct effect at the national level. Some domestic courts considered it necessary that the national law explicitly allowed such a direct effect, while other courts de facto gave decisions of international courts such a direct effect, for the state to be able to comply with its international obligations and binding force of international decisions. At the same time, the case study revealed a differentiation made by some states between general international law and decisions by courts and the Security Council, i.e., classification between primary and secondary rules. The classification worked in both ways. At one end of the spectrum, there are views that only the former qualify for direct effect and not the latter. At the other end of the spectrum, a great weight is given to enforcement. For instance, as analyzed in *Enforcement of Decisions of International Courts at the National Level*, states give great authority to decisions of the Security Council taken under Chapter VII of the UN Charter, cf. Article 25. With reference to the obligation, they considered decisions of the ad hoc tribunals, established under Chapter VII of the UN Charter, have direct effect in domestic law, at times overriding domestic legal impediments. Similar weight was given to decisions of the ICC, when it based its jurisdiction on a referral by the Security Council.[245]

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[244] *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals* 44; see discussion in Ingadottir, 'Enforcement of Decisions of International Courts at the National Level' (n 90) 357–8.

[245] ibid 367–8.

7.2 Object of law

According to the theory of dualism, the international law and national law regulate different subject matter, with the former regulating the behavior of states and the latter the behavior of individuals. Similarly, national law regulates domestic affairs while international law regulates foreign affairs. Kelsen considered this to be reasoning fallacy, as actions of states were reducible to the behavior of individuals representing the state. Furthermore, any domestic matter could be made subject of an international treaty.[246]

The case studies illustrate that substance of international and domestic law is similar or even the same in respective areas, whether considered as national or international law. In the large areas of human rights and criminal law both international and national law are governing the same area of law, and more than that, to a large extent they have merged in content and substance; the law has time and again roamed between the 'defined' spaces of international and national law, to the extent it is difficult to separate in substance. The paper on *The Implementation of the Rome Statute of the International Criminal Court in the Nordic Countries: A New Comprehenisve Criminalization of International Crimes* illustrates this well. The core of the Rome Statute are rules of the the Hague Conventions of 1898, the Genocide Conventinon of 1948 and the Geneva Conventions of 1949. In turn, the Hague Conventions and the Geneva Conventions adopted rules of customary humanitarian law as reflected in national law on warfare. For centuries, humanitarian principles regulating armed conflict developed.[247] The above international conventions on humanitarian law incorporated these principles from state practice at the national level, but this transition was only the first of many. As described in the case study and *The ICJ Armed Activity Case - Reflections on States´ Obligation to Investigate and Prosecute Individuals for Serious Human Rights Violations and Grave Breaches of the Geneva Conventions* and the case study on *The Role of the International Court of Justice in Enforcement of the Obligation of States to Investigate and Prosecute Serious Crimes at the National Level*, the Geneva Conventions of 1949 obligate states parties to enforce the conventions at the national level, being the first treaty to demand certain implementation at the national level. Following the entry into force of the conventions, their provisions were incorporated and/or enforced in numerous states. And as described in *The Implementation of the Rome*

[246] Kelsen, *General Theory of Law & State* (n 47) 364–5.

[247] Knights, kings, emperors, military leaders and states, - any rulers, have shown interest in controlling their military forces, and for various reasons, including self-interest, effectiveness, and reciprocity. For the history of the law of armed conflict, see Gary D Solis, *The Law of Armed Conflict*. (Cambridge University Press 2016) 31–33; M Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (Second revised edition, Kluwer Law International 1999) 41–88.

Statute of the International Criminal Court in the Nordic Countries: A New Approach to Criminalization of International Crimes, some states simply fulfilled this obligation by blanked references in their national codes, criminalizing 'violations of international humanitarian law'. Others considered general provisions in their penal codes cover the crimes. When these principles and conventions finally came into practice at the international level decades later, at the ad hoc criminal tribunals for the former Yugoslavia and Rwanda, again the development of the law came from practice at the national level. Indeed, the reliance of the ad hoc criminal tribunals on domestic law and practice has become key example of the relevance of 'general principles of law as recognized by civilized nations' as a source of international law.[248] To continue, the Rome Statute of the International Criminal Court then incorporated the principles developed by the ad hoc tribunals, and again the provisions of that treaty are incorporated at the national level. To meet the requirements of the complementarity principle of the ICC, great efforts are made by states to ensure that the content of their national criminal codes matches the one of the Rome Statute.[249]

As with international humanitarian law and individual criminal responsibility, the case studies focusing on enforcement of human rights illustrate similar contradictions inherent in the classification between international and national law. What are national human rights and what are international human rights? Just as with international humanitarian law, it is difficult to keep track of the number of transitional phases. The origin of the Universal Declaration of Human Rights is at the national level. It is described as a consolidation of liberal rights propounded in the seventeenth and eighteenth centuries in a number of countries.[250] The declaration, an instrument of non-legal binding character, is also said to have been incorporated in dozens of national constitutions.[251] Most of the provisions of the UDHR have since been codified in treaty form, including the ICCPR, International Covenant on Economic, Social and Cultural Rights (ICESCR),

[248] International Law Commission, First report on general principles of law, UN DOC A/CN.4/732, 5 April 2019.

[249] Considerable efforts are made within Europe to harmonize criminal law. For instance, the Council of Europe has sixty agreements in the areas of criminal law and procedural law; Kai Ambos, *European Criminal Law* (Cambridge University Press 2019) 19–23.

[250] Simmons (n 80) 42.

[251] Javaid Rehman, *International Human Rights Law* (Second edition, Pearson 2010) 81; Steven LB Jensen writes that the Universal Declaration had by the early 1960s been applied in the drafting of constitutions in more than twenty African states; Steven LB Jensen, *The Making of International Human Rights: The 1960s, Decolonization, and the Reconstruction of Global Values* (Cambridge University Press 2016) 7.

and ECHR.[252] The provisions of these treaties have then been codified in national constitutions and national legislation. Just as the Geneva Conventions of 1949, these treaties require implementation at the national level. For example, according to Article 1 of the ECHR, the States Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in the convention.[253] As described in the article on *Just Satisfaction and the Binding Force of judgments: Article 41 and 46 of the European Convention on Human Rights,* the human rights chapter of the Icelandic Constitution is an example of such implementation, drafted to mirror various provisions in a number of international human rights treaties. Furthermore, as described in that article and in *Enforcement of decisions of international courts at the national level,* the ECHR as such has the force of law in all member states of the Council of Europe and is directly applicable both at the national and international level. At the national level great efforts are being made that the convention is interpreted in accordance with decisions of the ECtHR. This is illustrated in *Just Satisfaction and the Binding Force of judgments: Article 41 and 46 of the European Convention on Human Rights*, as great systematic efforts have been made to ensure that all domestic legislation in Iceland is coherent with the convention as interpreted by the ECtHR.

Furthermore, the complementary jurisdiction of international and national courts illustrates the common object and substance of national and international law. The case studies illustrate this well. As illustrated above, international human rights conventions obligate states to secure individuals the rights provided in the conventions in national law. Similarly, international criminal law conventions obligate states to prosecute individuals at the national level for crimes stipulated in the conventions. Jurisdiction of international human rights and criminal courts is based on national and international law both being of the same substance. One of the key jurisdictional requirements of international human rights courts is that domestic remedies have been exhausted, that is the applicant has already sought their right before national courts. As to individual criminal responsibility for serious crimes, individuals are subject to about 200 national jurisdictions, as well as international courts in some instances. As to the ICC, its complementarity jurisdiction means that the Court can only exercise jurisdiction if the national jurisdiction is unable or unwilling to do so.[254]

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[252] International Covenant on Economic, Social and Cultural Rights, 16. December 1966, 993 U.N.T.S. 3, entered into force 3 January 1976; Philip Alston, Ryan Goodman and Henry J Steiner, *International Human Rights: Text and Materials* (Oxford University Press 2013) 141–2.

[253] See also, e.g., ICCPR, Article 2; ICESCR, Article 2.

[254] On complementarity and the development from autonomous systems of national and international law to two systems working in tandem, see Carsten Stahn, 'Introduction: Bridge over Troubled Waters? Complementarity Themes and Debates in Context' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and complementarity: from theory to practice. Vol. 1:* (Cambridge University Press 2011).

As studied in *The Implementation of the Rome Statute of the International Criminal Court in the Nordic Countries: A New Comprehensive Criminalization of Serious Crimes,* and *The Role of the International Court of Justice in the Enforcement of the Obligation of States to Investigate and Prosecute Serious Crimes at the National Level,* individuals are subjects to a number of jurisdiction for serious crimes.[255] For instance, all states which are members of the Geneva Conventions of 1949 and the Torture Convention are obligated to exercise universal jurisdiction if suspected criminal is found on their territory, and the state does not extradite him/her.[256] As for the relevant individual, there is no division of national and international law. He or she can be prosecuted in numerous national jurisdictions as well as before international courts, provided that the crimes prosecuted for constitute crimes according to conventions. As illustrated in the earlier case study, an Icelandic citizen, irrespective of national legislation in Iceland, could face prosecution all over the world in national courts, as well as before international courts.

Considering this fusion of the object and doctrinal content of international and national humanitarian and human rights law, its systematic doctrinal harmonization, and complementary jurisdiction of domestic and international courts, the cornerstone of the dualistic theory that domestic law and international law have different subject matter and govern different fields is far-fetched, if not delusional. In the same way, the case studies illustrate the extensive transformation of international law into national law, exceeding Kelsen´s arguments.

7.3 'Subjects of law'

One of the key concepts of the theory of dualism is that international law is a body of rules which exclusively concerns the relationship between states, individuals and other actors have no role. In the same way, it holds that only individuals and the state itself are actors at the national level. Kelsen contended this opinion 'erroneous' and claimed that an individual could both have direct rights and obligations under international law, listing examples to support the argument. As an example of obligations he cited piracy and the International Convention for the Protection of Submarine Telegraph Cables; as for rights he cited the International Prize Court, Treaty of Versailles and other peace treaties.[257] At the same time, he acknowledged those were exceptional instances, but concluded:

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[255] Ingadottir, 'The Role of the International Court of Justice in the Enforcement of the Obligation of States to Investigate and Prosecute Serious Crimes at the National Level' (n 83), 287–291.

[256] United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85, entered into force 26 June 1987.

[257] Kelsen, *General Theory of Law & State* (n 47) 342–3.

> It is, however, only in exceptional cases that international law directly obligates or authorizes individuals. If this should become the rule, the borderline between international and national law would disappear.[258]

The extensive literature illustrates the altered positions of various actors in international law, highlighting their enhanced position at the international level.[259] At the same time, one needs to acknowledge that participation of various actors other than states may have been considerable, but simply overlooked. One should always be careful how history is presented. As warned by Professor Koskenniemi, 'No doubt, a state-centric view haunts the imagination of jurists preoccupied with the 'international'. … As long as the focus is on states, matters of great importance are left out of sight'.[260] One should also be mindful that the very term *ius gentium* was originally seen as entirety of legal norms common to all human beings and was retained during the Middle Ages, covering individuals, corporations and sovereign alike. At the time when the theory of dualism was presented various actors other than states were participating at the international level. While Oppenheim was writing his text that international law exclusively concerned relationship between states, various delegations and petitioners other than of states were present in Paris participating in the negotiations of the Treaty of Versailles, ranging from a delegation of suffragettes to delegations of various ethnic minorities.[261] As an illustration of this broader understanding, in the creation of the PCIJ, 'theoretical proposals' were put forward to the effect that individuals could have direct access to the Court and bring actions against

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[258] ibid 348.

[259] Few examples include: Andrea Bianchi (ed), *Non-State Actors and International Law* (Ashgate Pub Co 2009); Roland Portmann, *Legal Personality in International Law* (Cambridge University Press 2010); Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge University Press 2011); Rene Urueña, *No Citizens Here: Global Subjects and Participation in International Law* (M Nijhoff Publishers 2012); Jan Klabbers (ed), *Research Handbook on the Law of International Organizations* (Paperback ed, reprint, Edward Elgar 2014); Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press 2016); Nigel D White, *The Law of International Organisations* (Third edition, Manchester University Press 2017); Astrid Kjeldgaard-Pedersen, *The International Legal Personality of the Individual* (First edition, Oxford University Press 2018); Ian Hurd, *International Organizations: Politics, Law, Practice* (Fourth edition, Cambridge University Press 2021).

[260] Martti Koskenniemi, 'What Should International Legal History Become?' in Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit (eds), *System, order, and international law: the early history of international legal thought from Machiavelli to Hegel* (First edition, Oxford University Press 2017) 391.

[261] Margaret MacMillan, *Peacemakers: The Paris Peace Conference of 1919 and Its Attempt to End War* (Murray 2003) 67, 155.

states. Such proposals were not rejected due to the lack of an individual´s legal personality or argument of dualism.[262]

The case studies illustrate well the position of various actors in international and national law, transcending borders. States are far from the only actor in international law, as individuals and international institutions, such as United Nations Security Council and international courts, are also key participants. Furthermore, these additional actors operate beyond defined parameters, as their actions simultaneously relate to both international and national law.

7.3.1 States

The Westphalian concept of sovereignty of states, entailing their independence from all foreign powers and the impermeability of the body of the state against all outside interference, is still holding strong. However, this understanding of sovereignty, which at the same time is the foundation for the theory of dualism, has changed considerably. The understanding of sovereignty has evolved, and the understanding of the state as a juridical entity is now understood as 'an analogy of the moral person that is capable of both rights and duties'.[263]

The case studies of this thesis support findings that a position on the full sovereignty of the state and the standing of the state as the only actor in international law, or even as the primary one, is a weak one. This is reflected in the case studies in various ways, for instance with respect to the development of international humanitarian and human rights law, developments with respect to requirements of exhaustion of local remedies, parties before international courts, remedies, and the authority of international courts.

The diminishing importance of the concept of state in international law is reflected in the case study of *The Implementation of the Rome Statute of the International Criminal Court in the Nordic Countries: A New Comprehensive Criminalization of Serious Crimes*. The case study demonstrates how the majority of the Nordic countries in their new implementing legislation on individual responsibility for serious crimes did away with the distinction between international and non-international conflict with respect to war crimes. For them, those borders do not matter with respect to criminalization of these serious crimes. This development goes hand in hand with other developments in international criminal law in which the state and its relationship to the individual is having a diminishing effect, such as individual criminal responsibility for stateless persons, and the responsibility of individuals under the UNSC sanction regime.

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[262] Committee of Jurisconsults, meeting at the Hague 16th June 1920, Annex No I, Report, 722-3.

[263] Panu Minkkinen, *Sovereignty, Knowledge, Law* (Routledge 2011) 13.

The sole power of states to enforce international law is a fundamental concept of dualism.[264] The case studies analyze this with respect to the role of states to enforce the prosecution of serious crimes at the national level and to enforce human rights obligations before the ECtHR. However, as concluded in *Just Satisfaction and the Binding Force of judgments: Article 41 and 46 of the European Convention on Human Rights* and *The Role of the International Court of Justice in Enforcement of the Obligation of States to Investigate and Prosecute Serious Crimes at the National Level,* states have had very little interest in playing the role, and have rather given it to other actors, such as individuals with respect to human rights, and international prosecutors with respect to serious crimes. As I describe in the earlier article, with the establishment of the European Commission of Human Rights and the ECtHR it was the understanding that it would primarily be states that would enforce the convention before these organs and not individuals. In the political climate following World War II, when the continent was stricken by the horrific crimes committed, states parties mutually agreed to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. The states believed that it was highly important to have the means to react if another state party violated these fundamental rights. Thus, a kind of 'joint trusteeship' would be established.[265] This never materialized and very few inter-state applications have reached the Court. Instead, states parties opted to give this role to individuals, first indirectly, but later fully by amending the treaty and allowing mandatory direct access of individuals to the ECtHR in 1998.[266] And states are still not showing any interest in a joint trusteeship to ensure compliance with the convention, as originally foreseen. Despite the Court being overburdened by individuals´ applications, threatening its operation, no serious inter-state applications are being made to meet this challenge. To illustrate this point, at the current time when numerous reports have been made about serious deterioration of the rule of law and fundamental rights in Poland and Turkey, no inter-state case application has been filed with respect to these situations.[267]

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[264] Lesaffer and Arriens (n 158) 434–6.

[265] See the preamble to the European Convention on Human Rights and the *travaux préparatoires* thereto: Council of Europe, European Court of Human Rights, Preparatory work on Article 1 of the European Convention on Human Rights, Information document prepared by the registry, Cour (77) 9. See, for instance, the statement by Lord Layton (UK) on 'joint trusteeship', ibid 67.

[266] Ingadottir, 'Just Satisfaction and the Binding Force of Judgments: Article 41 and 46 of the European Convention on Human Rights' (n 89).

[267] Council of Europe, Parliamentary Assembly, The functioning of democratic institutions in Poland, Doc 15025, 6 January 2020; Human Rights Watch, World Report 2021: Poland; United Nations General Assembly, Human Rights Council, Working Group on the Universal Periodic Review, Compilation on Poland, Report of the Office of the United Nations High Commissioner for Human Rights, UN Doc A/HRC/WG.6/27/POL/2 (22 February 2017); Human Rights Watch, World Report 2021: Turkey; United Nations General Assembly, Human Rights Council, Working Group on the Universal Periodic

As analyzed in *The Role of the International Court of Justice in Enforcement of the Obligation of States to Investigate and Prosecute Serious Crimes at the National Level*, states have shown little interest in prosecuting serious crimes, despite international obligation to do so. This reality led to establishments of various international criminal courts, in which states gave this prosecution authority to a new actor – the international prosecutor. And as concluded in the case study, states have been very hesitant to enforce such an obligation of other states before the ICJ, despite numerous opportunities to do so. Some change can be detected in recent cases such as *Questions Relating to the Obligation to Prosecute or Extradite*.[268] To the same extent, only recently are states enforcing human rights obligations before the ICJ, based on the *erga omnes* character of human right conventions, illustrated in the above case and the new case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*.[269] Nevertheless, despite the important precedent made by ICJ in *Questions Relating to the Obligation to Prosecute or Extradite,* regarding the *erga omnes* character of human rights conventions and hence of the option all states parties have to bring a case, states have not made use of that option of enforcement and the above case remains exceptional one.

A changed role of sovereignty and the state with respect to the relationship between international and national law is also reflected in recent developments with respect to traditional jurisdictional requirements of some international courts with respect to exhaustion of local remedies. As analyzed in *Enforcement of Decisions of International Courts at the National Level,* a major development has happened in this respect at ICJ. In *LaGrand* and *Avena and Other Mexican Nationals,* the Court concluded that Article 36(1) of the Vienna Convention on Consular Relations created not only a state´s right but also an individual right, rights which the USA had violated.[270] Importantly, this 'interdependence' of the rights of the state and of the individual led the ICJ to conclude that the duty to exhaust local remedies, which applies to cases of diplomatic protection, did not apply.[271] Similar development can be seen at the ECtHR, as analyzed in *Just Satisfaction and*

Review, Compilation on Turkey, Report of the Office of the United Nations High Commissioner for Human Rights, UN Doc A/HRC/WG.6/35/TUR/2 (12 November 2019).

[268] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422.

[269] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Application of 11 November 2019.

[270] *LaGrand (Germany v. United States of America)*, Judgment, I. C. J. Reports 2001, p. 466; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I. C. J. Reports 2004, p. 12.

[271] *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I. C. J. Reports 2004, p. 12, para 40. See discussion in Ingadottir, 'Enforcement of Decisions of International Courts at the National Level' (n 90) 359–360.

the Binding Force of judgments: Article 41 and 46 of the European Convention on Human Rights. Compliance with decisions of the Court is considered to obligate the state to provide remedies to all victims that are in the same positions as the individual in the case at hand. The development is also reflected in the new groundbreaking pilot-judgment procedure at the ECtHR, first adopted by the judges with no statutory authority, but accepted by states in practice. Now reflected in Rule 61 of the Rules of the Court, the Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the contracting party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications.[272]

7.3.2 International courts and international organizations

A key development rendering Triepel's theory of dualism outdated is the existence and authority of present-day international courts and organizations. Firstly, they are acknowledged actors in international law, and their decisions concern individuals and national law. Furthermore, they make decisions which have been considered to be a source of law at the national level. Kelsen's argument that decisions of international courts and certain decisions of organizations 'are norms of international law' have at times been confirmed in practice.[273]

The case study of *Enforcement of Decisions of International Courts at the National Level* illustrates well how states felt compelled to comply with decisions of international courts, whether because they had undertaken the explicit obligation to accept binding decisions of relevant court, or because they considered the authority of the court derived from Chapter VII powers of the Security Council of the United Nations. For instance, extradition requests from the ICTY and ICTR were complied with, irrespective of whether national law provided for such a possibility or even if the compliance even conflicted with national law. And as illustrated in *Just Satisfaction and the Binding Force of judgments: Article 41 and 46 of the European Convention on Human Rights*, states are making major changes at the national level due to decisions of the ECtHR, even in fields of key constitutional issues and structure of the state system.

The fast-changing relationship between international and national law is also due to recent developments of remedies awarded by international courts. As concluded in the three case studies on *The Role of the International Court of Justice in Enforcement of the Obligation of States to Investigate and Prosecute Serious Crimes at the National Level, Enforcement of Decisions of*

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[272] Ingadottir, 'Just Satisfaction and the Binding Force of Judgments: Article 41 and 46 of the European Convention on Human Rights' (n 89) ch 18.3.3.

[273] Kelsen, *General Theory of Law & State* (n 47) 366.

International Courts at the National Level and *Just Satisfaction and the Binding Force of judgments: Article 41 and 46 of the European Convention on Human Rights,* international courts are becoming bolder in awarding remedies regarding individuals, and importantly, in awarding remedies that require specific measures at the national level. This is reflected both in inter-state cases at the ICJ, as well as in cases at the international human rights courts. As analyzed in the first two cases studies, a number of decisions of the ICJ in recent years require measures regarding individuals at the national level. This is departing from earlier practice that reflected the prevailing view that state sovereignty precluded any specific directions given by international courts on how a state party should implement a decision against it at the national level.[274] Despite the current climate at the Council of Europe of enhancing the authority of states versus the ECtHR, reflected in the adoption of Protocol 15 on the principles of subsidiarity and margin of appreciation, the case study on *Just Satisfaction and the Binding Force of judgments: Article 41 and 46 of the European Convention on Human Rights* concluded that the ECtHR is becoming much bolder in awarding specific measures to be implemented at the national level.[275] This legal development began with a judgment from 1995 in *Papamichalopoulos et al. v. Greece*, leading to cases where the Court has indicated various types of individual measures, e.g. the state returning land to the applicant within six months,[276] the applicant being released as quickly as possible,[277] the applicant's prison sentence being commuted to a less severe alternative,[278] property ownership rights being recognized and eviction decisions repealed,[279] and the applicant's case being reopened in domestic courts.[280]

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[274] Ingadottir, 'Enforcement of Decisions of International Courts at the National Level' (n 90) 358–9; Ingadottir, 'The Role of the International Court of Justice in the Enforcement of the Obligation of States to Investigate and Prosecute Serious Crimes at the National Level' (n 83) 292–3.

[275] Ingadottir, 'Just Satisfaction and the Binding Force of Judgments: Article 41 and 46 of the European Convention on Human Rights' (n 89) ch 18.3.3.

[276] ECtHR judgment in Case No. 14556/89, 31 October 1995, *Papamichalopoulos et al. v. Greece*, (just satisfaction), paragraph 34.

[277] ECtHR judgment in Case No. 71503/01, 8 April 2004, *Assanidze v. Georgia*, paragraphs 202-233; ECHR judgment in Case No. 48787/99, 8 July 2004, *Ilascu v. Moldovia and Russia*; ECtHR judgment in Case No. 40984/07, 22 April 2010, *Fatullayev v. Azerbajdzhan*, paragraphs 176-177.

[278] ECtHR judgment in Case No. 46468/06, 22 December 2008, *Aleksanyan v. Russia*, paragraph 240.

[279] ECtHR judgment in Case No. 15711/13, 29 January 2015, *Stolyarova v. Russia*, paragraph 75.

[280] See e.g. the ECtHR judgment in Case No. 53431/99, 23 October 2003, *Gençel v. Turkey*, paragraph 27; ECtHR judgment in Case No. 67972/01, 18 May 2004, *Somogyi v. Italy*, paragraph 86; ECtHR judgment in Case No. 9808/02, 24 March 2005, *Stoichkov v. Bulgaria*, paragraph 81; ECtHR judgment in Case No. 62710/00, 26 January 2006, *Lungoci v. Romania*; ECtHR judgment in Cases No. 46825/99, 47132/99, 47502/99, 49010/99, 49104/99, 49195/99 and 49716/99 49195/99, 2 June 2005, *Claes et al. v. Belgium*; and the ECtHR judgment in Case No. 36391/02, 27 November 2008, *Salduz v. Turkey*, paragraph 72.

With international courts becoming more confident in awarding remedies, the significant gap between practice and the principle on state responsibility to make full remedies somewhat shrinks, although far from being fully bridged. As illustrated in *The Role of the International Court of Justice in Enforcement of the Obligation of States to Investigate and Prosecute Serious Crimes at the National Level* states continue to be reluctant to use to ICJ to enforce remedies at the national level, although I expressed the hope that some recent cases such as the *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* might break that pattern.[281] The new case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* is hopefully an indication of that.[282]

As illustrated in the case study on *Just Satisfaction and the Binding Force of judgments: Article 41 and 46 of the European Convention on Human Rights* and *The Implementation of the Rome Statute of the International Criminal Court in the Nordic Countries: A New Comprehensive Criminalization of Serious Crimes* states have made great efforts to implement international treaties and customary law in national law, ensuring the law is compatible with international obligations. The ECHR has legal effect in all member states of the Council of Europe, and states have made major changes in national law and practice following the case law of the ECtHR. Similarly, member states of Rome Statute of the ICC have undergone major changes in national law to ensure compliance with the four Geneva Conventions and the Genocide Convention. However, it is noteworthy what a great impact the complementary jurisdiction of the ICC had on such implementation, such as illustrated in *The Implementation of the Rome Statute of the International Criminal Court in the Nordic Countries: A New Comprehensive Criminalization of Serious Crimes*. All the Nordic countries had undertaken the obligation to prosecute most of these crimes decades earlier, but some, like Norway and Iceland, had limited or no implementing legislation to do so. The possibility of 'losing' jurisdiction to ICC truly transcended the implementation process, leading to comprehensive national implementation legislation in compliance with the international obligations undertaken. The commentaries to the relevant bills underline the importance of the national legislation to meet the ICC test of complementarity and hence being able to exercise jurisdiction themselves. Indeed, this was the primary argument in the implementing legislation. However, no references are made to the reasons why this is so important, in addition to general references to fight against impunity and support the operation of the ICC. No references are made to dualism or monism or elements thereof in support of this policy choice. As the Rome Statute itself does not obligate states to prosecute these

[281] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422.

[282] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, p. 3.

crimes, it is a certain policy choice to ensure the applicability of the national jurisdiction and hence ensure a priory of the national jurisdiction versus the jurisdiction of the ICC.

7.3.3 Individuals

A fundamental concept of dualism is that international law only regulates inter-state relations and hence only states can be addressees and actors in international law.[283] The case studies illustrate the active participation of individuals in international law, hence challenging this fundamental concept of dualism.[284] To a large extent the practice fits the concept as set out by monism, that individuals can equally be addresses of international law alongside states. The development of enhanced participation of individuals in international law in the last decades also fits Kelsen´s view at the time, 'that even if international law did not regulate the conduct of individuals, there was

[283] This concept is also key tenet of 'moderade dualism', represented by Dionisio Anzilotti; Gragl (n 42) 37.

[284] This position of the individual in international law is claiming a separate coverage in any general textbook of international law: e.g., Antonio Cassese and others, *Cassese's International Law* (Third edition, Oxford University Press 2020); Malcolm Nathan Shaw, *International Law* (9th ed, Cambridge University Press 2021). On the individual as a participant in the international system, see e.g., Carl Aage Nørgaard, *The Position of the Individual in International Law* (Munksgaard 1962); Hersch Lauterpacht, 'The Subjects of International Law' in E Lauterpacht (ed), *International Law. Being the Collected Papers of Hersch Lauterpacht, Volume I: The General Works* (1970); George H Aldrich, 'Individuals as Subjects of International Humanitarian Law', *Theory of International Law at the Threshold of the 21st Century, Essays in honour of Krzysztof Skubiszewski* (Kluwer Law International 1996); Rosalyn Higgins, 'Participants in the International Legal System', *Problems and process: international law and how we use it* (Repr, Clarendon Press 2001); Rosalyn Higgins, 'Conceptual Thinking about the Individual in International Law', *Themes and theories: selected essays, speeches, and writings in international law* (Oxford University Press 2009); Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge University Press 2011); Antônio Augusto Cançado Trindade, *The Access of Individuals to International Justice* (Oxford University Press 2011); Antonio Cassese, 'States: Rise and Decline of the Primary Subjects of the International Community' in Bardo Fassbender and others (eds), *The Oxford handbook of the history of international law* (First edition, Oxford University Press 2012); Robert Kolb, 'The Protection of the Individual in Times of War and Peace' in Bardo Fassbender and others (eds), *The Oxford handbook of the history of international law* (First edition, Oxford University Press 2012); Gerhard Hafner, 'The Emancipation of the Individual from the State under International Law' (2013) 358 Collected Courses of the Hague Academy of International Law; Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press 2016); Astrid Kjeldgaard-Pedersen, *The International Legal Personality of the Individual* (First edition, Oxford University Press 2018).

nothing to prevent the international legal order from expanding its reach to this respect'.[285]

Enforcement of human rights and individual criminal responsibility for international crimes does not confine itself to national or international jurisdictions. It is a circular endeavor. Individuals enjoy international human rights in their physical being in a national territory and they commit international crimes against other individuals in such a territory. An individual can hold an award in his or her name from an international court or be named in a court´s arrest warrant, but compliance takes place at the national level. The vast majority of prosecutions of individual criminal responsibility for international crimes is to take place at the national level, not before international courts.

Individual criminal responsibility for international crimes is a well-known principle of international law. It entails individuals being addressed directly by international rules and that they will be held responsible directly under international law.[286] The principle places the individual directly in international law, eroding traditional definitions of international law as law binding only on states and the fundamental concept of dualism that only states are actors in international law. The position of the individual in international law with respect to criminal responsibility has been acknowledged for some time, but in the larger debate and context of individuals as being subject to international law, it has been treated more as an exception or even as a minor area of law and of interest to few. The case studies on enforcement of individual criminal responsibility for international crimes illustrate the broad application of this principle, both at the national and international level. The large-scale efforts in codification of the concept at both the national and international levels and enforcement of the principle, before both national and international courts, is among the largest undertaking in international law, with respect to codification, application and universality, if not the largest. Hence, individual criminal responsibility for international crimes is an illustrative example of the individual as a key subject of international law.

For a long time, the position of the individual in international law with respect to rights was subject to a drudging debate on whether an individual was to be considered merely as an object of international law rather than as a subject. Reflective of the debate and its relevance to enforcement and the monism/dualistic debate, Sir Hersch Lauterpacht argued:

> The position of the individual as a subject of international law has often been obscured by the failure to observe the distinction between the

[285] Kelsen, *General Theory of Law & State* (n 47) 348.

[286] *See* e.g. Articles 227-229 of the Treaty of Versailles, signed 28 June 1919; IMT, judgment of 1 October 1946, in The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg Germany, Part. 22 (22 August, 1946 to 1 October, 1946), pp. 446-447; Article 25 of the Rome Statute of the International Criminal Court.

> recognition, in an international instrument of rights ensuring to the benefit of the individual and the enforceability of these rights at his instance. The fact that a beneficiary of rights is not authorized to take independent steps in his own name to enforce them does not signify that he is not a subject of the law or that the rights in question are vested exclusively in the agency which possesses the capacity to enforce them.[287]

Hopefully, the enforcement mechanism with respect to enforcement of international human rights can now lay this debate to rest, just as the enforcement mechanism of international law in general has done with respect to the debate on whether international law could be considered to be law or not due to lack of such a mechanism.[288] Saving clauses in various instruments on general international law also acknowledge the position of the individual in international law and as a holder of rights, such as Article 33(2) of the Draft Rules on State´s Responsibility for International Wrongful Acts by the International Law Commission, which recognizes that individuals (and other non-state entities) can be holders of rights deriving from state responsibility,[289] and Article 16 of the Draft Articles on Diplomatic Protection, which recognizes the rights of natural persons, legal persons or other entities under international law to resort to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act.[290]

The case studies reveal a different practice with respect to the position of the individual as a subject of international law, depending on whether it regards his or her human rights or individual criminal responsibility for serious crimes. The issue was more debated when it regarded the individual as a holder of international rights rather than when being held criminally

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[287] H. Lauterpacht, *International Law* (1950), 27, cited by Higgins (n 20) 53.

[288] Many observers have tried to close this debate, including Higgins, ibid 39; However, some still follow the object v. subject debate, see David Weissbrodt: 'States as the principal subjects of international law play a primary role in the formulation of international law and must obey the law they have created. Non-state actors are generally not subjects of international law, but they can be the objects of it.'; David Weissbrodt, 'Roles and Responsibilities of Non-State Actors' in Dinah Shelton (ed), *The Oxford handbook of international human rights law* (First edition, Oxford University Press 2013) 720.

[289]Responsibility of States for Internationally Wrongful Acts 2001, Yearbook of the International Law Commission, 2001, vol. II (Part Two), Article 33(2): 'This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State'. See also Commentary on Article 33(2), where it is stated: 'In cases where the primary obligation is owed to a non-State entity, it may be that some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of any State', UN Doc. A/56/10, p. 234.

[290] Draft articles on Diplomatic Protection 2006, Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10).

responsible for international crimes. In light of fundamental principles of law, both at national and international level, such as *nullum crimen sine lege*, one would assume the opposite. The case study on *Enforcement of Decisions of International Courts at the National Level* is illustrative on this point. The issue of the relationship between international and national law was much larger with respect to enforcement of human rights compared to individual criminal responsibility. A case in point is also the practice in Iceland, studied in *The Implementation of the Rome Statute of the International Criminal Court in the Nordic Countries: A New Comprehensive Criminalization of Serious Crimes,* with respect to individual criminal responsibility for international crimes, and in *Just Satisfaction and the Binding Force of judgments: Article 41 and 46 of the European Convention on Human Rights,* with respect to international human rights. As illustrated in the former case study the issue of dualism has never been an issue with respect to individual criminal responsibility for international crimes. For decades it was not considered necessary to translate and implement major conventions the state had ratified on such individual responsibility.[291] It was considered sufficient that Iceland would simply fulfil its international obligation to investigate and prosecute such serious crimes according to general provisions in the penal code, and no translations were made, irrespective of Icelandic citizens being subject to jurisdiction for crimes stipulated in the conventions in numerous countries and before international tribunals. On the contrary, as studied in *Just Satisfaction and the Binding Force of judgments: Article 41 and 46 of the European Convention on Human Rights*, with reference to dualism, individuals could not argue rights based on the ECHR before national courts until the convention was given a legal status in domestic law 1994, and even since then, individuals have had difficulty in enforcing decisions of the ECtHR before the national courts.[292]

With the individual as the acknowledged actor in international law, the reference and reliance on dualism in practice is inevitably riddled with contradictions. As the practice is analyzed in *The Implementation of the Rome Statute of the International Criminal Court in the Nordic Countries: A New Comprehensive Criminalization of Serious Crimes,* can one talk about

[291] For example, while Iceland ratified the Geneva Conventions of 1949 the same year, they were first translated in 2004, in a book (rather than in the government gazette), published by the Ministry of Foreign Affairs and the Icelandic Red Cross. Up to this day, the translation is not available in another format.

[292] It is a major concern, both with respect to individual´s international rights and obligations, that treaties ratified by the Icelandic government have not been published in the Icelandic gazette in the last 13 years, despite the domestic legal requirement to do so. An example of a treaty of major significance for individuals and legal persons is the Arms Trade Treaty, which Iceland was the first state to ratify in 2013, but the treaty has still not been translated nor published in Iceland, Arms Trade Treaty, 2 April 2013, 3013 U.N.T.S., entered into force 24 December 2014. The Ministry of Foreign Affairs has announced an initiative to address the backlog.

implementing legislation on individual criminal responsibility for international crimes and universal jurisdiction as a legislation in accordance with dualism? Similarly, as the practice is analyzed in *Just Satisfaction and the Binding Force of judgments: Article 41 and 46 of the European Convention on Human Rights*, can one talk about implementing legislation on the ECHR in accordance with dualism? Evenly contradictory, as analyzed in *Enforcement of Decisions of International Courts at the National Level* and *Just Satisfaction and the Binding Force of judgments: Article 41 and 46 of the European Convention on Human Rights,* can one argue that enforcement by individuals of decisions of international courts is only possible before an international organ and not domestic one due to the principle of dualism?

Simultaneous participation of various actors also does not mean that the process is logical. The case studies illustrate that even within a framework of defined roles and procedures of various actors, various loopholes remain. This is well reflected in the case study on *Just Satisfaction and the Binding Force of judgments: Article 41 and 46 of the European Convention on Human Rights* and the complicated relationship between states, individuals and organs of the Council of Europe. States ratify the ECHR and undertake the obligations to each other to provide individuals with the rights covered by the convention. Similarly, states undertake the obligation to comply with the decisions of the Court in a treaty between states. At the same time, it is individuals that are 'holders' of a decision. While these individuals are being given standing at the international level, they do not have the standing to enforce the decision at the national level. To complicate issues, compliance with the decision in the case is enforced by treaty members, the Committee of Ministers, and the individual has no role in that process, and as the case study illustrates, is not even aware of that process. To further complicate the process, the enforcement process and communication between the Committee and relevant state is not at all transparent. A case may be kept open for years due to non-compliance and the relevant individual has no knowledge about that process. The remedies that are at issue are also most often implementation of general measures which the relevant individual has no role in and no knowledge of as the remedies are discussed in correspondence between the state and the Committee. Domestic courts are equally ignorant about the process, illustrated by the case study, e.g., the Supreme Court of Iceland finding that compliance with a decision of ECtHR only requires payment of compensation. Similarly, the implementation process at the national level is far from transparent. As the case study illustrates, various amendments are made to legislation at the national level in order to comply with a judgement, in particular with respect to general measures, but at times, no mention is made of the reason for the amendment in the draft bills. At the same time, these legal amendments are highlighted in the communication between the state and the Committee of Ministers as a response to comply with relevant judgement/s. A recent example is a legal amendment in Iceland with respect to the opportunity to have a domestic case reopened following the decisions of

international courts.[293] In the commentary to the bill, it is noted that the legal amendment makes it possible to ask for a case to be reopened following a decision of an international tribunal and that the EFTA Court has been asking for this. No mention has been made of this major issue in the years before the Committee of Ministers and the Icelandic Supreme Court, surely being the primary reason for the amendment.

Another example is the ICJ decision in *LaGrand* and *Avena and Other Mexican Nationals,* analyzed in *Enforcement of Decisions of International Courts at the National Level.* While the court concluded that the USA had violated the rights of named individuals, the relevant individuals were trapped between systems, having neither standing at the international nor national level.[294]

7.4 Binding force and hierarchy of international law

7.4.1 Binding force of international law

The scope of the case studies regards an area of international law which has a clear doctrinal framework. They regard compliance and enforcement of comprehensive treaties, or law-making conventions, as Triepel would have described them, binding on states parties. They regard enforcement of treaties drafted and adopted by states and in which they have ratified and undertaken an explicit international obligation to comply with. The treaties set out detailed enforcement mechanisms, both with respect to implementation at the national level, adjudication at the international level, and compliance mechanism at the international political level. They consist of both primary and secondary rules, corresponding to Kelsen´s and Lauterpacht´s emphasis on the latter and the importance of enforcement as a function of law.

A crucial foundation of both dualism and monism is the binding force of international law. Both Triepel and Kelsen considered this a fundamental principle of international law. The principle is well reflected in treaties and practice. Indeed, the binding nature of international obligations and rules on state responsibility have been compared to a constitution for the international community.[295] The principle of *pacta sunt servanda* is now codified in

[293] Law 47 of 20 May 2020. The amendment adds the phrase 'information' to the phrase 'material' which the commentary argues could cover decisions of international courts.

[294] *LaGrand (Germany v. United States of America)*, Judgment, I. C. J. Reports 2001, p. 466; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I. C. J. Reports 2004, p. 12.

[295] Alain Pellet, 'The Definition of Responsibility in International Law' in James Crawford and others (eds), *The law of international responsibility* (Oxford University Press 2010) 3.

Article 26 of the 1969 VCLT and Article 12 of Draft Articles Responsibility of States for International Wrongful Acts.[296]

As illustrated in the case studies, the principle of binding force of decisions of international courts is based on the same foundation, such as Article 46 of the ECHR with respect to decisions of the ECtHR and Article 98 of the Charter of the United Nations with respect to decisions of the ICJ. Similarly, Article 25 of the Charter of the United Nations, with respect to decisions of the Security Council taken under Chapter VII, is grounded on the same principle.

7.4.2 Hierarchy of international law over national law

The theories of dualism and monism are both based on the binding effect of international obligations, but they have different understandings of the conflict of law. The theory of dualism does not envision a conflict between national and international law, because national and international law are separate branches of law according to the theory. They are two circles, which never superimpose and as they do not govern the same field, it is impossible for them to conflict. On the contrary, according to the theory of monism, domestic law and international law form a single hierarchic but a unified legal system in which international law is superior.[297] Kelsen considered that conflict could be possible between international and national law, but that was simply to be treated as conflict arising within domestic law, and hierarchy rules would solve such situations just as conflict between constitutional and ordinary law, etc. Kelsen also contended that solving a conflict between international law and national law could take time, due to the necessary legislative action, etc.

The doctrine of binding force of international law entails that a state cannot refer to internal matters as a justification for failing to uphold an international obligation. At the time of the principle´s formation the environment was different. In the nineteenth century, the major concern by states was changes in governments and hence the principle was endorsed. The London Conference of 1830 confirmed 'According to this principle of a higher order, treaties do not lose their power, whatever the changes are which intervene in the internal organization of the peoples' and at another assembly in London 1856, states confirmed that 'it is an essential principle of international law that no power can free itself from the engagements of a treaty, nor modify the

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[296] This rule is one of the oldest and most important principles of international law. It is considered to be part of customary law and therefore binding on all states. See e.g. the Judgment of the International Court of Justice, 25 September 1997, *Gabčikovo-Nagymaros Project (Hungary and Slovakia)*, I.C.J. Reports 1997, p. 7, paragraph 142.

[297] Heiskanen (n 93) 4. Among monist scholars there are different approaches to hierarchy of law, arguing either primacy of international or national law, see a wonderful explanatory figure by Gragl (n 42) 20.

stipulations, except following the consent of the contracting parties, by means of an amicable understanding'.[298]

The principle was announced in one of the first decisions of the PCIJ, *Acquisition of Polish Nationality* of 1923, and again in its decision on the *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* of 1932. In the latter decision the Court stated:

> a State cannot adduce as against another State its own Constitution with a view of evading obligations incumbent upon it under international law or treaties in force.[299]

Today, the principle is considered to be one of the most fundamental principles of international law, and included in the Vienna Convention on Law of Treaties as a principle established as a rule of customary law, confirmed countless times by case law:[300]

> A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

Gerald Fitzmaurice, the Special Rapporteur of the working group on the VCLT, included article 27 in his draft 1956, and highlighted the principle in his publication *The General Principles of International Law*, published in 1957. He considered the principle that states cannot plead their national law as a ground justifying non-performance of international obligations as:

> indeed one of the great principles of international law, informing the whole system and applying to every branch of it … Without it, international law could not function … [301]

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[298] Grewe (n 165) 514–5.

[299] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* of 1932, 4 February 1932, Series A/B, no. 44, p. 24.

[300] Annemie Schaus, 'Article 27 Convention of 1969' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: a commentary* (Oxford University Press 2011) 691. See Advisory Opinion of the International Court of Justice, 26 April 1998, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, I.C.J. Reports 1988, p. 12, 34-35, paragraph 57; Judgment of the International Court of Justice, 27 June 2011, *LaGrand Case (Germany v. United States of America)*, I.C.J. Reports 2001, pp. 466 and 497-98, paragraphs 90 and 91.

[301] Fitzmaurice (n 102) 85–6. Interestingly, previous Special Rapporteur, Lauterpacht, did not include the principle in his reports (1953 and 1954). Prior to the work of the International Law Commission on the VCLT states were invited to send their comments and 11 states responded to that request. Some of them commented extensively on the applicability of treaties on the national law with respect to its citizens, including Canada, Israel and the Netherlands. In some of the comments by these countries it was noted that separate legislation is needed to make treaties applicable at the national level (Canada,

The binding force of international law and hierarchy over national law is supported in the case studies, both at the international and national level. The case studies illustrate such an overwhelming practice, and to a larger extent than some writings indicate. This is done most often with explicit reference to the binding force of international obligations, and rarely with reference to the principle set out in Article 27 of the VCLT. Similarly, the case studies illustrate that states go to great lengths to comply with decisions of international courts. At the same time, national legislation is often not apt for such compliance, leading to conflicts of law.

The case study on *The Role of the International Court of Justice in the Enforcement of the Obligation of States to Investigate and Prosecute Serious Crimes at the National Level* illustrates how the ICJ continues to underscore this principle. For instance, as analyzed in the study, in *Questions Relating to the Obligation to Prosecute or Extradite*, with reference to Article 27 of VCLT, ICJ concluded that Senegal could not justify its breach of the obligation under the Torture Convention by invoking provisions of its domestic law and decisions rendered by its courts.[302]

As illustrated in *Just Satisfaction and the Binding Force of judgments: Article 41 and 46 of the European Convention on Human Rights,* Icelandic legislation in a number of cases has been found by the ECtHR to be in violation of ECHR. In all instances has Iceland complied with the judgments with numerous legislative changes. Some of these changes have required fundamental changes to the structure of the legal system, the last time in 2018 with the establishment of a new Appeal Court. As illustrated in the case study, some of these changes took time to implement, but they were done.

In cases in which national courts have given hierarchy of national law over international law, resulting in state violating its international obligation, at the same time the national judges have indicated that it is up to the legislative branch to change the national law in order to amend the situation. As illustrated in *Enforcement of decisions of international courts at the national level,* in *Medellín v Texas* the US Supreme Court acknowledged the obligation of the US to comply with decisions of the ICJ, but considered that internal organs are not directly obliged by virtue of the judgment unless a direct obligation is provided for in the constitutional law of the state.[303] In *Just Satisfaction and the Binding Force of judgments: Article 41 and 46 of the European Convention on Human Rights* it is studied how the Icelandic Supreme Court has wrongly interpreted Articles 41 and 46 of the ECHR. Based

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Israel) while in the Netherlands,it was noted that when a treaty is ratified it appeared to have the force of law in the state, not only for the state but also for the citizens; Report by G. G. Fitzmaurice, Special Rapporteur, Yearbook of the International Law Commission, 1956, vol. II, document A/CN.4/101.

[302] Ingadottir, 'The Role of the International Court of Justice in the Enforcement of the Obligation of States to Investigate and Prosecute Serious Crimes at the National Level' (n 83) 290–1.

[303] Ingadottir, 'Enforcement of Decisions of International Courts at the National Level' (n 90) 330.

on that interpretation, and its view that there is no international obligation to reopen a case following a decision of the ECtHR, it has denied such application by individuals as well as quashing decisions of the Committee of Reopening Cases to that effect. But notably, before they made that finding, they noted that the obligation to re-open a case in such circumstances did not exist in the relevant national law, and its latest decision of May 2019, it noted that such a right would need to be spelled out in the national law and the Court cited the Norwegian legislation as an example of such a law. In May 2020, the provisions on reopening cases were amended by the parliament to address this.[304]

8. Conclusion

In extraordinary political and legal circumstances Triepel and Kelsen presented their theories of dualism and monism. The theories were published in Germany, by authors studying the law and the state closely. The theories were also part of a larger scholarly movement adhering to strict positivism, fighting off elements of natural law and morality. Such an approach was part of the development in Europe, where nationalism was on the rise, revolutions took place, and there was a fierce battle against the long time influence of the Church and aristocracy in the law and the judiciary. The cause was to have one law, accessible to everyone and leaving little scope for interpretation for judges and authority.

Since the publications of the theories fundamental changes have taken place within states and in international relations; and national, regional and international law has evolved significantly. For instance, human rights has become a dominant area of law at both national and international levels, the individual has become a major actor in law at both levels, international cooperation has transformed, with powerful international actors such as the Security Council of the UN, international prosecutors and numerous international courts. The legal world consists of numerous legal sources and actors, not confined to fixed black boxes.

The case studies have illustrated that the theories of dualism and monism still have major influence and authority in practice both at the international and national levels. Due to this influence, this thesis illustrated the importance of revisiting the key concepts of the theories in order to understand their application better. The case studies revealed that the reliance of the theories is problematic, as their key foundations do not hold. In particular, the key concepts of the theory of dualism do not reflect the legal environment today. Hence, applying the theory to today´s legal environment and challenges is riddled with contradictions. The key concepts of the theory of monism passes

[304] See Thordis Ingadottir and Kristin Haraldsdottir, 'Reopening of Criminal Cases in Iceland' (2021) 7 Svensk Juristtidning 560.

the test of time better, although Kelsen´s argument of united legal order has never materialized fully. In a way, the theories of dualism and monism have become fictions of law in both theory and practice. Actors with major interests at hand, primarily individuals, find themselves at times trapped in this fiction, and left with a false promise of law.

Failing basic qualifications of theories and what is required of them, the classical notions of dualism and monism can no longer been considered suitable labels for describing what is going on, what then being a useful guide on how to react to today´s legal world and challenges. As often with dichotomy, the theories of dualism versus monism, still signal to practitioners that there are only two choices, when in fact others are or may be available.

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The ICJ *Armed Activity Case* – Reflections on States' Obligation to Investigate and Prosecute Individuals for Serious Human Rights Violations and Grave Breaches of the Geneva Conventions

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Abstract
In the *Armed Activity Case*, the International Court of Justice, found Uganda in breach of various international obligations. In establishing the state responsibility of Uganda, the Court concluded that in the Democratic Republic of Congo the country's troops committed, among other offences, grave breaches of international humanitarian law, as well as serious human rights violations, including torture. According to the Geneva Conventions of 1949 and human rights treaties, these acts should also entail individual criminal responsibility. Furthermore, states have undertaken an obligation to investigate and prosecute individuals for these heinous acts. However, enforcement of that obligation has always been problematic; states have been very reluctant to prosecute their own forces. And without an effective enforcement mechanism at the international level, states have largely gotten away with this bad practice. In light of the importance of having a state's responsibility support the enforcement of individual criminal responsibility at the national level, the article briefly reflects on the case's impact on individual criminal responsibility. It addresses the issue in two ways. Firstly, it examines a state's obligation to prosecute individuals as a secondary obligation, i.e., inherent in a state's obligation to make reparations for an international wrongful act. Secondly, it explores a state's obligation to prosecute individuals as a primary obligation, undertaken in the Geneva Conventions and human rights treaties. The article concludes that despite the clear obligation of a state to enforce individual criminal responsibility for the acts at hand in the *Armed Activity Case*, and the rear occurrence of having a case of this nature reaching the jurisdiction of the International Court of Justice, where the opportunity to address it and enforce it was largely missed. The nature and submissions in other recent cases at the International Court of Justice indicate that in the near future the Court will have a larger role in enforcing states' obligation to investigate and prosecute serious crimes at the national level.

Keywords
duty to prosecute; grave breaches of the Geneva Conventions; individual criminal responsibility; International Court of Justice; reparation; satisfaction; serious human rights violations; state responsibility

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1. Introduction

In the years 1998 to 2003 the Democratic Republic of Congo (hereinafter DRC) and its citizens were plagued with a reckless war. Its civil conflicts, fueled by aggressive inter-state wars, left the country devastated in the new century. The cost of the war was heavy, with at least 3 million lost lives and a further 3 million people displaced. Long reported horrific atrocities, including mass killings, torture and the use of children as soldiers, were verified in 2005 by a judgment of the International Court of Justice in the *Armed Activity Case*.[1] The Court found one of the warring parties, Uganda, in breach of various international obligations, including international humanitarian law and human rights law.

Enforcement of state responsibility for such heinous acts is not common in the international arena; it is, in fact, a rarity. Hardly never in its almost close to 90-year history have the International Court of Justice and its predecessor the Permanent Court of International Justice found a state in such serious breaches of obligations under peremptory norms of international law, nor being in the position to do so. Without a doubt, other states engaged in grave conflicts, in DRC and elsewhere, have engaged in acts entailing state responsibility, but have simply been protected by the jurisdictional hurdles in The Hague – whatever its violation, a state is not taken to an international court without its consent.[2]

The finding of state responsibility in the *Armed Activity Case* has various legal ramifications. One of them is the relation between state responsibility and individual criminal responsibility. While the Court is only dealing with state responsibility, the individual acts in the background – the ones that were found attributable to Uganda – can also entail individual criminal responsibility. In establishing the state responsibility of Uganda, the Court concluded that the country's troops committed, among other offences, grave breaches of international humanitarian law, as well as massive human rights violations, including torture. Individual criminal responsibility for exactly these crimes has existed for decades, and of particular relevance for this paper states have undertaken an international obligation to investigate and prosecute these crimes. For instance,

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1) *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 19 December 2005*, I.C.J. Reports* 2005, p. 116.

2) DRC brought also cases against Rwanda and Burundi to the International Court of Justice, without success. In *Congo* v. *Rwanda*, the Court "deem[ed] it necessary to recall that the mere fact that rights and obligations *erga omnes* or peremptory norms of general international law *(jus cogens)* are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties", s*ee Armed Activities on the Territory of the Congo*, (*Democratic Republic of Congo* v. *Rwanda)*, New Application 2002, Jurisdiction of the Court and Admissibility of the Application, Judgment, 3 February 2006, para. 125. *See also Status of Eastern Carelia Case*: "It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement", Advisory Opinion, 23 July 1923, PCIJ, Series B, No. 5, p. 27.

these obligations can be found in the four Geneva Conventions of 1949, its Additional Protocol I, and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment of 1984.

The rare finding of a state's responsibility for serious violations of international human rights law and international humanitarian law in the *Armed Activity Case* provides an excellent opportunity to explore the case's impact on individual criminal responsibility.[3] Despite being an explicit obligation in international conventions, enforcement of individual criminal responsibility at the national level has always been problematic. States have been reluctant to prosecute their own troops, and as the obligations come without any enforcement mechanism at the international level, the relevant provisions have almost become dead letters.[4] In contrast, the enforcement of individual criminal responsibility for international crimes at the international level has flourished, as illustrated by the number (now eight) of operating international criminal tribunals. However, on the eve of the operation of the international criminal tribunals for Rwanda and the former Yugoslavia, the limitations of these institutions are now surfacing. Firstly, they can never be a complete substitute for the prosecution by states at the national level. The tribunals' capacity to deal with the situations is minimal, enabling them to deal with only fraction of the cases. The initial years of the International Criminal Court only confirm this reality; its indictments so far can be counted on one hand in each situation.[5] Secondly, the International Criminal Court's principle of complementarity has worked in unexpected ways. Instead of being the long absent enforcement mechanism of national prosecutions, states, including DRC and Uganda, have voluntarily handed over the responsibility of these prosecutions to the International Criminal Court.[6]

In light of the importance of having a state responsibility support the enforcement of individual criminal responsibility at the national level, this article will briefly reflect on the *Armed Activity Case* with respect to states' international

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3) On the issue of the impact of individual responsibility on state responsibility, *see* A. Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law', 52 *International and Comparative Law Quarterly* (2003) pp. 615–640.

4) The bad practice has casted doubt on whether the principle can be considered a customary law, *see* A. Cassese, *The Human Dimension of International Law: Selected Papers* (Oxford University Press, 2008) p. 418; and United Nations, Commission on Human Rights, *The Administration of Justice and the Human Rights of Detainees, Revised final report prepared by Mr. Joined pursuant to Sub-Commission decision 1996/119*, U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997, para. 29.

5) On ICC prosecutorial strategy of focused investigations and prosecutions, *see* International Criminal Court, The Office of the Prosecutor, *Report on Prosecutorial Strategy*, 14 September 2006.

6) On this unexpected development, *see* M. H. Arsanjani and W. M. Reisman, 'The International Criminal Court and the Congo: From Theory to Reality', in L. N. Sadat and M. P. Scharf (eds.), *The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (Martinus Nijhoff Publishers, 2008) pp. 325–345.

obligation to investigate and prosecute individuals for serious violations of human rights and grave breaches of international humanitarian law.[7] As a prologue, section 2 describes the broad jurisdiction the International Court of Justice had in the case, as well as its findings. Section 3 illustrates how the difference between state responsibility and individual responsibility is reflected in the case. Then, section 4 examines a state's obligation to prosecute individuals as a legal consequence of violation of an international obligation, i.e., inherent in a state's obligation to make reparations for an international wrongful act. Finally, section 5 explores state's obligation to prosecute grave breaches of the Geneva Conventions and serious human rights violations. Section 6 contains some concluding remarks.

2. The International Court of Justice and the *Armed Activity Case*

The International Court of Justice was endowed with a broad jurisdiction in the *Armed Activity Case*. The jurisdiction relied on the declarations made by the two state parties accepting the Court's compulsory jurisdiction under Article 36(2) of the Statute of the Court.[8] Equipped with the declarations, broad references by the parties in submissions to "violations of human rights and international humanitarian law", coupled with the parties' ratifications of all major international human rights and international humanitarian conventions, the Court was in the unique position to apply and base its findings on all major international instruments of human rights and international humanitarian law. This is a rare occurrence at the Court, in particular when compared to the Court's often crippled jurisdiction in contentious cases on human rights law and international humanitarian law.[9] In light of the complicated situation in DRC and the multiple atrocities committed, the Court's broad jurisdiction *ratione materiae* greatly enhanced the Court's finding and its relevance.

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7) The analysis is confined to the finding of the Court that Uganda, by the conduct of its armed forces, which committed, among others, acts of killing and torture of the Congolese civilian population, violated its obligation under international human rights law and international humanitarian law. On other aspects of the case, *see* 40 *New York University Journal of International Law and Politics*, Special Issue on the *Armed Activity Case*, dealing with fact-assessment, self-defence, role of peace-agreements, and illegal resource exploitation. *See also* P. Okowa, 'Congo's War: The Legal Dimensions of a Protracted Conflict', 77 *Brit. Y.B.Int'L* 203 (2006).

8) Uganda' declaration is from the year 1963, *UNTS*, Vol. 479, p. 35, and Congo's is from the year 1989, *UNTS*, Vol. 1523, p. 300.

9) For instance, in the *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, the Court could only apply international humanitarian law that has gained the status as customary law, and not the Geneva Conventions directly. Similarly, in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the Court's jurisdiction was strictly limited to violations of that treaty – excluding any considerations of possible violations of other human right treaties or international humanitarian law.

The Court found Uganda in breach of international human rights law and international humanitarian law, and its responsibility was twofold. Firstly, Uganda's responsibility for atrocities committed by the Ugandan troops – attributable to the state; and, secondly, Uganda's responsibility as an occupying power in the area of Ituri, for failing its obligation of vigilance. The Court found that

> the Republic of Uganda, by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, trained child soldiers, incited ethnic conflict and failed to take measures to put an end to such conflict; as well as by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international human rights law and international humanitarian law.[10]

On the relationship between international humanitarian law and international human rights law and of the applicability of international human rights law instruments outside national territory, the Court relied on its previous finding in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, and concluded that both branches would have to be taken into consideration.[11] Consequently, the Court found Uganda in breach of both various human rights laws and international humanitarian law obligations, including ones in the Hague Regulations of 1907, the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, the International Covenant on Civil and Political Rights (hereinafter ICCPR), the First Protocol Additional to the Geneva Conventions of 12 August 1949, the African Charter on Human and People's Rights, the Convention on the Rights of the Child, and the Optional Protocol to the Convention on the Rights of the Child.

As a legal consequence, the Court concluded that Uganda had an obligation to make reparations to DRC for the injury caused, and decided that, failing an agreement between the parties, the question of reparations due to the DRC should be settled by the Court.[12]

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10) *Case concerning Armed Activities on the Territory of the Congo*, *supra* note 1, para. 345(3).

11) *Case concerning Armed Activities on the Territory of the Congo*, *supra* note 1, para. 216, citing its Advisory Opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. On the convergence of international humanitarian law and human rights law, *see* W. A. Schabas, 'Criminal Responsibility for Violations of Human Rights', in J. Symonides (Ed.), *Human Rights: International Protection, Monitoring, Enforcement* (Ashgate, 2003) pp. 281–302.

12) *Case concerning Armed Activities on the Territory of the Congo*, *supra* note 1, para. 345(13) and para. 345(14).

3. State Responsibility v. Individual Criminal Responsibility

State responsibility for internationally wrongful acts is distinct from individual responsibility for international crimes. This principle is well reflected in international instruments. According to Article 58 of the Draft Rules on States' Responsibility, the articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a state.[13] Similarly, from the other side, Article 25 of the Rome Statute of the International Criminal Court states that no provision in the Statute relating to individual criminal responsibility shall affect the responsibility of states under international law.[14] Even though the same treaty entails international responsibility of both states and individuals, such as the Geneva Conventions, it does not affect the principle of distinction of state and individual responsibility.[15] If the individual act is attributable to the state, the State is not exempted from its own responsibility even if it prosecutes and punishes the relevant individual.

In the *Armed Activity Case* the Court found that "massive human rights violations and grave breaches of international humanitarian law were committed by [Uganda's troops] on the territory of the DRC".[16] These acts were attributable to Uganda, and the state was found to have violated principles of international human rights law and international humanitarian law, such as prohibition of taking any measures to cause physical suffering or extermination of protected persons (Article 32 of Geneva Convention), and the right to life and prohibition against torture (Articles 6 and 7 of the ICCPR). Even if Uganda had prosecuted and convicted individuals for the acts attributable to it, it would not have changed anything regarding Uganda state's responsibility. For instance, finding that Uganda failed its duty of vigilance by not taking adequate measures to ensure its military forces did not engage in looting, the Court stated:

> It follows that by this failure to act Uganda violated its international obligations, thereby incurring its international responsibility. In any event, whatever measures had been taken by its authorities, Uganda's responsibility was nonetheless engaged by the fact that the unlawful acts had been committed by members of its armed forces.[17]

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13) International Law Commission, Responsibility of States for International Wrongful Acts (2001), U.N. Doc. A/RES/56/83.

14) Rome Statute of the International Criminal Court, 2187 *U.N.T.S.* 3.

15) On the relationship between international crimes committed by individuals and state responsibility, *see* S. Roseanne, 'War Crimes and State responsibility', in Y. Dinstein and M. Tabory (eds.), *War Crimes in International Law* (Martinus Nijhoff Publishers, 1996) p. 65.

16) *Case concerning Armed Activities on the Territory of the Congo*, *supra* note 1, para. 207.

17) *Ibid.*, para. 246.

Similarly, the Court considered it irrelevant for the attribution of the conduct of Uganda's troops whether they had acted contrary to the instruction given or exceeded their authority:

> It is furthermore irrelevant for the attribution of their conduct to Uganda whether the UPDF personnel acted contrary to the instructions given or exceeded their authority. According to a well-established rule of a customary nature, as reflected in Article 3 of the Fourth Hague Convention respecting the Laws and Customs of War on Land of 1907 as well as in Article 91 of Protocol I additional to the Geneva Conventions of 1949, a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces.[18]

The parties debated to what extent they needed to address the individual acts, in order to establish an attribution to the state. The DRC highlighted that it was not addressing the Court as a criminal tribunal, asking it to pass judgment on each of the tens of thousands of crimes committed. It was asking for the Ugandan state to be held responsible, and in that respect it suffices to show that agents of the Ugandan state, whatever their identity or position, have committed or tolerated violations. On the contrary, Uganda highlighted the need to identify each act in order to make it attributable to Uganda.[19] In order to rule on the claim of violations by Uganda's troops, the Court did not consider it necessary to make findings of facts with regard to each individual incident alleged.[20] Citing various documents from the United Nations, the Court "therefore finds the coincidence of reports from credible sources sufficient to convince it that massive human rights violations and grave breaches of IHL were committed by the UPDF on the territory of the DRC".[21]

4. A State's Obligation to Prosecute Individuals as a Legal Consequence of Violation of International Obligation

While a state is not exempted from its own responsibility for an internationally wrongful act by the prosecution and punishment of the state officials who carried it out, such a prosecution has relevance with respect to reparations, in particular satisfaction. According to Article 37 of the International Law Commission's Draft Rules of Responsibility of States for Internationally Wrongful Acts (2001):

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18) *Ibid.*, para. 214. On Article 3 and 91, *see* F. Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces', 40 *International and Comparative Law Quarterly* (1991) pp. 827–858.
19) International Court of Justice, Counter-Memorial submitted by the Republic of Uganda, 21 April 2001, p. 185.
20) *Case concerning Armed Activities on the Territory of the Congo*, *supra* note 1, para. 205.
21) *Ibid.*, para. 207.

> 1. The State responsible for an international wrongful act is under an obligation to give satisfaction for the injury caused by that act as it cannot be made good by restitution or compensation.
> 2. Satisfaction may consist in an acknowledgement of the breach, and expression of regret, a formal apology or another appropriate modality.[22]

The list of forms of satisfaction listed in paragraph two is not exhaustive. Indeed, the commentary on the Draft Rules lists duty to prosecute as an example of satisfaction:[23]

> The appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance. Many possibilities exist, including … disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act.

DRC included in its written submissions that in light of Uganda's violation of international obligations, Uganda shall "render satisfaction for the injuries inflicted by it upon the [DRC], in the form of … and the prosecution of all those responsible".[24] Citing the Draft Rules of Responsibility of States for Internationally Wrongful Acts, DRC made the argument

> that disciplinary action against Ugandan officials who have been guilty of serious or criminal misconduct, in respect of both the attack and the resulting human rights violations, should be viewed as a particularly appropriate form of satisfaction in the circumstances of this case. … It is essential, however, that the proceedings should be brought against all officials concerned, regardless of their rank and office within the Ugandan State and administrative structure. In other words, they must also – and indeed above all – be brought against the highest-ranking individuals, precisely because it is they who bear prime responsibility for the policy of aggression pursued and the acts of oppression committed against the Congolese State and its people.[25]

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22) Responsibility of States for International Wrongful Acts (2001), *supra* note 13.

23) In 2001 the International Law Commission adopted its final Draft Rules on States Responsibility. The final draft article on satisfaction changed in the last reading, moving prosecution of individuals from the list of examples in the main text of the article into the commentaries. However, the Commission made it clear that the list of different types of satisfaction in Article 37 was not exhaustive. The inclusion of this remedy was backed by a study on long diplomatic practice and punishment of individuals as a consequence of state violations, organised by practice in the time periods of 1850–1945 and from 1945–1989, *see Second state report on state responsibility*, by Aranguio-Ruiz, *ILC Report* 1989, document at 41st session, pp. 36–40. The report states: "the disavowal (d'esaveu) of the action of its agent by the wrongdoer State, the setting up of a commission of inquiry and the punishment of the responsible individuals are frequently requested and granted in post-war diplomatic practice" (para. 130, p. 39). As an example the commentary lists that action against the guilty individuals was requested in the case of the killing in 1948, in Palestine, of Count Bernadotte while he was acting in the service of the United Nations (Whiteman, *Digest of International Law*, vol. 8, pp. 742–743) and in the case of the killing of two United States officers in Tehran (*RGDIP*, vol. 80 (1976), p. 257); *Report of the International Law Commission on the work of its fifty-third sessio*n, p. 106 and fn. 589.

24) *Case concerning Armed Activities on the Territory of the Congo*, *supra* note 1, para. 24.

25) International Court of Justice, *Memorial of the Democratic Republic of the Congo*, Volume I, July 2000, para. 6.78.

However, while the DRC included this submission in its memorial and reply, it was not included in its final submissions given at the end of the oral proceedings. DRC's final submission was

> that the Republic of Uganda is under obligation to the [DRC] to make reparation for all injury caused to the latter by the violations of the obligations imposed by international law and set out in the submission 1, 2, and 3 above … that the nature, form and amount of the reparation shall be determined by the Court, failing agreement thereon between the Parties, and that the Court shall reserve the subsequent procedure for that purpose.[26]

Nothing in the case's documents explains this change of submission. Developments on the ground in the time period between written and oral proceedings should not have rendered the original submission of prosecution irrelevant.[27] Earlier practice at the International Court of Justice may have been an influencing factor. Declaratory judgments are common and the exact scope of reparations has largely been left to the parties to settle.[28] Mandatory orders are rare, and, for instance, the Court has never decided on prosecutions at the national level as a secondary obligation. Such a decision would by some be regarded as inappropriate, if not intrusion in the sovereignty of a state.[29] However, as the Court is increasingly dealing with the linkage between state responsibility and rights and obligation of individuals, the Court's jurisprudence on reparations may evolve. This is illustrated by the nature, submissions, orders and/or findings in recent cases such as *Jurisdictional Immunities of the State (Germany v. Italy)*, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, *Certain Questions of Mutual*

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[26] *Case concerning Armed Activities on the Territory of the Congo*, *supra* note 1, para. 25, 4(d) and (e).

[27] For instance, Uganda had not started any prosecutions for crimes committed by its troops in DRC. In 2003 and 2004 the DRC and Uganda, respectively, made referrals to the International Criminal Court, DRC with respect to crimes committed in all its territory from July 2002 and Uganda regarding crimes committed by the Lord Resistance Army in Uganda. While DRC's referral gives the International Criminal Court a broad jurisdiction, and in accordance with Article 12 of the Rome Statute includes crimes committed in the DRC irrespective of the nationality of perpetrators, the jurisdiction of the International Criminal Court is limited to crimes committed after July 2002, *cf.* Article 11 of the Rome Statute. As the violations in the *Armed Activity Case* go back to earlier years, DRC's referral could only cover a fraction of those crimes addressed in the *Armed Activity Case*.

[28] So much so that the power of the Court to order for instance a specific performance in a mandatory term has been questioned, or at least not considered to be an appropriate judicial remedy, *see for instance* the discussion in C. Brown, *A Common Law of International Adjudication* (Oxford University Press, 2007) pp. 209–211; C. Gray, *Judicial Remedies in International Law* (Oxford University Press, 1987) p. 98; and M. N. Shaw, 'A Practical Look at the International Court of Justice', in M. D. Evans (Ed.), *Remedies in International Law: The Institutional Dilemma* (Hart Publishing, 1998) pp. 13–16.

[29] *See* discussion in Gray, *ibid.*, p. 98.

Assistance in Criminal Matters (Djibouti v. France), *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia)*. The recently filed case before the International Court of Justice by Belgium v. Senegal, requesting the Court to declare that Senegal is obliged to prosecute Mr. H. Habré for acts including crimes of torture and crimes against humanity, and failing the prosecution is obliged to extradite him to Belgium, illustrates the changing nature of cases before the International Court of Justice.[30] While the case concerns primary obligation of a state, and not a secondary one, it reflects how states seem now to be less hesitant to make submissions regarding implementation at the national level. The developments at other international courts and tribunals, such as the regional human rights tribunals, appear to be following the same path. In their decisions on reparations, they are increasingly deciding on investigation and prosecutions at the national level as a remedy, abandoning a somewhat cautious earlier approach to the issue.[31]

The reparation agreement reached between the DRC and Uganda may include an obligation of Uganda to prosecute the individuals bearing the responsibility of the acts committed and which were attributable to it. The words "nature, form and amount" in the DRC's new submission, and subsequent decision by the Court that Uganda "is under obligation to make reparation to the [DRC] for the injury caused", keep the possibility open that the agreement can include satisfaction, including the duty to prosecute individuals. Such an inclusion would be in accordance with the international obligation of a state to make full reparation for internationally wrongful acts.[32] Then, the Court may need to decide on the nature of the reparations in the future. At the time of writing, close to four years after the judgment in the *Armed Activity Case*, the DRC and Uganda have not reached an

30) *Case concerning Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Application filed on 19 February 2009.

31) *See* C. Tomuschat, 'The Duty to Prosecute International Crimes Committed by Individuals', in *Tradition und Weltoffenheit des Rechts: Festschrift für Helmut Steinberger* (2002) pp. 319–322. *See also* the following recent decisions at the European Court of Human Righs: *Assanidze* v. *Georgia* [GC] (App. no. 71503/01) ECHR 2004-II, paras. 202–203; *Ilaşcu and Others* v. *Moldova and Russia* [GC] (App. no. 48787/99) ECHR 2004-VII, para. 490; *Papamichalopoulos and Others* v. *Greece* (Article 50) (App. no. 14556/89) ECHR Series A no. 330-B, paras. 34–39; and *Sejdovic* v. *Italy* [GC] (App. no. 56581/00) ECHR 2006-II.

32) *Factory at Chorzow*, Jurisdiction, Judgment No. 8, 1927, PCIJ, Series A, No. 17, p. 29. Similarly, according to Article 34 of the Draft Articles on State Responsibility, "[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter", Responsibility of States for International Wrongful Acts (2001), *supra* note 13.

agreement on reparations due to the DRC. According to the judgment in the *Armed Activity Case*, failing an agreement, the question of reparations due to the DRC is to be settled by the Court.[33]

5. A State's Obligation to Prosecute Grave Breaches of the Geneva Conventions and Serious Human Rights Violations

In international law there is an independent duty on states to investigate and prosecute individuals for certain international crimes. Applying the terminology set out in the Draft Rules of Responsibility of States for Internationally Wrongful Acts, the duty is a primary obligation as opposed to a secondary obligation (the latter being a legal consequence of a state's breach of an international obligation, as described in Section 4). The duty is irrespective whether the act can also be considered attributable to a state and may lead to a state responsibility. The primary example of a state's obligation to prosecute certain crimes is to be found in the very same instruments that are considered in the *Armed Activity Case* – the Geneva Conventions of 1949 and their additional protocols, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment.

The Geneva Conventions of 1949 were among the first international instruments to stipulate member states' obligations to prosecute crimes falling under the treaty. This was a major development in the enforcement of international obligations, as until that time it was up to individual states to determine how to implement international treaties at the national level.[34] Furthermore, the new obligation underscored the prosecution of war criminals by the state to which the perpetrators belongs.[35] According to Article 146 of the Fourth Geneva Convention:

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33) *Case concerning Armed Activities on the Territory of the Congo*, *supra* note 1, para. 345(13) and para. 345 (14).

34) J. S. Picted (Ed.), *The Geneva Conventions of 12 August 1949, Commentary, I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (International Committee of the Red Cross, 1952) p. 353. However, despite that the duty to prosecute is considered one of the cornerstones of the Geneva Conventions, the treaties do not provide for any enforcement mechanism in the case of a dispute over a state's compliance with the obligation. A vague enforcement mechanism was established in Additional Protocol I, Article 90, with the establishment of a permanent International Fact-Finding Commission. The Commission came into existence in 1991, but has never been used by state parties. Furthermore, a reporting duty on states parties on implementation of the Geneva Conventions at the national level does not exist either. This is also in stark contrast with the substantial reporting duty of states parties to the United Nations human rights conventions, and Security Council resolution 1373/2001 with respect to the implementation of the terrorist conventions. Recently, the Secretary General of the United Nations has made attempts to call for reports on the implementation of Protocol I to the Geneva Conventions, e.g., *Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts*, *Report of the Secretary-General*, UN Doc. A/61/222, 4 August 2006.

35) Prior to this the prosecution of war crimes had largely be confined to prosecution through the injured state, *see* R. Wolfrum, 'Enforcement of International Humanitarian law', in D. Fleck (Ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford University Press, 1995) p. 523.

> … Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such *grave breaches*, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a 'prima facie' case. …[36]

Similarly, according to Article 85 of Protocol I to the Geneva Conventions, the provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by the section, shall apply to the repression of breaches and grave breaches of the Protocol.[37]

Of relevance to the case at hand, an occupying power has obligation under international humanitarian law to ensure public order and safety. According to Article 43 of the Hague Regulations of 1907:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in the force in the country.

The obligation can be considered to entail the duty to prosecute violations of international humanitarian law and serious human rights violations. Interpreting the rather general wording of Article 43 ("take measures", "as far is possible") and deciding the scope of the obligation, the Court in the *Armed Activity Case* concluded:

> This obligation comprised the duty to secure respect for the applicable rules international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against the acts of violence, and not to tolerate such violence by any third party.[38]

The obligation to prosecute arises also corollary with regard to states' international human rights obligations.[39] The Convention against Torture and Other

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36) Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 *U.N.T.S.* 287, Article 146. *See* similar provisions in Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 *U.N.T.S.* 31, Article 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 *U.N.T.S.* 85, Article 50; and Geneva Convention relative to the Treatment of Prisoners of War, 75 *U.N.T.S.* 135, Article 129.

37) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 *U.N.T.S.* 2.

38) *Case concerning Armed Activities on the Territory of the Congo*, *supra* note 1, para. 178.

39) *See further* Cassese, *supra* note 4, p. 418. The obligations of states to investigate and prosecute crimes is also reinforced in United Nations work on the fight against impunity, right to truth, and right to reparations, *see* Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, Principle 19. Similarly, the duty to investigate and prosecute is listed in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International

Cruel, Inhuman, or Degrading Treatment or Punishment of 1984 and the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 have provisions stipulating the obligation of states parties to prosecute violations of the conventions.[40] The International Covenant on Civil and Political Rights does not have an explicit provision on such an obligation.[41] However, the obligation to prosecute is considered to arise with the right to an effective remedy, cf. Article 2(3) together with duties in other provisions, in particular in its provision on right to life and prohibition on torture.[42]

The failure of Uganda to prosecute was part of the DRC's submission regarding the violation of international humanitarian law and human rights law. DRC claims that

> Uganda, by committing acts of violence against nationals of the [DRC], by killing them and injured them…, by failing to take adequate measures to prevent violations of human rights in the DRC by persons under its jurisdiction or control, and or failing *to punish persons under its jurisdiction or control having engaged in the above-mentioned acts has violated the following principles of conventional and customary law: … the principle of conventional and customary law imposing an obligation to respect, and ensure respect for, fundamental human rights, including in times of armed conflict, in accordance with international humanitarian law; the right of Congolese nationals to enjoy the most basic rights, both civil and political, was well as economic, social and cultural.*[43]

In support of its submission, DRC referred to the Hague Regulations of 1907, the Fourth Geneva Convention of 1949, the ICCPR, the Additional Protocol to

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Human Rights Law and Serious Violations of International Humanitarian Law, resolution adopted by the General Assembly, Annex, UN Doc. A/RES/60/147, 21 March 2006, paras. 3(b), 4 and 22(f).

40) The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1465 *U.N.T.S.* 85, Articles 5 and 7; Convention on the Prevention and Punishment of the Crime of Genocide, 78 *U.N.T.S.* 277, Articles 3–6.

41) During the drafting of the ICCPR, some states wanted to strengthen the obligation on the part of government authorities to prosecute violations, *see* N. Roht-Arriaza, 'Sources in International Treaties of an Obligation to Investigate, Prosecute, and Provide Redress', in N. Roht-Arriaza, *Impunity and Human Rights in International Law and Practice* (Oxford University Press, 1995) p. 33.

42) ICCPR General Comment No. 07: Torture or cruel, inhuman or degrading treatment or punishment (Art. 7), 30/05/82, para 1; ICCPR, General Comment No. 31(80): Nature of the general legal obligation imposed on states parties to the Covenant, 26/05/2005, CCPR/C/21/Rev.1/Add.13 (General Comments), para. 18. For corresponding case law, *see for instance* CCPR, *Maria del Carmen Almeida de Quinteros and Elena Quinteros Almeida* v. *Uruguay* (Communication No. 107/1981), UN Doc. CCPR/C/19/D/107/1981, 21 July 1983, para. 16, and *Bleir* v. *Uruguay* (Communication No. 30/1978). The European Court of Human Rights follows a similar approach. In cases of enforced disappearances, torture and extrajudicial executions, the Court has highlighted that the notion of an effective remedy for the purpose of Article 13 of the European Convention on Human Rights entails a thorough and effective investigation capable of leading to the identification and punishment of those responsible, *see Aksoy* v. *Turkey*, Application No. 25781/94, Judgement of 18 December 1996, para. 136.

43) *Case concerning Armed Activities on the Territory of the Congo*, *supra* note 1, para. 25(2).

the Geneva Conventions, the African Charter on Human Rights and People's Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the African Charter on the Rights and Welfare of the Child.[44]

In the *Armed Activity Case* the Court addressed the obligation to prosecute with respect to the obligation of Uganda as an occupying power, and even there not directly. It found that Uganda "by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international human rights law and international humanitarian law".[45] In its findings, the Court does not mention Article 146 of the Fourth Geneva Convention and Article 85 of Protocol I to bring to courts those committing grave breaches of the Conventions. At the same time, establishing state responsibility of Uganda, the Court found that Uganda's troops had committed grave breaches of the Fourth Geneva Convention and Protocol I.[46] The Court's silence on the issue is addressed in one of the judge's separate declarations:

> Nevertheless, since grave breaches of international humanitarian law were committed, there is another legal consequence which has not been raised by the DRC and on which the Court remains silent. That consequence is provided for in international humanitarian law. There should be no doubt that Uganda, as party to both the Geneva Conventions of 1949 and the Additional Protocol I of 1977 remains under the obligation to bring those persons who have committed these grave breaches before its own courts (Article 146 of the Fourth Geneva Convention, and Article 85 of the Protocol I Additional to the Geneva Conventions).[47]

Similarly, the Court does not address the obligation to prosecute stipulated in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, or such an obligation considered inherent in the other human rights treaties. At the same time, the Court found that actions by Uganda's troops violated various international human rights law, including right to life and prohibition of torture or degrading treatment, cf. Articles 6 and 7 of the International Covenant on Civil and Political rights and Articles 4 and 5 of the African Charter on Human and People's Rights.[48]

The Court's silence on the issue of obligation to prosecute may be explained by the *non ultra petita* rule: the Court is bound by parties' submissions. As explained

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44) *Ibid.*, para. 190.
45) *Ibid.*, para. 345(3).
46) *Ibid.*, para. 207.
47) *Ibid.*, Declaration of Judge Tomka, para. 9.
48) The Court did not include in its list of provisions of international instruments violated by Uganda the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, while DRC referred to that instrument in its arguments and both Parties have ratified that instrument without any reservations.

by Sir Gerald Fitzmaurice, "an international tribunal will not decide more that it is asked to decide, and will not award by way of compensation or other remedy more than it is asked to award".[49] In its submission, DRC does not make specific reference to Article 146 of the Geneva Convention, Article 85 of Protocol I Additional to the Geneva Conventions, or relevant articles of the human rights treaties. So, while the Court found that Uganda's troops committed grave breaches of the Geneva Conventions and that Uganda breached Article 7 on torture and Article 6(1) on the right to live of the ICCPR, a decision on Uganda's failure to prosecute might be beyond the Court's jurisdiction. At the same time, DRC's final submission argued that Uganda "*fail[ed] to punish persons under its jurisdiction or control having engaged in the above-mentioned acts*", supported by general reference to the Hague Regulations, Geneva Conventions, and human rights treaties.

The Court's jurisprudence regarding state's obligation to prosecute as a primary obligation is not rich. For instance, in the *Case concerning United States Diplomatic and Consular Staff in Tehran*, among United States' submissions was that Iran "should submit to its competent authorities for the purposes of prosecution, or extradite to the United States, those persons responsible for the crimes committed against the personnel and the premises of the United States Embassy and Consulates in Iran".[50] The United States' submission was among others argued in light of Article 7 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, which stipulates that member states are obligated to prosecute the crimes defined in the Convention or extradite them to trial in other states.[51] Despite the fact that the Court found Iran in violations of various treaties, and international customary law, it did not address this submission. The issue of prosecuting serious international crimes was also in the background in the *Case concerning the Arrest Warrant of 11 April 2000*.[52] The Court's decision confined itself to international law regarding immunities, without addressing the subject of universal jurisdiction for serious international crimes, in this case acts punishable in Belgium under the Law of 16 June 1993 concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II

49) Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. II (1986) p. 524. According to the Court, "it is the duty of the Court not only to reply to the questions as stated in the final submission of the parties, but also must abstain from deciding points not included in those submissions", *Asylum Case* (interpretation), ICJ 1950, p. 402.

50) *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgement of 24 May 1980, para. 8.

51) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, 1035 *U.N.T.S.* 167, Article 7.

52) *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002.

of 8 June 1977 Additional Thereto. The Court was less restrained in the *Case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case*.[53] Among Bosnia and Herzegovina's submission was one that Serbia had failed its obligation under the Convention on the Prevention and Punishment of the Crime of Genocide to punish acts of genocide and its obligation to cooperate with international penal tribunal having a jurisdiction. In interpreting the obligation stipulated in the Genocide Convention on states' duty to punish the crime of genocide, the Court concluded that the obligation only related to states where genocide took place; other states were not obligated by the Convention to punish, not even those states which the perpetrators were nationals of. And as the genocide took place outside Serbia, that state was not obligated by the Convention to prosecute. However, the Court did find that Serbia failed its obligation under the Convention to cooperate with the international penal tribunal, in this case the International Criminal Tribunal for the former Yugoslavia (ICTY), in particular "for having failed to transfer Ratko Mladić, indicted for genocide and complicity in genocide, … and thus having failed fully to co-operate with that Tribunal".[54] The Court decided that Serbia

> should immediately take effective steps to ensure full compliance with its obligation under the Genocide Convention defined by Article II of the Convention, or any of the other acts proscribed by Article III of the Convention, and to transfer individuals accused of genocide or any of those other acts for trial by the International Criminal Tribunal for the former Yugoslavia, and to co-operate fully with that Tribunal.[55]

The Court's decision is interesting as it is not shy in deciding on Serbia's primary obligation to cooperate with an international penal tribunal. Furthermore, the decision goes far in stipulating that a state should act in a certain way, and in this case regarding measures against a named national not mentioned in the other party's submission. Furthermore, the decision seems to imply that Serbia is obligated to transfer to ICTY all individual requested by that Tribunal, including the ones indicted for other crimes than genocide ("any of those other acts for trial by the International Criminal Tribunal for the former Yugoslavia"). Such an interpretation is inconceivable, as the Court's jurisdiction in the case was strictly

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53) *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007.
54) *Ibid.*, para 471(6).
55) While the Court concluded that genocide did take place in Srebrenica, it did not address the duty of Bosnia and Herzegovina to prosecute the crimes, in accordance with the Genocide Convention. In its memorial and counter-reply Serbia made the submission that Bosnia and Herzegovina has the obligation to punish the persons held responsible for the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; however, the submission was not included in its very altered submissions presented at the oral hearings.

limited to the Genocide Convention.[56] As discussed earlier, the duty to prosecute individuals for international crimes is increasingly being dealt with by the Court, illustrated by the recent application by Belgium against Senegal. The duty to prosecute as a primary obligation is at the center of another pending case at the Court – *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*. Among Croatia's claims is that Serbia breached its legal obligation in Articles 3 and 4 of the Genocide Convention by not punishing individuals who committed acts of genocide.[57]

6. Conclusion

The *Armed Activity Case* illustrates well the difference between a state's responsibility and an individual criminal responsibility, as well as the linkage between the two principles. While the case only addressed responsibility of a state, the very same acts found attributable to the state, Uganda, should also entail individual criminal responsibility under international law. A state can both have a primary and secondary obligation to enforce such an individual criminal responsibility at the national level. States have undertaken in international conventions to investigate and prosecute grave breaches of international humanitarian law, and serious violations of human rights. The duty to prosecute can also be inherent in a state's obligation to make reparations for an international wrongful act.

The International Court of Justice was endowed with a broad jurisdiction in the *Armed Activity Case*. The parties have ratified all major humanitarian and human rights conventions and made general references to them in their submissions. Still, the issue of enforcement of individual criminal responsibility at the national level, stipulated or inherent in the above conventions, largely escaped any attention. The DRC's original submission of Uganda's obligation to prosecute at the national level was later merged to a general submission of reparations. Now it is dependent on the parties whether they will include such an obligation in the reparation

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56) The Court could only address Serbia's obligations to cooperate with ICTY in accordance with provisions of the Genocide Convention, not in accordance with the latter's obligations under the United Nations Charter, including Chapter VII.

57) International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Yugoslavia)*, Application Instituting Proceedings, 2 July 1999, para. 35. Croatia's submission requests the Court to find Serbia "to take immediate and effective steps to submit to trial before appropriate judicial authority, those citizens or other persons within its jurisdiction who are suspected on probable grounds of having committed acts of genocide as referred to in paragraph (1)(a), or any of the other acts referred to in paragraph (1)(b) in particular Slobodan Milosevic the former President of the Federal Republic of Yugoslavia, and to ensure that those persons are duly punished for their crimes", *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgement of 18 November 2008 (Preliminary Objections), para. 21.

agreement which is to be reached. The possibility remains, that failing an agreement, the question of reparations due to the DRC will be settled by the Court. While finding that Uganda's troops committed grave breaches of the Geneva Conventions and serious human rights violations, the Court did not address the obligation of Uganda to investigate and prosecute these crimes in accordance with international obligations to do so. The missed opportunity to do so is regrettable, in particular in light of the lack of enforcement of the obligation at the international level. Such enforcement is, however, increasingly reaching the jurisdiction of the Court, illustrated by the nature and submissions in recent cases.

II

Chapter 30

Compliance with the Views of the UN Human Rights Committee and the Judgments of the European Court of Human Rights in Iceland

*Gudrun Gauksdottir and Thordis Ingadottir**

1. Introduction

Compliance with decisions of international courts is gaining increased attention. The proliferation of international judicial mechanisms and corresponding case law has given ample opportunity to various considerations, both on substance and procedure.[1] For the sake of the integrity of the system and observance of international law, enforcement and effectiveness are becoming key issues. Today, comprehensive international regimes, whether in areas such as economic integration, law of the sea, or trade, are dependent on effective dispute settlement systems. Increasingly, states are undertaking far-reaching provisions regarding compliance with and enforcement of decisions by international judicial bodies.[2]

Compliance with and implementation of decisions of human rights tribunals give rise to an additional set of issues. In particular, the unique standing of the individual before these bodies calls into play the relationship between national and international law. This is reflected in the common requirement of exhaustion of local remedies. Moreover, this relationship is put to a test following a decision on a violation by a state against a human rights obligation. While decisions of international human rights bodies cannot quash national legislation or annul a decision taken by national

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1 C. Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford University Press, 2004); T. M. Franck and G. H. Fox (eds.), *International Law Decisions in National Courts* (Transnational Publishers, 1996); M.K. Bulterman and M. Kuijer (eds.), *Compliance with judgements of international courts* (Martinus Nijhoff Publishers, The Hague/Boston/London, 1996); T. Barkhuysen *et al.* (eds.), *The Execution of Strasbourg and Geneva Human Rights Decisions in the national legal order* (Kluwer Law International, The Hague, 1999).

2 *See* for instance the dispute settlement system of the World Trade Organization, of the United Nations Convention on the Law of the Sea, and of the European Communities.

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512

authorities, inevitably, compliance may require such measures. Furthermore, unlike their regional counterparts, including the European Court of Human Rights, the international human rights bodies of the United Nations are still merely quasi-judicial mechanisms, only able to give their Views rather than a judgment.[3] Finally, the practice of the supervising bodies of follow-up measures, *e.g.* the Committee of Ministers with respect to the European Court of Human Rights, and the Special Rapporteur on follow-up of Views with respect to the Human Rights Committee, has undergone major developments. Member states have participated in the process, despite meagre, or even absent, treaty provisions on the authority of the relevant supervisory bodies.

This chapter will look at Iceland's implementation of decisions of the European Court of Human Rights and the Human Rights Committee. In eight cases the European Court of Human Rights has concluded that Iceland was in breach of the European Convention on Human Rights. While Iceland has consented to most of the individual complaints mechanisms set up by the various United Nations human rights treaties, only the procedure set up by the Optional Protocol to the International Covenant on Civil and Political Rights has been resorted to.[4] On one occasion, the Human Rights Committee decided that Iceland was violating the Covenant. The Icelandic government has engaged in a dialogue with the Committee of Ministers and the Human Rights Committee with regard to compliance with the above decisions. Implementation measures have involved major legislative changes, including in areas of constitutional protection, the structure of the judiciary, and procedural law. Compliance with and implementation of a few decisions is pending. The primary outstanding issues involve payment of compensation and re-opening of domestic proceedings.

3 On the lack of authority of the UN human rights treaty bodies and the need for a international human rights court, *see* M. Nowak, 'The Need for a World Court of Human Rights', 7(1) *Human Rights Law Review* (2007) 251-259.

4 Iceland has consented to the individual complaint mechanism set up by the Optional Protocol to the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women, International Convention on the Elimination of All Forms of Racial Discrimination, and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Iceland has not ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, and the Convention on the Rights of Persons with Disabilities. The little use of the complaints procedures of the United Nations human rights bodies might be explained by the much more common use by individuals of the process under the European Convention on Human Rights. Notably, the three cases placed before the Human Rights Committee all regarded alleged violation of Article 26 of the International Covenant on Civil and Political Rights (on prohibition of discrimination). So far, Iceland has not ratified Protocol No. 12 to the European Convention on Human Rights (providing for a general prohibition of discrimination).

2. Iceland and International Law

Iceland ratified the European Convention on Human Rights on 19 June 1953 (hereinafter ECHR), and it was incorporated into Icelandic law by Law No. 62/1994. Iceland ratified the International Covenant on Civil and Political Rights on 22 August 1979 (hereinafter ICCPR).[5] On the same day, in accordance with article 41 of the Covenant, Iceland recognised the competence of the Human Rights Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Covenant. Similarly, on the same occasion, Iceland acceded to the Optional Protocol to the Covenant, recognising the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction.[6]

With respect to the relationship between municipal law and international law, Iceland adheres to the principle of dualism. Therefore, ratified international treaties do not assume the force of domestic law, but rather are only binding according to international law. This applies to the ICCPR as it has not been incorporated into domestic law.[7] However, following the incorporation of the ECHR, its provisions can be directly invoked in court as domestic legislation.[8]

Iceland does not have specific enabling legislation to receive the Views of the Human Rights Committee into its domestic legal order. With respect to the judgments of the European Court of Human Rights, according to Article 2 of Law No. 62/1994 on the European Convention on Human Rights, the decisions of the European Commission of Human Rights, the European Court of Human Rights and the Committee of Ministers of the Council of Europe are not binding under Icelandic law. Despite this provision, the explanatory report to the act assumes that the Icelandic courts and executive authorities seek guidance from the case law in their interpretation of the ECHR.[9] Similarly, Icelandic domestic law does not provide for the payment of com-

5 The ratification was accompanied by reservations with respect to Article 8, para. 3(a); Article 10, para. 2)b), and para. 3, second sentence; Article 13(3); Article 14, para. 7; and Article 20, para. 1. On 18 October 1993 Iceland withdrew its reservation to Article 8, para. 3(a), and on 19 October 2009 Iceland withdrew its reservation concerning Article 13(3).

6 Iceland acceded to the Protocol subject to a reservation, 'with reference to article 5, para. 2, with respect to the competence of the Human Rights Committee to consider a communication from an individual if the matter is being examined or has been examined under another procedure of international investigation or settlement.'

7 None of the United Nations human rights treaties have been incorporated into Icelandic Law. At time of writing, there is a bill before Parliament on the incorporation of the United Nations Convention on the Rights of the Child.

8 On the Icelandic legal system, *see* R. Tryggvadóttir and T. Ingadóttir, *Researching Icelandic Law*, in GlobaLex (2007), available at http://www.nyulawglobal.org/globalex/Iceland.htm , visited in February 2010.

9 For a general presentation of the status of the European Convention on Human Rights and its case law in Iceland *see* G. Gauksdottir, 'Iceland', in R. Blackburn, and J. Polakiewicz (eds.), *Fundamental Rights in Europe. The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001) pp. 399-422. *See* also D. Th.

514

pensation to the victims of violations of human rights as found by international organs. Neither the Icelandic Law on Civil Procedure No. 91/1991 nor Law No. 88/2008 on Criminal Procedure has explicit provisions on the reopening of cases following a determination by an international organ finding violations of a human rights obligation.[10]

The Supreme Court of Iceland has sought to interpret Icelandic law in conformity with Iceland's international obligations. The court has made several references to international obligations undertaken by Iceland, and it has sought to interpret both the Constitution and other laws in harmony with such obligations. These references include also instruments which have not been incorporated into Icelandic law, such as the ICCPR. As stipulated by the Icelandic Supreme Court: "It is a recognised rule in Nordic legislation that legislation shall be construed, as far as possible, in accordance with the international conventions that the State has ratified"[11] However, in a few recent cases where the legal status of decisions of the European Court of Human Rights and Human Rights Committee within the domestic legal order was at issue, the Supreme Court has denied any such standing.

3. European Court of Human Rights

3.1. Overview of Icelandic Cases

The European Court of Human Rights (hereinafter ECtHR) has concluded on violations in eight cases against Iceland and struck three cases off the list due to a friendly

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Björgvinsson, 'Mannréttindasáttmáli Evrópu. Meginatriði, skýring og beiting', in B. Thorarensen *et al.* (eds.), *Mannréttindasáttmáli Evrópu. Meginreglur, framkvæmd og áhrif á íslenskan rétt* (Mannréttindastofnun Háskóla Íslands, Lagadeild Háskólans í Reykjavík, Reykjavík, 2005) pp. 65-89.

10 A new provision in Law No. 88/2008 on Criminal Procedure could possibly be used to reopen cases where there has been found a violation of the right to a fair trial by such institutions. A convicted person may accordingly seek a reopening if it has been shown that the proceedings in the case have been considerably flawed and these flaws have influenced the outcome of the case. The explanatory report to the law states that under the present law there is no provision covering such situations but the law could *e.g.* cover the competence of a judge to handle a case. *See* Article 211 of Law No. 88/2008 on Criminal Procedure. For comparison *see* the Norwegian Law on Civil Procedure, LOV 2005-06-17 nr. 90 (art. 31-1-3, procedural breaches) (31-4-b, material breaches), and Law on Criminal Procedure LOV 1981-05-22-25 (art. 391-2) which both authorise re-opening of cases where the Eureopan Court of Human Rights or the Human Rights Committee have made findings about violations of the respective treaties. *See* A. Bårdsen, 'Execution of Strasbourg and Geneva decisions in Norway', in Barkhuysen *et al.* (eds.), *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (Kluwer Law International, The Hague, 1999) pp. 115-121.

11 H 2000, 4480 (section IV, para. 2). For a discussion on that case and a full translation of the judgement, *see* T. Ingadottir, *Oxford Reports on International Law in Domestic Courts*, ILDC 68 (IS 2000), Oxford University Press.

settlement. At the time of writing, Iceland has four cases pending before the Committee of Ministers (hereinafter CoM) which supervises the execution of judgments according to Article 46 § 2, *i.e., Petur Thor Sigurdsson* (2003), *Kjartan Asmundsson* (2004), *Sara Lind Eggertsdottir* (2007) and *Susanna Ros Westlund* (2007). After establishing that the state concerned has taken all the necessary measures to abide by the judgment, the Committee adopts a resolution concluding that its functions under Article 46 § 2 of the Convention have been exercised.

Seven cases concern the right to a fair trial secured in Article 6 of the ECHR. Impartiality of the courts was at issue in three cases. First, in *Jon Kristinsson,* where the system of combining investigative and judicial powers was put to the test.[12] Second, the Supreme Court was considered not to have been impartial in *Petur Thor Sigurdsson* since one of the judges and her husband were closely linked economically to one of the parties to the case.[13] Third, in *Sara Lind Eggertsdottir* the Supreme Court had overturned the district court's decision which was in favour of the applicant and based its own decision on the opinion of the State Medico-Legal Board, four of whose members were employees of the defendant hospital. The ECtHR concluded that the applicant might legitimately fear that the Medico-Legal Board had not acted with proper neutrality in the proceedings before the Supreme Court as a consequence of its composition, procedural position and role in the proceedings.[14]

Article 6 was violated in *Sigurthor Arnarsson* since the Supreme Court based the final conviction given on appeal solely on the oral evidence given before the district

12 *Jon Kristinsson* v. *Iceland*, 1 March 1990, ECHR, No. 12170/86, Series A No. 171-B. This case resulted in a friendly settlement before the Court. The Commission in its Report of 8 March 1989 unanimously found a violation of Article 6. It considered that there were reasons to fear that the deputy magistrate in his capacity as judge did not offer sufficient guarantee of impartiality.

13 *Petur Thor Sigurdsson* v. *Iceland*, 10 April 2003, ECHR, no. 39731/98, *Reports of Judgments and Decisions* 2003-IV.

14 *Sara Lind Eggertsdottir* v. *Iceland*, 5 July 2007, ECHR, no. 31930/04, <cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=819798&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>, visited in February 2010. Article 6 was also at issue in two friendly settlements. *Vilborg Yrsa Sigurdardottir* v. *Iceland* concerned the applicant's right to be presumed innocent until proven guilty. The Supreme Court exculpated the applicant but in subsequent proceedings the Supreme Court rejected her claim for compensation on the ground that 'she was not deemed more likely to be innocent than guilty of the conduct with which she was charged', 30 May 2000, ECHR, no. 32451/96, *<cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=696480&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>*, visited in February 2010. *Siglfirdingur* v. *Iceland* concerned the lack of a review by a superior court of a fine imposed by the Labour Court, *cf.* Article 2, para. 1, of Protocol No. 7, 30 May 2000, ECHR, no. 34142/96, <cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=696473&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>, visited in February 2010.

court.[15] Article 6 was violated in *Susanna Ros Westlund* because of the unjustified lack of an oral hearing in civil proceedings brought by the applicant before the Supreme Court. The ECtHR noted that the law in question conferred upon one of the parties – the defendant – the *de facto* possibility to decide unilaterally whether or not the Supreme Court would hold an oral hearing. The ECtHR concluded that the absence of a hearing in the applicant's case was a direct consequence of the application of Article 158 of the 1991 Code of Civil Procedure. The Article in question contained an apparent discrepancy between the national standards and the Convention's requirements as regards the right to a fair trial.[16] In *Thorgeir Thorgeirsson,* Article 10 on freedom of expression was violated because the applicant was charged and convicted for defaming civil servants in newspaper articles about police brutality.[17] In *Sigurdur Sigurjonsson,* the revocation of the applicant's licence to operate a taxi violated Article 11 on freedom of association (in this case the negative aspect).[18] In *Hilda Hafsteinsdottir,* the arrest of the applicant on several occasions was not considered legal within the meaning of Article 5§1 of the Convention.[19] Finally, the deprivation of the applicant's disability pension violated Article 1 of Protocol No. 1 protecting the right to property in *Kjartan Asmundsson.*[20]

516

3.2. Remedial Action

In response to the violations in the above cases, the Icelandic government has introduced different measures of implementation aimed at satisfying the requirements implicit in the judgments. These measures are subject to the supervision of the CoM. This is in accordance with the member states' obligations under the ECHR, more specifically Article 41 on just satisfaction and Article 46 on the binding force and execution of judgments. The Icelandic government has engaged in close collabora-

15 *Sigurthor Arnarsson* v. *Iceland,* 15 July 2003, ECHR, no. 44671/98, <cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=699090&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>, visited in February 2010.

16 *Susanna Ros Westlund* v. *Iceland,* 6 December 2007, ECHR, no. 42628/04, <cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=826728&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>, visited in February 2010.

17 *Thorgeir Thorgeirsson* v. *Iceland,* 25 June 1992, ECHR, no. 13778/88, Series A No. 239.

18 *Sigurður Sigurjonsson* v. *Iceland,* 30 June 1993, ECHR, no. 16130/90, Series A No. 264.

19 *Hilda Hafsteinsdottir* v. *Iceland,* 8 June 2004, ECHR, no. 40905/98, <cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=699689&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>, visited in February 2010.

20 *Kjartan Asmundsson* v. *Iceland,* 12 October 2010, ECHR, no. 60669/00, *Reports of Judgments and Decisions* 2004-IX.

tion with the CoM regarding just satisfaction, individual measures and general measures.[21]

Article 46 (1) of the ECHR concerns the binding force and execution of judgments and stipulates that Member States are obliged to abide by the final judgment of the ECtHR in any case to which they are parties. This implies an obligation under international law to comply with the judgment, *i.e.* to solve the problems underlying the violation established by the ECtHR. According to Article 41, if it finds that there has been a violation of the ECHR, and if the internal law of the State concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the applicant. The judgments of the ECtHR do not have direct effect and the ECtHR can neither annul nor modify laws nor annul judgments or administrative decisions in a member state. Article 46 (2) stipulates that the final judgment of the Court shall be transmitted to the CoM, which shall supervise its execution.

In its case law, the Court has emphasised that its judgments are essentially declaratory in nature, but it has also stated that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the CoM, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. In *Papamichalopoulos* v. *Greece*, the ECtHR stated that 'it follows that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.' According to the ECtHR, '[i]f the nature of the breach allows of *restitutio in integrum*, it is for the respondent State to effect it, the Court having neither the power nor the practical possibility of doing so itself.'[22] It used to be well established case law that the ECtHR did not have the power to order a State to take specific measures in response to a violation, but during the last decade there has been a gradual departure from this traditional understanding of the ECtHR

21 An analysis of the execution of the ECtHR judgment is provided in E. Lambert Abdelgawad, *The execution of the judgments of the European Court of Human Rights* (Council of Europe Publishing, 2008). *See* also J. Polakiewicz, 'The Execution of Judgments of the European Court of Human rights', in R. Blackburn. & J. Polakiewicz (eds.), *Fundamental Rights in Europe. The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001). C. Paraskeva, 'Returning the Protection of Human Rights to Where They Belong. At Home', Vol. 12, No. 3 *The International Journal of Human Rights* (2008) pp. 415-448.

22 *Papamichalopoulos* v. *Greece*, 31 October 1995, ECHR (Just satisfaction), no. 14556/89, *Reports of Judgments and Decisions* A330-B, para. 34.

role.[23] For example, the ECtHR is more frequently recommending the re-opening of
518 | domestic proceedings when this is considered the most appropriate form of redress.[24]

3.2.1. Just Satisfaction

According to Article 41, the State is under an unconditional obligation to pay just satisfaction in pursuance of the terms of the ECHR and of the Court's judgments.[25] Just satisfaction may be awarded for pecuniary and/or non-pecuniary damage and costs and expenses. The payment of just satisfaction has generally not been problematic in the Icelandic cases, although the government may have protested against the applicant's claims before the ECtHR in this respect. Just compensation has been paid promptly and within the set time limits of three months.[26] In some cases the ECtHR has not awarded compensation for damage and has considered the finding of a violation in itself adequate just satisfaction.[27]

Six years after the decision in *Kjartan Asmundsson,* the case is still under examination by the CoM. The contested issue seems to be to what extent the Icelandic

23 Paraskeva, *supra* note 21, p. 430 *et seq.*, Lambert, *supra* note 21, p. 46 *et seq. See* also L.G. Loucaides, 'Reparation for Violations of Human Rights under the European Convention and *Restitutio in Integrum*', 2 *EHRLR* (2008) p. 186 and V. Colandrea, 'On the Power of the European Court of Human Rights to Order Specific Non-Monetary Measures: Some Remarks in Light of the *Assanidze*, *Broniowski* and *Sejdovic* Cases', (2007) *Human Rights Law Review*, p. 396. It has been noted that 'the Court has gradually become more adventurous in its judgments in giving indications under Article 46 as to the most appropriate individual and general measures needed to provide redress'. *See* Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights*, 2nd ed., (Oxford University Press, 2009) p. 862.

24 Lambert, *supra* note 21, p. 46.

25 On the current practice of the CoM in supervising payment of sums awarded by way of just satisfaction *see Monitoring of the payment of sums awarded by way of just satisfaction: an overview of the Committee of Ministers' present practice.* Memorandum prepared by the Department for the Execution of Judgments of the European Court of Human Rights (DG-HL). CM/Inf/DH(2008)7 final 15 January 2009. Available at <wcd.coe.int/ViewDoc.jsp?id=1393941&Site=CM>, visited in February 2010.

26 *See e.g. Sigurthor Arnarsson* of 15 July 2003, *supra* note 15, just satisfaction (EUR 8000) paid on 5 September 2003, *Kjartan Ásmundsson, supra* note 20, judgment of 12 October 2004, just satisfaction for pecuniary and non-pecuniary damage EUR 61,500, *Susanna Ros Westlund* of 4 December 2007, *supra* note 16, just satisfaction for non-pecuniary damage due to some anxiety and distress EUR 2,500. The ECtHR rejected her claim for pecuniary damages as it could not speculate on the outcome had an oral hearing been held before the Supreme Court.

27 *Hilda Hafsteinsdottir, supra* note 19. *See* also *Thorgeir Thorgeirsson, supra* note 17. The applicant sought ISK 2,020,200 as compensation for loss of earnings (ISK 24,050 per month from the years 1984 to 1991) resulting from his 'dissident's status'. The Court was unable to accept this claim since it had not been established that there was a sufficient connection between the alleged loss and the matter held in the present judgment to be in breach of Article 10. In *Sigurdur Sigurjonsson, supra* note 18, the applicant did not seek compensation for damage.

government has compensated other individuals who were in the same position as the victim in the case. Under the item 'general measures', the Committee notes the attempts made by the authorities to locate and pay such individuals. Interestingly, the contested issue between the Committee and the Icelandic government is not about the duty to pay such compensation, but whether relevant individuals can be considered in the same position as the victim in the case and whether sufficient efforts have been made by the government to reach those individuals.[28]

3.2.2. Individual Measures

When supervising the execution of a judgment, the CoM shall, if required, examine whether individual measures have been taken to ensure that the violation has ceased and that the injured party is put, as far as possible, in the same situation as the party enjoyed prior to the violation of the Convention. In examining this, the CoM must take into account the discretion of the member state concerned to choose the means necessary to comply with the judgment. Examples include the striking out of an unjustified criminal conviction from the criminal records or the re-opening of impugned domestic proceedings.[29]

Petur Thor Sigurdsson raises interesting questions as to the availability of a procedure of reopening cases in Iceland when the ECtHR has found a violation of Article 6. As previously noted, the re-opening of proceedings has been held by the ECtHR to be a measure as close to *restitutio in integrum* as possible. This has particularly been the case where the right to an independent and impartial tribunal has been violated. Increasingly, the ECtHR is directing states to re-open proceedings on certain conditions.[30] In *Petur Thor Sigurdsson* the Supreme Court was not considered as an impartial tribunal since one of the judges and her husband, were economically linked to the Landsbanki, a party to the proceedings in issue. The ECtHR awarded the applicant EUR 25,000 for non-pecuniary damage plus costs and expenses. The judgment was delivered on 10 April 2003 and is still pending before the CoM, which has requested information about a possible review of the procedural obstacles to reopening the proceedings in the case. The applicant has lodged three petitions with the Supreme Court requesting the reopening of the proceedings, two prior to the decision of the ECtHR, and one following it. These petitions were rejected in July and

28 Notes of the agenda, available at < www.coe.int/t/dghl/monitoring/execution/Reports/Cases6.1-2009_en.pdf>, visited in February 2010.

29 Rule 6 (2b) of the *Rules adopted by the Committee of Ministers for the application of Article 46, para. 2 of the European Convention on Human Rights*. Adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies. Available at www.coe.int/t/e/human_rights/execution/02_Documents/CMrules2006.asp, visited in February 2010. *See* also Recommendation Rec (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of cases at domestic level following judgments of the European Court of Human Rights, adopted on 19 January 2000 at the 694th meeting of the Ministers' Deputies. Available at www.coe.int/t/dghl/monitoring/execution/Documents/CMrules2006_en.asp, visited in February 2010.

30 Lambert, *supra* note 21, p. 23.

October 1997 and October 2006. The reasons given for rejecting the first request was
520 | that the applicant was not considered to have established an economic relationship between the Landsbanki and the judge. Thus the judge was considered impartial and the legal conditions for re-opening the case therefore lacking. The second and the third requests were rejected based on Article 169 §2 of the Law on Civil Procedure No. 91/1991, which stipulates that a request for re-opening a case can only be lodged once. Therefore Article 169 §2 is a legal impediment for the possible re-opening of the case in light of the Strasbourg finding.

In its judgment in *Petur Thor Sigurdsson,* the ECtHR did not order the Icelandic authorities to implement any specific measures, neither in the merits component nor the operative component of the judgment. Still, in line with jurisprudence of the Court, in a concurring opinion, Judge Ress stated that: 'if there is a new ground for reopening the national proceedings after a judgment of the European Court, there should always be an appropriate procedure available.' The CoM has urged all member states to introduce into their national legislation the possibility of reopening proceedings in cases where a judgment of the European Court of Human Rights establishes a violation of Article 6 § 1, especially where 'the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of'.[31] As discussed above, Article 169 of the 1991 Law on Civil Procedure does not ensure this possibility.[32]

In *Petur Thor Sigurdsson,* the Icelandic government paid the victim the just satisfaction as set out by the ECtHR. However, the CoM seems to indicate that Iceland is also under a legal obligation to provide for the possibility of reopening the case:

> Consequently, it seems that even if Icelandic law in principle does not appear to exclude the possibility of reopening the proceedings at issue, in order to give effect to the judgments of the European Court (Article 169 (1) of the Code of Civil Procedure), a potential new request for reopening by the applicant has no chances of success. The individual measures are therefore linked to the general measures as reopening of the proceedings seems the most appropriate means to allow the applicant to have his case decided without lack of objective impartiality.[33]

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31 Recommendation Rec (2000) 2 of the Committee of Ministers to member States on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, adopted 19 January 2000, available at <wcd.coe.int/ViewDoc.jsp?id=334147&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679>, visited in February 2010.

32 Article 169 provides that a reopening is possible if there is a strong probability that facts of a case have not been correctly established, if there is strong probability that new evidence would change the outcome of the case in fundamental aspects or other circumstances commend the granting of a reopening, *e.g.* the great interests of the party.

33 Notes of the agenda, *Sigurdsson* v. *Iceland,* available at <www.coe.int/t/DGHL/MONITORING/EXECUTION/Reports/Current/Iceland_en.pdf>, visited in February 2010.

The Icelandic Ministry of Justice and Human Rights has informed the CoM that it has asked the Ministry's Permanent Committee on Procedural Law to give its opinion on whether the provisions of the Civil Procedure Law concerning the reopening of proceedings following a judgment of the ECtHR should be revised. As noted earlier a new provision in Law No. 88/2008 on Criminal Procedure could possibly be used to reopen cases where there has been found a violation of the right to a fair trial by such institutions in criminal cases. A convicted person may accordingly seek a reopening if it has been shown that the proceedings in the case have been considerably flawed and these flaws have influenced the outcome of the case. The explanatory report to the law states that under the present law there is no provision covering such situations but the law could *e.g.* cover the competence of a judge to handle a case. These words of the explanatory report might indicate that the new condition was introduced under the influence of *Petur Thor Sigurdsson.*[34]

It is clear that the Supreme Court does not extend Iceland's legal obligations under the ECHR so far as to encompass other measures than the payment of just compensation according to Article 41. The latest development in *Petur Thor Sigurdsson* is a judgment delivered by the Supreme Court on 18 June 2009 rejecting the applicant's claim for compensation, which he had based on the ground that his rights had been violated by the Supreme Court judgment of 1997. The applicant *inter alia* claimed compensation as the Icelandic state had not amended the relevant provisions of the 1991 Law on Civil Procedure on reopening of proceedings. Additionally, the applicant considered the State liable based on objective grounds as his constitutionally protected rights had been at stake. The Supreme Court stated:

> In the assessment of whether the defendant is liable because it has not amended the Law on Civil Procedure as the appellant had requested and is described above the Court looks to Article 46, §1 of the ECHR, *cf.* Law No. 62/1994, according to which the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. The rule cannot be inferred from the Convention that the Member States have an obligation to rectify the applicant's situation through other means but by the payment of just satisfaction the ECtHR may award the applicant in every case. Thus it does not appear that the Icelandic state has, through its membership to the ECHR, undertaken the international legal obligation to secure to those applicants whose rights have been violated according to the Court of Human Rights the right to have their proceedings reopened. The Recommendation of the Committee of Misters of the Council of Europe of 19 January 2000 to the member states No. R (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights do not confer upon the Icelandic state an obligation under international law [*translation by authors*].[35]

34 *Supra* note 10.

35 Judgment of the Supreme Court No. 604/2008, available at <www.haestirettur.is/domar?nr=5925>, visited in February 2010.

522

The Supreme Court noted that in August 2003, the Icelandic State had paid the applicant the compensation awarded by the ECtHR, together with costs and expenses, and considered it established that the Icelandic state had complied with the obligation under Article 46, §1, *cf.* Law No. 62/1994.[36] This is a narrow interpretation of Article 46.[37]

The possibility of reopening a case has also been addressed in two other Article 6 cases. In its communication with the CoM regarding *Sara Lind Eggertsdottir* (also concerning impartiality under Article 6), the Icelandic authorities indicated that the applicant did not ask for a reopening of the proceedings. According to the CoM, 'although it is not explicitly provided, Icelandic law does not appear to exclude the possibility of reopening the proceedings at issue in order to give effect to a judgment of the European Court (Article 169 (1) of Code of Civil Procedure).' The case is still pending before the CoM, as the committee is awaiting information from the government that reopening is possible following a judgment of the ECtHR, including examples of jurisprudence. In *Susanna Ros Westlund* the CoM indicated that since the applicant could apply for reopening of the proceedings before the Supreme Court on the basis of Article 169 of Law No. 91/1991 no further individual measures seemed necessary for the State to have complied with its obligation under the ECHR.[38]

Various States have adopted specific legislation, which expressly allows for the possibility of reopening of proceedings following a decision of the ECtHR and there are numerous examples of domestic proceedings having been reopened following such a judgment.[39] Norway has adopted explicit provisions on the reopening of domestic proceedings in cases of violation found by the ECtHR – both as regards violations of procedural nature and material breaches.[40]

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36 *See* a different conclusion by the Supreme Court of Italy, M. E. Bartoloni, *Oxford Reports on International Law in Domestic Courts*, ILDC 560 (IT 2006).

37 For example, such a narrow interpretation does not take into account the 'pilot judgment procedure' of the Court. When the Court receives a significant number of applications alleging violations deriving from the same root cause, it may decide to select one or more of them for priority treatment. In dealing with the selected case or cases, and finding a violation, it will seek to achieve a solution that extends beyond the particular case or cases so as to cover all similar cases raising the same issue. The resulting judgment is called a pilot judgment. One of the aims of this judgment is to give clear indications to the Government as to how it can eliminate an apparent dysfunction. *See The Pilot-Judgment Procedure. Information note issued by the Registrar.* Available at www.echr.coe.int/NR/rdonlyres/DF4E8456-77B3-4E67-8944-B908143A7E2C/0/Information_Note_on_the_PJP_for_Website.pdf, visited in February 2010.

38 In *Sigurthor Arnarsson, supra* note 15, concerning the fairness of criminal proceedings the CoM noted that, concerning individual measures, the applicant's counsel had indicated that the applicant did not wish to apply for reopening.

39 Polakiewicz, *supra* note 21, p. 67-68.

40 *Ibid.*

3.2.3. General Measures

General measures are intended to prevent new and further violations similar to those found in the judgment in question, or putting an end to continuing violations. Depending on the terms of the ECtHR judgment, the measures taken may *e.g.* be legislative or regulatory amendments, or changes in case law.[41]

3.2.3.1. Legislative Amendments

The above cases have had a great impact within the Icelandic legal system, especially in three ways. First, following the judgment of the ECtHR in *Thorgeir Thorgeirsson,* the Minister of Justice appointed a committee to decide upon the reactions to the finding of violation of Article 10 and to look into the question of incorporating the Convention. The committee suggested that the Convention should be incorporated into Icelandic law and this proposal was enacted as Law No. 62/1994. The findings and the reasoning of the committee formed the explanatory report to the law.

Second, the human rights chapter of the constitution was amended with Constitutional Law No. 97/1995. One of the main reasons behind the revision was to fulfil the international obligations of the Icelandic State. Article 74 of the constitution on freedom of association was amended to provide that no one may be obliged to be a member of any association. According to the explanatory report to the 1995 Law, one of the core arguments behind the inclusion of a negative right in Article 74 was the judgment in *Sigurdur Sigurjonsson*, finding the negative aspect of the freedom of association in Article 11 of the ECHR was violated.[42]

Last, no provision of the ECHR has had such an impact on Icelandic procedural law as the requirement of Article 6 (1) of impartiality of the courts. Following the Commission's finding of violation of Article 6 in its report in *Jón Kristinsson* in 1989 and a subsequent friendly settlement before the ECtHR the Icelandic court system was fundamentally reformed by Law No. 92/1989 on the Separation of District Judicial and Administrative powers which entered into force on 1 July 1992. At the same time, considerable amendments were made in procedural legislation.[43]

Apart from the major amendments listed above, various legal amendments have been made as a result of the finding of a violation of the ECHR. In response to the violation of Article 11 in *Sigurdur Sigurjonsson,* Parliament passed Law No. 61/1995, which entered into force on 8 March 1995, abolishing the requirement that taxi operators in Iceland had to belong to a specified union in order to obtain a licence to conduct business.[44] As a consequence of the violation of Article 10 in *Thorgeir Thorgeirsson,* Article 108 of the Penal Law was repealed. This is noteworthy since it was

41 Note to Rule 6(2b) of the Rules of the Committee of Ministers 2006 *supra*, note 29.

42 *Legal Gazette*, Section A, 1994, p. 2107.

43 *Supra* note 12. E. Tómasson, 'Réttur til réttlátrar málsmeðferðar', in B. Thorarensen *et al.*(eds.), *Mannréttindasáttmáli Evrópu. Meginreglur, framkvæmd og áhrif á íslenskan rétt* (Mannréttindastofnun Háskóla Íslands, Lagadeild Háskólans í Reykjavík, Reykjavík, 2005) p. 238.

44 Resolution of the Committee of Ministers No. DH (95) 36 of 4 May 1995, available at <cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=693549&portal=hbk

524

perhaps not a necessary measure in light of the judgment nor was it recommended by the CoM.[45] As a result of the friendly settlement in *Siglfirdingur ehf* the legislator amended the Trade Unions and Industrial Disputes Law No. 80/1938 permitting, under the circumstances covered by Section 67 of the law, the Labour Court's decrees and judgments to be reviewed by the Supreme Court.[46] In *Vilborg Yrsa Sigurdardottir* the contested section 150 (2), of the then Code of Criminal Procedure No. 74/1974, was repealed by Law No. 36/1999.[47] In relation to *Hilda Hafsteinsdottir* the necessary legal basis for deprivation of liberty under such circumstances was provided for in a new Police Law No. 90/1997 and further regulated in the Regulation on the Legal Status of Arrested Persons and on Police Investigations No. 395/1997 as well as in the General Rules of 1998 and other rules issued by the Reykjavik Police Commissioner.[48]

A few cases regarding general measures are still pending. *Sara Lind Eggertsdottir* of 2007 is still under examination by the CoM. It concerns the violation of the applicant's right to a fair hearing by an impartial tribunal (the relevance of the opinion of the State Medico Legal Board). The CoM referred to information provided by the Icelandic authorities on 12 March 2008, informing that the State Medico-Legal Board was abolished through Law No. 42/2008. The explanatory report to the bill makes reference to the ECtHR's judgment to affirm that, as it stands, the procedure of the State Medico-Legal Board does not comply with the rules on impartiality. It is proposed instead to solve disputes on medical issues before the courts, with the assistance from court-appointed assessors and specialist judges. Since Iceland has fulfilled its obligation in light of the judgment and recommendations from the CoM, a resolution is soon to be expected from the CoM.[49] In *Susanna Ros Westlund* of 2007, the CoM awaits information on measures envisaged to prevent future, similar violations. The government has informed the Committee that it has requested the

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m&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>, visited in February 2010>.

45 Resolution of the Committee of Ministers No. DH (92) 59 of 10 November 1992, available at <cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=693457&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>, visited in February 2010.

46 Resolution of the Committee of Ministers No. DH (2002) 67 of 24 June 2002, available at <cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=693984&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>, visited in February 2010.

47 Resolution of the Committee of Ministers No. DH (2000) 111 of 2 October 2000, available at <cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=693783&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>, visited in February 2010.

48 Resolution of the Committee of Ministers No. CM/ResDH(2008)44 of 25 June 2008, available at <cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=838098&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>, visited in February 2010.

49 Notes of the Agenda, available at www.coe.int/t/DGHL/MONITORING/EXECUTION/Reports/Current/Iceland_en.pdf, visited in February 2010.

Committee on Procedural Law to give its opinion as to whether there is a reason to amend Article 158 of the 1991 Law on Civil Procedure under its upcoming revision.[50]

3.2.3.2. Changes in Case Law

A violation of a right protected by the ECHR may call for changes in practice. According to the CoM, changes in case law may sometimes be sufficient general measures. The violation found by the ECtHR in *Thorgeir Thorgeirsson* was one of the factors leading to changes in the approach of the domestic courts in their assessment whether the freedom of expression has been violated.[51] According to the Icelandic authorities, the origin of the violation found by the court in *Sigurthor Arnarsson* did not stem from the wording of the legal provision but lay in the circumstances of the case. Therefore, the judgment of the ECtHR had been translated, disseminated and published on the website of the Ministry of Justice so that the courts could take it into account in the future.[52] The authorities also pointed out that in fact:

> Even though the jurisprudence of the European Court has no binding direct effect in Icelandic Law ... the Supreme Court takes it regularly into account. Thus, since the facts in this case, the Supreme Court has used the possibility to receive oral evidence and to invalidate the lower court's judgments in several cases. According to the Icelandic authorities, the Supreme Court will continue to follow this practice in accordance with the European Court's case-law.[53]

The Icelandic government considered that the general measures adopted would prevent similar violations and that Iceland had thus complied with its obligations

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50 Notes of the Agenda, available at www.coe.int/t/DGHL/MONITORING/EXECUTION/Reports/Current/Iceland_en.pdf, visited in February 2010.

The judgment in *Hauschildt* v. *Denmark* (24 May 1989, ECHR, Series A.154) prompted changes in Icelandic legislation, *cf.* Article 6 of the former Law of Penal Procedure concerning the impartiality of judges in penal cases, *see* E. Tómasson, *supra* note 43, p. 238. Although not binding on anything other than the State party, a judgment has instigated changes in legislation in other member states and even case practice, *see* Paraskeva, *supra* note 21 p. 428.

51 P. Thórhallsson, 'Tjáningarfrelsi,' in *Mannréttindasáttmáli Evrópu. Meginreglur, framkvæmd og áhrif á íslenskan rétt* (Mannréttindastofnun Háskóla Íslands, Lagadeild Háskólans í Reykjavík, Reykjavík, 2005) p. 387.

52 Eirikur Tomasson says that this judgment undoubtedly will have the effect that the Supreme Court will not convict an accused individual who has been acquitted by the district court on the basis of oral evidence unless the accused and possibly also key witnesses give evidence before the Court. The Court has availed itself once of this possibility. *See* E. Tomasson, *supra* note 43, p. 220.

53 Resolution of the Committee of Ministers No. DH (2007) 82 of 20 June 2007, available at <cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=820068&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>, visited in February 2010.

under Article 46 paragraph 1 of the Convention. The CoM closed its examination of
526 | the case.[54]

To secure necessary dissemination the Icelandic authorities have translated the judgments of the ECtHR and brought them to the attention of the relevant authorities, e.g. the domestic courts and the state prosecutor. For example, in *Thorgeir Thorgeirsson*, *Hilda Hafsteinsdottir* and *Sara Lind Eggertsdottir*, the authorities informed the CoM that the judgment of the ECtHR had been translated and published on the homepage of the Ministry of Justice, thus ensuring its dissemination to practicing lawyers and other interested persons. It would also be published in a periodical on the case law of the ECtHR.

4. The International Covenant on Civil and Political Rights

4.1. Overview of the Icelandic Cases

At the time of writing, the Human Rights Committee has received three communications where the authors claim to be victims of a violation of the Covenant by Iceland. Two of those communications were deemed inadmissible,[55] but in the latest one, Communication No. 1306/2004 (*Haraldsson et al. v. Iceland*), the Human Rights Committee was of the view that Iceland was in violation of Article 26 of the Covenant.[56]

As noted earlier, Iceland does not have a specific enabling legislation to receive the views of the Human Rights Committee into its domestic legal order. Similarly, domestic legislation does not provide for the payment of compensation to the victims of violations of human rights as found by international organs. By the same token, domestic legislation does not have specific provisions regarding the reopening of cases or retrials in light of decisions by such entities. As discussed earlier, this lacuna in domestic legislation has not prevented Iceland from largely complying with and implementing the decisions of the European Court of Human Rights. However,

54 In *Petur Thor Sigurdsson* the CoM noted that the judgment had been translated and sent out to the Icelandic judicial authorities and the Icelandic version had been published on the website of the Ministry of Justice. In assessing these measures, the CoM took into account the direct effect given to the Convention and to case law of the ECtHR by Icelandic Courts and believed that these measures were sufficient to execution. The CoM referred to examples of this direct effect in *Sigurthor Arnarson*, *supra* note 15. *See* notes of the agenda, available at www.coe.int/t/DGHL/MONITORING/EXECUTION/Reports/Current/Iceland_en.pdf, visited in February 2010.

55 Communication No 674/1995 (*Lúðvík Emil Kaaber* v. *Iceland*), UN Doc. CCPR/C/58/D/674/1995; Communication No 951/2000 (*Bjorn Kristjánsson* v. *Iceland*), UN Doc. CCPR/C/78/D/951/2000, 30 July 2003. In the former communication, the author claimed to be a victim of Articles 2 and 26 of the Covenant, and in the latter the author claimed to be a victim of Article 26.

56 Communication No 1306/2004 (*Erlingur Sveinn Haraldsson and Örn Snævar Sveinsson* v. *Iceland*), UN Doc/CCPR/C/91/D/1306/2004, 14 December 2007.

whether the Icelandic government would comply in the same manner with Views of the Human Rights Committee was first put to a test in *Haraldsson et al.* v. *Iceland.*

For various reasons, such a parallelism was not self-evident. First, Views of the Human Rights Committee do not have a binding authority as judgements; they are views and not binding upon the states parties. The procedure is in essence quasi-judicial rather than judicial.[57] Second, inevitably, the ECHR has been given more authority than the ICCPR in Iceland, as the former has been given a legal status in domestic legislation, and the latter has not. Third, the Views of the Human Rights Committee in the case of *Haraldsson et al.* v. *Iceland*, regards the fundamental structure of the Icelandic fisheries management system, and as asserted by the government, '[i]t is clear that overturning the Icelandic fisheries system at this time would have a profound impact on the Icelandic economy'.[58] Icelandic fisheries have been the subject of an international tribunal once before, in the International Court of Justice in the *Icelandic Fisheries case,*[59] and in that situation the Icelandic government chose to ignore the decision of the court. According to Article 59 of the Statute of the International Court of Justice, the decision between the parties was binding and Iceland, as a member of the United Nations, had undertaken to comply with the decision, cf. article 94 of the Charter of the United Nations.[60] Commenting on the non-compliance by Iceland, Judge Schwebel notes that '[i]n the *Icelandic Fisheries* case a most democratic State, perhaps the State with the oldest existing democratic system in the world and a history of compliance with international law, declined to argue whether the Court had jurisdiction – although it was obvious that it did – and paid no attention to the judgement of the Court when it came down.'[61]

57 M. Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, 2nd revised edition (N.P.Engel Publisher, 2005) p. 821, pp. 894-895; Philippe Sands *et al.*, *Manual on International Courts and Tribunals* (Butterworhts, London, Edinburgh, Dublin, 1999) pp. 170-171.

58 *See* letter from the government of Iceland, dated 6 June 2008, concerning Views adopted by the Human Rights Committee on 24 October 2007, concerning communication No. 1306/2004, pp. 17-18, <eng.sjavarutvegsraduneyti.is/news-and-articles/nr/9306>, visited in February 2010.

59 *Fisheries Jurisdiction (United Kingdom* v. *Iceland)*, Merits, Judgment, *I.C.J. Reports 1974*, p. 3; *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland)*, Merits, Judgment, *I.C.J. Reports 1974*, p. 175.

60 Iceland's non-compliance with the decision is a well noted exception to the compliance record of the International Court of Justice, *see* e.g., M.N. Shaw, *International Law*, 5th ed., (Cambridge University Press, 2003) p. 997; Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005*, 4th ed., (Martinus Nijhoff Publishers, Leiden/Boston, 2006) p. 198.

61 S.M. Schwebel, 'Commentary', in M.K. Bulterman and M. Kuijer (eds.), *Compliance with judgments of international courts* (Martinus Nijhoff Publishers, The Hague/Boston/London, 1996) p. 40.

4.2. Communication No 1306/2004 (Haraldsson et al. v. Iceland)

528

On 24 October 2007 the Human Rights Committee under the Optional Protocol to the ICCPR adopted its Views in Communication No. 1306/2004 *Haraldsson et al. v. Iceland*. The complaint relates to the Icelandic fishery management system and its consequences for the authors of the complaint. The main issue before the Committee was whether the authors, who are lawfully obliged to pay money to fellow citizens in order to acquire quotas necessary for exercising commercial fishing of certain fish species and thus to have access to such fish stocks that are the common property of the Icelandic nation, are victims of discrimination in violation under Article 26 of the Covenant. The Icelandic Supreme Court had decided that the system complied with the equality principle of the Icelandic Constitution, cf. Article 65 of the Constitution, and the principle of equality that must be observed in the imposition of restrictions on employment rights, cf. Article 75 of the Constitution. In the criminal case, the authors were sentenced to a fine or three months imprisonment and to payment of costs. According to the Views of the Human Rights Committee:

> 11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 26 of the Covenant.
> 12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including adequate compensation and review of its fisheries management system.
> 13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not, and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views.

On 6 June 2008 the Icelandic government sent a letter to the Human Rights Committee concerning the Views adopted by the Committee in the case.[62] The government 'declare[d] its willingness to prepare a long-term plan for the review of the Icelandic fisheries management system or its adaptation to the Views of the Human Rights Committee.'[63] However, the government's position is that the victims cannot be paid compensation.

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62 Letter from the government of Iceland concerning the Views adopted by the Human Rights Committee on 24 October 2007, concerning communication No. 1306/2004, *supra* note 58. *See* also *Report of the Human Rights Committee*, Volume II, UN Doc. A/63/40, pp. 529-530.

63 *Ibid.*

By letter dated 10 August 2008, the victims sent the Human Rights Committee their response, in which they questioned the government's intention to review the system.[64] The authors also noted that they had, on their own initiative, approached the government for payment of the compensation, but were denied. They also informed the Committee that they made a petition of a reopening of the case to the Supreme Court of Iceland in light of the Views adopted by the Committee. On 8 May 2008 the Supreme Court of Iceland did not grant the petition for reopening of the case.

On 26 February 2009, the government of Iceland wrote again to the Human Rights Committee informing it about the financial crises it was undergoing and changes in governments.[65] At the same time, the government reiterated that '[t]he present government supports the commitments made in the letter from the Icelandic authorities of 6 June 2008. However, given the unique economic, financial, and political circumstances and the very short term of office of the present government, I have no doubt that the Committee will show understanding and consideration for the need for a wider timeframe in fulfilling these commitments. The government has already decided to promote amendments to the Icelandic constitution, including changes to enshrine in the constitution the common ownership of fishing resources by the Icelandic nation and to reinforce its human rights provisions.'[66]

The Human Rights Committee considered these comments and responded that it had decided that there was a 'follow-up dialogue ongoing' in the case of *Haraldsson et al. v. Iceland*.[67] Therefore, it remains to be seen whether the Committee considers the actions taken by Iceland to be 'satisfactory' or 'un-satisfactory'. However, the above dialogue raises some questions of relevance for this paper, including the authority of the Human Rights Committee, compensation, and reopening of cases at the national level.

64 Letter from L. E. Kaaber, hdl., dated 10 August 2008, regarding follow-up to the Committee's Views adopted 24 October 2007 relating to Communication No. 1306/2004, on file with authors.

65 Letter, dated 26 February 2009, from the Icelandic government regarding the Views of the Human Rights Committee on 24 October 2007, concerning communication No. 1306/2004, on file with authors.

66 *Ibid.*

67 *See Report of the Human Rights Committee*, Volume I, UN Doc. A/64/40 (Vol. I), p. 144, and *Report of the Human Rights Committee*, Volume I, UN Doc. A/63/40 (Vol. I), p. 132. The Committee publishes a table in its yearly report indicating whether follow-up replies are or have been considered as satisfactory or unsatisfactory, or whether the dialogue between the state party and the Special Rapporteur for follow-up of Views continues.

530

4.3. Authority of the Human Rights Committee

The Icelandic government highly respects the authority and Views of the Human Rights Committee, both with respect to its follow-up procedures and the nature of its finding.[68]

Unlike the European Convention on Human Rights, the Optional Protocol does not have any provision on follow-up procedures on compliance with Views. Late into its existence, the Human Rights Committee asserted its implied powers to ensure compliance with its decisions, relying on Article 5(4) of the Optional Protocol.[69] In 1990, following decades of problematic compliance with its decisions, the Human Rights Committee established follow-up procedures and created the position of Special Rapporteur to follow up on its Views and to review measures taken by states parties to give effect to the Committee's Views.[70] In its Views, the Committee has gradually set out firmer directions on dialogue with respondent states, including a time frame for responses.[71] In *Haraldsson et al.* v. *Iceland* the Icelandic government fully respected these procedures set up by the Committee and engaged in a dialogue with the Committee on follow-up measures.

As discussed, the Views of the Human Rights Committee do not have the same binding authority as judgements. The procedure is in essence quasi-judicial rather than judicial. In its correspondence with the Committee, Iceland does not refer to or use this non-binding authority as a shield to avoid compliance with the Committee's Views.[72] On the contrary, Iceland refers to its international obligations to consider the Views of the Human Rights Committee and it repeats in its letters to the Committee that, despite difficulties in changing the system, it will amend its fishery management system in accordance with the Views:

> It is also established that Iceland elected to become a party to the Optional Protocol to the International Covenant on Civil and Political Rights, thereby recognising the competence of the Human Rights Committee to decide whether there has been a violation

68 The acknowledgement of the Committee's authority is in line with Iceland's general support of the work of the Committee. For instance, Iceland sponsored the resolution by the General Assembly on the International Covenants on Human Rights, which '*Urges* State parties to take duly into account, in implementing the provisions of the International Covenants on Human Rights, ... the views adopted by the Human Rights Committee under the first Optional Protocol to the International Covenant on Civil and Political Rights,' UN Doc. A/RES/64/152.

69 D. Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 1999) p. 144.

70 This role is now embedded in Rule 101 of the Rules of procedure of the Human Rights Committee, UN Doc. CCPR/C/3/Rev.8, 22 September 2005.

71 *See* J. Th. Möller and A. de Zayas, *United Nations Human Rights Committee Case Law 1977-2008* (N.P. Engel Publisher, Kehl am Rhein, 2009) pp. 503-507.

72 A few States have done this, including the Czech Republic, *see* J. Th. Möller and A. de Zayas, *op. cit,* p. 517.

> of the provisions of the Covenant or not. The State of Iceland is therefore required by international law to address the conclusions of the Committee.[73]

At the same time, the Icelandic government adds a reservation:

> However, any such measures must fall within the limits imposed on the Government by the provisions of the Constitution of Iceland and the European Convention on Human Rights regarding the protection of employment rights. ... The accepted opinion is that caution should be observed in giving wide interpretation to judgments and their value as precedents. Such caution is particularly relevant in the case of views, as in the present case, which do not include a summarised conclusion in the form of an adjudication, but a general discussion which, in addition, does not lay down detailed guidance as to the precise measures required.[74]

In *Haraldsson et al.* v. *Iceland* there is an interesting dialogue on the specificity of measures directed by Human Rights Committee. The Icelandic government contends that the Views are not specific enough as to what measures it should take to amend its legislation:

> The difficulty confronting the Icelandic Government is, among other things, that it cannot be inferred from the Views of the Human Rights Committee how far the Government needs to go in order for its measures to constitute *effective remedy*. Will minor adaptations and changes in the Icelandic Fisheries Management System suffice, or are more radical changes needed?[75]

The argument that the Views do not have enough detailed guidance or instructions concerning what measures the state party should take to comply with it is in stark contrast with the generally accepted understanding of the extent of the authority of the Human Rights Committee, or for that matter, the extent of the authority of international courts in general. To date, state sovereignty has been considered to preclude any specific directions given by courts on how a state party should implement a decision against it at the national level.[76] For instance, the European Court of Human Rights grants state parties full discretion on how to implement decisions against it.[77] The Human Rights Committee has taken the same approach; the recommendation or remedy stipulated in the Views of the Human Rights Committee 'is in principle of a general nature, allowing [the] State Party a certain discretion in implementation

73 Letter from the government of Iceland concerning the Views adopted by the Human Rights Committee on 24 October 2007, *supra* note 58.

74 *Ibid.*

75 *Ibid.*

76 *See* C. Brown, *A Common Law of International Adjudication* (Oxford University Press, New York, 2007) pp. 209-216; C. Gray, *Judical Remedies in International Law* (Oxford University Press, 1987) p. 98.

77 *See* note 22.

532

subject to its own legal or administrative system.'[78] One might infer from the above criticism made by the Icelandic government that it wants to give the Committee more authority in this respect, a position which is favoured by some commentators.[79]

4.4. Compensation

Iceland refuses to provide the authors with compensation, as set out in the Views:

> In the opinion of the State of Iceland there are no grounds for paying compensation to the applicants in question, as this could result in a run of claims for compensation against the State; such claims are untenable according to current Icelandic law, as evidenced by the judgment of the Supreme Court in the Court Records for 2000, p. 1534 (*Vatneyri*). To ensure equality the government would have no option but to compensate all those who found themselves in a similar situation as the applicants.[80]

As discussed in Chapter 2, Iceland does not currently have legislation on payment of compensation to victims of violations of human rights as found by international organs.[81] In its general comment No. 33, the Human Rights Committee discusses this common lacuna in domestic legislation and notes that "[i]n any case, States parties must use whatever means lie within their power in order to give effect to the views issued by the Committee."[82] Many States lacking this legislation pay compensation *ex gratia*.

In its first decision in the context of the examination of the reply from Iceland, the Human Rights Committee does not comment on this refusal of payment of compensation. It merely welcomes the fact that Iceland is conducting a review of its Fisheries Management System and 'looks forward to being informed of the results as well as

78 *See* International Human Rights Instruments, *Follow up to decisions: Overview of follow-up procedures*, UN Doc. HRI/ICM/2009/7, 11 November 2009, pp. 3-6.

79 *See* J. Th. Möller and A. de Zayas wondering whether the time has come for States to expect more details in the remedies clause of the Committee's Views, J. Th. Möller and A. de Zayas, *supra* note 71, p. 499.

80 *See* Letter from the government of Iceland concerning the Views adopted by the Human Rights Committee on 24 October 2007, *supra* note 58.

81 While most States do not have specific enabling legislation to receive the views of the Human Rights Committee into their domestic legal order, some do have legislation providing for compensation to victims as found by international organs, see *General Comment No 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, UN Doc. CCPR/C/GC/33, 5 November 2008, para. 20.

82 *Ibid.*

the implementation of the Committee's Views.'[83] At the same time, the follow-up to the case is categorised a 'follow-up dialogue ongoing.'[84]

In *Haraldsson et al.* v. *Iceland* the Committee calls only for compensation to the authors of the communication, and Iceland would only need to pay compensation to the authors of the case in order to be considered to have made 'satisfactory response'. As evident in the Optional Protocol and the Rules of Procedure of the Human Rights Committee, a communication from an individual under the Optional Protocol concerns only that case. This is inherent in the Committee's jurisdiction and general effects of *res judicata*; illustrated by the fact that a communication from another victim of the identical violation is admissible under the Optional Protocol.[85] In addition, not only is effect of *res judicata* limited to the parties of the case, but according to a recent decision by the Icelandic Supreme Court a decisions by an international court does not constitute *res judicata* in national law. According to the Supreme Court, as for a judgment of the European Court of Human Rights: "Provisions of Icelandic law do not prevent the appellant in this case from receiving compensation from the [government], even though the European Court of Human Rights has already accorded him compensation for the [misconduct] which is the basis of his claims in this case, cf. Article 2 of Law No. 62/1994" (*translation by authors)*.[86] By analogy, and then without the need to consider the fact that decisions of the ECtHR are binding judgements and the Views of the Human Rights Committee are not, the authors in *Haraldsson et al.* v. *Iceland* cannot enforce the remedial clause of the Views in national courts in Iceland, much less other individuals in a similar situation.[87]

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83 *See* Report of the Human Rights Committee, *supra* note 62, p. 530.

84 In its General Comments, the Human Rights Committee argues that when States have rejected the Committee's View, in whole or in part, the Committee regards the dialogue between the Committee and the State party as ongoing, *see General Comment No 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, *supra* note 80, para. 18.

85 A good example is the numerous communications and subsequent Views by the Human Rights Committee regarding Czech Republic and its denial of the right to restitution of the property which had been confiscated when victims left the former Czechoslovakia for political reasons (violation of art. 26 of the Covenant). *See* e.g. the following cases in 2006 only: 1448/2006 (Kohoutek), 1463/2006 (Gratzinger), 1533/2006 (Ondracka), 1484/2006 (Lnenicka), 1485/2006 (Vlcek), 1488/2006 (Süsser), 1497/2006 (Preiss). In one case has the Committee in its remedial clause stated that the state party was required to provide an effective remedy, including compensation, not only to the six victims in the communications but to all others that were victims of the same incident. HRC 2006 Report, Vol. II, Annex V, Sect. AA, para. 8 (Nos. 1152 and 1190/2002 (Ndong Bee et al. and Micó Abogo v. Equatorial Guinea)). *See* discussion in J. Th. Möller and A. de Zayas, *supra* note 71, p. 495.

86 H 604/2008, chapter V.

87 Increasingly, the Human Rights Committee is specifying the amount of compensation in its views, *see* M. Nowak, *supra* note 57, p. 893.

4.5. Reopening of a Case

534

The authors in *Haraldsson et al.* v. *Iceland* informed the Human Rights Committee that they had unsuccessfully applied before the Supreme Court of Iceland for a reopening of their case. In their application they relied on article 183-185 of Law on Criminal Procedure. In the case, the authors based their request on a provision allowing a reopening of a case if new material has appeared, which might have had a material impact on the outcome of the case if placed before the court before it handed down its judgement (Article 184, para. 1(a)). The authors argued that the Supreme Court may have failed to take account of international law and the generally accepted principle that Icelandic law shall be interpreted in accordance with international law when deciding the case. The authors suggested that the Supreme Court may have come to a different conclusion should this not have been the case. In its decision of 8 May 2008, the Supreme Court of Iceland rejected these arguments, stating that: 'Law No. 19/1991 does not have a provision allowing the reopening of a case decided by the Supreme Court following a decision of the Human Right Committee of United Nations about a violation of the ICCPR. ... Even though the Human Rights Committee has now determined that the Icelandic government has violated its international obligations under Article 26 of the Covenant, it cannot be considered that the sentenced individuals have in their application for a reopening provided new material which might have had a material impact on the outcome of the case if placed before the Court before it handed down its judgment, cf. Article 184, para. 1(a))." *(translation by authors).*[88]

In the remedial clause in *Haraldsson et al.* v. *Iceland* the Human Rights Committee stipulated that the State party had an obligation 'to provide the authors with an effective remedy, including adequate compensation and review of its fisheries management system.' Unlike some other Views, the Committee does not mention a reopening of the case. Obviously by using the word 'including', such a remedy would be one option for a state party. Whether a denial of a reopening of the case would be considered an 'unsatisfactory response' is difficult to say. One must keep in mind the discretion given to states on how to implement the decisions of international organs. It should also be kept in mind that the case was not about violation of the right to fair trial, but the Committee has often recommended reopening of cases when there has been a violation of such a right. In previous cases, the Committee has considered some responses by State parties unsatisfactory when certain remedies, like compen-

88 The view of the Supreme Court is interesting, in particular as it has in many other cases taken due account of international law when interpreting the human right provisions of the Constitution, *see* T. Ingadottir, *supra* note 11. Most often, such interpretation had strengthened individual rights. It is noteworthty that in another case before the Supreme Court, where the same fisheries management system as in *Haraldsson et al.* v. *Iceland* is challenged as a violation of the Constitution, the Supreme Court cited an international convention (United Nations Convention on the Law of the Sea), not incorporated into Icelandic law, to restrict individuals' rights protected by the Constitution, *see* T. Ingadottir, *Oxford Reports on International Law in Domestic Courts*, ILDC 67 (IS 2000), Oxford University Press.

sation, had not been provided to the victims, even though the Committee merely recommended 'adequate remedies' in its remedial clause.[89] In any event, if authors cannot have their case reopened, the compensation payment to them, as stipulated by the Committee in *Haraldsson et al.* v. *Iceland,* should be considered to cover at least the fine they were sentenced to pay.

5. Conclusion

In general, Iceland's record of compliance with decisions of the ECtHR is good. The impact of the cases has been considerable, illustrated by the incorporation of the treaty into domestic law in 1994. In the majority of cases, the execution of the judgments has not been problematic. Violations have resulted in individual measures, especially the payment of compensation, and general measures involving legal amendments and impact on domestic case law. The Icelandic authorities have gone further than seemingly required in its response in some cases. In two recent cases, the Icelandic government remains in ongoing dialogue with the Committee of Ministers regarding full compliance and implementation. Contested issues concern the possibility of reopening of cases at the national level in civil cases, and on payment of compensation involving non-parties of the case. As for the former issue, it remains to be seen whether the Icelandic government accepts that Article 46 of the ECHR imposes the obligation on the State to ensure that there always is appropriate procedures in place if there are grounds for reopening the national proceedings after a finding of violation by the ECtHR. Judging from the practice illustrated above of the great lengths taken by the Icelandic government to implement individual and general measures, including legal amendments, it should be expected that changes will be made to the Civil Procedural Law to ensure the possibility of reopening in cases following a decision by the ECtHR. Such changes would also be in harmony with a recent provision in the Criminal Procedure Law. At the same time, the judgement in *Petur Thor Sigurdsson* is from 2003 and the extended dialogue between the Committee and the Icelandic government in the case may indicate a hesitance on behalf of the government to make such changes. Regardless, the recent statement made by the Supreme Court, illustrating a narrow interpretation of Article 46, that compliance with the decisions of the ECtHR only require payment of just satisfaction and no individual and general measures, goes against established practice of the government, and general case law of the ECtHR. To illustrate, as for the latter issue on payment of compensation involving non-parties of the case, the current dialogue between the government and the CoM is not regarding the duty to pay others in similar situations, but rather whether the government has undertaken sufficient measures to reach those individuals.

Only one case exists regarding Iceland's compliance with decisions of the Human Rights Committee, a case of major interest for Iceland and it citizens. In its response, the government refers to its international obligations to consider the Views and the follow up process established by the Committee. However, while the government

89 *See e.g.,* cases regarding Colombia, Communication No 46/79 (*O. Fals Borda et al.* v. *Colombia)* and Communication No 64/1979 (*C. Salgar de Montejo* v. *Colombia).*

536 | has informed the Committee that it will amend its legal framework in accordance with the Views, which may require some fundamental changes to the current fishing management system, it has denied payment of compensation to the authors of the case. It remains to be seen whether the Human Rights Committee will accept the government's arguments that such a payment would result in too many claims from individuals in similar positions. As illustrated by the provisions of the Optional Protocol, the effect of *res judicata* applies to Views of the Human Rights Committee, and hence the Views are limited to the parties to the case. The opinions of the Icelandic Supreme Court expressed in recent cases should also make such a run of claims impossible. In cases regarding reopening of cases and in one on compensation, the Supreme Court has stipulated that the decisions of the European Court of Human Rights, as well as of the Human Rights Committee, have no legal effects within the Icelandic domestic legal system. Parties in such cases can therefore not enforce such decisions before Icelandic courts, not to speak of non-parties. It remains to be seen whether the Human Rights Committee will find that Iceland has made a 'satisfactory response' considering that the victims in *Haraldsson et al.* were not able to have their case reopened at the national level. While the nature of the case is neither about an unfair trial (as opposed to many of the cases of the ECtHR under examination), nor a violation which is referred to in the new Criminal Procedure Law, the case is still a criminal case, which resulted in a fine or a prison sentence.

Without doubt, the issues regarding implementation of decisions by the European Court of Human Rights and the Human Rights Committee will continue to be of high relevance, internationally and domestically. The Icelandic experience may contribute to that discussion.

III

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The Role of the International Court of Justice in the Enforcement of the Obligation of States to Investigate and Prosecute Serious Crimes at the National Level

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States have undertaken an international obligation to investigate and prosecute individuals for serious human rights violations and grave breaches of international humanitarian law. However, compliance with that obligation is poor and prosecutions at the national level remain few. The mechanism for enforcement of that obligation is also limited. This article explores the way in which the International Court of Justice (ICJ) can play, and has played, a role in this respect. The jurisprudence of the Court is analysed with regard to three matters: (i) the obligation of states to investigate and prosecute serious crimes at the national level; (ii) national criminal jurisdiction with regard to prosecution of serious crimes, as well as immunities from that jurisdiction; and (iii) the obligation of states to cooperate in criminal matters with other jurisdictions. The Court has adjudicated on some key issues relating to national prosecutions. Some of its findings have, without doubt, enhanced the enforcement of prosecution at the national level, while others have undermined it. Recent cases before the ICJ show an increased willingness by states to use the Court as an avenue for enforcement and, at the same time, the Court has proved more willing to utilise its powers.

Keywords: International Court of Justice, serious crimes, prosecution, reparations, individual criminal responsibility, enforcement

1. Introduction

States have undertaken a number of international obligations to investigate and prosecute individuals for serious human rights violations and grave breaches of international humanitarian law. Even so, compliance with that obligation has always been problematic. States have been very reluctant to prosecute their own forces and officials, and the prosecution of non-nationals found on the territory and alleged to have committed crimes abroad has not been a priority.

While international criminal tribunals have enhanced the prosecution of serious crimes at the international level, they are able to deal with only a handful of cases. Because of the lack of jurisdiction and sources, international criminal tribunals will never replace the need for national prosecutions. Thus, enforcement of such proceedings at the national level remains a fundamental issue in the fight against impunity. The International Court of Justice (ICJ or the Court) can play an important role in enforcing national proceedings. Despite the recent proliferation of international courts and tribunals, it remains the only global court where the obligation of states to investigate and prosecute serious crimes can be adjudicated and enforced.

The ICJ and its predecessor, the Permanent Court of International Justice (PCIJ), have received a number of cases relating to international humanitarian law and gross violations of

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human rights.[1] This article considers only the Court's cases which are relevant to the duty of states to investigate and prosecute serious crimes at the national level and the serious crimes in focus are violations of the major international human rights treaties and the Geneva Conventions of 1949 and their Additional Protocols.[2] Furthermore, the discussion is limited to three issues. First, the Court's jurisprudence on the obligation of states to investigate and prosecute serious crimes will be analysed. The second issue to be considered is national criminal jurisdiction with regard to the prosecution of serious crimes, as well as immunities from that jurisdiction. Lastly, the jurisprudence of the Court with regard to the obligation of states to cooperate in criminal matters with other jurisdictions will be examined.

Without doubt, the Court's findings have had an impact on prosecutions of serious crimes at the national level. At the same time, one may be surprised to discover how few cases before the Court, despite the availability of opportunities, address the issue directly. The reason is twofold: states have not shown any great interest in including the duty to prosecute among their submissions to the Court and, even when it is included, the Court has not always addressed the issue, although in recent cases before the Court the matter has been brought more to the forefront.

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[1] These include *The Corfu Channel Case (United Kingdom v Albania)*, Judgment [1949] ICJ Rep 4; *Case concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment [1986] ICJ Rep 14; *Case concerning Armed Activities on the Territory of Congo (Democratic Republic of the Congo v Uganda)*, Judgment [2005] ICJ Rep 168; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226; and the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136. A considerable number of writings exist on the general role of the ICJ with respect to the development and enforcement of human rights law and international humanitarian law: see Shiv RS Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice* (Hart 2007); Rosemary Abi-Saab, 'The "General Principles" of Humanitarian Law According to the International Court of Justice' (1987) 27 *International Review of the Red Cross* 367–75; Judith Gardam, 'The Contribution of the International Court of Justice to International Humanitarian Law' (2001) 14 *Leiden Journal of International Law* 349; Vincent Chetail, 'The Contribution of the International Court of Justice to International Humanitarian Law' (2003) 85 *International Review of the Red Cross* 235; Fabián O Raimondo, 'The International Court of Justice as a Guardian of the Unity of Humanitarian Law (2007) 20 *Leiden Journal of International Law* 593–611; VS Mani, 'The International Court and the Humanitarian Law of Armed Conflict' (1999) 39 *The Indian Journal of International Law* 32–46; Stephen M Schwebel, 'The Roles of the Security Council and the International Court of Justice in the Application of International Humanitarian Law' (1994) 27 *New York University Journal of International Law & Politics* 731; Kenneth J Keith, 'The International Court of Justice and Criminal Justice' (2010) 59 *International & Comparative Law Quarterly* 895.

[2] The Geneva Conventions of 12 August 1949 and Protocols additional to the conventions: Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (entered into force 21 October 1950) 75 UNTS 31 (GC I); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (entered into force 21 October 1950) 75 UNTS 85 (GC II); Geneva Convention (III) relative to the Treatment of Prisoners of War (entered into force 21 October 1950) 75 UNTS 135 (GC III); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I or AP I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II or AP II); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (entered into force 14 January 2007) (2006) 45 *International Legal Materials* 558.

While some of the findings of the Court can be hailed as a triumph in the fight against impunity, others can be considered a major setback in that quest.

2. THE OBLIGATIONS OF STATES TO INVESTIGATE AND PROSECUTE SERIOUS CRIMES

International law imposes an independent duty on states to investigate and prosecute individuals for certain international crimes. This obligation arises in various treaties. Applying the terminology set out in the Draft Articles on State Responsibility,[3] the duty is a primary, as opposed to a secondary, obligation. The duty to investigate and prosecute as a secondary obligation has relevance with regard to reparations, in particular satisfaction.

2.1 THE OBLIGATION TO PROSECUTE INDIVIDUALS AS A PRIMARY OBLIGATION

The key example of the primary obligation of states to prosecute certain serious crimes is to be found in the Geneva Conventions of 1949 and their First Additional Protocol.[4] According to Article 146 of the Fourth Geneva Convention[5] and Article 85 of Additional Protocol I[6] each contracting party is under an obligation to search for persons who have committed grave breaches of the Convention and bring such persons, regardless of their nationality, before its own courts. The obligation to prosecute is also found in some international human rights conventions.[7] The

[3] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries [2001] UN Doc A/56/10.

[4] The Geneva Conventions and Additional Protocols (n 2) were among the first international instruments to stipulate the obligation of member states to prosecute crimes mentioned in the treaty. This was a major development in the enforcement of international obligations, as until that time it had been up to states to decide how to implement international treaties at the national level: Jean S Pictet and others, *Commentary on the Geneva Conventions of 12 August 1949, Vol I: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Jean S. Pictet and International Committee of the Red Cross 1952) 353. Furthermore, the new obligation underscored the prosecution of war criminals by the state to which the perpetrators belong. Prior to this, prosecution of war crimes had largely been confined to prosecution through the injured state: see Rüdiger Wolfrum, 'Enforcement of International Humanitarian Law' in Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford University Press 1995) 517, 523. The specific articles discussing the obligation to prosecute are GC I, art 49; GC II, art 50; GC III, art 129; GC IV, art 146; and AP I, art 85.

[5] GC IV (n 2) art 146.

[6] AP I (n 2) art 85.

[7] The obligation of states to investigate and prosecute crimes is also reinforced in the United Nations' work on the fight against impunity, the right to truth and the right to reparations. The updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity affirms the need for a comprehensive approach towards impunity, including undertaking investigations and prosecutions of those suspected of criminal responsibility. According to Principle 19, states shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished: Diane Orentlicher, 'Report of the Independent Expert to Update the Set of Principles to Combat Impunity – Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity', 8 February 2005, UN Doc E/CN.4/2005/102/Add.1. Similarly, the duty to investigate and prosecute is listed in the 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (Torture Convention) (Articles 5 and 7),[8] and the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (Genocide Convention)[9] (Article 6), both have provisions that stipulate the obligation of states parties to prosecute violations of the Conventions. The International Covenant on Civil and Political Rights (ICCPR)[10] does not contain an explicit provision on this obligation.[11] However, the obligation to prosecute arises under that Convention with the right to an effective remedy (see Article 2(3) ICCPR), in conjunction with substantive duties found in other provisions, in particular in its provision on right to life and prohibition of torture.[12]

The obligation of states to prosecute serious crimes as a primary obligation has been included in submissions by states in a few cases before the Court. Some of these submissions have not been successful. In the *Case concerning United States Diplomatic and Consular Staff in Tehran*[13] and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[14] the Court did not address these submissions, despite finding violations of international obligations.[15] In *Armed Activities on the Territory of Congo,* the Democratic Republic of the Congo (DRC) submitted that Uganda 'fail[ed] to punish persons under its jurisdiction or control having engaged in the above-mentioned acts', supported by a general reference to the Hague Regulations, Geneva Conventions and human rights treaties.[16] In its judgment the Court found Uganda to be in breach of these Conventions, but did not address the obligation to prosecute. The Court's silence on the issue is addressed in Judge Tomka's separate declaration:[17]

Rights Law and Serious Violations of International Humanitarian Law', 60/147(2005), 16 December 2005, UN Doc. A/RES/60/147 (2005), paras 3(b), 4 and 22(f).

[8] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entered into force 26 June 1987) 1465 UNTS 85 (Torture Convention).

[9] Convention on the Prevention and Punishment of the Crime of Genocide (entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention).

[10] International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[11] During the drafting of the Convention, some states wanted to strengthen the positive obligation on the part of governments to prosecute violations: see Naomi Roht-Arriaza, 'Sources in International Treaties of an Obligation to Investigate, Prosecute, and Provide Redress' in Naomi Roht-Arriaza (ed), *Impunity and Human Rights in International Law and Practice* (Oxford University Press 1995) 24, 33.

[12] UN Human Rights Committee (HRC), CCPR General Comment 7, Article 7, 'Compilation of General Comments and General Recommendation adopted by Human Rights Treaty Bodies', 30 May 1982, UN Doc HRI/GEN/1/Rev1 at 7, para 1; UNHRC, General Comment 31, 'Nature of the General Legal Obligation Imposed on States Parties to the Covenant', 26 May 2005, CCPR/C/21/Rev.1/Add.13, para 18. For corresponding case law, see *Maria del Carmen Almeida de Quinteros and Elena Quinteros Almeida v Uruguay*, Communication No 107/1981, 21 July 1983, UN Doc CCPR/C/19/D/107/1981, para 16 ('bring to justice any persons found to be responsible for her disappearance and ill treatment'); *Irene Bleier Lewenhoff and Rosa Valino de Bleier v Uruguay*, Communication No 30/1978, 29 March 1982, UN Doc CCPR/C/OP/1, para 15.

[13] *Case concerning United States Diplomatic and Consular Staff in Tehran (United States v Iran)*, Judgment [1980] ICJ Rep 3.

[14] *Wall* (n 1).

[15] *Diplomatic Staff* (n 13*)* [8]; *Wall* (n 1) [145]–[146].

[16] *Armed Activities* (n 1) [25].

[17] ibid, Declaration of Judge Tomka [9].

> Nevertheless, since grave breaches of international humanitarian law were committed, there is another legal consequence which has not been raised by the DRC and on which the Court remains silent. That consequence is provided for in international humanitarian law. There should be no doubt that Uganda, as party to both the Geneva Conventions of 1949 and the Additional Protocol I of 1977, remains under the obligation to bring those persons who have committed these grave breaches before its own courts (Article 146 of the Fourth Geneva Convention, and Article 85 of the Protocol I Additional to the Geneva Conventions).

Among the submissions of Bosnia and Herzegovina in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* was one claiming that Serbia had failed in its obligation under the Genocide Convention to punish acts of genocide. In interpreting the obligation stipulated in the Genocide Convention on the duty of states to punish the crime of genocide, the Court concluded that the obligation related only to states where genocide took place; other states were not obligated by the Convention to punish acts of genocide, not even those states of which the perpetrators were nationals. As the genocide took place outside Serbia, that state was not obligated by the Convention to prosecute. The territorial limit of the obligation to prosecute under the Convention is described by the Court as follows:[18]

> The substantive obligations arising from Articles I and III are not on their face limited to territory … The obligation to prosecute imposed by Article VI is by contrast subject to an express territorial limit. The trial of persons charged with genocide is to be in a competent tribunal of the State in the territory of which the act was committed, or by an international penal tribunal with jurisdiction.

The obligation to prosecute under the Genocide Convention is also an issue in an ongoing case before the Court – *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* – and, citing the above decision, Serbia claims that the Genocide Convention obliges contracting parties only to institute and exercise territorial criminal jurisdiction, in this case not over alleged acts of genocide committed in Croatia.[19]

The obligation of states to prosecute was the central issue in *Questions Relating to the Obligation to Prosecute or Extradite*.[20] In this case, Belgium instituted proceedings against Senegal regarding Senegal's compliance with its obligation to prosecute the former President of Chad, Hisséne Habré, or to extradite him to Belgium for the purposes of criminal proceedings. Belgium based its claim on the Torture Convention and customary international law. The judgment of the Court confined itself to an analysis of obligations under the Torture Convention, as it did not consider that it had jurisdiction over the latter claim.[21]

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[18] *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Judgment [2007] ICJ Rep 43, [183]–[184], [439]–[450] (*Bosnian Genocide*).

[19] *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Preliminary Objections, Judgment [2008] ICJ Rep 412, [21], [135] (*Croatian Genocide*).

[20] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment [2012] ICJ Rep 442.

[21] The Court concluded that, at the time of the filing of the application, the dispute between the parties did not relate to breaches of obligations under customary international law: ibid [55]. On the contested issue whether there is such an obligation under customary international law, see the work of the International Law

In its examination of the temporal scope of the Torture Convention, the Court stated that 'the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)'.[22] However, citing Article 28 of the Vienna Convention on the Law of Treaties,[23] and decisions of the Committee against Torture, the Court found that the obligation to prosecute under the Convention applies only to facts that occurred after its entry into force for the state concerned.[24] The Court emphasised that prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the state.[25]

The Court considered that the obligation to prosecute under the Torture Convention is linked to other obligations within the Convention – the obligations to adopt adequate domestic legislation and to make an inquiry into the facts. The Court considered these obligations to be 'elements of a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility'.[26] As to the obligation of states to incorporate appropriate domestic legislation (Article 5(2) of the Convention), the Court held that it did not have jurisdiction over alleged violations of that article. Notwithstanding this, the Court considered the article as it reviewed the state's performance of its obligations to establish the universal jurisdiction of its courts over the crime of torture as a necessary condition for enabling a preliminary inquiry (Article 6(2)), and for submitting the case to its competent authorities for the purpose of prosecution (Article 7(1)). The Court highlighted the importance of timely implementation of legislation to enable the criminalisation of torture and universal jurisdiction, as required by the Convention. It also highlighted the preventive character of such domestic legislation. As to obligations under Article 6(2) of the Torture Convention, regarding the obligation to make a preliminary inquiry into facts, the Court concluded that the Convention requires such steps to be taken as soon as a suspect is identified in the territory of the state.[27] The Court also underscored that when authorities are operating on the basis of universal jurisdiction, they must be as demanding in terms of evidence as when they have jurisdiction by virtue of a link with the case in question (see Article 7(2)).[28]

Turning to the issue of the obligation to prosecute, the Court considered that Article 7(1) of the Torture Convention requires the state concerned to submit the case to its authorities for prosecution. It is then for the competent authorities to decide whether to initiate proceedings in the same manner as they would for any alleged offence of a serious nature under the law of the state concerned.[29] The Court found that the proceedings should be undertaken without delay, and 'as

Commission (ILC) on the subject of the obligation to extradite or prosecute: eg Zdzislaw Galicki, Bases for Discussion in the Working Group on the Topic 'The Obligation to Extradite or Prosecute (*aut dedere aut judicare*)', 24 June 2010, UN Doc No A/CN.4/L.774.

[22] *Obligation to Prosecute* (n 20) [99].

[23] Vienna Convention on the Law of Treaties (entered into force 27 January 1980) 1155 UNTS 331.

[24] *Obligation to Prosecute* (n 20) [100], [101].

[25] ibid [102], [119]–[121].

[26] ibid [91]. Judge Owada criticised the methodology in the judgment to be 'too formalistic and somewhat artificial', and failed to consider the Torture Convention as an organic whole: ibid, Declaration of Judge Owada, [11].

[27] ibid [86], referring to the Torture Convention (n 8) art 7(2).

[28] ibid [84].

[29] ibid [90], [94].

soon as possible'.[30] The Court considered that Senegal's reasons for delay – compliance with decisions of the Economic Community of West African States (ECOWAS) Court of Justice (which requested the establishment of an international tribunal) and financial difficulties – were not justifiable. Furthermore, citing Article 27 of the Vienna Convention on the Law of Treaties, the Court found that Senegal could not justify its breach of the obligation by invoking provisions of its domestic law and decisions rendered by its courts.[31] Finally, the obligation to submit the case to its authorities for prosecution is irrespective of the existence of a prior request for the extradition of the suspect.[32] However, if the state had received a request for extradition it could 'relieve itself of its obligation to prosecute by acceding to that request'.[33]

2.2 THE OBLIGATION TO PROSECUTE INDIVIDUALS AS A LEGAL CONSEQUENCE OF VIOLATIONS OF INTERNATIONAL OBLIGATIONS

The obligation on the part of states to investigate and prosecute crimes can also be regarded as a secondary obligation – that is, as a remedy. Prosecution has considerable relevance with respect to reparations, in particular satisfaction. According to Article 37 of the International Law Commission's (ILC) Draft Articles of Responsibility of States for Internationally Wrongful Acts (2001):[34]

> 1. The State responsible for an international wrongful act is under an obligation to give satisfaction for the injury caused by that act … as it cannot be made good by restitution or compensation.
> 2. Satisfaction may consist of an acknowledgement of the breach, and expression of regret, a formal apology or another appropriate modality.

The list of forms of satisfaction listed in paragraph 2 is not exhaustive. Indeed, the Commentary on the Draft Articles lists the duty to prosecute as an example of satisfaction:[35]

> The appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance. Many possibilities exist, including … disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act.

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[30] ibid [117].
[31] ibid [111]–[117].
[32] ibid [94]. However, that might not necessarily lead to a prosecution, in light of all the evidence before them.
[33] ibid [95].
[34] Draft Articles (n 3).
[35] ibid [106]. In 2001 the ILC adopted its final Draft Rules on State Responsibility. The final draft article on satisfaction was amended in the final reading, moving prosecution of individuals from the list of examples in the main text of the article into the commentaries. However, the Commission made it clear that the list of different types of satisfaction in Article 37 was not exhaustive. The inclusion of this remedy was backed by a study on long diplomatic practice and punishment of individuals as a consequence of state violations: Gaetano Arangio-Ruiz, 'Second State Report on State Responsibility', 41st sess, UN Doc A/CN.4/425 & Corr 1 and Add 1 & Corr 1 (1989) 36–40.

Surprisingly the Court has never decided on prosecution at the national level as a secondary obligation. The main reason is that such submissions are very rare. In the *Armed Activities* case, the DRC included in its written submissions that, in light of Uganda's violation of international obligations, Uganda shall 'render satisfaction for the insults inflicted by it upon the [DRC], in the form of … and the prosecution of all those responsible'.[36] However, while the DRC included this submission in its memorial and reply, it was not included in its final submissions at the end of the oral proceedings. The final submission was much broader, namely that Uganda was under an obligation to 'make reparation for all injury caused', and 'that the nature, form and amount of the reparation [shall] be determined by the Court, failing agreement thereon between the Parties'.[37] Nothing in the case documentation explains this change of submission, and later development of the case did not include the issue. The ensuing negotiation between the parties focused on compensation rather than prosecution as a form of satisfaction. Nevertheless, now eight years later, the parties have still not reached an agreement, while at the same time the case has not been referred back to the Court.

The apparent reluctance on the part of states to include submissions on the obligation to prosecute, illustrated by the amended submission on reparations in the *Armed Activities* case, echoes the earlier practice of the Court. Declaratory judgments are common and the exact scope of reparations has largely been left to the parties to settle. By way of illustration, there are only two occasions on which the Court has awarded compensation.[38] At times, the Court has considered that its declaration of the breach 'constitutes appropriate satisfaction' and has denied claims for other forms of reparation.[39] Such a finding raised much criticism following the Court's judgment in *Application of the Convention for the Prevention and the Punishment of the Crime of Genocide*.[40]

The power of the Court to order specific performance of a mandatory term has even been questioned, or at least is not considered to be an appropriate judicial remedy.[41] However, there seems to be a development at the Court of less restriction in this respect. Several recent decisions have been quite specific with regard to performance, despite its implementation being carried out

[36] *Armed Activities* (n 1) [24].
[37] ibid [25(4)(d) and (e)].
[38] *Corfu Channel* (n 1); *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo* (Compensation owed by the DRC to the Republic of Guinea), Judgment [2012] ICJ Rep 2.
[39] This practice has been illustrated by some as an example of how the Court has been selective in relying on the work of the ILC on state responsibility: see Santiago Villalpando, 'Editorial: On the International Court of Justice and the Determination of the Rules of Law' (2013) 26 *Leiden Journal of International Law* 243, 250.
[40] *Bosnian Genocide* (n 18). The Court found that Serbia had failed to comply with its obligations under the Genocide Convention in respect of the prevention and punishment of genocide. The Court found that its findings constituted appropriate satisfaction and denied an award of compensation. For a critique see, eg, Conor McCarthy, 'Reparation for Gross Violations of Human Rights Law and International Humanitarian Law at the International Court of Justice' in Carla Ferstman, Mariana Goetz and Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Martinus Nijhoff 2009) 283.
[41] See, eg, the discussion in Chester Brown, *A Common Law of International Adjudication* (Oxford University Press 2007) 209–11; Christine Gray, *Judicial Remedies in International Law* (Oxford University Press 1987) 98; and Malcolm N Shaw, 'A Practical Look at the International Court of Justice' in Malcolm D Evans (ed), *Remedies in International Law: The Institutional Dilemma* (Hart 1998) 11, 13–16.

by 'means of [the state's] own choosing'. Examples include recent cases regarding remedies. In *Ahmadou Sadio Diallo* the Court 'recalls that the sum awarded to Guinea in the exercise of diplomatic protection of Mr Diallo is intended to provide reparation for the latter's injury'.[42] In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* the Court stated that reparations must be awarded to all natural and legal persons who had suffered loss by the state of Israel.[43] In other recent cases there is also de facto limited room for discretion in implementing the ICJ's orders, such as a stay of execution in *LaGrand* and *Avena and Other Mexican Nationals*,[44] the cancellation of an arrest warrant in *Arrest Warrant of 11 April 2000*,[45] the transfer of individuals to the International Criminal Tribunal for the former Yugoslavia (ICTY) and cooperation with that tribunal in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*,[46] and the requirement that decisions of national courts that infringe state immunity cease to have effect in *Jurisdictional Immunities of the State*.[47]

The Court has also become somewhat bolder with regard to the scope of its awarded remedies. In *LaGrand*, the President indicated the application of its remedy – the 'review and reconsideration' of convictions and sentences – in situations other than those at hand in the case.[48] This wide application was confirmed in *Avena and Other Mexican Nationals*, in which the Court re-emphasised the binding nature of the decision beyond the present case.[49]

This development by the Court is following the same path taken by other international courts and tribunals; for instance, decisions of regional human rights tribunals on reparations are increasingly departing from the more cautious approach that was previously applied to the issue.[50]

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[42] *Diallo* (n 38) [10] and [57]. Judge Trindade considered that the Court's judgment 'shows that its findings and reasoning have rightly gone well beyond the straightjacket of the strict interstate dimension'; ibid, Separate Opinion of Judge Cançado Trindade, [12].

[43] *Wall* (n 1) [152]–[153], [163]. Following the decision, the UN Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory was established, UN Res ES-10/17 (2007), 24 January 2007, UN Doc No A/RES/ES-10/17.

[44] *LaGrand Case (Germany v United States of America)*, Provisional Measures [1999] ICJ Rep 9 [29]; *Case concerning Avena and Other Mexican Nationals (Mexico v United States of America)*, Provisional Measures [2003] ICJ Rep 77 [59].

[45] *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment [2002] ICJ Rep 3.

[46] *Bosnian Genocide* (n 18) [471(8)].

[47] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment [2012] ICJ Rep 99, [139(4)].

[48] *LaGrand* (n 44) [517].

[49] *Avena* (n 44) [151].

[50] See Christian Tomuschat, 'The Duty to Prosecute International Crimes Committed by Individuals', in Hans-Joachim Cremer, Thomas Giegerich, Dagmar Richter and Andreas Zimmermann (eds), *Tradition und Weltoffenheit des Rechts: Festschrift fur Helmut Steinberger* (2002) 315, 319–22. See also the following decisions of the European Court of Human Rights: *Assanidze v Georgia*, App No 71503/01 (ECtHR, 8 April 2004), paras 202–203; *Ilaşcu and Others* v *Moldova and Russia*, App No 48787/99 (ECtHR, 8 July 2004), para 490; *Papamichalopoulos and Others* v *Greece*, App No 14556/89 (ECtHR, 24 June 1993), paras 34–39; and *Sejdovic* v *Italy*, App No 56581/00 (ECtHR, 1 March 2006), paras 135–138.

3. THE EXTRATERRITORIAL JURISDICTION OF NATIONAL COURTS OVER SERIOUS CRIMES – IMMUNITIES

3.1 EXTRATERRITORIAL JURISDICTION

The prosecution of serious crimes at the national level is often associated with extraterritorial jurisdiction, such as universal jurisdiction. Some of the major treaties that impose obligations on states to prosecute serious crimes also require them to establish and exercise universal jurisdiction – for example, Article 146 of the Fourth Geneva Convention,[51] and Article 5 of the Torture Convention.[52]

The issue of extraterritorial jurisdiction in relation to criminal acts was soon to enter the docket of the Court. According to one of the most cited cases of the PCIJ, *Case of the SS 'Lotus'*, a state was not able to exercise its power outside its frontiers in the absence of a permissive rule of international law. However, this did not mean that 'international law prohibits a state from exercising jurisdiction in its own territory in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law … it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules'.[53]

The ICJ has firmly underscored the obligation of states parties to implement immediately a treaty obligation on universal jurisdiction and application. As discussed above, in *Questions Relating to the Obligation to Prosecute or Extradite* the Court strongly emphasised the obligation of states parties under the Torture Convention to bestow its national courts with universal jurisdiction, criminalise the acts, and investigate and prosecute when an alleged offender is found on its territory.[54] According to the Court:[55]

> The obligation for the State to criminalize torture and to establish its jurisdiction over it finds its equivalent in the provisions of many international conventions for the combating of international crimes. This obligation, which has to be implemented by the State concerned as soon as it is bound by the Convention, has in particular a preventive and deterrent character, since by equipping themselves with the necessary legal tools to prosecute this type of offence, the States parties ensure that their legal systems will operate to that effect and commit themselves to coordinating their efforts to eliminate

[51] Geneva Conventions and Protocols (n 2).
[52] Torture Convention (n 8).
[53] *The Case of the SS 'Lotus'*, Judgment (1927) PCIJ Rep (Ser A, No 10) 19. The PCIJ's finding has led to extensive academic writings up to the present day, and recent commentators are convinced that the emphasis lies in the former finding – that of restrictive jurisdiction. See, eg, Malcolm N Shaw, *International Law* (6th edn, Cambridge University Press 2008) 656. See also Roger S Clark, 'Some Aspects of the Concept of International Criminal Law: Suppression Conventions, Jurisdiction, Submarine Cables and The Lotus' (2011) 22 *Criminal Law Forum* 519–30.
[54] The Court did not address whether Belgium was entitled to exercise jurisdiction. Three judges criticised the Court's 'reluctance to face the issue': see *Obligation to Prosecute* (n 20), Declaration of Judge Owada, Separate Opinion of Judge Skotnikow, and Dissenting Opinion of Judge Xue.
[55] *Obligation to Prosecute* (n 20) [75].

> any risk of impunity. This preventive character is all the more pronounced as the number of States parties increases. The Convention against Torture thus brings together 150 States which have committed themselves to prosecuting suspects in particular on the basis of universal jurisdiction.

The Court has not adjudicated directly on the issue of universal jurisdiction in criminal matters outside conventional relations. It came close to it in *Arrest Warrant of 11 April 2000*. In this case, the DRC argued in its application that the universal jurisdiction exercised by Belgium contravened the international jurisprudence established by the judgment in *The 'Lotus'*.[56] However, the DRC did not include this claim in its final submission; therefore the Court considered that the *non ultra petita* rule precluded it from addressing that issue in its operative part, while the rule did not preclude it from dealing with certain aspects of that question in its reasoning, should it deem this necessary or desirable.[57] The reasoning in the judgment did not do so, while several judges commented on the issue of universal jurisdiction in their separate and dissenting opinions.[58] The issue of universal jurisdiction was pivotal in *Certain Criminal Proceedings in France*, but the case was later removed from the docket of the Court.[59]

At the same time, the Court has given an indication on the correct application of extraterritorial jurisdiction in some cases, but not to what extent. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* the Court found that Article VI of the Genocide Convention required states parties only to institute and exercise territorial criminal jurisdiction:[60]

> While it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so.

While the case cites jurisdiction based on nationality as a primary example, the phrase 'in particular' still leaves room for other jurisdictions, including universal jurisdiction. As discussed above, in *Questions Relating to the Obligation to Prosecute or Extradite* the Court concluded that Senegal's obligation to prosecute pursuant to Article 7(1) of the Torture Convention did not apply to acts alleged to have been committed prior to Senegal's ratification of the Convention. Noticeably, the Court adds that '[a]lthough Senegal is not required under the Convention to institute proceedings concerning acts that were committed before 26 June 1987 [the date on which the Convention entered into force for Senegal], nothing in that instrument

[56] *The 'Lotus'* (n 53) [11]–[12].
[57] *Arrest Warrant* (n 45) [43].
[58] ibid, Separate Opinion of President Guillaume, Dissenting Opinion of Judge Oda, Declaration of Judge Ranjeva, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, Separate Opinion of Judge Rezek, Separate opinion of Judge Bula-Bula, and Dissenting Opinion of Judge Van Den Wynaert.
[59] *Case concerning Certain Criminal Proceedings in France (Republic of Congo v France)*, http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=d2&case=129&code=cof&p3=0; the case was removed from the Court's list on 17 November 2010 at the request of Congo.
[60] *Bosnian Genocide* (n 18) [442].

prevents it from doing so'.[61] This dictum is of great relevance as, in light of the facts of the case, it could only be referring to, and thereby confirming, passive personality jurisdiction or universal jurisdiction.[62]

3.2 LIMITATION ON JURISDICTION – IMMUNITIES

Immunity as a limitation on extraterritorial jurisdiction has been a major issue in the prosecution of serious crimes. The ICJ addressed this issue in *Arrest Warrant of 11 April 2000*.[63] The DRC brought the case before the Court and claimed, among others, that Belgium violated its sovereignty and the diplomatic immunity of its Minister of Foreign Affairs as Belgium had issued an international arrest warrant for the Minister, charging him with grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity. The Court held that, while abroad, the Minister enjoyed full immunity from criminal jurisdiction and inviolability before the national courts.[64] It also rejected Belgium's claim that such immunity did not apply to these serious crimes. The Court considered that it is:[65]

> unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

The Court also specifically addressed conflicting obligations: on the one hand, to fulfil a treaty obligation to exercise jurisdiction; on the other hand, to respect immunities of heads of states and others. In this case, the Minister was charged with grave breaches of the Geneva Conventions of 1949 and Additional Protocols I and II – crimes which states parties are obligated to investigate and prosecute when a suspect is found on their territory. While the accused in the case was not found in Belgian territory, and hence there was no treaty obligation under which he could be prosecuted, the Court still decided the issue. It concluded that full immunity also applied when states extend their jurisdiction as a result of obligations under international conventions of prosecution or extradition:[66]

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[61] *Obligation to Prosecute* (n 20) [102].

[62] Belgium argued it that it had standing in the case as it was exercising passive personal jurisdiction in its national proceedings. The Court did not consider it necessary to address this issue as it considered Belgium to have standing as a mere state party to the Torture Convention: ibid [65], [70].

[63] *Arrest Warrant* (n 45) [35].

[64] ibid [54]–[55]. Two judges dissented strongly from this part of the judgment and considered that the prosecution of serious crimes and personal accountability represented higher norms than the rules on immunity, and they should therefore prevail: see Dissenting Opinion of Awn Al-Khasawneh, [7], and Dissenting Opinion of Judge Van den Wyngaert. Several scholars have also criticised the judgment: see J Wouters, 'The Judgment of the International Court of Justice in the Arrest Warrant Case: Some Critical Remarks' (2003) 16 *Leiden Journal of International Law* 253, 263. Antonio Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v Belgium Case' (2002) 13 *European Journal of International Law* 853, 855.

[65] *Arrest Warrant* (n 45) [58]–[59].

[66] *Arrest Warrant* (n 45) [59].

> Such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign state, even where those courts exercise such a jurisdiction under these conventions.

The Court made its often quoted observation that immunity from jurisdiction does not mean impunity, and that a distinction needs to be made between immunity from criminal jurisdiction and individual criminal responsibility. The Court set out a list of circumstances in which the Minister of Foreign Affairs would not enjoy immunity: (i) prosecution before his or her own courts; (ii) prosecution before other states if when the state which they represent or have represented decides to waive that immunity; (iii) after the person ceases to hold office, he or she will enjoy immunity only for official acts; and (iv) prosecution before international criminal tribunals.[67] With regard to point (iii), the majority did not qualify what constitute 'official acts'. In the Joint Separate Opinion of Judges Higgins, Koojimans and Buergenthal it is stated that:[68]

> serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform … that State-related motives are not the proper test for determining what constitutes public State acts.

In *Certain Questions of Mutual Assistance in Criminal Matters* the Court applied the test set out in the *Arrest Warrant* case, finding that invitations or service of a summons addressed to a head of state to appear as a witness in a criminal case were not associated with measures of constraint and were therefore not violations of his immunity.[69]

The Court returned to the issue of immunities in *Jurisdictional Immunities of the State*. As in the *Arrest Warrant* case, this case dealt with serious international crimes, and the primary issue was whether *jus cogens* crimes trump state immunity before foreign courts. Unlike the *Arrest Warrant* case, this was a civil remedy case. However, in the same manner as before, and by citing state practice and decisions of the European Court of Human Rights, the Court considered that it had still not accepted that states no longer enjoy immunity in cases of serious violations of international law.[70] Citing its decision in the *Arrest Warrant* case, the Court considered that even though proceedings in national courts involved violations of the *jus cogens* rule, the applicability of the customary international rule on state immunity was not affected.[71] The Court cited its earlier decisions regarding the issue that state immunity is a matter of procedural law and must be distinguished from the substantive law which determines whether the conduct is lawful or unlawful.[72] In that context, the Court pointed out that whether a state is entitled to immunity before the

[67] ibid [61].
[68] ibid, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, [85].
[69] *Case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment [2008] ICJ Rep 177, [170]–[171].
[70] *Jurisdictional Immunities* (n 47) [81]–[91].
[71] ibid [95] [97].
[72] ibid [100].

courts of another state is a question that is entirely separate from whether the international responsibility of that state is engaged and whether it has an obligation to make reparation.[73]

4. The Obligation of States to Cooperate with Other Jurisdictions and Courts

Conventions that require state parties to prosecute serious crimes require them also to cooperate with other jurisdictions. These requirements frequently take the form of an obligation to prosecute or extradite (*aut dedere aut judicare),* as stipulated in the Geneva Conventions[74] (for instance Article 146 of the Fourth Geneva Convention), and in Article 7 of the Torture Convention.[75] States parties to the Convention on the Prevention and Punishment of the Crime of Genocide 'pledge themselves … to grant extradition in accordance with their laws and treaties in force', as mentioned in Article 7, and according to Article 6 of the Convention:[76]

> Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

In its case law the ICJ has emphasised the need for cooperation in fighting the crime of genocide. In *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* the Court considered genocide to be a crime under customary law which requires cooperation to eradicate it:[77]

> The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the cooperation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention).

In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, the Court analysed Serbia's obligation under Article 6 of the Genocide Convention. The Court decided that Serbia was under an obligation to transfer individuals accused of genocide or any of those other acts for trial by the ICTY,

[73] ibid.
[74] Geneva Conventions and Protocols (n 2).
[75] Torture Convention (n 8) art 7. For a detailed study of the duty to cooperate, see the International Law Commission's reports on the topic of obligation to extradite or prosecute: Galicki (n 21). On the obligation in general, see Zdzislaw Galicki, 'Fourth Report on the Obligation to Extradite or Prosecute (*aut dedere aut judicare*)', 31 May 2011, UN Doc A/CN.4/648.
[76] Torture Convention (n 8) arts 6 and 7.
[77] *Reservations to the Convention on Genocide*, Advisory Opinion [1951] ICJ Rep 15, [23].

and to cooperate fully with that Tribunal. The Court concluded in its judgment that once an 'international penal tribunal' has been established, it is certain that Article VI obliges the contracting parties 'which have accepted its jurisdiction' to cooperate with it. The Court continued that the obligation to cooperate with the Tribunal implies that the contracting parties will 'arrest persons accused of genocide who are in their territory'.[78] The Court specifically noted that even if the crime of which the person was accused was committed outside the state territory, the contracting parties are under an obligation to arrest that person if they are within the state territory. The Court also concluded that Article VI implies that, failing prosecution of that person in the parties' own courts, the state will hand them over for trial by the competent international tribunal.[79] The Court found that the ICTY constitutes an 'international penal tribunal' and Serbia was obliged to cooperate with it from the time it had accepted its jurisdiction.[80] In a case pending before the Court, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, it is debated whether Serbia is obliged under the Genocide Convention to hand over to Croatia persons who have allegedly committed acts of genocide.[81]

In *Questions Relating to the Obligation to Prosecute or Extradite* the Court considered the obligation to cooperate to be less far-reaching than it had in its judgment in the *Bosnian Genocide* case.[82] The Court found that the duty to extradite under the Torture Convention was a mere option offered to the state by the Convention, which did not entail any state responsibility if not accepted:[83]

> It follows that the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.

At the same time the Court found that Senegal could relieve itself of the duty to prosecute by acceding to an extradition request.[84]

In *Questions of Mutual Assistance* the Court examined the extent of judicial cooperation set out in general bilateral cooperation treaties between the parties. The Court concluded that judicial cooperation in criminal matters could not be the subject of the general obligation of cooperation in the parties' Treaty of Friendship and Cooperation, as it was not mentioned specifically.[85] The parties' obligation in this respect was the subject of a bilateral Treaty on Mutual Assistance in Criminal Matters, and the Court applied a strict literal interpretation to its provisions.[86]

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[78] *Bosnian Genocide* (n 18) [443].
[79] ibid.
[80] ibid [445]–[449].
[81] *Croatian Genocide* (n 19) [134]–[135].
[82] *Mutual Assistance* (n 69).
[83] *Obligation to Prosecute* (n 20) [95].
[84] ibid.
[85] *Mutual Assistance* (n 69) [105].
[86] ibid [119], [123]–[124], [145], [147].

5. CONCLUSIONS

The ICJ has received several cases concerning serious crimes. At the same time, the cases demonstrate a reluctance by states to use the ICJ as a channel to enforce the obligations of states to prosecute at the national level. This is evident in their submissions, which hardly ever include the duty of a state to prosecute, even as a primary obligation, much less than as a secondary obligation as a form of reparation. This was particularly evident in the *Armed Activities* case, forcing one judge to address this issue in a separate decision. In some case the Court has also been cautious in addressing the matter. This practice is very surprising given the nature of these cases, the clear international obligation undertaken by states to prosecute, and the undisputed obligation of states to give satisfaction for the injury caused, which includes penal action against the individuals whose conduct caused the internationally wrongful act. The missed opportunity in these cases is regrettable, particularly in light of the lack of enforcement of the obligation at the international level. Recent cases such as *Questions Relating to the Obligation to Prosecute or Extradite*, in which the primary submission is the obligation to prosecute, will hopefully break this pattern. Furthermore, recent submissions by states in some cases (although relating to different areas of international law) that require states to take far-reaching measures at the national level, and the Court's award of such measures, may also overcome the myth that submissions that include the international obligation to prosecute are somewhat improper, or even a violation of state sovereignty. The major interest of other actors in the enforcement of this duty, including individuals, and increased acknowledgement of their rights, including by the ICJ, may also encourage more cases in this area.

The Court's findings in *Questions Relating to the Obligation to Prosecute or Extradite* on the substance of the obligation to prosecute under the Torture Convention are firm and well-founded. The linked elements of a conventional mechanism were highlighted, all equally necessary to facilitate prosecution. Since ratification of the Torture Convention, states parties are under a duty to implement the treaty properly, including criminalising acts and giving their national courts universal jurisdiction. They are required to investigate alleged crimes as soon as the alleged offender is on their territory, and subsequently hand the case to the prosecution authorities. No excuses for delays will be accepted, either of a substantive or a practical nature. The findings have underscored the clear and extensive obligations undertaken by states parties to the Torture Convention, which are different from those contained in the Genocide Convention, which the Court concluded had a territorial limit to the obligation of states parties to prosecute, as mentioned in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*.[87]

The solid conventional base for extraterritorial jurisdiction of the Torture Convention was highlighted in the Court's judgment in *Questions Relating to the Obligation to Prosecute or Extradite.* The finding is welcome, particularly in light of the Court's reluctance to address the

[87] *Bosnian Genocide* (n 18) [183]–[184].

issue of universal jurisdiction in earlier cases. However, the extent of extraterritorial jurisdiction outside conventional relations remains unsettled. Arguments could be made that the Court supports this jurisdiction for certain serious crimes. Interestingly, the judgments in both *Case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide* and *Questions Relating to the Obligation to Prosecute or Extradite* include dicta to the effect that states parties are allowed to establish broader jurisdiction than that required by the treaties, leaving ample room for interpretation.[88] The Court's continual findings on principles of the *jus cogens* character and *erga omnes* obligations in international law also support such extraterritorial jurisdiction for serious crimes.

While the Court's judgment in *Questions Relating to the Obligation to Prosecute or Extradite* may be hailed as a triumph in the fight against impunity, its recent judgment in *Jurisdictional Immunities of the State* will certainly not achieve that accolade.[89] An almost unified Court extended its reasoning in *Arrest Warrant of 11 April 2000,* by building on its finding of full immunity from national criminal proceedings for foreign heads of state, to now provide immunity also to states in civil law cases in foreign national courts. In both cases the Court rejected the argument that *jus cogens* violations trump state immunity.[90] The Court offered the consolation that state immunity is a matter of procedural law, and must be distinguished from the substantive law which determines whether the conduct is lawful or unlawful. At the same time, the Court has acknowledged that it has taken this approach 'notwithstanding that the effect was that a means by which a *jus cogens* rule might be enforced was rendered unavailable'.[91]

The cooperation of states with other jurisdictions prosecuting serious crimes is crucial in the fight against impunity. Conventions relating to serious crimes commonly include the obligation to prosecute or extradite. In *Obligation to Prosecute* the Court interpreted the Torture Convention to the effect that states parties are not required to extradite, it being a mere option offered to them, while a state party could relieve itself of the duty to prosecute by acceding to an extradition request.[92] On the contrary, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* the Court gave a broad interpretation to Article 6 of the Genocide Convention, requiring a state to cooperate extensively with an international criminal court.[93] This is the second time the Court has given strong support to prosecutions at the international level; the first occasion was in *Arrest Warrant of 11 April 2000* by denying immunity to heads of state before international criminal courts, while upholding it before national courts.[94]

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[88] See nn 60 and 61.

[89] On the other hand, some commentators hailed it as 'a victory to traditional conceptions of international law and a setback to an effort to privilege international human rights over other aspects of the international legal system': see Benjamin Wittes, 'Paul Stephan on ICJ Decision in Jurisdictional Immunities of the State (Germany v Italy)', *Lawfare*, 5 February 2012, http://www.lawfareblog.com/2012/02/paul-stephan-on-icj-decision-in-jurisdictional-immunities-of-the-state-germany-v-italy-2/#.UsxHBfQW30c.

[90] *Obligation to Prosecute* (n 20) [96]–[105]; *Arrest Warrant* (n 45) [58]–[61].

[91] *Jurisdictional Immunities* (n 47) [95].

[92] ibid 11.

[93] *Bosnian Genocide* (n 18) [439]–[450].

[94] ibid 35.

As has been illustrated, the ICJ handles a number of cases concerning serious crimes. Yet its role with regard to enforcing the obligation of states to investigate and prosecute serious crimes at the national level has been marginal. A further step towards enhancing the role of the ICJ in realising the goals of international criminal justice rests both with states parties and the Court itself. The Court is at the mercy of states parties to confer upon it jurisdiction. At the same time, when it is bestowed with jurisdiction the Court needs to accept its responsibility and tackle the matter determinedly. In recent cases the Court has shown its potential to be a vital enforcement mechanism in the fight against impunity. In the near future, it may fill the lacuna in the current state of affairs.

IV

Translation of 'Sanngjarnar bætur og bindandi áhrif dóma' in Björg Thorarensen (ed), Mannréttindasáttmáli Evrópu, meginreglur, framkvæmd og áhrif á íslenskan rétt (Mannréttindastofnun Háskóla Íslands, Lagadeild Háskólans í Reykjavík, Bókaútgáfan Codex 2017).

18

Just Satisfaction and the Binding Force of Judgments

Þórdís Ingadóttir[1]

Article 41 Just satisfaction

If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

Article 46 Binding force and execution of judgments

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two-thirds of the representatives entitled to sit on the Committee.

4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.

5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.

18.1. Introduction

Human rights and the international obligations undertaken by states to respect and protect them have become a significant part of international law. There are numerous international conventions to safeguard human rights, and the range of different rights that states have undertaken to protect has grown rapidly. At the same time, it is clear that simply acknowledging such rights only goes so far. It is important that the fulfilment of such rights can be enforced. Binding nature of international obligations and compliance by states are foundations of international law, and rules on state responsibility have been compared to a constitution for the international community.[2]

The European Convention on Human Rights was the first international treaty to impose general obligations on member states to ensure that human rights were protected. The member

[1] The author wishes to thank Ásgerður Ragnarsdóttir, Guðrún Gauksdóttir, María Rún Bjarnadóttir, Þorbjörn Björnsson and the peer reviewers for their helpful suggestions.

[2] Alain Pellet: 'The definition of responsibility in international law', *The Law of International Responsibility*, p. 3.

states of the Council of Europe signed the Convention on 4 November 1950, and it entered into force on 3 September 1953. The Convention is based on the United Nations' Declaration of Human Rights of 10 December 1948 and is intended to safeguard the rights and freedoms defined therein, including right to life (Article 2), prohibition of torture (Article 3), right to a fair trial (Article 6), freedom of expression (Article 10) and freedom of assembly and association (Article 11). The member states of the Council of Europe believed that it was important to move beyond the measures undertaken under the auspices of the United Nations and turn fine words on human rights into a binding agreement with specified rights.[3] They considered this possible for European nations due to their shared heritage of political traditions, ideals, freedom and rule of law.[4] The people of Europe had also lived through the horrors of World War II and witnessed horrific crimes and human rights violations. The Cold War was looming, and many states feared the expansion of communism from the east.

An important factor in the European Convention on Human Rights was that the states parties mutually agreed to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. The states believed that it was highly important to have the means to react if another state party violated these fundamental rights. Thus, a kind of 'joint trusteeship' would be established.[5] To that end, the Convention established surveillance authorities, the European Commission of Human Rights and the European Court of Human Rights, and each contracting party could refer an alleged breach by another contracting party to the Commission. However, the contracting parties were obliged not only towards each other, but also towards the parties that the Convention was intended to protect, i.e. individuals. This development was an important milestone in international law, as regards both the status of individuals as legal persons in international law and their access to international courts.[6] Individuals, non-governmental organisations and groups of individuals claiming to be the victim of a violation by one of the contracting party of the rights set forth in the Convention could submit an application to the European Commission of Human Rights to that effect, but only if the state in question had specifically agreed to the Commission's competence to handle such applications. The entry into force of Protocols 9 and 11 to the Convention further improved access for individuals to the European Court of Human Rights.[7] Protocol 9 abolished the arrangement whereby only the European Commission of Human Rights or contracting States could bring a case before the Court, thereby according direct access to the Court and full *locus*

[3] Cf. the statement of the Swedish representative: "Mankind today has had more than enough of high-sounding principles and beautiful declarations. Willingness and ability to make something real out of those declarations has too often been lacking." – Council of Europe, Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights (1975), vol. I, p. 78.

[4] See the preamble to the European Convention on Human Rights and the *travaux préparatoires* thereto: Council of Europe, European Court of Human Rights, Preparatory work on Article 1 of the European Convention on Human Rights, Information document prepared by the registry, Cour (77) 9.

[5] See, for instance, the statement by Lord Layton (UK) on 'joint trusteeship', ibid p. 67.

[6] See Kate Parlett: *The Individual in the International Legal System: Continuity and Changes in International Law*, p. 279 and p. 339; and Rosalyn Higgins: *Problems and Process: International Law and How We Use It*, p. 95. For previous international treaties providing individuals with access to international dispute settlement, see e.g. the overview by Albreht Randelzhofer: 'The Legal Position of the Individual under Present International law', in *State Responsibility and the Individual: Reparations in Instances of Grave Violations of Human Rights*, pp. 238-240; and Carl Aage Nørgaard: *The Position of the Individual in International Law*, pp. 99-172.

[7] Protocol 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, signed on 6 November 1990, entering into force on 1 October 1994, Council of Europe Treaty Series – No 140; Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, signed on 11 May 1994, entering into force on 1 November 1998, Council of Europe Treaty Series – No 155. For the development of access of individuals to the European Court of Human Rights, see: Council of Europe: 'Explanatory Report to the Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms'; and Antônio Augusto Cançado Trindade: *The Access of Individuals to International Justice*, pp. 32–37.

standi to the individual. Protocol 11 formally abolished the European Commission of Human Rights and the previous court and established a new European Court of Human Rights (ECtHR). From then on, all member states were obliged to be subject to the jurisdiction of the European Court of Human Rights as regards applications from individuals. No international human rights court currently gives individuals such direct access as the European Court of Human Rights.[8] Experience has shown that individuals play a key part in enforcing the provisions of the Convention, while states have rarely launched proceedings against other states for alleged breaches of the Convention.

The purpose of establishing the European Court of Human Rights is clear. According to Article 19 of the European Convention on Human Rights the establishment of the Court is intended to 'ensure the observance of the engagements undertaken by the High Contracting Parties in the Conventions and the Protocols thereto'.[9] A vital part of this function is the Court's jurisdiction to afford just satisfaction to injured parties under Article 41, and the binding force of the Court's judgments under Article 46 of the Convention. The last few years have seen considerable discussion on these basic aspects of the Court. The main reason for this is that swift and satisfactory execution of judgments has become a highly pressing issue for the efficiency and future of the Court. An increasing number of cases and the huge workload of the Court has made this a priority issue, both for the Court itself and states parties to the European Convention on Human Rights. The Court itself has made radical changes in procedures regarding the execution of judgments, by adopting the 'pilot judgment procedure'. There has also been significant development at the Court regarding reparation, with many judgments stipulating more explicitly the measures which states must undertake in order to execute judgments. The member states have also brought in fundamental changes to the Council of Europe's system of monitoring the execution of ECtHR judgments. Protocol 14 to the European Convention on Human Rights gives greater powers of the Committee of Ministers of the Council of Europe to enforce the execution of judgments, as well as giving the Court itself a significant role in determining whether a state has failed to fulfil its obligation to abide by a judgment under Article 46(1) of the European Convention on Human Rights.[10]

Just satisfaction and the execution of judgments of the European Court of Human Rights is a wide-ranging topic which can be approached from many different angles.[11] This chapter is intended only to provide an overview of the main legal issues involved, and with reference to practice in Iceland. According to Article 41 of the European Convention on Human Rights, the Court can afford just satisfaction to the injured party. The term 'satisfaction' in Article 41 of the European Convention on Human Rights is broader than the term 'bætur' in Icelandic law, as the former term covers more than simply monetary reparation.[12] For instance, a finding by

[8] See comparison in Solomon T. Ebobrah: 'International Human Rights Courts', *The Oxford Handbook of International Adjudication*, pp. 225–249.

[9] For further details on the purpose of the European Court of Human Rights, see Yuval Shany: *Assessing the Effectiveness of International Courts*, pp. 256-261.

[10] Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, signed on 13 May 2004, entered into force on 1 June 2010, Council of Europe Treaty Series – No. 194.

[11] See e.g. Christine Gray: 'Remedies', *The Oxford Handbook of International Adjudication*; Dinah Shelton: *Remedies in International Human Rights Law*; Chester Brown: *A Common Law of International Adjudication*; C. Schulte: *Compliance with Decisions of the International Court of Justice*; M.K. Bulterman and M. Kuijer (eds.), *Compliance with judgments of international courts*; M.L. van Emmerik, Piet hein van Kempen and T. Barkhuysen (eds.): *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order*.

[12] 'Just satisfaction' in this section refers to the term as defined in the European Convention on Human Rights. The Icelandic translation of Article 41 is not consistent, as the terms 'satisfaction' and 'reparation' are both translated as 'bætur'. It should also be noted that the term 'just satisfaction' as used in Article 41 of the European Convention on Human Rights is not entirely comparable to the terminology used in international law, where a general distinction is made between the following terms: 'reparation', 'restitution' (an obligation to restore circumstances to the state they were in before the violation), 'compensation' (payment of damages), and

the European Court of Human Right's on a breach by a state falls under the term just satisfaction. Payment of compensation is only one part of the execution of a judgment. The European Court of Human Rights has interpreted Article 46(1) in accordance with general rules on State responsibility in international law. In addition to paying compensation, States must also, as necessary, take general and individual measures in its internal legal order to put a stop to the illegal action, compensate as possible for potential consequences thereof, and prevent the violation from being repeated.[13] Article 46(2) reads: 'The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution'. The execution of ECtHR judgments is generally good. Member states provide just satisfaction and, in many cases, execution has also brought about fundamental changes to their internal legal order. A review of the execution of the Court's judgments in Iceland indicates that this is also the case here. Icelandic authorities have always paid compensation and, in some instances, fundamental changes have been made to Icelandic legislation following ECtHR judgments to ensure that comparable violations are not repeated. Examples of this are the separation of judicial and administrative powers in 1989 and the recent introduction of an intermediate level court, - a Court of Appeal, as will be discussed in more detail later. Difficulties in executing ECtHR judgments in Iceland have mainly been regarding the reopening of cases before domestic courts.[14]

18.2. Just satisfaction

18.2.1. Background

The European Court of Human Rights can afford just satisfaction to the injured party, cf. Article 41 of the European Convention on Human Rights. The provision is in accordance with the principles of international law, one of whose main foundations is the responsibility of States for violations of international law and their obligation to make full reparation.[15] The European Court of Human Right's judgment in *Cyprus v. Turkey* is predicated on Article 41 being based on the international law principle of state responsibility and that, despite the provision's specific nature as *lex specialis*, it must be interpreted with this in mind.[16] Reference is made to the Convention's *travaux préparatoires* in this regard:

> '[...] [t]his provision is in accordance with the actual international law relating to the violation of an obligation by a State. In this respect, jurisprudence of the European Court will never, therefore, introduce

'satisfaction'. 'Satisfaction' may include an acknowledgement of the violation, an apology or prosecution. See general discussion of reparation for violations of international obligations: Articles 34-37 of Responsibility of States for Internationally Wrongful Acts, 2001. See also: The UN General Assembly Resolution No. 60/147 of 16 December 2005: 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (UN Doc. A/RES/60/147).

[13] See e.g. the ECtHR judgment in Case No. 14556/89, 31 October 1995, *Papamichalopoulos v. Greece*, paragraph 34; and the ECtHR judgment in Cases No. 39221/98 and 41963/98, 13 July 2000, *Scozzari and Giunta v. Italy*, paragraph 249.

[14] The following discussion of the execution of ECtHR judgments in Iceland is partly based on Gudrun Gauksdottir and Thordis Ingadottir: 'Compliance with the Views of the UN Human Rights Committee and the Judgments of the European Court of Human Rights in Iceland', *Making Peoples Heard, Essays on Human Rights in Honour of Gudmundur Alfredsson*, pp. 511-536.

[15] Judgment by the Permanent Court of International Justice on 26 July 1926 in Case No. 8, *Factory at Chorzow*, Jurisdiction, 1927, P.C.I.J., Series A, no 17, p. 29; Advisory Opinion of the International Court of Justice, 11 April 1949, *Reparations for Injuries Suffered in the Service of the United Nations*, I.C.J. Reports 1949, p. 174, p. 184; Judgment of the International Court of Justice, 25 September 1997, *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7, paragraph 152. See also Articles 30 and 31 of the Draft Articles by the International Law Commission: 'Responsibility of States for International Wrongful Acts' (UN Doc. A/RES/56/83), cf. UN General Assembly Resolution No. 56/83 of 12 December 2001 (UN Doc. A/56/10).

[16] ECtHR judgment in Case No. 25781/94, 12 May 2014, *Cyprus v. Turkey* (just satisfaction), paragraphs 40-42.

> any new element or one contrary to existing international law...' (Report presented by the committee of experts to the Committee of Ministers of the Council of Europe on 16 March 1950 (Doc. CM/WP 1(50)15)).[17]

In its case law, the Court has reiterated that the underlying basic principle of the provision on just satisfaction is that the applicant should, as far as possible, be placed in the position in which he or she would have been had the Convention not been violated.[18] This basic principle - *restitutio in integrum* - is a principle of international law on state responsibility and one which the European Court of Human Rights refers to. In determining reparations in *Papamichalopoulos v. Greece* the European Court of Human Rights cited the well-known precedent of the Permanent Court of International Justice in *Factory at Chorzow*:

> ... reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[19]

Thus, *restitutio in integrum* takes precedence over other forms of reparation, as recently reiterated by the Court:

> The Court reiterates that, normally, the priority under Article 41 of the Convention is *restitutio in integrum*, as the respondent State is expected to make all feasible reparation for the consequences of the violation in such a manner as to restore as far as possible the situation existing before the breach.[20]

Just satisfaction includes both monetary awards for damages and other forms of reparation. As a general principle, the Court has afforded just satisfaction in two ways. Firstly, by means of the Court finding on a violation by a state. In many instances, the Court considers that the finding of violation in itself constitutes sufficient just satisfaction under Article 41. Secondly, the Court awards compensation for pecuniary and non-pecuniary damage as just satisfaction under Article 41. According to the Court's *Practice direction on just satisfaction claims*, it is only in rare cases that the Court awards just satisfaction in any form other than these two.[21] Other awards have included a demand that a state release a person from detention or grant the person's request to have a case reopened in a domestic court. In recent years, the Court has, as a general principle, discussed such reparation with reference to the obligation of states under Article 46, as will be discussed later.

The wording in Article 41 of the European Convention on Human Rights, that the Court can afford just satisfaction 'if the internal law of the High Contracting Party concerned allows only partial reparation to be made' is not considered to entail that the applicant must again exhaust appeal procedures at the domestic level, once the Court has found that the state has violated rights protected by the Convention. It is therefore not necessary for the applicant,

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[17] ibid paragraph 40.

[18] See e.g. the ECtHR judgment in Case No. 55707/00, 18 February 2009, *Andrejeva v. Latvia*, paragraph 111; the ECtHR judgment in Case No. 35605/97, 28 May 2002, *Kingsley v. United Kingdom*, paragraph 40; the ECtHR judgment in Case No. 14556/89, 31 October, *Papamichalopoulos et al. v. Greece* (Article 50), paragraph 34.

[19] ECtHR judgment in Case No. 14556/89, 31 October 1995, *Papamichalopoulos et al. v. Greece*, paragraph 36.

[20] ECtHR judgment in Case No. 15711/13, 29 January 2015, *Stolyarova v. Russia*, paragraph 75. See also the ECtHR judgment in Case No. 18156/05, 27 May 2010, *Tchitchinadze v. Georgia*, paragraph 69; the ECtHR judgment in Case No. 14340/05, 15 June 2010, *Fener Rum Patrikliği (Ecumenical Patriarchy) v. Turkey* (just satisfaction), paragraphs 35 and 198; and the ECtHR judgment in Case No. 43590/04, 19 July 2011, *Stoycheva v. Bulgaria*, paragraph 74.

[21] ECtHR: 'Rules of Court – 19 September 2016 – Just satisfaction claims: Practice direction issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 28 March 2007', paragraph 23.

following the Court's finding of a state's violation of the Convention, to first submit a claim for just satisfaction to a domestic court before the European Court of Human Rights can award such satisfaction.[22]

Applicant must make a specific claim for just satisfaction under Article 41, in accordance with Article 60 of the Rules of Court and the *Practice direction on just satisfaction claims*. Just satisfaction may include satisfaction for pecuniary damage, non-pecuniary damage, and costs and expenses. For the Court to award just satisfaction, a clear violation of the Convention and damage caused must be established, as well as a causal link between said violation and damage.[23] The Court may afford just satisfaction under Article 41 of the Convention in its judgment on the merits. If a claim for just satisfaction is declared inadmissible at a given time, the Court will rule on the claim in a later judgment.

When assessing just satisfaction, the Court will usually take into account the local economic circumstances. The Court may decide to take guidance from domestic standards, but is, however, never bound by them.[24] It may also find reasons of equity to award less than the value of the actual damage sustained, or even not to make any award at all, for example if the situation complained of is due to the applicant's own fault.[25] Likewise, the Court may take into account the respective position of the applicant as the party injured by a violation and the fact that the contracting state is responsible for the public interest. In awarding just satisfaction, the Court may order default interest to be paid if the Court's award is not paid within the set time-limit. There is usually a three-month time-limit for awarding just satisfaction.[26]

Article 41, on just satisfaction, also applies to inter-State cases, cf. the European Court of Human Rights judgment in the case of *Cyprus v. Turkey*.[27] In this case, the Court further reiterated that compensation concerns damages to individuals and that States awarded compensation should pass on to the victims. This conclusion is important for the general development of law on reparations for individuals in inter-State cases. In support thereof, the Court referred to the judgment by the International Court of Justice in the case of *Diallo* and Article 19 of the International Law Commission's Draft Articles on Diplomatic Protection.[28]

Even if the Court rules that the Convention has been violated, it will not necessarily also award just satisfaction. Reservations in the wording of Article 41 give the Court much leeway in determining whether or not to award such satisfaction (the Court affords just satisfaction 'if necessary'). However, in the majority of cases where compensation is claimed, the Court has accepted such claims. The seriousness of the violation and the conduct of the state have been important factors when determining compensation. It has been pointed out that the Court has

[22] The ECtHR judgment in Cases No. 2832/66, 2835/66 and 2899/66, 10 March 1972, *De Wilde, Ooms and Versyp v. Belgium* (Article 50), paragraph 16; the ECtHR judgment in Cases No. 10588/83, 10589/83, 10590/83, 13 June 1994, *Barberà, Messegué and Jabardo v. Spain* (Article 50), paragraph 17.

[23] See e.g. the ECtHR judgment in Case No. 55707/00, 18 February 2009, *Andrejeva v. Latvia*, paragraph 111; the ECtHR judgment in Case No. 31195/96, 25 March 1999, *Nikolova v. Bulgaria*, paragraph 73.

[24] ECtHR Practice direction on just satisfaction claims, paragraphs 2 and 3. Before the adoption of Protocol 14, it was proposed to allow the Court to refer decisions on the amount of compensation to domestic courts, thereby easing the strain on the Court's resources. This proposal was completely rejected, one of the grounds being that applicants would not have equal status before the Court as the amount of compensation would vary widely in comparable cases. See: Helen Keller, Andreas Fischer and Daniela Kühne: 'Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals', *European Journal of International Law* (21) 2011, pp. 1039-1040.

[25] ECtHR judgment in Case No. 18984/91, 27. September 1995, *McCann and Others v. United Kingdom*, paragraph 219.

[26] For further details, see: ECtHR Practice direction on just satisfaction claims.

[27] ECtHR judgment in Case No. 25781/94, 12 May 2014, *Cyprus v. Turkey* (just satisfaction), paragraph 43.

[28] ibid paragraphs 46 and 58. For States awarding compensation in an inter-State case to individuals, see: Thordis Ingadottir: 'The Role of the International Court of Justice in the Enforcement of the Obligation of States to Investigate and Prosecute Serious Crimes at the National Level', *Israel Law Review* (47) 2014, pp. 292-293.

generally awarded damages for violations of freedom of expression only if the applicant has been sentenced to a prison term or a fine.[29] The Court sometimes awards compensation for both pecuniary and non-pecuniary damage and it is difficult in such cases to draw conclusions from the Court's findings. The Court has long been criticised for its lack of a clear policy on just satisfaction.[30] Individual judges at the Court have issued dissenting opinions harshly criticising rulings on just satisfaction and claiming that the Court undervalues human life as compared to other types of compensated damages.[31] In recent years, the Court has brought in measures to better coordinate judgments on just satisfaction, including the publication in 2007 of the abovementioned *Practice direction on just satisfaction claims*.[32]

18.2.2. Compensation for pecuniary and non-pecuniary damage

The principle with regard to pecuniary damage is that the applicant should be placed, as far as possible, back in the position in which he or she would have been had the violation found not taken place – *restitutio in integrum*.[33] There is therefore compensation for both loss incurred (*damnum emergens*) and loss, or dimished gain, to be expected in the future (*lucrum cessans*). The burden of proof as regards proving the damage and the causal link between said damage and the contracting State's violation of the Convention is on the applicant.[34] The Court lays down strict requirements in this regard. The Court has frequently awarded pecuniary damage in cases relating to violations of the right to life, prohibition of torture, right to liberty, and protection of property. In such cases, compensation has been based on loss of income of the deceased person's relatives and on unlawful expropriation.[35] Furthermore, given the wide range of different views taken into account by the Court when assessing compensation claims, the amounts granted vary greatly, even in cases involving similar events. Proving pecuniary damage in cases of procedural violations, e.g. Article 6, is tricky as it can be difficult to demonstrate the consequences of such a violation.[36] For instance, the Court has in some cases rejected compensation claims for pecuniary damage where the violation relates to a lack of oral witness reports in a criminal case before an appeals court or in cases where the court in question lacks independence. In such cases, the Court has deemed it impossible to rule on the outcome

[29] See overview of the development of case law on reparations at the European Court of Human Rights: Shelton, pp. 293-298; and Szilvia Altwicker-Hámori, Tilmann Altwicker and Anne Peters: 'Measuring Violations of Human Rights: An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage under the European Convention on Human Rights', *Zeitschrift fuer auslaendisches öffentliches Recht und Voelkerrecht* (76) 2016, pp. 1-51.

[30] D.J. Harris, M. O´Boyle, E.P. Bates and C.M. Buckley: *Law of the European Convention on Human Rights*, p. 856; Thordis Ingadottir, Carla Ferstman and Edda Kristjansdottir: 'Victims of Atrocities – Access to Reparation', The Conference on Searching for Justice: Comprehensive Action in the Face of Atrocities, pp. 16-17; Shelton, p. 345; Altwicker-Hámori, Altwicker and Peters, p. 3.

[31] See e.g. the ECtHR judgment in Case No. 33202/96, 28 May 2002, *Beyeler v. Italy* (just satisfaction), dissenting opinion of Judge Greve. This was the highest amount ever awarded by the Court – €300,000 for the loss of a painting, 420% the original purchase price; see also the ECtHR judgment in Case No. 21594/93, 20 May 1999, *Ogur v. Turkey*, partly dissenting opinion of Judge Bonello.

[32] ECtHR Practice direction on just satisfaction claims, paragraphs 10-12.

[33] Same source, paragraph 10. See also the ECtHR judgment in Case No. 55707/00, 18 February 2009, *Andrejeva v. Latvia*, paragraph 111; the ECtHR judgment in Case No. 15711/13, 29 January 2015, *Stolyaraova v. Russia*, paragraph 75.

[34] ECtHR Practice direction on just satisfaction claims, paragraphs 10-11.

[35] Harris, O'Boyle, Bates and Buckley, p. 859.

[36] Case-law in such cases is not, however, uniform. See Shelton, p. 321.

of the case if the violation had not taken place.[37] In addition, the Court has deemed itself unable to reassess evidence given before a domestic court in such cases.[38]

As well as compensation for pecuniary damage, the Court also awards compensation for non-pecuniary damage.[39] Such compensation covers such things as psychological and physical suffering. The Court has repeatedly described its case-law on compensation for non-pecuniary damage as follows:

> The Court would observe that there is no express provision for non-pecuniary or moral damage. Evolving case by case, the Court's approach in awarding just satisfaction has distinguished situations where the applicant has suffered evident trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life, or real loss of opportunity […] and those situations where the public vindication of the wrong suffered by the applicant, in a judgment binding on the Contracting State, is a powerful form of redress in itself. In many cases where a law, procedure or practice has been found to fall short of Convention standards this is enough to put matters right… In some situations, however, the impact of the violation may be regarded as being of a nature and degree as to have impinged so significantly on the moral well-being of the applicant as to require something further. Such elements do not lend themselves to a process of calculation or precise quantification.[40]

The Court also affirms that, when ruling on compensation for non-pecuniary damage, its role is different compared to how domestic courts would function in civil liability compensation claims. The Court bases its rulings on fairness and takes into account various different viewpoints:

> Nor is it the Court's role to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred. Its non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage; they are not, nor should they be, intended to give financial comfort or sympathetic enrichment at the expense of the Contracting Party concerned.[41]

As regards claims for non-pecuniary damage, the Court often decides that the finding of violation in itself constitutes sufficient just satisfaction for such damage.[42]

18.2.3 Costs

With reference to Article 41 of the European Convention on Human Rights on just satisfaction, the Court has ordered states to pay those costs actually incurred by the applicant and which are considered both necessary and unavoidable. The applicant is required to produce evidence of

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[37] See e.g. the ECtHR judgment in Case No. 10563/83, 26 May 1988, *Ekbatani v. Sweden*; and the ECtHR judgment in Case No. 16034/90, 19 April 1994, *Van de Hurk v. Netherlands*. See also discussion in Matti Pellonpää: 'Individual Reparation Claims under the European Convention on Human Rights', *State Responsibility and the Individual: Reparations in Instances of Grave Violations of Human Rights*, pp. 114-115.

[38] See the ECtHR judgment in Case No. 14448/88, 27 October 1993, *Dombo Beheer B.V. v. Netherlands*, paragraph 40.

[39] ECtHR Practice direction on just satisfaction claims, paragraphs 13-15.

[40] ECtHR judgment in Cases No. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90, 16073/90, 18 September 2009, *Varnava et al. v. Turkey*, paragraph 224; see also the ECtHR judgment in Case No. 25781/94, 12 May 2014 (just satisfaction), *Cyprus v. Turkey*, paragraph 56.

[41] See the same judgments.

[42] See e.g. the ECtHR judgment in Case No. 59166/12, 23 August 2016, *J.K. et al. v. Sweden*, paragraph 127; ECtHR judgment in Case No. 37201/06, 28 February 2008, *Saadi v. Italy*, paragraph 188; and the ECtHR judgment in Cases No. 22636/13, 24034/13, 24334/13 and 24528/13, 7 May 2014, *Nizamov et al. v. Russia*, paragraph 50.

any such costs.[43] Typical examples of costs awarded by the Court are legal costs and other costs related to legal proceedings before both domestic courts and the European Court of Human Rights. If the Court deems said costs to be excessive, it awards an amount it considers fair.[44]

18.2.4. Punitive damages

The Court has in principle never awarded punitive damages. The nature of any such damages would be to punish states rather than to make good any damage to the applicant. However, the ECtHR's *Practice direction on just satisfaction claims* does not rule out the Court's jurisdiction to award such damages:

> The purpose of the Court's award in respect of damage is to compensate the applicant for the actual harmful consequences of a violation. It is not intended to punish the Contracting Party responsible. The Court has therefore, *until now*, considered it inappropriate to accept claims for damages with labels such as 'punitive', 'aggravated' or 'exemplary'.[45]

That said, when looking at the Court's case-law, there is in actual fact a fine line between whether compensation is for pecuniary or non-pecuniary damage or for punitive damages. Some judges of the Court consider that many Court rulings are actually awarding punitive damages, with deviation from general requirements of proof of pecuniary or non-pecuniary damage.[46]

18.3. Binding force and execution of judgments

18.3.1. Background

States parties to the European Convention on Human Rights have committed under international law to abide by ECtHR judgments, c.f. Article 46(1) of the Convention. This commitment reflects the basic principle of international law that states must keep their commitments – *pacta sunt servanda*.[47] Comparable obligations are to be found in the founding treaties of other international courts.[48] A basic principle of international law is that states may renege on their international legal obligations only in cases of absolute emergency. They may not, for instance, invoke the provisions of its internal law as justification for its failure to abide by their international legal obligations.[49]

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[43] ECtHR Office: Rules of the Court (as amended by the Plenary Court on 14 November 2016), 1 January 2016, Article 60(2).

[44] ECtHR Practice direction on just satisfaction claims, paragraphs 16-21.

[45] ibid, paragraph 9. Italics added.

[46] See e.g. the ECtHR judgment in Case No. 25781/94, 12 May 2014 *Cyprus v. Turkey* (just satisfaction), Concurring Opinion of Judge Pinto de Albuquerque, joined by Judge Vučinić, paragraphs 12-19.

[47] This rule is one of the oldest and most important principles of international law. It is considered to part of customary law and therefore binding on all states. See e.g. the Judgment of the International Court of Justice, 25 September 1997, *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7, paragraph 142. See also Article 12 of Responsibility of States for International Wrongful Acts; and Article 26 of the 1969 Vienna Convention on the Law of Treaties, signed on 23 May 1969, entered into force on 27 January 1980, 1155 U.N.T.S. 331. Iceland has not ratified the Vienna Convention on the Law of Treaties and the Convention is therefore not binding *per se* on it. That said, many of the clauses in the Convention are deemed to reflect customary law, see e.g. the Judgment of the International Court of Justice, 2 February 1973, *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, I.C.J. Reports 1973, p. 3, paragraphs 24 and 36.

[48] See e.g. Article 94(1) of the Charter of the United Nations and Articles 59 and 60 of the Statute of the International Court of Justice, signed on 19 November 1946 and entered into force on the same day, SÍ [Iceland's treaties with foreign countries] 52; Article 33 of the Agreement between the EFTA States on the Establishment of a. Surveillance Authority and a Court of Justice, ratified on 2 February 1993, entered into force on 1 January 1994, C 32/1993; Articles 67 and 68(1) of the American Convention on Human Rights, signed on 22 November 1969, entered into force on 18 July 1978, 1444 U.N.T.S. 123.

[49] See Article 27 of the Vienna Convention on the Law of Treaties; Advisory Opinion of the International Court of Justice, 26 April 1998, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations*

The execution of Court judgments also has a bearing on the right of individuals to apply to the Court under Article 34 of the Convention. With reference to the fact that the right to access to domestic courts under Article 6 of the Convention is considered to entail the right to execution of the relevant judgment, the Court considers that the same applies to the right of individuals to apply to the Court and to the execution of its judgments. The Court has also indicated that any failure to execute its judgments undermines the effectiveness of the Court.[50]

To ensure execution of judgments, Article 46(2) of the Convention confers on the Committee of Ministers the important role of supervision the execution of judgments. The binding nature of judgments and the supervisory role of the Committee of Ministers have been an important part of the Convention from the outset.[51] The powers of Committee of Ministers as regards the execution of judgments were increased by means of Protocol 14 to the Convention, cf. Article 46(3) and (4) of the Convention. The amendment empowered the Committee to refer cases to the Court if there were any difficulties in interpreting the final judgment, and to refer to the Court the question whether or not a given state has violated its duty to abide by a final judgment of the Court.

18.3.2. Status of ECtHR judgments in domestic law

Article 1 of the Convention states: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in [...] this Convention.' The Convention does not, however, lay down that it has direct effect in domestic law or that the contracting parties should confer such effect on it. At the same time, contracting parties must discharge their treaty commitments and ensure that their domestic law reflect such commitments. According to the European Court of Human Rights:

> That apart, the Court also reiterates that by virtue of Article 46 of the Convention, the Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties. Furthermore, it follows from the Convention, and from Article 1 in particular, that in ratifying the Convention the Contracting States undertake to ensure that their domestic legislation is compatible with it. Consequently, it is for the respondent State to remove any obstacles in its domestic legal system that might prevent the applicant's situation from being adequately redressed.[52]

The Convention likewise does not provide that a judgment of the Court should have direct effect in domestic law or, for instance, be enforceable with measures of constraint.[53] The Court cannot, for example, invalidate a judgment or piece of national legislation which violates the Convention.[54] As the Court itself describes:

Headquarters Agreement of 26 June 1947, I.C.J. Reports 1988, p. 12, 34-35, paragraph 57; Judgment of the International Court of Justice, 27 June 2011, *LaGrand Case (Germany v. United States of America)*, I.C.J. Reports 2001, pp. 466 and 497-98, paragraphs 90 and 91.

[50] European Court of Human Rights: 'Reply to Committee of Ministers request for comments on the CDDH Report on Execution' 9 May 2014, paragraph 5.

[51] Originally Articles 53 and 54 of the Convention. The substance of these clauses remained unchanged when Protocol 11 came into force and became Article 46. On views expressed when drafting the clause, see William A. Schabas: *The European Convention on Human Rights: A Commentary*, pp. 862-866.

[52] ECtHR judgment in Case No. 39748/98, 17 February 2004, *Maestry v. Italy*, paragraph 47. See also e.g. the ECtHR judgment in Case No. 34932/04, 6 January 2011, *Paskas v. Lithuania*, paragraph 119; and the ECtHR judgment in Case No. 64886/01, 29 March 2006, *Cocchiarella v. Italy*, paragraph 126.

[53] See e.g. general discourse on the effect of international law and the judgments of international courts in domestic law: Davíd Thór Björgvinsson: *The Intersection of International Law and Domestic Law: A Theoretical and Practical Analysis*; André Nollkaemper, *National Courts and the International Rule of Law*; Sara McLaughlin Mitchell and Emilia Justyna Powell, *Domestic Law Goes Global: Legal Traditions and International Courts*; and David Sloss (ed.): *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study*.

[54] ECtHR judgment in Case No. 6833/74, 13 June 1979, *Marckx v. Belgium*, paragraph 58. A proposal to this effect while the Convention was being negotiated was rejected, see Schabas, pp. 830-831.

> [i]f the nature of the breach allows of restitutio in integrum, it is for the respondent State to effect it, the Court having neither the power nor the practical possibility of doing so itself.[55]

It is up to the domestic law of the states parties to determine how they implement the Convention. The states parties have given great importance to the Convention in domestic law and most states have incorporated it fully into national law. The Convention has, in this way, been given direct legal effect in domestic law and individuals can base their case on it before their own courts. The status given to the judgments of the Court, whether in legislation or case-law, is however another matter.[56] Some states have brought in legislation giving binding force to judgments of the Court against the state in its domestic courts, e.g. Austria, Greece, Malta, Serbia and Turkey.[57] With reference to Article 46 of the Convention, courts of the contracting parties have conferred great importance on the judgments of the Court, and even if they may not have been given formal legal effect in domestic law in the relevant national legislation, some courts have in effect given them comparable weight.[58]

According to data from the Committee of Ministers, the vast majority of contracting parties have legislation which provides for the reopening of legal cases which the Court deems to violate the Convention.[59] However, among the Nordic countries only Norway has specific authorisation for reopening a case on the basis of a Court judgment.[60] That said, Court judgments have weighed heavily in assessing general conditions for reopening cases in Denmark, Finland and Sweden, whether regarding content or form. Requests for case reopening have been granted in cases where the state in question has been found to have violated Article 6 and 10 of the Convention. The Swedish Supreme Court has ruled that Swedish courts may authorise reopening a criminal case on the basis of the Convention (with specific reference to Article 13 thereof) in special cases, even if the general conditions for review are not met. Finally, the Finnish Supreme Court has overlooked the requirements of its own domestic

[55] ECtHR judgment in Case No. 14556/89, 31 October 1995, *Papamichalopoulos and others v. Greece* (just satisfaction), paragraph 34; the ECtHR judgment in Cases No. 6878/75 and 7238/75, 18 October 1982, *Le Compte, Van Leuven and De Meyere v. Belgium*, paragraph 13.

[56] In some states where international conventions have legal effect in domestic law, the same applies to the judgments of the relevant international courts, while in other states this is not the case. See discussion and examples in Nollkaemper, pp. 75-76.

[57] For this in general, see: Harris, O'Boyle, Bates and Buckley, p. 26; see also: Committee of Experts for the improvement of procedures of the protection of human rights: 'Reopening of proceedings before domestic courts following findings of violation by the European Court of Human Rights – Draft survey of existing legislation and case-law' (Ref. DH-PR(2005)002); Council of Europe: 'Practical impact of the Council of Europe monitoring mechanisms in improving respect for human rights and the rule of law in member states' H/Inf(2010)7.

[58] See e.g. the Judgment of the Italian Constitutional Court in Case No 113/2011, 17 April 2011, *Dorigo and President of the Council of Ministers (intervening)*, (2011) 94 RDI 960, ILDC 1732 (IT 2011); the Judgment of the Bulgarian Supreme Administrative Court in Case No 11004/2002, 8 May 2003, *Al-Nashif v. National Police Directorate at the Ministry of the Interior*, ILDC 608 (BG 2003); the Judgment of the Constitutional Court of the Czech Republic in Case No II ÚS 604/02, 26 February 2004, *Červeňáková and ors v Regional Court in Ústí nad Labem and District Court in Ústí nad Labem*, ILDC 877 (CZ 2004).

[59] Council of Europe: 9th Annual Report of the Committee of Ministers, Supervision of the Execution of judgments and decisions of the European Court of Human Rights, 2015, p. 240. An overview of the national legislation of individual States as regards authorisation to reopen cases following a Court judgment can be found on the website of the Council of Europe: http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/Reopening-en.asp, last consulted in November 2016.

[60] See the Norwegian laws on civil proceedings, LOV 2005-06-17 No. 90 (Articles 31-1-3 and 31-4-b), and on criminal proceedings, LOV 1981-05-22-25 (Article 391-2), which both authorise case reopening in cases where the Court has found Norway guilty of violating the Convention. See also A. Bårdsen: 'Execution of Strasbourg and Geneva decisions in Norway', *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order*, pp. 115-121.

legislation for a deadline for requesting the reopening of a case, if such a request is made on the basis of a Court judgment against Finland.[61]

18.3.3 Just satisfaction, individual and general measures

The European Court of Human Rights has interpreted Article 46(1) of the Convention in accordance with general rules on state responsibility in international law. The commitment entered into by states is three-fold: the state should cease the unlawful activity, fully remedy any unlawful activity carried out, and ensure it is not repeated. The Court has reiterated that the commitment of states under Article 46(1) does not entail only paying compensation as ruled under Article 41, but also an obligation to undertake such individual and general measures in domestic law as are necessary to execute the judgment.[62]

> It follows, *inter alia*, that a judgment in which the Court finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and make all feasible reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.[63]

The Court has likewise reiterated that it is up to the states what methods they use to discharge their obligations under Article 46 of the Convention. Judgments of the Court are declaratory in nature and it is up to the individual states how they ensure execution of the judgments, under the supervision of the Committee of Ministers:

> The Court observes that the respondent State is bound by Article 46 and thus by its international obligations to comply with the principal judgment. It reaffirms the general principle that the respondent State remains free to choose the means by which it will discharge its legal obligation under the above-mentioned provision, and that the supervision of the execution of the Court's judgments is the responsibility of the Committee of Ministers.[64]

The approach described above is in line with the Court´s case-law on the principle of subsidiarity, i.e. that the main responsibility for protecting human rights sits with the member

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[61] See information on conditions for the reopening of cases and case-law from Denmark to the Committee of Ministers, http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/Reopening/PDFs/Denmark.pdf (1 July 2015); see information on conditions for the reopening of cases and case-law from Finland to the Committee of Ministers, http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/Reopening/PDFs/Finland.pdf (14 January 2016); see information on conditions for the reopening of cases and case-law from Sweden to the Committee of Ministers, http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/Reopening/PDFs/Sweden.pdf (21 May 2015), last consulted in May 2016.

[62] The ECtHR judgment in Case No. 14556/89, 31 October 1995, *Papamichalopoulos et al. v. Greece*, (just satisfaction), paragraph 34; the ECtHR judgment in Cases No. 39221/98 and 41963/98, 13 July 2000, *Scozzari and Giunta v. Italy*, paragraph 249.

[63] ECtHR judgment in Case No. 64886/01, 29 March 2006, *Cocchiarella v. Italy*, paragraph 125. See also the ECtHR judgment in Case No. 39748/98, 17 February 2004, *Maestri v. Italy*, paragraph 47; the ECtHR judgment in Case No. 23186/94, 24 July 1998, *Menteş et al. v. Turkey*, paragraph 24; the ECtHR judgment in Cases No. 39221/98 and 41963/98, 13 July 2000, *Scozzari and Giunta v. Italy*, paragraph 249; the ECtHR judgment in Case No. 48787/99, 8 July 2004, *Ilaşcu et al. v. Moldovia and Russia,* paragraph 487; the ECtHR judgment in Case No. 25781/94, 12 May 2014, *Cyprus v. Turkey* (just satisfaction), paragraph 27.

[64] The ECtHR judgment in Case No. 25781/94, 12 May 2014, *Cyprus v. Turkey* (just satisfaction), paragraph 63; the ECtHR judgment in Case No. 32772/02, 30 June 2009, *Verein gegen Tierfabriken Schweiz v. Switzerland*, paragraph 61; the ECtHR judgment in Case No. 6833/74, 13 June 1979, *Marckx v. Belgium*, paragraph 58; the ECtHR judgment in Case No. 27765/09, 23 February 2012, *Hirsi Jamaa et al. v. Italy*, paragraph 209; the ECtHR judgment in Case No. 71503/01, 8 April 2004, *Assanidze v. Georgia*, paragraphs 198 and 202; the ECtHR judgment in Case No. 48787/99, 8 July 2004, *Ilaşcu et al. v. Moldovia and Russia*, paragraph 490; and the ECtHR judgment in Case No. 61498/08, 2 March 2010, *Al Saadoon and Mufdhi v. United Kingdom*, paragraph 170.

states themselves, and on the principle of margin of state appreciation, subject to the jurisdiction of the Court.[65]

In recent decades, there have been legal developments as regards state discretion to choose which measures they prefer to take to execute Court judgments. Previously, the Court rejected demands to provide for individual or general measures, as it considered that it was not authorised to do so.[66] Nowadays, the Court is to a greater extent proposing and even laying down what measures states should take to discharge their obligations under Article 46(1) of the Convention.[67] This is particularly true in cases where the violation stems from a systemic problem in domestic law or cases where it is deemed possible to restore the individual to a state equivalent to if the violation had never occurred (*restitutio in integro*). This development began after Protocol 9 to the Convention, which gave individuals direct access to the Court, entered into force, and is line with developments at other international courts.[68] In the same vein, the Court is now increasingly ruling on cases involving large groups of individuals and/or ruling on violations relating to underlying systemic problems in the state in question.

As regards individual measures, the Court has in some cases found that the nature of the violation is in fact such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate a specific measure. This legal development began with a judgment from 1995 in *Papamichalopoulos et al. v. Greece*.[69] The approach taken by the Court in this regard is reflected clearly in *Öcalan v. Turkey*, cf. the following reasoning now also appearing in many other judgments:

> The Court reiterates that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order to discharge its obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment ... This discretion as to the manner of execution of a judgment reflects the freedom of choice attached to the primary obligation of the Contracting States to secure the rights and freedoms guaranteed under the Convention (Article 1) … However, exceptionally, with a view to helping the respondent State to fulfil its obligations under Article 46, the Court will seek to indicate the type of measure that might be taken in order to put an end to a violation it has found to exist. In such circumstances, it may propose various options and leave the choice of measure and its implementation to the discretion of the State concerned […] In certain cases, the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate a specific measure.[70]

[65] On the principles of subsidiarity and margin of appreciation, see Council of Europe: 'Explanatory Report to Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms'. See also Oddný Mjöll Arnardóttir: 'Organised Retreat? The Move from 'Substantive' to 'Procedural' Review in the ECtHR's Case Law on the Margin of Appreciation', European Society of International Law, Conference Paper No. 4/2015.

[66] See e.g. the ECtHR judgment in Case No. 10486/83, 24 May 1989, *Hauschildt v. Denmark.*

[67] L.G. Loucaides: 'Reparation for Violations of Human Rights under the European Convention and Restitutio in Integrum', *European Human Rights Law Review* (2) 2008, p. 186; V. Colandrea: 'On the Power of the European Court of Human Rights to Order Specific Non-Monetary Measures: Some Remarks in Light of the Assanidze, Broniowski and Sejdovic Cases', *Human Rights Law Review* (7) 2007, p. 396; Harris, O'Boyle, Bates and Buckley, p. 862; Helen Keller and Cedric Marti: 'Reconceptualizing implementation: the judicialization of the execution of the European Court of Human Right's judgments', *European Journal of International Law* (26) 2015, p. 829.

[68] See e.g. the judgment of the International Court of Justice of 3 March 1999 (provisional measures), *La Grand (Germany v. United States of America*, I.C.J. Reports, p. 9, 16-17; and the judgment of the International Court of Justice of 5 February 2003 (provisional measures), *Avena and Other Mexican Nationals* (*Mexico v. United States of America*), I.C.J. Reports, pp. 77, 91-92. See further discussion in Thordis Ingadottir, p. 293.

[69] ECtHR judgment in Case No. 14556/89, 31 October 1995, *Papamichalopoulos et al. v. Greece*, (just satisfaction), paragraph 34.

[70] ECtHR judgment in Case No. 46221/9, 12 May 2005, *Öscalan v. Turkey*, paragraphs 194 and 195.

On the basis of this reasoning, the Court has indicated various types of individual measures, e.g. the state returning land to the applicant within six months,[71] the applicant being released as quickly as possible,[72] the applicant's prison sentence being commuted to a less severe alternative,[73] property ownership rights being recognised and eviction decisions repealed[74], and the applicant's case being reopened in domestic courts.[75] The Court has in recent years been more determined in ordering case reopening in cases involving violation of Articles 5 and 6 of the Convention.[76] The Court, on occasion, proposes or orders such a remedy in its reasonings or even in the operative parts of its judgments. For instance, in Case *Gençel v. Turkey*, the Court recommended in the operative part of its judgment that reopening the case would be the best remedy.[77] In Case *Lungoci v. Romania*, the Court's ruling laid down that the state in question should reopen the case if the applicant so requested.[78] The case-law of the Court is still developing as regards individual measures. In a recent Court judgment in Case *Al Nashiri v. Poland*, the Court laid down that the state in question should attempt to prevent the death penalty against the applicant in a third country as quickly as possible.[79] The Court justifies this ruling in detail, including with the same grounds as before, i.e. with reference to the commitments of states under Article 46 of the Convention, commitments of states not to pay only compensation under Article 41 of the Convention, but also to apply individual and general measures, and that, while states are in principle free to choose how they execute judgments, in certain circumstances the Court has deemed it necessary to deviate from this arrangement.[80]

As with individual measures under Article 46, the Court has begun to give guidance and in some cases specify what general measures are necessary in domestic law. This is particularly the case when it comes to systemic violation in domestic law and/or when many people are in the same situation as the applicant. As compared to individual measures (which mostly aim to halt violations and restore the initial situation of the applicant), general measures aim to prevent similar violations occurring in the future. See, in this connection, the need for changes in domestic law as regards judicial appointsments[81] and compensation for unlawful expropriation.[82]

At the same time as recommending general measures under Article 46 of the Convention, the Court has also developed a radical procedure targeted at systemic violations, with the introduction of the 'pilot judgment procedure'. This change to the execution of judgments was

[71] ECtHR judgment in Case No. 14556/89, 31 October 1995, *Papamichalopoulos et al. v. Greece*, (just satisfaction), paragraph 34.
[72] ECtHR judgment in Case No. 71503/01, 8 April 2004, *Assanidze v. Georgia*, paragraphs 202-233; ECHR judgment in Case No. 48787/99, 8 July 2004, *Ilascu v. Moldovia and Russia*; ECtHR judgment in Case No. 40984/07, 22 April 2010, *Fatullayev v. Azerbajdzhan*, paragraphs 176-177.
[73] ECtHR judgment in Case No. 46468/06, 22 December 2008, *Aleksanyan v. Russia*, paragraph 240.
[74] ECtHR judgment in Case No. 15711/13, 29 January 2015, *Stolyarova v. Russia*, paragraph 75.
[75] See e.g. the ECtHR judgment in Case No. 53431/99, 23 October 2003, *Gençel v. Turkey*, paragraph 27; ECtHR judgment in Case No. 67972/01, 18 May 2004, *Somogyi v. Italy*, paragraph 86; ECtHR judgment in Case No. 9808/02, 24 March 2005, *Stoichkov v. Bulgaria*, paragraph 81; ECtHR judgment in Case No. 62710/00, 26 January 2006, *Lungoci v. Romania*; ECtHR judgment in Cases No. 46825/99, 47132/99, 47502/99, 49010/99, 49104/99, 49195/99 and 49716/99 49195/99, 2 June 2005, *Claes et al. v. Belgium*; and the ECtHR judgment in Case No. 36391/02, 27 November 2008, *Salduz v. Turkey*, paragraph 72.
[76] See discussion in Keller and Marti, p. 837.
[77] ECtHR judgment in Case No. 53431/99, 23 October 2003, *Gençel v. Turkey*, paragraph 27.
[78] ECtHR judgment in Case No. 62710/00, 26 January 2006, *Lungoci v. Romania*.
[79] ECtHR judgment in Case No. 28761/11, 24 July 2004, *Al Nashiri v. Poland*, paragraph 589.
[80] ECtHR judgment in Case No. 28761/11, 24 July 2004, *Al Nashiri v. Poland*, paragraph 587. See also the ECHR judgment in Case No. 27765/09, 23 February 2012, *Hirsi Jamaa et al. v. Italy*, paragraphs 209-211; and the ECHR judgment in Case No. 71386/10, 25 April 2013, *Savriddin Dzhurayev v. Russia*, paragraphs 252-254.
[81] ECtHR judgment in Case No. 21722/11, 9 January 2013, *Oleksandr Volkov v. Ukraine*, paragraphs 199-202.
[82] ECtHR judgment in Case No. 31443/96, 22 June 2004, *Broniowski v. Poland*, paragraph 194; and the ECHR judgment in Case No. 43662/98, 6 March 2007, *Scordino v. Italy*, paragraph 236.

brought into the case-law of the Court in 2004 in Case *Broniowski v. Poland*.[83] This case gives a clear picture of the problem faced by the Court in cases involving a violation against many individuals and the need for the Court to tackle such cases in a different way:

> The Court has already noted that the violation which it has found in the present case has as its cause a situation concerning large numbers of people. The failure to implement in a manner compatible with Article 1 of Protocol No. 1 the chosen mechanism for settling the Bug River claims has affected nearly 80,000 people [...] There are moreover already 167 applications pending before the Court brought by Bug River claimants. This is not only an aggravating factor as regards the State's responsibility under the Convention for an existing or past state of affairs, but also represents a threat to the future effectiveness of the Convention machinery.[84]

Pilot judgments are intended to deal with the immense case load of the Court and to some extent they address the inefficiency of the system of the Committee of Ministers for monitoring the execution of judgments as regards general measures.[85] The judgments in question are intended to deal with situations for which there is a large number of cases owing to identical or equivalent situations. When using this remedy, the Court freezes the procedure for all comparable cases except one. When passing judgment in that one case, the Court clearly rules on what measures the state must take to deal with the violation in question. The state is then given leeway to take measures involving structural changes and to reach an agreement with other parties who have applied to the Court and/or are in a similar situation. It is interesting to note that this method was introduced without direct authorisation in the Convention or in the Rules of the Court. The practice had been proposed by the Court in 2003 and Committee of Ministers ruled on it in 2004.[86] The method was justified with reference to Article 46(1) of the Convention. It was then formally adopted in the Rules of the Court in 2011, cf. Article 61 of the Rules of the Court.[87]

18.4. Committee of Ministers supervision of execution of judgments

18.4.1. Role of the Committee of Ministers

The Committee of Ministers of the Council of Europe has also played an important role as regards enforcement of the Convention. Until the entry into force of Protocol 11 to the Convention, the Committee to some extent exercised judicial power. Following the changes to the supervisory system of the Convention the Committee lost this power but continues to play a key role in the execution of Court judgments, cf. Article 46(2) of the Convention.

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[83] ECtHR judgment in Case No. 31443/96, 22 June 2004, *Broniowski v. Poland.* On later pilot judgments, see e.g. the ECtHR judgment in Case No 27912/02, 30 November 2009, *Suljagić v. Bosnia-Hercegovina* (repayment of bank deposits); the ECtHR judgment in Case No 46344/06, 2 September 2010, *Rumpf v. Germany* (length of civil proceedings before administrative ruling authorities); and the ECtHR judgment in Cases No 60041/008 and 60054/08, 23 November 2010, *Greens and M.T. v. United Kingdom* (voting rights for prisoners). For further details, see: ECtHR: 'Factsheet - Pilot Judgments'. See also Davíð Þór Björgvinsson: 'Leiðardómar Mannréttindadómstóls Evrópu', *Úlfjótur* Vol. 3 2007, p. 463; P. Leach: 'Beyond the Bug River – A new dawn for redress before the European Court of Human Rights', *European Human Rights Law Review* (10) 2005, pp. 148-164; Philip Leach: Helen Hardman, Svetlana Stephenson, Brad K. Blitz: *Responding to Systemic Human Rights Violations: An Analysis of 'Pilot Judgment' of the European Court of Human Rights and their Impact at National Level*.

[84] ECtHR judgment in Case No. 31443/96, 22 June 2004, *Broniowski v. Poland*, paragraph 193.

[85] Leach, Hardman, Stephenson and Blitz, p. 171.

[86] ECtHR: 'Position paper of the European Court of Human Rights on proposals for reform of the European Convention on Human Rights and other measures as set out in the report of the Steering Committee of Human Rights', 12 September 2003 (CDDH-GDR(2003)024); Council of Europe: 'Resolution RES (2004) 3 on judgments revealing an underlying systemic problem', 12. May 2004.

[87] See discussion on criticism of the authorisation for the remedy: Keller, Fischer and Kühne, p. 1042.

The Committee of Ministers is a political body and the supreme executive power of the Council of Europe.[88] It is made up of the Foreign Ministers of all member states of the Council of Europe, although most tasks are carried out by the ambassador of these states to the Council of Europe. The Council of Europe has a specific department handling execution of Court judgments and assisting the Committee of Ministers in its work.[89] The Committee has approved recommendation to states on successful implementation and execution of judgments in domestic law.[90] It has also approved rules on supervision of execution of judgments and terms of friendly settlements.[91]

Article 46(2) of the Convention confers on the Committee of Ministers the important role of supervising the execution of judgments and determining whether or not a given state has executed a judgment in a satisfactory way. The Court has not deemed itself to have comparable powers and has in this connection referred to the role and powers of the Committee. While the Court stresses the competency of states to choose how they execute judgments, it also emphasises the power of the Committee to determine the necessary measures to meet the obligation under Article 46(1):

> Consequently, it considers that in these applications it falls to the Committee of Ministers acting under Article 46 of the Convention to address the issues as to what may be required in practical terms by way of compliance.[92]

In the light of Court case-law and Protocol 14, these clear dividing lines of power between the Court and the Committee of Ministers are shifting.[93] As indicated above, the Court is now to a greater extent proposing and indicating what measures States should take to discharge their obligations under Article 46(1) of the Convention. Protocol 14 also gives the Court a new role, include replying to questions from the Committee as to whether contracting parties have violated their obligations under Article 46(1).

18.4.2. Execution

The Committee of Ministers meets four times a year to deal with supervision of judgments. It has issued detailed rules for the supervision of the execution of judgments.[94] Decisions on execution of judgments are taken in the form of resolutions on each case, passed by a two-thirds majority of those voting and a simple majority of states sitting on the Committee. If the Committee considers that the state in question has executed a judgment, it issues an opinion to

[88] See Article 15 of the Statute of the Council of Europe on the role of Committee, membership 7 March 1950, entered into force on the same day, SÍ 79. Some consider that the political nature of the Committee of Ministers is not suited to enforcing and ensuring execution of judgments, cf. Harris, O'Boyle, Bates and Buckley, p. 28.

[89] See the Committee's website: http://www.coe.int/en/web/execution.

[90] Recommendation CM/Rec(2008)2 of the Committee of Ministers to Member States on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights, adopted on 6 February 2008.

[91] Rules of the Committee of Ministers for the supervision of the execution of judgments and of terms of friendly settlements, adopted on 10 May 2006.

[92] ECtHR judgment in Case No. 55721/07, 7 July 2011, *Al-Skeini et al. v. United Kingdom*, paragraph 181; ECHR judgment in Cases No. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90, 16073/90, 18 September 2009, *Varnava et al. v. Turkey*, paragraph 222.

[93] In Case *Cyprus v. Turkey*, for instance, some of the judges considered that the Court had gone too far in this regard and had encroached on the supervisory remit of the Committee – see the ECtHR judgment in Case No. 25781/94, 12 May 2014 *Cyprus v. Turkey* (just satisfaction), Partly Concurring Opinion of Judges Tulkens, Vajić, Raimondi and Bianku, joined by Judge Karakaş.

[94] Appendix 4 (Item 4.4), Rules for the supervision of the execution of judgments and of the terms of friendly settlements.

that effect. If it considers that the state has not executed a judgment, it issues a provisional resolution. Committee meetings are not public but its resolutions are made public.[95]

The *Rules of the Committee of Ministers on supervision of execution of judgments and of the terms of friendly settlements* set out the main substantive aspects of supervisions and details of communication between the Committee and states on the execution of judgments.[96] Following issuance of a judgment, the Committee requests information from the state in question on how it intends to execute said judgment. The Committee and the state in question subsequently remain in contact on the subject of executing the judgment until such time as the Committee considers that this has been achieved. When supervising the execution of a judgment, the Committee of Ministers is bound, under Article 6(2) of the Rules, to examine the following:

> a) Whether or not the State has paid the compensation ordered under Article 41 of the Convention.
> As regards State freedom to choose how it executes judgments, the Committee is also bound to examine the following:
> b) Whether or not the State has implemented the necessary individual measures to ensure that the violation is ceased and that the individual is, as far as possible, back in the same situation they were in before the violation of the Convention occurred. Some examples in this connection are: the removal of an undue conviction from a criminal record, the granting of a residence permit, or the authorisation to reopen a case, cf. Committee proposals on such measures.[97]
> c) The Committee must examine whether or not the State has brought in the necessary general measures to prevent comparable violations in the future or the continuation of an existing violation. The Rules cite examples such as amendments to legislation, changes to case-law or administration, or translation or publication of judgments.

With the advent of the Court's pilot judgments, the role of the Committee in supervising general measures has undoubtedly increased.[98] As regards individual measures, the supervisory role of the Committee has also developed in line with the changing case-law of the Court. One prevalent aspect as regards the execution of judgments under Article 46 is the reopening of cases in domestic courts. In many cases whether the Court has, for instance, deemed that a trial has violated the Convention, reopening the case in domestic courts is, in the view of the Committee, the only way of granting the applicant *restitutio in integrum*. In light of the importance of this remedy, the Committee issued guidance for Member States and has closely monitored national legislation in contracting States as regards the possibility of reopening cases in the wake of a Court judgment.[99] As part of its supervision of the execution of judgments, the Committee has also often indicated this remedy as the only option to abide by a given judgment.[100] Some consider that the Committee's implementation as regards reopening cases

[95] The state is asked to send the Committee an action plan within six months of a judgment being rendered setting out how they intend to respond to the judgment; Rule 6 (Information to the Committee of Ministers on the execution of the judgment), Rules for the supervision of the execution of judgments and of the terms of friendly settlements. See also Harris, O'Boyle, Bates and Buckley, p. 873.

[96] Rules for the supervision of the execution of judgments and of terms of friendly settlements, 10 May 2006, available at https://rm.coe.int/16806eebf0, last consulted May 2017.

[97] Recommendation Rec(2000)2 of the Committee of Ministers to Member States on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, adopted on 19 January 2000.

[98] Philip Leach: 'The Effectiveness of the Committee of Ministers in Supervising the Enforcement of Judgments of the European Court of Human Rights', *Public Law*, Vol. 3 2006, pp. 443-456.

[99] Recommendation (2000)2 and (2004)6. See also: Explanatory Memorandum on the Recommendation No. R (2000)2 of the Committee of Ministers on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights. See also Council of Europe, 9th Annual Report of the Committee of Ministers, p. 239.

[100] Committee of Ministers: Resolution DH(94)84, 16 November 1994, concerning the judgment of 6 December 1988 and 13 June 1994 in the case of Barberà, Messegué v. Spain.

in domestic courts has actually influenced the Court in recommending such a remedy in recent years.[101]

18.4.3. Non-compliance

In cases where the contracting State fails to execute a judgment of the Court, the Committee of Ministers has a few remedies at its disposal. Firstly, when there is a delay in executing a judgment, the Committee has recourse to some methods to put political pressure on the state in question.[102] Until the entry into force of Protocol 14 to the Convention, other remedies were confined to applying Articles 3 and 8 of the Statute of the Council of Europe, on voting rights in the Committee of Ministers and expulsion from the Council of Europe. Such remedies have proven to be politically unrealistic and have never been used.[103] The range of remedies available to Committee was increased by Protocol 14, cf. new Article 46(3) and (4). Under Article 46(3), the Committee may now request a Court interpretation of a judgment in order to facilitate execution thereof. This new remedy was brought about by the previous experience of the Committee, whereby there was occasional disagreement on the interpretation of a judgment which the Committee deemed to delaying or preventing execution thereof. This remedy requires a qualified majority – two-thirds of the representatives entitled to sit on the Committee, cf. final sentence of Article 46(3). Such requests from the Committee are examined, as appropriate, by the Grand Chamber, Chamber or Committee which originally ruled on the case in question. Under Article 92 of the Rules of Court, if this is impossible, the President of the Court shall participate or set up a new Chamber. At the time of writing, the Committee has yet to use this remedy.

Article 46(4) furnishes the Committee with a further powerful remedy. It reads: 'If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.' Again, this remedy requires a qualified majority – two-thirds of the representatives entitled to sit on the Committee. Such cases shall be brought before the Grand Chamber of the Court, cf. Article 31(1)(2) of the Convention. These cases are not intended either to reassess the violation(s) committed by the parties or to impose a fine on states which are deemed to have violated their obligations under Article 46(1). The political pressure which this remedy entails is deemed sufficient to lead to execution of the original judgment.[104] This new clause on the direct involvement of the Court in enforcing its own judgments constitutes a fundamental changes in the supervisory system of the Council of Europe and the role of the Court.[105] At the time of writing, the Committee has yet to use this remedy.

18.4.4. Execution difficulties and States violation of Article 46

Execution of judgments and the great number of cases the Court has to deal with are closely related issues. It should firstly be noted that execution of Court judgments has generally been

[101] Helen Keller and Cedric Marti, footnote 50. Keller is a judge at the European Court of Human Rights.

[102] Leach: 'The Effectiveness of the Committee of Ministers in Supervising the Enforcement of Judgments of the European Court of Human Rights', p. 443.

[103] The only related example is Greece's withdrawal from the Council of Europe in 1967, when it was clear that the Committee was about to expel it. Greece rejoined in 1974. See further details in Konstantinos D. Magliveras: 'Membership in international organizations', *Research Handbook on the Law of International Organizations*, pp. 84-107.

[104] Council of Europe: 'Explanatory Report to the Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms', paragraph 99.

[105] The clause was controversial. For instance, the Court opposed this new role it was intended to be given. One reason was that the Court felt that the clause blurred the line between the judicial and executive powers of the Council of Europe. See: Harris, O'Boyle, Bates and Buckley, p. 884.

deemed good.[106] That said, the enhanced legal protection offered by the Court to individuals and the increase in the number of member states of the Council of Europe and the Convention, led to an avalanche of cases which is still being dealt with. This development, as well as giving an insight into the unsatisfactory human rights protection situation in member states, has also brought to light the weaknesses of the institutional system intended to safeguard the rights laid down in the Convention. Not least because a considerable number of the cases processed by the Court concern systemic problems in domestic law, on which the Court has already ruled without the state in question addressing the underlying violations in a satisfactory manner. There have been, for instance, a considerable number of cases against Greece, Italy, Russia and Turkey. In fact, the problem has been so great that it had begun to threaten the operation of the Court.

As set out above, both the Court and the states parties have taken various measures to enhance execution of Court´s judgments. In parallel to the measures concerning Articles 41 and 46 of the Convention, there have been major changes to the Court's procedural rules. The entry into force of Protocol 14 to the Convention laid down new conditions for admissability, e.g. that the applicant must have suffered a significant disadvantage, cf. Article 35(3)(b) of the Convention. There were also various changes aimed at speeding up case processing before the Court. Case-law of the Court has also developed towards laying greater emphasis on the principles of subsidiarity and margin of appreciation, also illustrated by the adoption of Protocol 15 to the Convention, which adds these rules to the preamble of the Convention.[107] The impact of the various measures brought in over recent years concerning the efficiency of the Court and the legal protection of individuals will not be assessed here. The Court has, in any event, succeeded in reducing its case backlog from some 161,000 in September 2011 to some 65,000 by the end of 2015. The Court's 2015 annual report shows that there are still around 20,000 cases relating to repeated violations pending resolution.[108] While the number of cases before the Court has fallen, the percentage of cases relating to repeated violations has increased. In 2014, just over 40% of the cases before the Court concerned states who had not acted upon a previous judgment under Article 46(1).[109] The number of cases under the supervision of the Committee of Ministers has also increased.

The fact that a falling number of Court cases has been accompanied by a higher proportion of cases concerning repeated violations suggests that it is not sufficient to concentrate on the efficiency of the Court – attention has also to be turned to the member states. Member states are continuing to work on reforming the system, with specific focus on executing judgments. Joint declarations by member states following conferences on the effectiveness of the Convention and on the future of its supervisory system have urged states to execute judgments swiftly. Suggested actions include setting up a supervisory system at the domestic level to ensure such enforcement, national parliaments playing an active role execution of judgments, and providing judges, officials and lawyers with training to ensure active legal protection in line with the provisions of the Convention.[110]

18.5. Icelandic law
18.5.1. Background
18.5.1.1. Iceland's membership of the European Convention on Human Rights

[106] Same source, p. 26.
[107] Council of Europe: 'Explanatory Report to the Protocol No. 15 to the Convention for the Protection of Human Rights and Fundamental Freedoms'.
[108] See the annual reports of the European Court of Human Rights for 2014 and 2015.
[109] See the annual report of the European Court of Human rights for 2014.
[110] See e.g. High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration 19 February 2010; High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, 19-20 April 2012: High-level Conference on the 'Implementation of the European Convention on Human Rights, our shared responsibility', Brussel Declaration, 27 March 2015.

Iceland joined the Council of Europe on 7 March 1950.[111] The Icelandic authorities signed the European Convention on Human Rights on 3 November 1950 and ratified it on 29 June 1953. The Convention entered into force in respect of Iceland on 3 September that year.[112] Iceland has also ratified most of the Protocols to the Convention.[113] Iceland has always considered that the supervisory bodies of the Convention play an important role in enforcing the Convention and have approved their jurisdiction. Other signatory member states to the Convention have had a right to refer to the Court any alleged breach of Iceland of the convention since the entry into force of the Convention in 1953, and individuals and organisations have had said right since 1955. Up until the entry into force of Protocols 9 and 11 to the Convention, Iceland regularly expressed its perpetual recognition, under the then Article 25 of the Convention, of the right of the European Commission of Human Rights to receive applications from individuals and organisations against Iceland.[114] Iceland also declared, under the then Article 46 of the Convention, that it was bound by the jurisdiction of the Court.[115] Since the entry into force of Protocol 11 to the Convention on 1 November 1998, ratified by Iceland on 29 June 1995, the Court has had jurisdiction over Iceland as regards alleged violations of the Convention, without need for specific authorisation from the government.

The Supreme Court of Iceland has reaffirmed that '[b]y ratifying the Convention, Iceland undertook under international law to abide to the provisions thereof'.[116] This commitment entails aligning Icelandic law with the provisions of the Convention and safeguarding the rights contained therein. When the approval of the Icelandic Parliament was sought for ratification of the Convention, the Minister for Justice declared that Iceland's legal rules were deemed to be in line with the provisions of the Convention.[117] In his address, the Minister for Justice at the time (Bjarni Benediktsson) described why ratification was necessary despite the fact that the Convention involved nothing which was not already safeguarded in Icelandic law. In his view, ratification would ensure even greater legal protection, both as regards the status of individuals in domestic law and as regards state´s obligations under international law and the responsibility of the Icelandic authorities deriving therefrom:

> However, although citizens already enjoy such rights under Icelandic law, this treaty entails an international commitment to respect the rights while the treaty is in force, and the State undertakes in respect of other contracting parties to enforce these rights. If Iceland ultimately signs up, it – i.e. the State – will be committed not only inwards towards its citizens, but also towards other parties and contracting States, to uphold these rights and accept certain sanctions if commitments are violated. There can, therefore, be no doubt, if Iceland becomes a party to this treaty, that these rights will be better safeguarded than previously.[118]

The Minister's words are interesting in two respects. Firstly, they can be understood to mean that he considers ratification of the Convention would commit the Icelandic government as regards individuals in domestic law. By the Icelandic authorities ratiyfing the first human rights convention of its kinds, shortly after the horrors of the Second World War, the

[111] Statute of the Council of Europe, membership 7 March 1950, entered into force on the same day, SÍ 79.
[112] Convention for the Protection of Human Rights and Fundamental Freedoms, membership 29 June 1953, entered into force 3 September 1953, SÍ 88.
[113] Iceland has ratified Protocols 1-8, 10, 11, 13 and 14. Iceland has signed Protocols 12 and 15 but has yet to ratify them. Iceland has neither signed nor ratified Protocol 16.
[114] Iceland issued a five-year declaration under Article 25 on 25 March 1955. It then issued a further declaration on 11 March 1960, which was to remain in force until further notice.
[115] The initial declaration in this regard was issued in 1958. It was most recently extended in 1994. Such declarations were usually valid for three or five years and, in total, covered the period from 2 September 1958 to 31 October 1998. The last declaration from 1994, however, had no time limit.
[116] *H 1989 120*, p. 4; see also the reiteration of this international legal obligation in the same case, p.7.
[117] Icelandic Parliament Gazette 1951 (D edition), p. 239, see Case *H 1990 2*, p. 4.
[118] Icelandic Parliament Gazette 1951 (D edition), p. 240 [translation by author].

independence of Iceland, and the entry into force of the present Constitution, it cannot be inferred from the Minister's words that individuals were not supposed to have been able to avail themselves of the Convention in domestic law. Nowhere does the Minister refer to any differentiation between international legal obligations and domestic law on the basis of the theory of dualism, as implementation and understanding would subsequently become.[119] Secondly, the Minister considered that the responsibility of states under international law and the resolutions of the supervisory bodies of the Convention would better safeguard the rights which the Convention was supposed to ensure individuals.

18.5.1.2. The European Convention on Human Rights and Icelandic legislation

Both the legislative and executive powers place great emphasis on Icelandic legislation being in line with international obligations. The position of the authorities is clearly set out in the *Handbook on preparing and finalising parliamentary bills*:

> When drafting bills, care should be taken to ensure laws are in line with the Constitution of Iceland. In this context, it is particular necessary to be mindful of those clauses of the Constitution relating to human rights. The Icelandic authorities are similar obligatated by international law to ensure domestic laws are in line with international obligations.[120]

To some extent, the stipulation for legal compatibility with international obligations is here equated with legal compatibility with the Constitution. Similarly, the requirement for legal compatibility with the Constitution to some extent ensures compatibility with the European Convention on Human Rights. One of the main aims of the amendments to the clauses of the Constitution relating to human rights brought in by means of Act No. 97/1995 was to implement the state's international obligations in the field of human rights, including on the basis of the Convention.[121]

As discussed above, at the time the Convention was ratified, it was considered that Icelandic law fully ensured the rights enshrined therein. A lot of water has flowed under the bridge since then and many amendments have been made to Icelandic law to adapt them to the obligations deriving from the Convention. The European Convention on Human Rights was subsequently enacted as law by means of Act No. 62/1994, which entered into force on 30 May 1994. The comments to the bill which was subsequently passed into law repeatedly stated that Iceland has the international obligation of meeting the obligations laid down in the Convention but that, similarly, it is up to each Member State how this is implemented and that this will depend on the constitution and legal systems thereof.[122] It is also stated that, on the basis of the principle of dualism in Icelandic law, the Convention does not have legal effect in Iceland and that Iceland has met its obligations by adopting the provisions of the Convention by means of adaptation. The main arguments set out in the bill on enacting the Convention as domestic law are: greater protection of individuals, legal certainty, and that enactment would

[119] Icelandic Parliament Gazette 1993-1994, Parliamentary Documents 105 – Case 102.

[120] Prime Minister's Office, Ministry of Justice and Ecclesiastical Affairs, and the Parliamentary Office: 'Handbók um undirbúning og frágang lagafrumvarpa' [*Handbook on preparing and finalising parliamentary bills*], Article 7 (Samræmi við stjórnarskrá og alþjóðlegar skuldbindingar) [*Compliance with the Constitution and International Obligations*].

[121] Icelandic Parliament Gazette 1994 (A edition), Parliamentary Documents 389 – Case 297, Chapters IV and V in the general comments to the statement. A specific reference is made to the fact that, although the European Convention on Human Rights has been given legal effect, it does not have constitutional status and that it is therefore necessary 'to review the human rights provisions of the Constitution, particularly in respect of the European Convention on Human Rights'.

[122] Icelandic Parliament Gazette 1993-94, Parliamentary Documents 105 – Case 102, see e.g. Chapter IV.

enable individuals to cite the provisions of the Conventions as direct legal rules before the courts and the authorities.[123]

A specific reservation was made when enacting the Convention. Article 2 of Act No. 62/1994 on the European Convention on Human Rights stipulates that the resolutions of the European Commission of Human Rights, the European Court of Human Rights and the Committee of Ministers of the Council of Europe are not binding in Icelandic domestic law.[124] The comments to the bill set out the legal effect of such resolutions, both in international and domestic law.[125] A full account is given of the legal effect in domestic law of resolutions issued by the institutions of the Convention, e.g. they do not displace Icelandic law or court rulings and that the power of the European Court of Human Rights to recommend compensation does not give entitlement to enforcements actions in Iceland. As discussed above, this is in line with the view of the Court. That said, the bill gives no clear reasons for why the Icelandic legislature opted to make Court rulings regarding Iceland non-binding in domestic law when it enacted the Convention, as some other States chose to do. In the nine subparagraphs justifying the enhanced protection and legal certainty brought about by enacting the Convention, there is no mention of access to the Court or executions of the judgments thereof in Iceland. It can be inferred from the comments to the bill that the author considers the nature of the rulings of the supervisory parties to be such as not to be able to be binding in domestic law and that Article 2 exists merely to reaffirm that:

> It is worth pointing specifically that the question of whether or not the Convention is a part of domestic law has no bearing on the position of member States towards rulings of international institutions, on the basis of the Convention for the Protection of Human Rights and Fundamental Freedoms, as to whether a state has violated its obligations under the Convention. Whether the Convention is a part of domestic law or not, the European Commission of Human Rights, the European Court of Human Rights and the Committee of Ministers of the Council of Europe have the sole function, in this regard, of ruling on whether or not a member State has violated their obligations under international law and, as appropriate, lay down their liability for compensation.[126]

As discussed above, judgments of the European Court of Human Rights have effect in the domestic law of some contracting states and this can make it easier to execute them, e.g. the payment of compensation to the applicant. Just as the Convention does not require the Convention to be enacted in domestic law, neither does it require a judgment against a state to be binding in domestic law, although some states have opted to do this in order to improve the legal protection of individuals. The Committee of Ministers considers that this is possible and contributes towards execution of judgments. It is noteworthy, in this connection, that on the basis of reports issued by the Icelandic authorities the Committee considers that Court judgments against Iceland have direct legal effect in the Icelandic legal system:

> It is further pointed out that the Convention and the European Court's judgments against Iceland enjoy direct effect in the domestic legal order. [127]

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[123] ibid, Chapter VII.

[124] See, for the sake of comparison, Article 110 of the EEA Agreement and Article 2 of Act No. 2/1993 enacting said Agreement – no comparable reservation is made by the legislature.

[125] Icelandic Parliament Gazette 1993-1994, Parliamentary Documents 105 – Case 102.

[126] Icelandic Parliament Gazette 1993-94, Parliamentary Documents 105 – Case 102, Chapter IV.

[127] See information of the Committee of Ministers on execution in the Súsanna Rós Westlund case, http://hudoc.exec.coe.int/eng?i=004-67, last consulted November 2016. See also the recent declaration by Iceland to the Human Rights Council of the United Nations: 'By ratifying the ECHR, Iceland has undertaken to comply with the judgments issued by the European Court of Human Rights in cases brought against Iceland. Judgments against Iceland have prompted the payment of compensation to applicants, and in some instances amendments to legislation. The ECHR has been incorporated, as a whole, into Icelandic law'. National UPR Report, Iceland, 1 August 2016, Section 2 (B).

A former Icelandic judge at the Court has been very critical of Article 2 of Act No. 62/1994. In his view, the provision creates inconsistency in domestic law as regards the applicant and in international law as regards member states. With implementation of the theory of dualism in Article 2 of Act No. 62/1994 and comments on the provision in the bill, the Icelandic state is obligated in respect of other member states under international law to pay the applicant compensation, but not in respect of the applicant themselves under domestic law.[128] He also points out that, even with implementation of the theory of dualism in the parliamentary bill, the legal effect of the provision in Icelandic law remains extremely unclear and even has no practical legal meaning, since Articles 34 and 46 of the Convention have been given legal effect in Iceland.[129]

Although rulings of the supervisory bodies of the Convention do not have binding effect in Iceland, execution thereof has generally been very good. There has therefore been little question of Article 2 of Act No. 62/1994 in Icelandic courts. As discussed at length above, execution of Court judgments against contracting parties often entails measures in domestic law and this has been the case with judgments against Iceland (see below). The Ministry of Justice (previously, the Ministry of Home Affairs) handles cases concerning the execution of Court judgments in Iceland, cf. paragraph 18 of Presidential Decree 15/2017 on the distribution of administrative matters between the ministries of the government of Iceland. The Ministry has overall supervision of legal amendments required by international obligations and of reporting to committees on the implementation of human rights treaties to which Iceland is a party, including the Committee of Ministers.[130]

At the time of writing, sixteen complaints against the Icelandic state have been deemed admissible before the European Court of Human Rights. In thirteen cases, the Court ruled that Iceland had violated its obligations under the Convention, while the remaining three cases were closed following a legal settlement between the applicant and the state.[131] One of the cases in which the Icelandic State was found to be in violation is still being supervised by the Committee of Ministers, i.e. the judgment of the Court of 6 December 2007 in *Súsanna Rós Westlund v. Icelandic State*. Execution of judgments in these cases has involved various aspects of execution of ECtHR judgments – payment of compensation and individual and general measures.[132]

18.5.2. Just satisfaction

18.5.2.1. Compensation for pecuniary and non-pecuniary damage

In most of the Icelandic cases before the European Court of Human Rights, the applicant has demanded compensation for pecuniary and non-pecuniary damage, plus costs. The Icelandic authorities have usually disputed claims for pecuniary compensation, arguing that no causal link between the violations and the alleged pecuniary damage has been demonstrated and/or that the applicant has not sustained any pecuniary damage. As regards claims for compensation for non-pecuniary damage, the Icelandic state has disputed such claims, considering that recognition of a violation is sufficient satisfaction. In cases where the Court had ordered

[128] Davíð Þór Björgvinsson: 'Staða dóma Mannréttindadómstóls Evrópu í íslenskum rétti' [*Status of rulings of the European Court of Human Rights in Icelandic law*], *Tímarit Lögréttu*, Issue 1, 2014, p. 30.
[129] ibid, p. 31.
[130] See the websites of the Ministry of Justice. Human rights, https://www.innanrikisraduneyti.is/raduneyti/starfssvid/mannrettindi/almennt/, last consulted May 2017.
[131] Before the entry into force of Protocol 14, legal settlements were decided upon in Court judgments – now they contained in decisions. All settlements concluded by the Icelandic state were concluded before Protocol 14 entered into force.
[132] On the execution of judgments against Iceland, see information from the Icelandic authorities on each case and resolutions of the Committee of Ministers on performance thereof: http://www.coe.int/en/web/execution, last consulted November 2016.

payment of compensation, the Icelandic State has paid by the deadline set. Therefore, as far as is known, there have been no cases regarding execution of such claims before Icelandic courts.

Compensation awarded in cases against Iceland reflect the general case-law of the Court discussed above. As regards compensation for pecuniary damage, the highest amount awarded was in *Kjartan Ásmundsson*, who was awarded €75,000 for pecuniary damage. This was a case of the state violating Article 1 of Protocol 1 to the Convention on the protection of property, in which the Court awarded damages for the national auhtorities decided to discontinue disability pension payments.[133] In *Sara Lind Eggertsdóttir*, the total compensation awarded for pecuniary and non-pecuniary damage was €75,000. Iceland was found to have violated Article 6(1) of the Convention on the right to a fair trial. The applicant claimed €340,000 in compensation for pecuniary damage, corresponding to the amount of compensation for pecuniary damage awarded to her by the District Court. She also claimed €116,000 for non-pecuniary damage. The Court indicated that any decision on compensation could be based solely on the fact that the applicant did not enjoy the advantages conferred by Article 6(1). The Court also stated that it was not possible to speculate on what the situation would have been is she had. It does not, however, rule out that the violation she was deemed to have suffered may have deprived her of certain possibilities, which must be taken into account, even if it doubtful whether she might have been able to avail herself of them.[134] The difficulties encountered by the Court in assessing the consequence of a violation of Article 6 of the Convention are clearly reflected in Case *Pétur Þór Sigurðsson*, *Sigurþór Arnarsson and Súsanna Rós Westlund*. In all cases, the claims for compensation for pecuniary damage were rejected on the grounds that the Court could not speculate on the outcome of the court case if the rights under Article 6 had not been violated.[135] In *Erla Hlynsdóttir*, pecuniary compensation was awarded in respect of compensation for personal injury which Hlynsdóttir was ordered to pay. It was noted that, since the effect of the present Court´s judgment did not automatically lead to the quashing of the District Court's order, the causal link between the violation and the claim had been demonstrated.[136] In *Þorgeir Þorgeirson*, the Court rejected the claim for compensation for pecuniary damage, deeming that the causal link between the damaged suffered by the applicant and the established violation had not been demonstrated.[137]

Court judgments concerning compensation for non-pecuniary damage reflect the large discretion of the Court in its assessments. In Case *Pétur Þór Sigurðsson*, it was deemed that he had suffered owing to an established violation of the Convention as he was awarded €20,000 in compensation for personal injury. Two judges in the case considered this amount to be rather high, but justified insofar as the applicant was unable under Icelandic law to apply for reopening of the case.[138] One judge in the case considered the amount to be far too high and much higher that compensation for personal injury in cases of Court regarding serious violations of Articles 2 and 3 of the Convention.[139] In Case *Súsanna Rós Westlund*, €2,500 was awarded in compensation for personal injury and in Case *Sigurþór Arnarsson*, €8,000. In Cases *Björk Eiðsdóttir* and *Erla Hlynsdóttir*, compensation for non-pecuniary damage was awarded and the amounts were in line with Court case-law as regards violations of Article 10 of the Convention.

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[133] ECtHR judgment in Case No. 60669/00, 12 October 2004, *Kjartan Ásmundsson v. Iceland*, paragraph 51.
[134] ECtHR judgment in Case No. 31930/04, 5 July 2007, *Sara Lind Eggertsdóttir v. Iceland*, paragraph 59.
[135] ECtHR judgment in Case No. 39731/98, 10 April 2003, *Pétur Þór Sigurðsson v. Iceland*, paragraph 51; ECtHR judgment in Case No. 44671/98, 15 July 2003, *Sigurþór Arnarsson v. Iceland*, paragraph 42; ECtHR judgment in Case No. 42628/04, 6 December 2007, *Súsanna Rós Westlund v. Iceland*, paragraph 46.
[136] ECtHR judgment in Case No. 43380/10, 10 July 2012, *Erla Hlynsdóttir v. Iceland*, paragraph 78.
[137] ECtHR judgment in Case No. 13778/88, 25 June 1992, *Þorgeir Þorgeirson v. Iceland*, paragraph 73.
[138] ECtHR judgment in Case No. 39731/98, 10 April 2003, *Pétur Þór Sigurðsson v. Iceland*, Concurring Opinion of Judge Ress and Concurring Opinion of Judge Zupančić.
[139] ibid, Partly Concurring and Partly Dissenting Opinion of Judge Greve.

The Court awarded €5,000 in compensation for personal injury in both cases.[140] In Case *Erla Hlynsdóttir (No. 2)*, the Court awarded €5,500 in compensation for personal injury and in Case *Erla Hlynsdóttir (No. 3)*, €4,000.[141] Iceland was ruled to have violated Articles 6(1) and 10 of the Convention. In Case *Hilda Hafsteinsdóttir*, the Court rejected the claim for compensation for non-pecuniary damage, considering a ruling that the Convention had been violated to be sufficient just satisfaction. Iceland was ruled to have violated Article 5(1) of the Convention.[142]

In most cases, applicants have also been paid costs. In some cases, the Court has not admitted claims for costs in full, on the grounds that a part of the costs incurred was not necessary. In Cases *Björk Eiðsdóttir* and *Erla Hlynsdóttir*, only a part of the costs incurred was awarded as the Court considered that invoices in support of the claim had not been submitted.[143] In Cases *Erla Hlynsdóttir (No. 2)* and *Erla Hlynsdóttir (No. 3)*, the Court rejected all claims for costs on the grounds that evidence was scarce, including the fact that none of claims were supported by invoices submitted on time.[144]

Payment of just satisfaction entails an obligation on the Icelandic State to award compensation to others in a similar situation to the applicant. When executing the judgment in Case *Kjartan Ásmundsson* (2004), the Committee of Ministers deemed it necessary, as a general measure, for the Icelandic authorities to compensate for the damage of individuals in the same situation as Ásmundsson. The Committee closed the case in 2011 when it deemed that this condition had been fulfilled.[145]

18.5.2.2. Other compensation claims in domestic courts

Following Court judgments awarding compensation to applicants to be paid by the Icelandic State, further compensation claims have been filed with Icelandic courts. Icelandic courts have considered that payment of compensation to applicants on the basis of an ECtHR judgment on just satisfaction does not preclude applicants being awarded further compensation in Iceland. Following the judgment in Case *Pétur Þór Sigurðsson*, the applicant filed a compensation suit against the Icelandic State. The Supreme Court found that handling of Supreme Court Case 210/1996 involved violation of Article 70 of the Constitution (cf. Article 6 of the Convention and Act No. 62/1994) and that the state was liable for any pecuniary damage which may have resulted. As regards compensation for personal injury, the Supreme Court stated that:

> [...] [t]he provisions of Icelandic law do not preclude the payment of compensation for personal injury by the defendant to [P], despite the fact that the European Court of Human Rights has previously awarded the applicant such compensation for the circumstances on which he bases the claim in this case, cf. Article 2 of Act No. 62/1994.[146]

[140]See EtCHR judgment in Case No. 46443/19, 10 July 2012, *Björk Eiðsdóttir v. Iceland*, paragraph 81; ECtHR judgment in Case No. 43380/10, 10 July 2012, *Erla Hlynsdóttir v. Iceland*, paragraph 81.

[141]See ECtHR judgment in Case No. 54125/10, 21 October 2014, *Erla Hlynsdóttir (No. 2) v. Iceland*, paragraph 82; ECtHR judgment in Case No. 54145/10, 2 July 2015, *Erla Hlynsdóttir v. Iceland*, paragraph 86.

[142] ECtHR judgment in Case No. 40905/98, 8 June 2004, *Hilda Hafsteinsdóttir v. Iceland*, paragraph 60.

[143] ECtHR judgment in Case No. 43380/10, 10 July 2012, *Erla Hlynsdóttir v. Iceland*, paragraph 84; ECtHR judgment in Case No. 46443/09, 10 July 2012, *Björk Eiðsdóttir v. Iceland*, paragraph 93.

[144]ECtHR judgment in Case No. 54125/10, 21 October 2014, *Erla Hlynsdóttir (No. 2) v. Iceland*, paragraph 85; ECtHR judgment in Case No. 54145/10, 2 July 2015, *Erla Hlynsdóttir (No 3) v. Iceland*, paragraph 89.

[145] The case was closed by the Committee on the basis of information from the authorities that several individuals had contacted the Ministry of Justice, who had advised them to apply to the Attorney-General, with whom they could file a claim for compensation. The Icelandic authorities considered that the 53 individuals who were in the same situation as the applicant were sufficient well-informed of the possibilities of applying to the Attorney-General for compensation, as a translation of the judgment was posted on the Ministry's website. See Committee of Ministers: Resolution CM/RESDH(2011)223, adopted on 2 December 2011.

[146] *H 18 June 2009, No. 604/2008*.

As regards the causal link between the violation of the human rights of the applicant and the alleged damage, the Supreme Court found that no such link was demonstrated, as it was impossible to speculate on how votes would have cast in the Supreme Court if another judge had from the outset sat in court, instead of the judge who should by rights should have recused himself during processing of the case. One judge rendered a dissenting opinion, considering that it was impossible for the applicant to demonstrate a causal link between the violation of his fundamental rights and damage he suffered. As regards the obligation of the state to ensure that the rights of the individual are not violated in this way, it is the state's responsibility if proof is impossible.[147] The reasons given for the dissenting opinion in this case are convincing, as the applicant's evidence base is very weak. See, in this connection, cases in the field of tort law where the Supreme Court has deemed specific rules to apply to proof of causal links according to the situation of the injured party, cf. liability of doctors and hospitals, lawyers and chartered estate agencies.[148]

Following the judgment of the Court in Case *Sigurþór Arnarsson*, the applicants requested his case be reopened before the Icelandic courts. As discussed later, the request of reopening was approved and the District Court judgment acquitting Arnarsson was subsequently confirmed by the Supreme Court, cf. *H 6 December 2012, No. 512/2012*. Following acquittal by the Supreme Court, Arnarsson filed for compensation against the Icelandic state. Part of the state's defence was a plea to the effect that the plaintiff had already received full compensation with the €8,000 awarded by the European Court of Human Rights. The District Court approved Arnarsson's compensation claim, but on different grounds to the Supreme Court in *H 18 June 2009, No. 604/2008*:

> [P]rovisions of Icelandic law [...] do not [preclude] the plaintiff being awarded compensation from the defendant, cf. Supreme Court judgment, 18 June 2009, Case 604/2008. The European Court of Human Rights judgment addresses only the violation by the Icelandic State of Article 6(1) of the European Human Rights Convention and not the conviction or acquittal of the plaintiff, as done in the Supreme Court judgment of 6 December 2012, or the claims filed by the plaintiff on the basis of this acquittal. The judgment of the European Court of Human Rights and the claim compensation for personal injury ruled on there are not based on the same circumstances as this case rests on. It therefore does not preclude the plaintiff from being awarded further compensation for personal injury.[149]

The District Court judgment considers that, since the claim for compensation for personal injury in the new case is not based on the same circumstances as the claim for compensation for personal injury in the European Court of Human Rights case, it is possible to award further compensation. This is something a different approach to that of the Supreme Court, which considered that Icelandic law did not preclude awarding compensation in respect of the same circumstances for which the European Court of Human Rights had awarded compensation. This ruling is based on the fact that such judgments are not binding on Icelandic domestic courts, cf. Article 2 of Act No. 62/1994. In both cases, it is natural to take account of the compensation awarded and paid to the party as part of the subsequent compensation claim under domestic law. It should be borne in mind that the European Court of Human Rights, when determining compensation, takes various viewpoints into account and that, as discussed above, the Court has affirmed, that its role is not to work as domestic courts would function for compensation claims in civil cases. It should also be noted that the Supreme Court has also deemed itself empowered to assign objective liability to the state for damage caused by the impairment of

[147] ibid, dissenting opinion of Ólafur Börkur Þorvaldsson.
[148] *H 1992 2122*, *H 2001 244*. See further Viðar Már Matthíasson: *Skaðabótaréttur* [Tort Law], pp. 354-357.
[149] *Judgment of the District Court of Reykjavik, 25 November 2015, Case E-823/2014* [translation by author]. The judgment found the state liable for compensation under Article 228 of Act No. 88/2008. The judgment was not appealed.

citizens' rights enshrined in the Icelandic Constitution, many of which are interpreted with reference to the European Convention on Human Rights, cf. H 1998 2528.[150]

18.5.3. Individual measures

As discussed above, assessing execution of judgments of the European Court of Human Rights may involve aspects other than the payment of compensation. When execution judgments against Iceland, the Committee of Ministers has considered both individual and general measures. Individual measures have most involved the reopening of cases before domestic courts.

Execution of the ECtHR judgment in Case *Pétur Þór Sigurðsson* tested authorisation to reopen a case under Act No. 91/1991 on civil procedure. The Court judgment (10 April 2003) found that the disqualification of a Supreme Court judge, Sigurðsson's right to fair procedure under Article 6 of the Convention had been violated.[151] When the case was tried by the ECtHR, Sigurðsson has already applied for reopening of his case twice and this is noted in the Court´s judgment. On the first occasion, his request was rejected on material grounds, and on the second it was rejected with reference to Article 169(2) of Act No. 91/1991 on civil procedure, which states that a party may only apply for case reopening once. Sigurðsson applied once more for reopening on the basis of the ECtHR´s judgment, but was refused such on the same basis. As part of its supervisory work in relation to execution of the judgment, the Committee of Ministers sought information on the possibilities open to Sigurðsson to have his case reopened before Icelandic courts.

This Committee of Ministers procedure took ten years and was only completed in October 2015. It appears that the Committee asked for information on legal amendments to authorisation of reopening of cases, but the Icelandic authorities announced to the Committee in 2005 that they were looking into such amendments to the law. The report drafted by the Icelandic authorities for the Committee, dated 6 October 2015, indicates that the Minister for Home Affairs intends to submit a parliamentary bill including specific authorisation for reopening cases following a Court´s judgment. The report also states that existing legislation allows for cases to be reopened following a Court judgment, cf. Article 169 of Act No. 91/1991 on civil procedure. It is argued that, although the abovementioned provision does not directly mention judgments of ECtHR, such judgments may be considered to be new information within the meaning of the provision. The authorities refer to the Case *Súsanna Rós Westlund* in support of this argument.[152]

Since case reopening was impossible for Sigurðsson after the Court´s judgment, he subsequently filed for compensation from the state for the pecuniary damage he considered himself to have suffered owing to the Icelandic state's violation of his rights under Article 6 of the Convention. One of his arguments was that the Icelandic state's failure to bring about legal amendments to authorise case reopening following a Court judgment constituted criminal behaviour. The Supreme Court stated the following:

> When assessing whether or not the defendant has incurred liability in respect of the appellant by failing to bring about the legal amendments requested by the appellant and set out above, it should be considered that, under Article 46(1) of the European Convention on Human Rights (cf. Act No. 62/1994), the contracting parties undertake to abide by the final judgment of the Court in any case to which they are parties. It does not derive from the Convention that Member States are obliged to give the applicant their due in any other way than by paying the compensation awarded to the applicant by the Court in any given case. It cannot therefore be considered that the Icelandic state, by virtue of its membership of the European

[150] On compensation liability of the Icelandic State when laws or regulatory rules do not comply with the Constitution or human rights treaties, see Viðar Már Matthíasson: *Skaðabótaréttur* [Tort Law], pp. 571-574.
[151] ECtHR judgment in Case No 39731/98, 10 April 2003, *Pétur Þór Sigurðsson v. Iceland*.
[152] Council of Europe: DH-DD(2015)106, 1243 meeting (8-10 December 2015).

> Convention on Human Rights, has undertaken the international obligation to safeguard the right of those whom the Court deems to have suffered a violation to have their case reopened before Iceland courts. Recommendation No R (2000) 2 of the Committee of Ministers of the Council of Europe to Member States of 19 January 2000 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights does not entail such an obligation in international law in respect of the Icelandic state.[153]

This view of the Supreme Court that Article 46 of the Convention entails only an obligation on States to pay compensation awarded by the Court is not in line with case-law of the Court or supervision of execution of judgments by the Committee of Ministers. Neither is it line with the view of other authorities in Iceland. In its dealings with the supervisory authorities of the Convention, the competent body (the Ministry of Home Affairs, now Ministry of Justice) has never had any comments to make regarding supervision over execution of individual and general measures in Iceland, on the basis of Article 46 of the Convention. Neither would the execution of Court pilot judgments fall under the interpretation of the Supreme Court, nor execution of other measures which the Court is increasingly including in its reasonings and decisions.

The Committee of Ministers concluded its supervision of Case *Sigurþór Arnarsson* in June 2007. This decision was based on notification from the Icelandic authorities that the applicant's lawyer had indicated that he would not be seeking reopening of the case.[154] It subsequently transpired, however, that Arnarsson applied to the Supreme Court, by letter dated 30 September 2011, for his case to be reopened, basing his applicanion on Article 211(1)(c) and (d) of Act No. 88/2008 on criminal procedure. In its ruling, the Supreme Court rejects the premise that the Court's judgment can constitute independent grounds for case reopening:

> The application by the convicted persons to reopen the case is among others based, that a confirmation has been obtained, by means of an abovementioned judgment of the European Court of Human Rights, that handling of the case had been significant flawed [...]. Act No. 88/2008 contains no specific power to reopen a case ruled upon by the Supreme Court, following a ruling of the European Court of Human Rights that the case was handled in such as way as to violate the European Convention on Human Rights. Cases will be processed anew only if any of the conditions laid down in Article 211(1) of the Law and set out above are fulfilled.[155]

The Supreme Court considered that handling of the case had been significantly flawed and authorised reopening on the basis of Article 211(1)(d) of Act No. 88/2008. Following approval of Arnarsson's request for case reopening, the District Court's judgment acquitting him was confirmed by means of *Judgment 512/2012. H 6 December 2012*.

The Committee of Minister also asked for information regarding reopening Case *Sara Lind Eggertsdóttir*. According to the authorities' report to the Committee, the Supreme Court's replied that Eggertsdóttir applied for case reopening on 22 December 2008. The Committee concluded its supervision over execution of the judgment at the end of 2015, following notification from the authorities that the application for reopening had not been followed trough.[156]

The case *Súsanna Rós Westlund* also involved reopening of a case following a judgment of the European Court of Human Rights. The Committee of Ministers website indicates that

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[153] *H 18 June 2009, No. 604/2008* [translation by author].

[154] Committee of Ministers: Resolution CM/ResDH/(2007)82, adopted on 20 June 2007.

[155] Application for case reopening in *H 1998 2058*: Prosecuting Authority v. Sigurþór Arnarsson and Sverrir Þór Einarsson. Transcript of the Minutes of the Supreme Court, 13 June 2012, Chapter IV, Article 4.

[156] Committee of Ministers: Resolution CM/ResDH(2015)200, adopted on 17 November 2015. The Icelandic authorities conclude from the above that Eggertsdóttir no longer intends to seek reopening of her case. Given that Eggertsdóttir had already received compensation, the authorities considered that it was not necessary to take any further individual measures in light of the judgment.

Westlund has sought reopening of her case. It can be inferred from the information given that the Supreme Court had deemed the Court judgment to be new evidence within the meaning of Article 167(b) of the Act on civil procedure, but considered that the condition of high likelihood of such new evidence leading to a different conclusion in significant aspects has not been fulfilled. The request for case reopening was therefore rejected. The report of the Icelandic authorities to the Committee of Ministers on execution deals with the Supreme Court's rejection of reopening Westlund's case. It refers to the Court judgment in the context of the Supreme Court's position in the case, but that the Court had rejected Westlund's claim for compensation for pecuniary damage on the ground that it had not wished to speculate on the conclusion of the case. The report indicates that, in this case, account should also be taken of the principle of legal predictability and the interests of third parties.[157] The Committee has not yet concluded its supervision over execution of the judgment by the Icelandic authorities.

The Committee concluded its supervision over execution in Cases *Erla Hlynsdóttir* and *Björk Eiðsdóttir* on 8 March 2016.[158] The authorities' report highlights that the applicants had been able to request case reopening but had chosen not to avail themselves of that possibility.[159]

18.5.4. General measures

Execution of judgments of the European Court of Human Rights may involve general measures. As discussed above, ever greater emphasis is being placed on this aspect in the supervisory work of the Committee of Ministers over execution of judgments. It its communications with the Committee, the Icelandic authorities have reported on general measures undertaken as part of execution of judgments in Iceland. Such general measures have chiefly involved legal amendments, the most significant of which are discussed here. These are fundamental changes to Icelandic law on procedure, freedom of association and the criminality of actions.

Following the report of the European Commission of Human Rights in Case *Jón Kristinsson*, Act No. 92/1989 on the separation of district judicial and administrative powers was enacted, bringing in a clear division of responsibilities between district courts and district commissioners. This Act constituted the biggest ever change in Icelandic legal procedure. The comments in the Statement to the parliamentary bill for Act No. 92/1989 referred to Kristinsson's case, and state that the case 'has placed Icelandic legal procedure in public proceedings under the microscope of our partner nations in the Council of Europe. This should result in greater pressure for reform of the court system and legal procedure in Iceland.'[160]

The section of the Icelandic Constitution dealing with human rights was updated by means of Constitutional Law Act No. 97/1995. Among the provisions amended was the provision on freedom of association, which is now contained in Article 74 of the Constitution. The explanations accompanying the parliamentary bill refer specifically the Court judgment in Case *Sigurður Sigurjónsson*. It was deemed necessary in light of this judgment for the amended provision on freedom of association to allow for people's right not to be a member of a union.[161] Act No. 61/1995 also made amendments to legislation on taxis, lifting the obligation to be a member of the taxi drivers' union. The comments to the parliamentary bill state that the purpose of this was specifically 'to make the necessary legal changes in line with the ruling of the

[157] Communication from Iceland concerning the case of *Súsanna Rós Westlund* against *Iceland* (Application No 42628/04), Committee of Ministers: DH-DD(2015)1208, 17 November 2015.
[158] Committee of Ministers: Resolution CM/ResDH(2016)26, adopted on 8 March 2016.
[159] Communication from Iceland concerning the *Björk Eiðsdóttir group of cases* against *Iceland* (Application No 46443/09), Committee of Ministers: DH-DD(2015)1207, 17 November 2015.
[160] Icelandic Parliament Gazette 1988 (A edition), Parliamentary Documents 204 – Case 182.
[161] Icelandic Parliament Gazette 1995 (A edition), Parliamentary Documents 1 – Case 1, cf. Icelandic Parliament Gazette 1994 (A edition), Parliamentary Documents 389 – Case 297.

European Court of Human Rights in the case of *Sigurður Sigurjónsson* against the Icelandic State'.[162]

Case *Vilborg Yrsa Sigurðardóttir* concluded with a court settlement which was approved by the Court. When this settlement was reached between Sigurðardóttir and the State, the law on public procedure had be changed to remove the condition that the individual in question was more likely to be innocent than guilty, cf. Article 42 of Act No. 36/1999. The comments to the parliamentary bill for this Act do not refer directly to Sigurðardóttir's case, but references to the European Convention on Human Rights do make up a part of the ground for the changes.

In its judgment in Case *Sara Lind Eggertsdóttir*, the European Court of Human Rights found that the applicant had legitimate doubts on the competence of the medical board, owing to the membership of the board, its legal status, and its involvement in the procedure. This meant that the principle of equality of the parties to the case was violated. It was therefore considered that Eggertsdóttir had not received a trial before an impartial court and that her rights under Article 6(1) of the Convention had thereby been violated. Act No. 42/2008 repealed the previous law on medical boards. The comments to the parliamentary bill describe how the nature of the membership of the board was such as not to meet the eligibility requirements, referring specifically to the judgment of the Court in Case *Sara Lind Eggertsdóttir*.[163]

Following the Court judgment in Case *Þorgeir Þorgeirson*, amendments were made to the General Penal Code, cf. Act No. 71/1995. The amending law removed the then Article 108 of the General Penal Code (Act No. 19/1940), which dealt with special protection for civil servants against defamatory remarks. The parliamentary bill for this Act referred to the Court judgment in Case *Þorgeir Þorgeirson*.[164]

Act No. 20/2001 amended Act No. 80/1938 on trade unions and industrial disputes to the effect that rulings of the Labour Court imposing fines on members (cf. Article 65) would now be reviewed by the Supreme Court. The comments to the parliamentary bill for the amending law refer specifically to the settlement in Case *Siglfirðingur ehf.*:

> The settlement refers to the fact that a parliamentary bill to amend the law on trade unions and industrial disputes (involving referral of fines imposed by the Labour Court to the Supreme Court) had been put before the Icelandic Parliament in the spring of 2000 and would be submitted again in the autumn. It is therefore clear that this bill was one of the grounds on which the European Court of Human Rights accepted the abovementioned settlement in the case of Siglfirðingur ehf. against the Icelandic State.[165]

The report of the Icelandic authorities, annexed to the ruling of the Committee of Ministers concluding follow-up of Case *Hilda Hafsteinsdóttir*, indicates that, since the judgment, the Police Act No. 90/1996 has been enacted and Regulation No 395/1997 on the legal status of arrested persons and on police interrogations has entered into force. The Icelandic authorities specify that the police force no longer has the power to arrest and detain people for drunk and disorderly behaviour as long as is necessary. It is also stated that, under Administrative Procedures Act No. 37/1993 on the work of the police force, the authorities must use the most lenient remedy possible to achieve the objective stated in law and that this view had been adopted in Regulation No 395/1998. There is also reference to the official procedures of the

[162] Icelandic Parliament Gazette 1994-1995 (A edition), Parliamentary Documents 699 – Case 329.
[163] Icelandic Parliament Gazette 2007-2008 (A edition), Parliamentary Documents 737 – Case 463.
[164] Icelandic Parliament Gazette 1994-95 (A edition), Parliamentary Documents 423 – Case 693. The Minister for Justice set up a committee to advise the Ministry on a response to the Court judgment. The committee considered that, by paying Þorgeirson the money awarded to him in the judgment and making the judgment known in Iceland, Iceland would have done what could be considered required of it as a response to the judgment. See: Attachment 1.
[165] Icelandic Parliament Gazette 2000-2001 (A edition), Parliamentary Documents 211 – Case 201 [translation by author].

police force and the recommendations by the Police Commissioner of the Reykjavik Metropolitan Police.[166]

Following the Court judgment in Case *Vörður Ólafsson*, industry charges were abolished by means of Act No. 124/2010. The comments on the parliamentary bill state:

> The reason for embarking upon a review of the law on industry charges is the judgment of the European Court of Human Rights on industry charges of 27 April 2010. The judgment finds that application of the law on industry charges contravenes Article 11 of the European Convention on Human Rights. It is not to be inferred from the judgment that charges are entirely prohibited, but that arrangements for making use of such charges and supervision thereof need to be changed.[167]

The report of the Icelandic authorities to the Committee of Ministers also states that the Supreme Court has taken the approach of the European Court of Human Rights in Case *Vörður Ólafsson* in two other cases where the court in question has ruled that the applicant's freedom of association had been violated.[168] The first was *H 18 October 2010, No 504/2008* on the payment of charges on the basis of Act No. 24/1986 on exchange value and payment mediation within the fisheries sector, collected by the National Association of Small Boat Owners. Once the judgment was pronounced, this Act was amended by means of Act No. 44/2013. The parliamentary bill for this Act states:

> It should be noted that the Supreme Court judgment appears to have been influenced by the judgment of the European Court of Human Rights on industry charges of 27 April 2010, which held that a uniform obligation to pay industry charges to the Federation of Icelandic Industries (SI), irrespective of the membership status of the payer, was – in the case in question – in contravention of the right of the individual not to belong to a union under Article 11 of the European Convention on Human Rights. The judgment of the European Court of Human Rights ran counter to the ruling of the majority of the Supreme Court in the same case – Supreme Court Ruling 2005, p. 5217, cf. also Supreme Court Ruling 1998, p. 4406.[169]

The second case was *H 6 March 2014, No 144/2014*, in which the Supreme Court conceded that compulsory membership of the Icelandic Association of Estate Agents was not necessary for the association to perform the role conferred on it by Act No. 99/2004 on the sale of real estate, companies and ships, which involved mainly supervision of the sale of real estate. Compulsory membership of the Icelandic Association of Estate Agents was abolished by means of Act No. 70/2015. The explanations in the accompanying statement refer specifically to this judgment. In neither of these two judgments does the Supreme Court refer directly to the judgment of the European Court of Human Rights in Case *Vörður Ólafsson*. The judgment of the Reykjavik District Court of 25 February 2014, confirmed by *H 6 March 2014, No 144/2014* did, however, refer to the judgment of the European Court of Human Rights in Case *Vörður Ólafsson*.

The Committee concluded its supervision over execution in Cases *Erla Hlynsdóttir* and *Björk Eiðsdóttir* on 8 March 2016.[170] The cases were closed by the Committee on the grounds that it considered both the individual measure and the general measures to have been satisfied. The general measures referred include training to amend case-law in domestic courts. Libel legislation in domestic law is also being reviewed – one of the aspects looked at is whether to

[166] Committee of Ministers: Resolution CM/ResDH(2008)44, adopted on 25 June 2008.
[167] Icelandic Parliament Gazette 2009-2010, Parliamentary Documents 1281 – Case 661, Article 3 [translation by author].
[168] Committee of Ministers: Resolution CM/ResDH(2015)200, adopted on 17 November 2015.
[169] Icelandic Parliament Gazette 2012-2013 (A edition), Parliamentary Documents 517 – Case 417, Chapter IV [translation by author].
[170] Committee of Ministers: Resolution CM/ResDH(2016)26, 8 March 2016.

remove provisions on imprisonment for libel. This is being done despite the fact that prison sentences are not handed down in case-law for libel.[171]

In the spring of 2016, the judicial structure in Iceland was substantially altered with the introduction of an intermediate level court, cf. Act No. 50/2016. It is clear that the Court judgment in Case *Sigurþór Arnarsson* greatly influenced this procedural change. The 'Committee Opinion on first-hand evidence-giving in criminal cases' makes repeated reference to Case *Sigurþór Arnarsson* as an argument for the existing arrangements not being in line with Article 2 of Protocol 7 to the Convention.[172] The parliamentary bill for this new Act reads as follows:

> [T]o meet international requirements on first-hand evidence-giving at the appeal stage. The European Court of Human Rights has deemed first-hand evidence-giving to be part of a fair trial under Article 6(1) of the European Convention on Human Rights, cf. also Article 70(1) of the Icelandic Constitution. It is clear that the current arrangements for cases fail to meet the most stringent requirements in this field.[173]

The new judicial arrangements in Iceland are part of general measures in execution of the Court judgment in Case *Súsanna Rós Westlund*, cf. the report of the Icelandic authorities to the Committee of Ministers in this regard.[174] Execution of the judgment is still being supervised by the Committee nine years after the judgment was passed and it is evident from the communications of the Committee with the Icelandic authorities that they have been waiting for the advent of the new judicial level to close the case.[175]

18.6. Conclusion

The European Court of Human Rights pays a key role in enforcing the European Convention on Human Rights and has extensive jurisdiction to ensure complyance by states parties. Both the state and individuals have direct access to the Court and the Court has the power to rule on violations of the Convention and the Protocols thereto without the need for specific approval from the contracting state in question. Under Article 41 of the Convention, the Court may also awarded individuals 'just satisfaction' (in the independent meaning given in the Convention), and under Article 46(1), states are committed to abiding by Court judgments. The Committee of Ministers has the important role of supervising execution of Court judgments, cf. Article 46(2) of the Convention. Execution of Court judgments involves the standing, rights and obligations of various parties – individuals, the state and the abovementioned bodies of the Council of Europe – both in international and domestic law.

Case-law of the Court as regards just satisfaction and the execution of judgments has evolved a great deal in the time the Court has been in operation. These changes are fully in accordance with general rules on state responsibility in international law. By interpreting and applying Articles 41 and 46, member states must cease unlawful conduct, provide compensation, and prevent any repetition of the violation. This case-law has enhanced the legal protection of individuals, improved enforcement of the Convention at the national level, and

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[171] See also the letter from the Icelandic authorities on individual measures and general measures, DH-DD(2015)1207, dated 26 October 2015.

[172] Ministry of Justice and Ecclesiastical Affairs: 'Committee Opinion on first-hand evidence-giving in criminal cases', pp. 12-13 and p. 20.

[173] Icelandic Parliament Gazette 2015-2016 (A edition), Parliamentary Documents 1017 – Case 615.

[174] Committee of Ministers, DH-DD(2015)1208, Communication from Iceland concerning the case of *Súsanna Rós Westlund against Iceland* (Application No 42628/04), 17 November 2015. The Icelandic authorities have also discussed the change in their reports to the Committee on execution of the judgment in Case Pétur Þór Sigurðsson – Committee of Ministers, DH-DD(2015)1061, Communication from Iceland concerning the case of Sigurðsson against Iceland (Application No 39731/98).

[175] Committee of Ministers, DH-DD(2015)1208, Communication from Iceland concerning the case of Súsanna Rós Westlund against Iceland (Application No 42628/04), 17 November 2015.

made the Court the effective and significant supervisory body the member states of the Convention intended it to be.

The Committee of Ministers has, from the outset, had the important role of supervising execution of Court judgments. Such execution has involved the payment of compensation and the adoption of individual and general measures in domestic law. As a rule, the convicted state has discretion to decide how it will execute the judgment, albeit subject to the approval of the Committee of Ministers. The interplay between this discretion and the role of the Committee is clearly evident in its supervision of execution of judgments against Iceland. In most cases, there was a great deal of communication between these parties and cases were not closed by the Committee until it deemed that all elements of execution were demonstrated to be in place. The lines of authority between the Committee of Ministers and the Court have shifted in recent years, with the Court increasingly indicating such measures in its reasonings or even in the operative parts of its judgments. Decades of case-law of the Committee of Ministers and interpretation of what is deemed sufficient execution of a judgment has undoubtedly had its effect on this legal development at the Court. In light of case-law with respect to Iceland, this development could contribute to a better execution in Iceland in some instances and also facilitate greater transparency.

It is often said that the Court is the victim of its own success. With direct access of individuals to the Court, the rise in the number of member states in the 1980s, and the fact that it is a realistic way of getting states to comply with their international obligatons, the case load of the Court has multiplied. The situation in fact reached a point that the future of the Court was at stake. The binding nature of Court judgments and the execution thereof was identified as fundamental to solving the problem. On the basis of Article 46, the Court reiterates that states must tackle any systemic problems resulting in violations of the Convention and suggests ways of doing so in its rulings. Under the same provision, the Court has adopted a radical procedure in the form of 'pilot judgments', which resolve a number of comparable cases with just one judgment. In the same vein, legal developments call for wider interpretation of Article 46 of the Conventions by courts in Iceland, cf. Act No. 62/1994, than has hitherto been the case.

Article 41 on just satisfaction had chiefly involved the payment of compensation, whether for pecuniary damage or non-pecuniary damage, and costs and expenses. The amounts of compensation awarded in Icelandic cases closely reflect general case-law of the Court. The Court often awards compensation for non-pecuniary damage, although the amounts involved vary. Where a causal link between the violation and the damage in question has been clearly demonstrated, the Court has also awarded compensation for pecuniary damage. The Court's reluctance to award compensation for pecuniary damage as regards procedural rules is also clearly reflected in Icelandic cases, where such claims have mostly been rejected.

The Icelandic authorities have always paid any compensation awarded and there have been no cases of infringement in this regard. Case-law in Iceland on further compensation claims by the applicant following a Court judgment is still unclear. Judgment *H 18 June 2009, No 604/2008* and the recent judgment of the Reykjavik District Court of 25 November 2015 in Case *E-823/2014* are, however, consistent in that a first payment should not preclude the filing of a second claim. That said, the two judgments justify such a stance in different ways. Owing to differing approach by the European Court of Human Rights and Icelandic domestic courts when determining compensation, applicants should subsequently be able to make further claims, not least in respect of damage on which the Court deems itself unable to rule.

As an overview of individual and general measures in Iceland has shown, there have been radical changes to Icelandic legislation following Court´s judgments against Iceland and in some cases fundamental changes in Iceland's legal system, cf. the recent law on an intermediate-level court. What remains outstanding is the issue of case reopening, particularly in relation to civil proceedings. The Committee of Ministers has long emphasised such a

resource in domestic law and the Court has begun, on occasion, to refer to the right to case reopening both in its reasonings and rulings. The condition laid down in the Act on Civil Procedure that case reopening may be applied for only once has clearly prevented applicants from demanding such following a Court´s judgment and where the Committee of Ministers has deemed such to be the most appropriate course of action. According to the information provided to the Committee of Ministers by the Icelanidc authorities, work is ongoing on legal amendments regarding the reopening of cases following judgments of the European Court of Human Rights.

The Implementation of the Rome Statute of the International Criminal Court in the Nordic Countries: A New Comprehensive Criminalization of Serious Crimes

*Thordis Ingadóttir**

1 Introduction

In the international arena, the Nordic countries have been among the principal supporters of the International Criminal Court (ICC) and effective enforcement of international criminal law. They were active in the drafting of the Rome Statute and played an important role in its adoption and entry into force.[1] Their continued support of the ICC is well reflected in their joint yearly statement to the General Assembly of the United Nations, in which they have renewed their pledge to remain principal supporters of the Court.[2] The Nordic countries have also supported effective enforcement of international humanitarian law at the national level. It was at the request of Denmark, Finland, Norway, and Sweden that the Status of the Protocols additional to the Geneva Conventions of 1949

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1 Denmark, Finland, Norway and Sweden were members of the so-called Like-Minded Group that was influential in the drafting process. Some delegates of the Nordic countries served as key officials in the drafting process of the Rome Statute, as well as in the later work of the Preparatory Commission. In general on the role of various actors in the negotiations process, *see* F. Benedetti, K. Bonneuau and J. Washburn, *Negotiating the International Criminal Court, New York to Rome, 1994–1998* (Martinus Nijhoff Publishers, Leiden, 2014); R. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results* (Kluwer Law International, The Hague, 1999).

2 Statement on behalf of the Nordic Countries by H.E. Ambassador A. Rönquist, Director General for Legal Affairs Ministry for Foreign Affairs Sweden, in the United Nations General Assembly on the Report of the ICC Agenda item 75, 31 October 2013. *See* also Statement on behalf of the Nordic Countries by H.E. Ambassador A. Rönquist, Director General for Legal Affairs Ministry for Foreign Affairs Sweden, in the United Nations General Assembly on the Report of the ICC, Agenda item 73, 30 October 2014.

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was included in the agenda of the General Assembly of the United Nations during the years 1982–2008, resulting in national reporting on the relevant implementation by the member states of the United Nations.[3] Effective implementation of the European Union Guide-lines on promoting compliance with international humanitarian law was also one of Finland´s priorities during its presidency of the EU in 2006. According to the Guidelines, the EU countries are to ensure that those responsible for war crimes are brought before their respective domestic courts, the courts of another State, or the ICC.[4]

A key condition for effective implementation of international criminal law at the national level is proper national legislation. Absence of – or flaws in implementing – legislation can delay or even prevent prosecution of those accused of serious crimes.[5] Importantly, implementation of international criminal law and criminalization of serious crimes at the national level have undergone a major reinforcement in recent years. The entry into force of the Rome Statute in 2002 was the key catalyst for this change. States stepped up their efforts to fight impunity, and ensured that they would be able to exercise jurisdiction in accordance with the complementarity principle of the ICC. These efforts have led to a significant development with respect to quantity and nature of national legislation on international humanitarian law and gross violations of human rights.

The Nordic countries have been part of this phenomenon. In the last few years, most of them have adopted major new items of domestic legislation on genocide, crimes against humanity and war crimes. This is reflected in the Norwegian act of 7 March 2008, incorporating a new substantive chapter in the general national criminal code (*LOV-2008-03-07-4, Lov om straff, Kapittel 16. Folkemord, forbrytelse mot menneskeheten og krigsforbrytelse,* taking effect the same day); a Finnish act similarly inserting a new substantive chapter in Finland´s national criminal code (*Law 212/2008, Strafflag 19.12.1889/39, 11 kap. Om krigsförbrytelser och brott mot mänskligheten,* taking effect on 1 May 2008); and most recently a Swedish act of 2014 on the criminalization of genocide, crimes against humanity and war crimes (*Lag 2014:406 om straff för folkmord, brott mot mänskligheten och krigsförbrytelser,* taking effect on 1 July 2014).

3 Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts, UN Doc (A/37/142).

4 *See* Updated European Union Guidelines on promoting compliance with international humanitarian law (IHL), OJ 2009/C 303/06, OJ C 303/12, 15 December 2009.

5 J.K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (OUP, New York, 2008) p. 38.

In Iceland, a committee was established by the government on the drafting of an act on the implementation of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), the Geneva Conventions of 1949 and their additional protocols of 1977, and the Rome Statute. The committee has submitted its draft to the government and new legislation on the subject is expected this year.[6]

Unlike its Nordic neighbours, Denmark is not in the process of reviewing and enacting new legislation on these serious crimes. Instead, Denmark relies on older legislation on genocide and a military penal code.

This chapter explores the new Nordic legislation and analyses whether the Nordic countries have taken a common approach in the implementation of the crimes within the jurisdiction of the ICC: the crime of genocide, crimes against humanity, war crimes and crime of aggression.[7] The comparison is limited to criminalization (*actus reus*) of these crimes. In all the countries, one of the primary purpose of new legislation was to ensure that the relevant state

6 The draft is available at the website of the Ministry of Interior, https://www.innanrikisraduneyti.is/media/frettir-2017/Lagafrv.-um-refsingar-fyrir-hopmord-og-fleira.pdf.

7 In this chapter these crimes will be referred to as serious crimes and international crimes. On international crimes in Nordic legislation, *see* e.g., regarding Denmark: A. Laursen, *Internationale forbrydelser i dansk ret* (Jurist- og Økonomforbundets Forlag, København, 2011); and A. Laursen, 'A Danish Paradox? A Brief Review of the Status of International Crimes in Danish Law', 10:4 *J Int Criminal Justice* (2012) pp. 997–1016. Regarding Finland: Ari-Matti Nuutila, 'Implementation of the Rome Statute in Finnish Law', in Matthias Neuner (ed.), *National Legislation Incorporating International Crimes: Approaches of Civil and Common Law Countries* (BWV – Berliner Wissenschafts-Verlag GmbH, 2003), pp. 85–104; D. Frände, 'Finnland', in A. Eser and H. Kreicker (eds.), *Nationale Strafverfolgung völkerrechtlicher Verbrechen – National Prosecution of International Crimes* (edition iuscrim Max-Planck-Institut fũr ausländisches und internationals Strafrecht, Freiburg i.Br., 2003), pp. 21–75. Regarding Iceland: Þ. Ingadóttir, 'Innleiðing helstu sáttmála á sviði alþjóðlegs refsiréttar í íslenskan rétt', in R. Bragadóttir et al. (eds.), *Afmælisrit: Jónatan Þórmundsson sjötugur* (CODEX, Reykjavík, 2007), pp. 619–647. Regarding Norway: S. Eskeland, *De mest alvorlige forbrytelser* (Cappelen Damm As, 2011); Rolf Einar Fife and Kristian Jervell, 'Elements of Nordic Practice 2000: Norway', 70 *Nordic Journal of International Law* (2001) pp. 531–546; Karin Cornils, 'Om kriminalisering av folkmord, brott mot mänskligheten och krigförbrytelser', 44:3 *Lov og rett* (2005), pp. 131–14. Regarding Sweden: O. Bring, S. Mahmoudi and P. Wrange, *Sverige och folkrätten* (5th edn, Norstedts Juridik, Stockholm, 2014), pp. 257–273; H. Friman, 'Political and legal considerations in Sweden relating to the Rome Statute for the International Criminal Court', in R.S. Lee (ed.), *States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judical Cooperation and Criminal Law* (Brill, Leiden, 2005), pp. 121–145; I. Cameron, M.T. Schunke, K.P. Bartes, C. Wong and P. Asp, *International Criminal Law from a Swedish Perspective* (Intersentia, Antwerp, 2011).

would meet the principle of complementary of the ICC. At the same time, the legislation was also to cover some crimes which the states had undertaken in various treaties to criminalize and which they considered part of customary international law. To reach this goal, they undertook major studies on the content of the crimes, as is reflected in their extensive preparatory documents.

2 Individual Criminal Responsibility for Serious Crimes at the International and National Level

Individual criminal responsibility for international crimes is a well-known principle of international law. It entails that individuals are direct addressees of international rules and will be held responsible directly under international law.[8] The principle places the individual directly in international law, eroding traditional definitions of international law as law binding only on states.[9] As to enforcement, the principle has bearing with respect to criminalization and prosecution of these crimes both at the international and the national level. Individuals can be prosecuted for international crimes before international courts, irrespective of national legislation. They can also be prosecuted for international crimes before national courts, even though the relevant crimes had not been implemented in the relevant domestic legislation when committed. Furthermore, individuals can face prosecution for international crimes before national courts worldwide, based on universal jurisdiction.

The jurisdiction of the ICC reflects the enforcement of individual criminal responsibility for international crimes. Its jurisdiction extends to the conduct of individuals in territories of all member states, as well as that of citizens of member states, wherever they are committed. Irrespective of any domestic legislation, the Court may prosecute the conduct of these individuals. ICC's

8 *See* e.g. Articles 227–229 of the Treaty of Versailles, signed 28 June 1919; IMT, judgment of 1 October 1946, in The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg Germany, Part. 22 (22 August, 1946 to 1 October 1946), pp. 446–447. This position of the individual in international law is claiming a separate coverage in any general textbook of international law: e.g., M.N. Shaw, *International Law* (Cambridge University Press, Cambridge, 2008, 6th ed.), Chapter 8; A. Cassese, *International Law* (OUP, Oxford, 2005, 2nd ed.), Chapter 21; J. Klabbers, *International Law* (Cambridge University Press, Cambridge, 2013), p. 226.

9 On the individual as a participant in the international system, *see* R. Higgins, 'Conceptual Thinking about the Individual in International Law', *in Themes and Theories* (Oxford University Press, Oxford, 2009), p. 77; and A.A.C. Trindade, *The Access of Individuals to International Justice* (Oxford University Press, Oxford, 2011).

predecessors, the ICTY and ICTR, were established to enforce individual criminal responsibility for international crimes at the international level. Both tribunals came into being following serious crimes in the former Yugoslavia and Rwanda and over 250 individuals were prosecuted at these ad hoc tribunals. Establishing the courts, the Security Council underscored the responsibility of individuals for genocide, grave breaches of the Geneva conventions and other violations of international humanitarian law.[10]

Individual criminal responsibility for international crimes is also enforced at the national level. States have in various treaties undertaken the obligation to investigate and prosecute certain serious international crimes before their national courts. The key example is to be found in the Geneva Conventions of 1949 and their First Additional Protocol.[11] According to Article 146 of the Fourth Geneva Convention and Article 85 of the Additional Protocol I each contracting party is under an obligation to search for persons who have committed grave breaches of the convention and bring such persons, regardless of their nationality, before its own courts. These provisions entail an obligation for states to investigate and prosecute crimes committed on their territory and by their nationals abroad. Importantly, however, it also entails an obligation to exercise universal jurisdiction if a suspected perpetrator is found on their territory.

Enforcement of individual criminal responsibility for international crimes at the national level tests the relationship between international law and domestic law. The fundamental principle of international law is that treaties are binding upon states parties to them and they must be performed in good

10 Security Council, Resolution 808 (1993), 22 February 1993, UN Doc S/RES/808 (1993); Security Council Resolution 955 (1994), 8 November 1994, UN Doc S/RES/955 (1994).

11 The Geneva Conventions and Protocols were among the first international instruments to stipulate members' state obligation to prosecute crimes falling under the treaty. This was a major development in enforcement of international obligations, as until that time it was up to states how to implement international treaties at the national level; J.S. Pictetet al., *Commentary on the Geneva Conventions of 12 August 1949, Vol I: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, (International Committee of the Red Cross, 1952) p. 353. Furthermore, the new obligation underscored prosecution of war criminals by the state to which the perpetrators belongs. Prior to this the prosecution of war crimes had largely be confined to prosecution through the injured state, *see* R. Wolfrum, 'Enforcement of International Humanitarian Law', in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Clarendon Press, Oxford, 1995) pp. 517, 523. The specific articles discussing the obligation to prosecute are Geneva Convention I art 49, Geneva Convention II art 50, Geneva Convention III art 129, Geneva Convention IV art 146, Additional Protocol I art 85.

faith – *pacta sunt servanda*.[12] A corollary of the principle is that a state party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty.[13] A state party has to ensure that its domestic legislation is coherent with the international obligation and when a state has a treaty obligation to prosecute a crime, in failing to comply with its obligation the state party has engaged its international responsibility.[14]

States have implemented their international obligation with respect to prosecutions of international crimes in various ways. Indeed, international law is indifferent in what manner states implement their international obligation at the national level. The choice of legislative technique is the reserved domain of the domestic legislature and it depends on the constitutional law of each state. States are often described as followers of one of two theories, dualism or monism. Dualism distinguishes between international and national laws and views them as separate independent legal systems, the only existing rules are those that are part of the system. Monism, in contrast, is described as a system where national and international law are part of one and the same legal system.[15] The former group of states needs to adopt implementing legislation, while other can rely on upon direct application of international law in their domestic system.

Individual criminal responsibility for any crime, national or international, is also dependent on adherence to the principle of legality. To respect the principle of legality, the crime and the applicable punishment must be set out in clear terms before its commission – *nullum crimen sine lege* and *nulla poena sine lege*. The principle is underscored both at the international and national level, in numerous international conventions and most national constitutions.[16] As to criminalization of international crimes at the national level this has various implication, e.g., with respect to definitions of the crimes, retroactive application of national legislation, and universal jurisdiction. The nature of individual criminal responsibility for international crimes is well reflected

12 Article 26 of the Vienna Convention on the Law of Treaties, 1155 U.N.T.S 331.

13 *Ibid.*, Article 27. *See* also *Questions Relating to the Obligation to Prosecute or Extradite* (*Belgium* v. *Senegal*), Judgment, I.C.J. Reports 2012, p. 422, paras. 111–117.

14 *Ibid.*, paras. 119–121.

15 G. Gaja, 'Dualism – a Review', in J. Nijman and A. Nollkaemper (eds.), *New Perspectives on the Divide Between National & International Law* (Oxford University Press, Oxford, 2007), p. 52; Sir G. Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law', *Collected Courses of the Hague Academy of International Law* (Brill/Nijhoff, Leiden, 1957), pp. 70–74.

16 M.C Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd ed., Kluwer Law International, The Hague, 1999), pp. 123–176.

in how international law defines the principle of legality with respect to prosecution of the crimes. The Geneva Conventions of 1949 and their additional Protocols of 1977 define the principle of *nullum crimen sine lege* and *nulla poena sine lege* as no one should be tried or sentenced for an act which was not forbidden by *national or international law* when committed.[17] Article 11, paragraph 2, of the Universal Declaration of Human Rights, Article 7 of the European Convention on Human Rights and Article 15 of the Convention of Civil and Political Rights stipulate the same principle. While setting forth the fundamental principle of no punishment without law, it makes clear that that there is no requirement of domestic criminalization when it comes to criminal responsibility for international crimes. To date, the European Court of Human Rights has firmly supported this unique applicability of international criminal law at the national level. In *Van Anraat* v. *the Netherlands* the Court considered a Dutch criminal act criminalizing 'a violation of the laws and customs of war' to meet the standards and the elements of rule of law in Article 7, as the act was a violation of customary international law at the time when it was committed.[18] Furthermore, in *Kononov* v. *Latvia* the Grand Chamber of the European Court on Human Rights considered that Latvia had not violated Article 7 of the Convention by convicting the applicant in 2004, for war crimes allegedly committed in 1944, pursuant to Latvian Criminal Code from 1961, a provision inserted in 1993 on war crimes, with blanket reference to international law ('war crime as defined in the relevant legal conventions'), permitting the retrospective application of the provision, and exempting war crimes from limitation.[19]

The international principle of legality with respect to international crimes does not have to be the same at the national level. Some states regard it as a minimal standard that differs from stricter standards set in some national law. A differentiation in the standards of the principle of legality for ordinary crimes and international crimes has also be adopted by various national

17 Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S 13[4], Art. 99, Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art. 75, paragraph 4, sub-paragraph (c), 1125 U.N.T.S 2, and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Art. 6, paragraph 2, sub-paragraph (c), 1125 U.N.T.S 608.

18 *Van Anraat* v. *the Netherlands* (App. No. 65389/09), 6. July 2010, paras. 80–92.

19 *Kononov* v. *Latvia* (App. No. 36376/04), 17. May 2010. For a critic of some parts of the judgement, *see* Harmen van der Wilt, 'Nullum Crimen and International Criminal Law: The Relevance of the Foreseeability Test', 84:3 *Nordic Journal of International Law* (2015) p. 515.

courts.[20] All this has to be taken into account, when a state decides on the extent and manner of its implementing legislation on international crimes. International criminal law has been charged of lacking the degree of precision required in domestic criminal law.[21] However, individual criminal responsibility for serious crimes has also developed greatly in recent years. The jurisprudence of the ad hoc international criminal tribunals and the Rome Statute, and its Elements of Crimes, has refined this area of law and these developments have been aimed towards individual criminal responsibility and prosecutions while respecting the principle of legality.

3 The Complementarity Principle of the International Criminal Court and the Obligation to Prosecute Serious Crimes at the National Level

The complementarity principle of the Rome Statute has transformed the domestic legislation. In fact, few international treaties have led to such extensive national legislative implementation. Member states undertook a comprehensive review of their domestic legislation in order to ensure that the principle of complementary set out in Article 17 of the Rome Statute would be met. No one wanted their legislation to result in their being considered "unwilling or unable genuinely to carry out the investigation or prosecution", and hence lose its jurisdiction to the ICC. This major undertaking at the national level is interesting for various reasons, one of the more intriguing ones being that the Rome Statute itself does not obligate member states to carry out this implementation, as it does not obligate them to prosecute crimes that lie within the jurisdiction of the Court. Its preamble only refers to the obligation in general, by recalling that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes.[22] Nevertheless, member states ensured that their domestic legislation was up to the task, in order retain jurisdiction.

Thus, the Rome Statute has had a major impact on the national enforcement regime of international criminal law.[23] It has truly empowered the

20 Ward N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (T.M.C Asser Press, The Hague, 2006), pp. 224–232.

21 van der Wilt, *supra* note 19, p. 515.

22 The Rome Statute of the ICC, Preamble, para 6. The preamble also affirms that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, *ibid*, para 4.

23 P. Seils, 'Putting Complementarity in its Place', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (OUP, Oxford, 2015), p. 305.

prior regime, which lacked the enforcement mechanisms. Under older treaties, states had undertaken the obligation to investigate and prosecute certain serious international crimes at the national level. The primary examples are obligations under the Genocide Convention of 1948, with respect to the crime of genocide, and the Geneva Conventions of 1949, with respect to grave breaches of the conventions. However, that was as far it went, which illustrates the weakness of the treaties of that period. Unlike later universal human rights treaties, neither the Genocide Convention nor the Geneva Conventions contained any oversight mechanism on whether states implemented them properly at the national level. Hence, enforcement of these obligations has always been very weak. The Rome Statute, the jurisdiction of which includes the crime of genocide and grave breaches of the Geneva Conventions, has not only given these older treaties an enforcement regime at the international level, but – through its complementarity principle – also at the national level.

4 The Nordic Countries and Implementation of International Crimes in Domestic Legislation

Regarding the relationship between international and domestic law, the Nordic countries have traditionally been described as following a dualistic approach. Following that doctrine, application of international law at the domestic level would require implementing legislation. Surely, the new legislations reflect this by incorporating international crimes into the domestic legislation. At the same time, an examination of practice in the Nordic countries with respect to the implementation of crimes within the jurisdiction of the ICC reveals a much more varied relationship between international and domestic law than is accounted for by the dualistic approach.[24]

Prior to the ratification of the Rome Statute, the Nordic countries had undertaken the obligation to investigate and prosecute international crimes.

24 Studies on other areas of law have come to a similar conclusion. For instance, with respect to human rights treaties, there remain examples within the Nordic countries in which those treaties were given preference over conflicting national provisions, despite having not been implemented, *see* Betænkning nr. 1407/2001 pp. 126–127; *Betænkning om inkorporering mv. inden for menneskeretsområdet*, Betækning nr. 1546 (Justitsministeriet, København, 2014) pp. 91–93. *See also*, Bring et al., *supra* note 7, pp. 54–65; J. Klabbers, 'Coming in from the Cold: Treaties in Finland's Legal Order', in T. Koivurova (ed.), *Kansainvälistyvä Oikeus: Juhlakirja Professori Kari Hakapää* (Rovaniemi: University of Lapland, 2005), pp. 143–152; D.T. Björgvinsson, *The Intersection of International Law and Domestic Law: A Theoretical and Practical Analysis* (Edward Elgar Publishing, Cheltenham, 2015).

This tested the relationship between international and domestic law within the countries. Regarding the crime of genocide, Denmark, Finland, and Sweden adopted legislation defining and criminalizing the crime.[25] No such legislation existed in Norway and Iceland but these countries maintained that they could prosecute the crime by relying on general provision of murder in the penal code. As to war crimes, some war crimes were criminalized in military codes, though only applying to certain individuals; this was the case in Denmark, Norway, Finland, and Sweden. Furthermore, the Danish military code is broad, criminalizing war crimes via a very general reference to international law.[26] Similarly, Sweden criminalized serious international crimes by means of a general reference to international law.[27] The Finnish penal code also criminalized specific conduct in war through very general references to international law.[28] Iceland had no penal provisions regarding war crimes.

All this legislation was put to the test with the entry into force of the Rome Statute. With the ratification of the treaty, all the Nordic countries carried out the necessary review of their domestic legislation. That review was twofold. First, all of the countries quickly implemented provisions so as to be able to cooperate with the ICC in accordance with Part 9 of the Rome Statute.[29] That legislation largely built upon existing legislation in the countries on cooperation with the *ad hoc* criminal tribunals of the United Nations, the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda. Second, in most of the countries, a comprehensive study of the substantive part of the Rome Statute and relevant domestic legislation was undertaken, in order to ensure that the principle of complementary could

25 Denmark, Lov nr. 132 af 29. April 1955 om folkedrab; Finland, Strafflag 19.12.1889/39, Chapter 11, Sections 6–8; Sweden, Lagen 1964:169 om straff för folkmord.

26 Lov om straff for krigsforbrytelser, lov 12. juli 1946, Article 25. *See* also Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts, Report of the Secretary-General, U.N. Doc. A/61/222, 4 August 2006, p. 9.

27 Brottsbalken, SFS 1962:700, Article 22, para. 6.

28 Strafflag 19.12.1889/39, Chapter 11, Section 1, para. 3.

29 Denmark, Lov nr. 342 af 16/05/2001 om Den Internationale Straffedomstol; Finland, Lag nr. 1284/2000 om ikraftträdande av de bestämmelser som hör till området för lagstiftningen i Romstadgan för Internationella brottmålsdomstolen och om tillämpning av stadgan; Iceland, Lög nr. 43/2001 um framkvæmd Rómarsamþykktar um Alþjóðlega sakamáladómstólinn; Norway, Lov om gjennomføring i norsk rett av Den internasjonale straffedomstols vedtekter 17. juli 1998 (Roma-vedtektene), LOV-2001-06-15-65; Sweden, Lag om samarbete med Internationella brottmålsdomstolen, SFS 2002:329.

be met. Norway took the lead in adopting a new chapter on genocide, crimes against humanity, and war crimes in its general penal code in March 2008.[30] Finland adopted a new chapter on war crimes and crimes against humanity in its general penal code in April 2008 (Chapter 11).[31] In 2002 a comprehensive study on the implementation of the Rome Statute and draft legislation was prepared and presented in Sweden, but adoption was postponed.[32] A new bill was presented in February 2014, followed by the adoption of a separate act on genocide, crimes against humanity, and war crimes.[33] Unlike its neighbouring countries, Denmark has not undertaken a similar reform of its criminal law with respect to definitions of crimes in the Rome Statute.[34] Denmark maintains that it can prosecute those crimes either under its military penal code or provisions of the ordinary penal code on murder, assault, rape, etc.[35] Iceland is in the final phase of preparing legislation on crimes within the jurisdiction of ICC, in a separate act. This will be the first time that the crime of genocide, crimes against humanity and war crimes are defined and criminalized in its national legislation. Only Finland has implemented provisions on the crime

30 *See* Lov 7 mars 2008 nr. 4 om endringer i straffeloven 20. Mai 2005 nr. 28 mv., entry into force the same day. As for preparation documents see the government bill, O.t.prp.nr.8 (2007–2008), Om lov om endringer i straffeloven 20. mai 2005 nr. 28 mv. (skjerpende og formildende omstendigheter, folkemord, rikets selvstendighet, terrorhandlinger, ro, orden og sikkerhet, og offentlig myndighet), and Justis- og politidepartemented, *Høringsnotat*-straffebestemmelser om folkemord, forbrytelser mot menneskeheten og krigforbrytelser, Lovavdelingen April 2007, Saksnr. 200701831 EO HI/TRR. In its proposition of ratification submitted to parliament, the government prepared also a comprehensive analysis of the Rome Statute and of its implication, including an analyses of constitutional issues, *see* Det Kongelige Utenriksdepartement, St.prp. nr. 24 (1999–2000).

31 *See* the Finnish government bill RP 55/2007 rd and Law 11.4.2008/212, entering into force 1 May 2008.

32 Internationella brott och svensk jurisdiktion, SOU 2002:98.

33 Lag (2014:406) om straff för folkmord, brott mot mänskligheten och krigsförbrytelser, entering into force 1 July 2014. *See* the government bill, Regeringens proposition 2013/14:146, Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser.

34 On criticism of this approach and lack implementing legislation, *see* Laursen, 'A Danish Paradox?', *supra* note 7, pp. 997–1016. *See also* a paper prepared by the Danish Justice Ministry on Danish Criminal Jurisdiction, which included recommendation that would make it easier for Danish courts to prosecute crimes committed abroad, in particular international crimes, Justitsministeret, Dansk straffemyndighed, Betænkning nr. 1488, June 2007.

35 Laursen, "A Danish Paradox?", *supra* note 7, at 1001; *see* also Militær straffelov nr. 530 from 24/06/2005, Lov om Straf for Krigsforbrydelser nr. 395 af 12/07/1946.

of aggression.[36] Iceland includes definition and criminalization of that crime in its draft bill.

The new legislation in Finland, Norway, Denmark, and Sweden on genocide, crimes against humanity, and war crimes is extensive and detailed. Citing the principle of legality, the commentaries to the various bills highlight the importance of having precise provisions. Sweden has altogether abandoned its earlier approach of relying on criminalization via general reference to international crimes, citing criticism of following a monistic approach in otherwise dualist system.[37] Facing the difficulties posed by rapid developments in international criminal law, some flexibility is allowed for in certain provisions of most of the countries, as is done in similar provisions in the Rome Statute. Iceland adheres most closely to the definitions and structure of the Rome Statute, following an approach taken by many members of the ICC. One of its key arguments for such an approach is the harmonization with existing international law and practice. Regarding war crimes, Finland, Norway, and Sweden simplify and reorganize the definitions of the Rome Statute. Finland still retains a provision on criminalization via a very general reference to violations of law of war under international law.

The relevance of the applicability of international law at the national level and individual responsibility for international crimes was also tested in other aspects of the implementing legislation. Citing the international nature of the crimes, Norway had its legislation apply to crimes committed before the entry into force of the legislation. Later, it abandoned this approach due to a decision by the Norwegian Supreme Court. The draft bill in Iceland proposes to have the legislation apply to prior crimes, provided that they were international crimes when committed and could have been prosecuted under the provisions of the general penal code. All the states adopted a provision on the non-applicability of statute of limitations, covering previous crimes, as long as they were not already subject to the statute of limitations when the new legislation took effect. As the states have universal jurisdiction in their penal codes, due care had to be taken that crimes covered by that jurisdiction were also crimes under customary international law.

36 *See* the Finnish government bill, 289/2014 rd, and law 1718/2015 (Lag om ändring av strafflagen, adopted 30 December 2015).

37 Regeringens proposition 2013/14:146, *supra* note 33, p. 68. Interestingly, the argument for Swedish approach when implementing obligations under international humanitarian law in the fifties, was that the obligations in this area were so enormous that it was not possible to spell them out and therefor a general reference was needed, proposition 1948:144, p. 167 and proposition 1953:142, p. 26 f., cited in proposition 2013/14:146, *supra* note 33, p. 68.

5 The Crime of Genocide

For a long time, the implementation of provisions covering genocide in the Nordic countries was not harmonious. All the Nordic countries ratified the Genocide Convention before or soon after its entry into force in 1951.[38] Soon afterwards Denmark and Sweden adopted special laws on the crime of genocide, while Finland incorporated the crime into its penal code in 1974.[39] In all instances the legislation defined and criminalized genocide. Prior to their bills implementing the Rome Statute, Norway and Iceland had no provisions in their domestic legislation criminalizing genocide and the crime was not *delictum sui generis* in their law, though Norway provided for universal jurisdiction over the crime.[40] Iceland's view on the matter is unclear as no commentaries were published on it at the time of ratification of the Genocide Convention or the Rome Statute.[41] At the time of ratification of the Rome Statute, Norway contended that implementation of a definition of the crime was not necessary as the crime could be prosecuted as an ordinary crime of murder. One of the factors that led to later criminalization of the crime in Norway was the decision of the Appeal Chamber of the International Criminal Tribunal for Rwanda in the case of *Bagaragaza*.[42] In this case the tribunal rejected the argument of Norway that genocide could be sufficiently prosecuted under a general penal provision on murder. The case was a major setback to the approach adopted by Norway with respect to implementation of the Genocide Convention, and was an important consideration that led to legislative review and changes in the criminalization of serious crimes.[43]

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38 Denmark 15 June 1951, Finland 18 December 1959, Iceland 29 August 1949, Norway 22 July 1949, and Sweden 27 May 1952.

39 *See* in Sweden Lagen 1964:169 om straff för folkmord, in Denmark Lov nr. 132 af 29. April 1955 om folkedrab, and in Finland Code 987/1974, later in the general Penal Code, Chapter 11, Sections 6–8.

40 Article 12, para. 4(a) of the Norwegian penal code.

41 In the case of *Eðvald Hinriksson* from 1992, regarding alleged crimes in the Second World War, it was contented that alleged criminal could prosecuted for the crime of genocide, based on provisions in the Icelandic penal code on murder. The case did not go to trial, as the Mr. Hinriksson died during the investigation.

42 International Criminal Tribunal for Rwanda, The Appeal Chamber, The Prosecutor v. Michel Bagaragaza, Case No. ictr-2005-86-PT, Decision on Rule 11bis Appeal of 30 August 2006. The ICTR assessment was made against rule 11bis of the Court´s Rules of Procedure and Evidence, which regarded transfer of proceedings from the Court to national criminal jurisdiction.

43 *See* e.g., Justis- og Politidepartementet, *Høringsnotat* – straffebestemmelser om folkemord, forbrytelser mot menneskeheten og krigforbrytelser, Lovafdelingen April 2007, *supra* note 30, pp. 7–8.

The definition of the crime of genocide in Article 6 of the Rome Statute is materially identical to that in Article II of the Genocide Convention of 1948. It was considered that the definition reflected customary international law and there was reluctance among states to tamper with the definition.[44] However, the list of groups protected by the definition of genocide has been debated and criticized by some as being too rigid.[45] Both during the drafting of Genocide Convention and the Rome Statute, unsuccessful attempts were made to enlarge the list of protected groups.[46] It is also questionable whether other groups now fall within the scope of genocide by virtue of customary international law, or by interpretation.[47]

Denmark's legislation on genocide incorporates the definition as set out in Article II of the Genocide Convention. Sweden adopted the same definition in its legislation of 1964 and adheres to the same in its new legislation. The Norwegian legislation now criminalizes the genocide and defines it in the same way as the Genocide Convention and the Rome Statute. So does the Icelandic draft bill. In its older legislation on genocide, Finland adopted a broader definition of genocide than was stipulated in the Genocide Convention. The groups protected by the Genocide Convention are listed in a closed manner as "national, ethnical, racial and religious" groups. Finland enlarged this list by adding the term "or another comparable group". In its new bill of 2008, Finland still adheres to this broader definition.

Following the new legislative amendments, all the Nordic countries have now criminalized genocide. Finland is the only one that has adopted a broader definition than that stipulated in the Rome Statute, hence enlarging the list of groups protected by the definition.[48] In general, therefore Nordic implementing

44 H. von Hebel and D. Robinsson, 'Crimes within the Jurisdiction of the Court', in Lee (ed.), *supra* note 1, p. 89.

45 *See* A. Cassese, 'Genocide', in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (OUP, Oxford, 2002), p. 336.

46 R. Cryer, H. Friman, D. Robinson, E. Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, Cambridge, 3rd ed. 2014), p. 210; W.A. Schabas, *Genocide in International Law, The Crime of Crimes* (Cambridge University Press, Cambridge, 2nd ed., 2009) p. 109. Debated missing groups have included social and political groups, and cultural genocide. Recently, some other groups have surfaced in the debate on who are or should be included in the protected groups, such as individuals with Down-Syndrome.

47 This was the view of the judgment in Akayesu, *see* ICTR T. Ch. I 2.9.1998, para. 516. *See* discussion in Cryer et al., *ibid.*, p. 210.

48 A few states, such as Spain, have followed the same path as Finland and have adopted a wider definition than is stipulated in the Rome Statute.

legislation is not progressive in its definition of genocide.[49] However, all the Nordic countries have adopted a provision on universal jurisdiction over crimes of genocide; in doing so, they have opted for a broader jurisdiction than the Genocide Convention requires.

6 Crimes against Humanity

The implementation of provisions on crimes against humanity into the legislation in the Nordic countries raised issues different from those raised by genocide and war crimes. The two latter categories are the subject of international treaties that require states to prevent and punish these crimes. Although crimes against humanity were criminalized in the Nuremberg Charter, and later in the statutes of the international criminal tribunals for the former Yugoslavia and Rwanda, there still exists no international treaty defining these crimes and requiring states to prevent and punish them. At the same time, they are considered as international crimes under customary international law.[50] Still, prior to the implementation of the Rome Statute, none of the Nordic countries had definitions of crimes against humanity, or provisions to punish them, in their legislation.

The Rome Statute's definition of crimes against humanity builds largely on the definitions in the statutes of the international criminal tribunals for the former Yugoslavia and Rwanda, and their case law. Many of the crimes are also listed in the Nuremberg Charter.[51] Nevertheless, negotiation of the definition of the crimes proved difficult. This was the first time that these crimes were defined in a multilateral treaty. Many countries were also concerned that internal violence committed by their officials might fall within the jurisdiction of the court, as crimes against humanity are not required to have a nexus with armed conflict.[52]

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49 The preparatory documents of the bills are meager on this point. The Swedish bill had some reservations of using the term 'racial', as it considered it associated with discrimination and racism. It was decided to use the term, given that it would be understood as in the relevant international treaties using it, Regeringens proposition 2013/14:146, *supra* note 33, pp. 79–80.

50 Bassiouni, *supra* note 16. The European Court of Human Rights has also adjudicated on the definition of the crimes against humanity, *Korbely* v. *Hungary* (App. No. 9174/02), 19 September 2008.

51 ICTY Statute, Article 5, ICTR Statute, Article 3.

52 Crimes against humanity have progressed from a crime associated with armed conflict to a crime that can occur whenever there is a widespread and systematic attack directed

Crimes against humanity are defined as serious crimes which are committed *as part of a widespread or systematic attack directed against any civilian population*. They may be committed in a context of conflict or outside it. The bar in the Rome Statute for crimes against humanity is set high. They must not only be committed as part of a widespread or systematic attack against any civilian population, but also *with knowledge of the attack*.[53] This last requirement has been implemented in various ways by state parties to the Rome Statute. None of the Nordic countries has implemented this additional element in the legal text.[54] It is significant that the Nordic countries did not incorporate the definition of "attack", stipulated in Article 7, paragraph 2 (item a), of the Rome Statute, requiring connection with a state or organizational policy. That requirement is considered to lack support in customary law and has for instance been rejected by the International Criminal Tribunal for the former Yugoslavia.[55]

Article 7, paragraph 1, of the Rome Statute stipulates ten crimes which can qualify as crimes against humanity, including murder, torture, sexual violence and persecution. In addition, the article provides for an "open-ended" provision: "Other inhuman acts of similar character intentionally causing great suffering, or serious injury to body or to mental or physical health" (item k). A similar catchall provision was also included in the statutes of the UN *ad hoc* criminal tribunals.[56] Paragraphs 2 and 3 of Article 7 define further the elements of the crimes enumerated in paragraph 1. These detailed provisions reveal the intensive negotiations that took place on the drafting of the text and the efforts made to limit an overly broad interpretation of the provision.

Iceland and Norway implement Article 7, paragraph 1, more or less "as it is", and with the catchall provision.[57] Finland incorporates two provisions on crimes against humanity in its penal code, one on crimes against humanity and

against civilian population by means of certain heinous acts. For a detailed account on crimes against humanity, *see* First report on crimes against humanity, by Sean D. Murphy, Special Rapporteur, UN Doc A/cn.4/680, 17 February 2015.

53 According to Article 30, para 3, of the Rome Statute, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

54 To large extent, it is implemented through the applicable *men rea* requirements.

55 *Prosecutor* v. *Kunarac et al.*, Case No. IT-96-23-A, Judgement, Appeals Chamber, 12 June 2002, para 98.

56 ICTY Statute, Artice 5(i), ICTR statute, Artice 3(i). *See* also M. Boot, revised by C.K. Hall, 'Article 7 Crimes against Humanity (k) "Other inhuman acts"', in O. Triffterer (ed.), *Commentary on the Rome Statute of the Internatinal Criminal Court – Oberservers´ Notes, Article by Articles* (2nd ed., C.H. Beck, Munich 2008), p. 230.

57 Norway, *see* Article 102, para. k.

other on grave crimes against humanity.[58] While differently organized, the former provisions on substance incorporates Article 7, paragraph 1, of the Rome Statute, with some changes. For instance, it does not include the open-ended provision provided. Sweden incorporates Article 7, paragraph 1, though without the open-ended provision. Also, it did not consider it necessary to have a separate provision on apartheid, as it considered it sufficiently covered by the persecution provision.[59] Denmark has not incorporated a provision on crimes against humanity. In its commentary on the Rome Statute, it maintained that the crimes, when committed by military personnel, could be punished under the Military Penal Code. And failing that, then under the provisions of the ordinary penal code on murder, rape, etc.[60] This statement has been harshly criticized by some, and it has been argued that crimes against humanity could not fall within these provisions.[61]

All the Nordic countries only incorporated paragraph 1 of Article 7 of the Rome Statute, leaving out paragraphs 2 and 3. Norway considered that such a detailed description in the law itself would go against traditional law-making practice at its national level.[62] Some of the definitions in paragraph 2 were taken into account by the countries when formulating the provisions, such as torture. With respect to certain crimes, some countries considered it necessary to broaden the definitions, like Norway with respect to persecution and apartheid.[63] In incorporating crimes against humanity Sweden considered that criminalization should not go further than what customary law provides, due to the country´s universal jurisdiction.[64]

A new treaty on crimes against humanity is on the horizon. It has been in the making for years, but in 2013 considerable progress was made when the International Law Commission of the United Nations adopted the topic in its program.[65] The Nordic countries supported this work and in their statement to Sixth Committee of the General Assembly they called for robust inter-state cooperation for the purposes of investigation, prosecution and punishment

58 *See* Strafflag 19.12.1889/39, Chapter 11, Article 3 and 4.

59 Regeringens proposition 2013/14:146, *supra* note 33, p. 117.

60 Folketingstidende (The Folketing Hansard), 2000–2001, Appendix A, p. 499, cited by Laursen, 'A Danish Paradox?', *supra* note 7, p. 1001.

61 *See* Laursen, *ibid.*, 7, pp. 1003, 1007.

62 Höringsnotat, *supra* note 30, p. 32.

63 Höringsnotat, *ibid.*, pp. 33–36.

64 Regeringens proposition 2013/14:146, *supra* note 33, p. 78.

65 *See* Report of the International Law Commission on the Work of its Sixty-Fifth Session, U.N. GAOR, 68th Sess., Supp. No. 10, U.N. Doc. A/68/10, at 116, para. 170 and Annex B (2013).

of these crimes.[66] The International Law Commission has now prepared the first draft articles of the new treaty.[67] The proposed draft articles adopt the same definition of crimes against humanity as the Rome Statute. The draft articles also require states to prevent these crimes and to prosecute the alleged offenders.

7 War Crimes

7.1 *Legislation Adopted Prior to the Rome Statute*

All the Nordic countries have ratified all major treaties on war crimes. They are bound by the Hague Conventions on the laws and customs of wars and prohibited weapons of 1899 and 1907, either by ratification or customary international law.[68] They are all parties to the four Geneva Conventions of 1949, and their two Additional Protocols of 1977. Furthermore, they are also parties to Additional Protocol III of 2005. The Nordic countries are all parties to other major conventions on methods and means of warfare, including the Convention on the Prohibition of Biological Weapons of 1972, Convention prohibiting Chemical Weapons of 1993, and the Anti-Personnel Mine Ban Convention of 1997. They are parties to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

As described earlier, already with the ratification of the Geneva Conventions of 1949, the Nordic countries undertook a sweeping obligation to investigate and prosecute war crimes at the national level. According to the Geneva Conventions, state parties were to enact any legislation necessary to provide effective penal sanctions for persons committing grave breaches of the conventions, to search for such persons, and bring such persons, irrespective of their nationality, before their own courts. The conventions also incorporated the principle of *aut dedere aut judicare*, i.e., states could, if they preferred, hand such persons over for trial to another party concerned, provided that such party had made out a *prima facie* case.[69]

66 Statement to the Sixth Committee by Norway on behalf of the Nordic Countries, at 5 (28 October 2013), available at https://papersmart.unmeetings.org/media2/703463/norway-part-1.pdf.

67 United Nations, UN Doc A/CN.4/680, 17 February 2015.

68 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, para. 89.

69 Geneva Convention I, Article 49, Geneva Convention II, Article 50, Geneva Convention III, Article 129, and Geneva Convention IV, Article 146.

Furthermore, prior to the ratification of the Rome Statute all the Nordic countries except Iceland had domestic legislation on war crimes. Interestingly, in all of these instances the relevant provisions criminalizing war crimes were very broadly defined and far reaching. The Danish Military Penal Code described the possibility for military personnel to be punished if, during an armed conflict, they acted in defiance of international conventions ratified by Denmark or in defiance of international customary law.[70] The Norwegian Military Penal Code criminalized violations of the Geneva Conventions of 1949 and its two protocols.[71] In an addition to a military penal code, Sweden had a very broad definition and reference to war crimes. Under the Swedish penal code, Article 22, para 6, a violation of international humanitarian law, whether according to a treaty or customary law, was a crime.[72] The provision was adopted in order to implement Sweden´s obligations under the Hague Convention of 1904, the Geneva Conventions of 1949 and their Protocols of 1977.[73] Under the Finnish penal code, anyone who violated treaties on the law on war that Finland had ratified, or customary law relating to war, was to be sentenced.[74] Iceland had no provisions at all on war crimes in its legislation on war crimes, and it was maintained by the government that the general provisions of the penal code could be used to prosecute war crimes.[75]

With the ratification of the Rome Statute, some of the Nordic countries undertook studies of the need to implement legislation with respect to the

70 Article 25, Lov om straff for krigsforbrytelser, 12 July 1946. *See* also Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts, *supra* note 26, p. 9.

71 Article 108, Militær Straffelov, LOV-1902-05-22-13. Norway had also a penal code on foreign war criminals, Lov om straff for utlendske krigsbrotsmenn 13 December 1946 nr. 14. Then some general provisions of its penal code were to apply to some of the crimes. *See* Høringsnotat, *supra* note 30, p. 38.

72 Brottsbalken, SFS 1962:700.

73 *See* Friman, *supra* note 7, p. 141.

74 Strafflagen, Chapter 11, Section 1, paragraph 3.

75 It was the view of the Ministry of Foreign Affairs in 2001, that there was no need to implement the Geneva Conventions with respect to protection of citizens, as general provisions of the penal code could be used, *see* Utanríkisráðuneytið, Umsögn um tillögu til þingsályktunar um lagabreytingar til að fullnægja ákvæðum Genfarsáttmálans um vernd óbreyttra borgara á stríðstímum, 7 May 2001. *See* also this view, to some extent, in Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts, *supra* note 26, p. 10. There is an ambiguous provision in Law 73/2007 on the Icelandic Peacekeeping, according to Icelandic Peace-keepers shall "honour" international law that Iceland is bound of and have legal effects towards individuals, *see* Law 73/2007, Article 6.

criminalization of war crimes. Denmark and Norway considered that no further legislation was needed.[76] Like the older code, a recent Danish military penal code has a very broad reference to violations of international law.[77] On the contrary, Sweden and Finland concluded that changes were indeed needed in order to bring their domestic legislation into line with the Rome Statute. In its later review of legislative amendments, Norway proposed major changes to criminalization of war crimes. With the ratification of the Rome Statute, Iceland did not undertake a review of its legislation with respect to the crimes within the jurisdiction of the International Criminal Court. According to information submitted to the Secretary-General of the United Nations in 2006, Iceland considered some war crimes to fulfil the elements of the relevant provisions of its penal code, e.g., those on homicide, bodily injury and sexual offences.[78] In a study done some years later, commissioned by the Ministry of Justice in Iceland, it was concluded that changes were needed to the national legislation in order to comply with the Geneva Conventions and to be able to benefit from the complementary jurisdiction of the Court.

7.2 *The Content of Article 8 of the Rome Statute*

In general, Article 8 of the Rome Statute on war crimes was to reflect customary international law.[79] It defines 50 types of conduct as war crimes, classifying them according to whether they are committed in international armed conflict (Article 8, paragraphs 2, a and b) or armed conflict not of international character (Article 8, paragraphs 2, c and e). This is in harmony with major treaties on international humanitarian law. It fully incorporated the Hague Conventions and Regulations of 1899 and 1907, and the provisions of the

76 However, in the Norwegian proposition for ratification, it was proposed to that further legislation should be considered at a later stage and in the context of a major revision of the criminal code, *see* Det Kongelige Utenriksdepartement, St.prp. nr. 24 (1999–2000), *supra* note 30.

77 For instance, according to Article 36 of Act 530 of 24/06/2005, anybody who during armed conflict deliberately abuses or does not respect characteristics or designations reserved for people, equipment and materials designated to provide help to people who are wounded or ill shall be punished with imprisonment for life, and anybody who deliberately uses war methods or procedures contrary to an international agreement signed by Denmark or international customary law shall be punished similarly. The Danish military penal code applies to Danish military personnel, international military personnel interned in Denmark, and other people who are, according to international agreements accepted by Denmark, entitled to treatment as military personnel, *see* Article 1.

78 Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts, *supra* note 26, p. 10.

79 On the drafting of Article 8, *see* von Hebel and Robinsson, *supra* note 44, pp. 103–122.

Geneva Conventions of 1949 on grave breaches, all of which are considered to reflect international customary law. The customary law status of some norms was debated, in particular in relation to war crimes in non-international conflict, e.g. some provisions of Additional Protocol II to the Geneva Conventions. In the end, that protocol did not fully make it into the Rome Statute. However, in some aspects, Article 8 was progressive, i.e., in relation to sexual violence.[80] The horrific experience of victims in the former Yugoslavia and Rwanda, and the case-law of the criminal tribunals of the United Nations, were the driving force behind that development.

One of the highly contentious issue in Rome relating to war crimes was methods of warfare. Particularly controversial was the inclusion or non-inclusion of nuclear weapons on the list of prohibited weapons.[81] In the end, weapons of mass destruction did not make it into the Rome Statute as prohibited weapons. In connection with ratification of the Rome Statute, Sweden included a statement recalling the Advisory Opinion given by the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*,[82] recalling that according to the decision that there can be no doubt as to the applicability of humanitarian law to nuclear weapons.[83] No consensus was reached on the issue at the Review Conference of the Rome Statute in Kampala in 2010. Some other criticism on the convention with respect to war crimes was, however, met in Kampala. There, the state parties adopted amendments to Article 8, with respect to crimes committed in non-international conflict. The weapons which had made it to the list in Rome with respect to international conflict, were included also with respect to prohibited weapons in non-international conflict. Only Finland and Norway have ratified the amendment to Article 8 on war crimes, but ratifications by the other Nordic countries are expected.[84]

7.3 *Legislation Adopted by the Nordic Countries to Implement Article 8 of the Rome Statute*

Today, all the Nordic countries except Denmark have prepared or adopted comprehensive legislation in order to implement Article 8 of the Rome Statute in domestic law. In all instances, the legislation was enacted to implement

80 C. Steains, 'Gender Issues', in Lee (ed.), *supra* note 1, pp. 103–122. *See* also D.M. Koening and K.D. Askin, 'International Criminal Law and the International Criminal Court Statute: Crimes agains Women', in K.D. Askin and D.M. Koening (eds.), *Women and International Human Rights Law*, Volume II (Transnational Publishers, Inc. New York, 2000) p. 3.

81 *See* von Hebel and Robinsson, *supra* note 44, pp. 113–116.

82 *Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, ICJ, Advisory Opinion.

83 UNTC, Chapter XVIII, 10, Rome Statute of the International Criminal Court, Declarations and Reservations, Sweden.

84 Norway as of 16 June 2013 and Finland as of 30 December 2015.

the substantive part of Article 8, primarily in order to ensure full compliance with the complementary jurisdiction of the ICC. In some instances, all these countries adopted wider definitions of war crimes than stipulated in Article 8, primarily in three aspects. First, all the countries declined to include the phrase in paragraph 1 of Article 8, limiting war crimes to "when committed as part of a plan or policy or as a part of a large-scale commission of such crimes". All the commentaries to the bills noted that this restriction applying to war crimes did not reflect international humanitarian law and was only meant to restrict the jurisdiction of the ICC. Secondly, citing ratification of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, all the countries raised the age of children covered in the provision on the war crimes of conscripting or enlisting children into armed forces or using them to participate actively in hostilities (Article 8, paragraph 2, (b) (xxvi), and Article 8, paragraph 2, (e) (vii)). The Rome Statute limits this to children under the age of 15, but the Nordic countries raised this age limit to 18. Thirdly, all the countries broadened the definition of prohibited weapons, substantially largely reflecting controversial Article 8, paragraph 2, (b) (xx), which was awaiting determination in Kampala. The countries also considered criminalization of prohibited weapons applicable in a conflict of non-international character. The countries considered this necessary so as to implement their obligations under other international treaties. Furthermore, they considered that the Rome Statute did not reflect customary international law in this matter.[85]

While the provisions on genocide and crimes against humanity in the new legislations are very much alike, the new provisions on war crimes differ immensely. Iceland is the country that follows the Rome Statute to the fullest extent. Its provision on war crimes more or less follows the structure and definition of Article 8 of the Rome Statute, with the substantive changes listed above. According to the commentary to the bill this was done in order to ensure full compliance with the Geneva Conventions, and to give full effect to the principle of complementarity contained in the Rome Statute. This method was also considered to facilitate legal harmony with international practice.

The new Article 5 of Chapter 11 of the Finnish penal code defines and criminalizes war crimes. It is much more itemized than the earlier text. The article

85 The concern of the Nordic countries to address war crimes in non-international conflict and sexual violence is reflected in a number of statements during the negotiations, *see* e,g,, Summary records of the meetings of the Committee of the Whole, 6th Plenary meeting, para. 33 (Finland), U.N. Doc. A/CONF.183/SR.6, and 4th meeting, para. 72 (Denmark) and para. 74 (Sweden), U.N. Doc. A/CONF.183/C.1/SR.4.

is a combination of a definition of war crimes and general open references to violations of treaties and customary international law. Under the article, individuals are to be punished for war crimes for acts in violations of the Geneva Conventions and its Protocols or other international law and customs relating to war, armed conflicts and occupations; these acts are then listed in 14 items. In addition, punishment for war crimes for other acts will be imposed if they are in violation of Article 8 of the Rome Stature on war crimes, or of Finland's international obligations relating to war, armed conflict or occupation, or other recognized international law or customary law of war. As with crimes against humanity, the Finnish penal code has a separate provision on serious war crimes (if the crime is directed against a large group of people, the resulting harm is great, etc.), leading to a more severe minimum sentence.

The provisions in Norway and Sweden are similar. They define and list war crimes, but in a very concise manner. At the same time it is noted in the commentaries to the bills that notwithstanding this concise manner, the new provisions are considered to incorporate fully all the war crimes listed in Article 8 of the Rome Statute.[86] The crimes are categorized according to the nature of the crime; whether it is directed against a person or property. The provisions on war crimes do not have any general references to international law. In this way, Sweden has made a substantial departure from its earlier approach, with earlier provisions including broad references to international law. Norway still has a reference to violations of the Geneva Conventions and their Protocols in its military code.[87]

What is truly striking about the new provisions on war crimes in Finland, Norway, and Sweden is that they depart from the traditional distinction between law applicable in international armed conflict and armed conflict that is not of an international character. This distinction is firmly rooted in international humanitarian law, as is illustrated by Article 3 common to the four Geneva Conventions, Protocol II to the Geneva Conventions and Article 8 of the Rome Statute, which closely follow this distinction. However, as can be seen in the Finnish legislation on war crimes, this distinction is blurred. Article 5 of Chapter 11 of the Finnish Penal Code, refers to the Geneva Conventions and their Protocols in general and defines war crimes irrespective of whether they are committed in international armed conflict or armed conflict not of international character. Norway and Sweden erase the distinction

86 Höringsnotat, *supra* note 30, pp. 10–11; Regeringens proposition 2013/14:146, *supra* note 33, p. 77. Sweden notes also that the yardstick for the Swedish legislation is international customary law, rather than the definitions of the Rome Statute.

87 Article 108, Militær Straffelov, LOV-1902-05-22-13.

fully and define war crimes as acts in armed conflicts, and do not make any references to whether they are committed in an international armed conflict or a domestic one.[88] Certainly, the normative gap between the two types of armed conflict has decreased in the last decades, as is illustrated by Article 8 of the Rome Statute. However, full abandonment of the distinction has not yet happened at the international level, and these three Nordic countries are taking a very progressive step at the national level in this respect.[89]

8 Aggression

The crime of aggression comes under the jurisdiction of the ICC, *cf.* Article 5, paragraph 1(d), of the Rome Statute. The inclusion of the crime was highly debated, both among governments, UN officials, and non-governmental organizations.[90] In the final days of the negotiations in Rome it was agreed that

88 Sweden notes, while there is no distinction in the law, a distinction shall be made only if international customary law does not allow application to a non-international armed conflict or the crime is such that it can be committed only in an international armed conflict or during occupation; Regeringens proposition 2013/14:146, *supra* note 33, pp. 125–128.

89 One of the arguments made by Norway for this approach is the decision of the International Criminal Tribunal of the former Yugoslavia in the *Tadić* case. The government bill included the often cited quote in the case: "What is inhumane and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife", *see* O.t.prp.nr.8 (2007–2008), p. 88, and Höringsnotat, *supra* note 30, p. 42. The Swedish government bill also cited the case as illustrating the development of the law, *see* Regeringens proposition 2013/14:146, *supra* note 33, p. 127. *See* ICTY, *The Prosecutor* v. *Duško Tadić aka "Dule"*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, Case No. it-94-1-AR72, para. 119. For criticism of the approach of suppressing the dichotomy between norms of international armed conflict and non-international armed conflict, *see* C. Hellestveit, 'The Geneva Conventions and the dichotomy between international and non-international armed conflict: curse or blessing for the 'Geneva Co of humanity'?', in K.M. Larsen, C.G. Cooper, and G. Nystuen (eds.), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (Cambridge University Press, Cambridge, 2012) p. 86.

90 Some states supportive of the establishment of the ICC, and even some major NGOs, thought that the crime should not be included at all in the statute as it risked the credibility and operation of Court. Their concern was that the definition of the crime was too contentious, too political and would involve delicate questions of national security and defense, which should be left outside of the Court. The Court should rather focus on the other remaining crimes of genocide, war crimes and crimes against humanity, *see* C. Kress and L. Holtzendorff, 'The Kampala Compromise on the Crime of Aggression', 8 *Journal of International Criminal Justice* (2010) p. 1179.

aggression should be covered by the statute, but delegates were not able to agree on the definition of the crime or the relationship between the jurisdiction of the Court and the authority and mandate of the Security Council with respect to determining threats to peace and security under Chapter VII of the Charter of the United Nations. That task was deferred to the Review Conference in Kampala, where it was successfully brought to a conclusion with the adoption of amendments on aggression.[91]

The definition adopted reflects the international condemnation of the crime and the prohibition of the use of force as one of the key principle rules of international law, enshrined in Article 2, para 4, of the Charter of the United Nations. The state act of aggression is defined using the core element of the 1974 General Assembly definition of aggression (Article 8 *bis*). A threshold clause was added; the act of aggression must constitute "by its character, gravity and scale" a "manifest violation of the Charter of the United Nations".[92] The definition sets forth the criminal act of the individual and limits the criminal responsibility to leaders. The mechanism adopted for the exercise of the jurisdiction of the Court illustrates well the compromises that had to be made. Unlike the situation with the other crimes within the jurisdiction of the Court, jurisdiction here is narrowly limited to states parties and the act must both take place on state territory and be committed by a national of the state party. Furthermore, states parties can even opt out of the jurisdiction. Regarding the relationship to the Security Council, the Court is not dependent on a determination by the Security Council of an act of aggression committed by the state concerned, but a notification period is added. As was already provided in Article 16 of the Rome Statute, the Security Council can defer an investigation or prosecution for a period of 12 months. Thirty states need to ratify the amendments on the crime of aggression in order for it to take effect. However, exercise of jurisdiction is still subject to a decision to be taken after 1 January 2017 by the same majority of states parties as is required for adoption of an amendment to the Rome Statute.

91 Rome Statute of the International Criminal Court, Rome 17 July 1998, Amendments to the Rome Statute of the International Criminal Court, Kampala, 11 June 2010, Adoption of amendments on the crime of aggression, Reference: C.N.651.2010.TREATIES-8. On the history of the negotiations, see P. Wrange, *Aggressionsbrottet och Internationella brottmålsdomstolen* (Totalförsvarets folkrättsråd, Försvarsdepartementet, 2011).

92 *Handbook, Ratification and Implementation of the Kampala Amendments to the Rome Statute of the ICC: Crime of Aggression, War Crimes* (Liechtenstein Institute on Self-Determination, Woodrow Wilson School of Public and International Affairs, Princeton, 2012).

The divergence among states on crime of aggression is illustrated by the fact that the Nordic countries do not yet see eye to eye on the issue. Finland was keen from the outset to include the crime of aggression in the Rome Statute. During the negotiations in Rome, Denmark, Norway and Sweden all supported its inclusion, although their enthusiasm varied.[93] The subtle approach taken by Norway is well reflected in the personal view of Ambassador Rolf Fife of Norway, commenting that *jus ad bellum* should not be developed through the back door of international criminal law.[94] During the negotiations in Kampala the states seem to have had different view on some key issues.[95] The different path taken is also reflected in the ratification of the amendment and so far only Finland and Iceland of the Nordic countries are on board. On 30 December 2015, Finland ratified the amendments on the crime of aggression and at the same time implemented it in its domestic legislation. Iceland ratified the amendments on the crime of aggression on 17 June 2016.[96] Norway only ratified the Kampala amendment with respect to war crimes and not the

93 Norway favoured limited list of crimes, *see* Summary records of the plenary meetings, 2nd plenary meeting, U.N. Doc. A/conf.183/SR.2, para. 20. Norway appreciated the efforts made by Germany to include the crime, but had doubts if agreement could be reached on the definition of the crime and jurisdiction with respect to relation with the Security Council of the United Nations, *see* Summary records of the meetings of the Committee of the Whole, 6th meeting, U.N. Doc. A/CONF.183/C.1/SR.6, para. 33. Sweden favored the inclusion of the crime of aggression, provided that it was properly defined and treated in a way that it respected the role of the Security Council, Summary records of the plenary meetings, 2nd plenary meeting, U.N. Doc. A/CONF.183/SR.2, para. 60. Denmark was very supportive of the inclusion, stating that "it would be a most unfortunate signal to the world public if the primary crime of aggression could not be included in the Statute. The Charter of the United Nations was based on the need to save succeeding generations from the scourge of war. To claim that aggression could not be included in the Statute because it had not been defined was unacceptable", *see* Summary records of the meetings of the Committee of the Whole, 27th meeting, A/CONF.183/C.1/SR.27, para. 47.

94 R. Fife, 'Criminalizing Individuals for Acts of Aggression committed by States', in M. Bergsmo (ed), *Human Rights and Criminal Justice for the Downtrodden* (Martinus Nijholl Publishing, Leiden, 2003) pp. 53, 70–73; *see* also this concern he raised in Chatham House, Meeting Summary, The International Criminal Court and its Review Conference, 29 April 2010.

95 The permanent members of the Security Council insisted that the Court could not exercise its jurisdiction of the crime unless the Security Council had declared an aggression, cf. Article 39 of the Charter of the United Nations. Few states backed this position, but notable both Denmark and Norway, *see* Wrange, *supra* note 89, p. 28.

96 For the proposition for ratification, *see* Tillaga til þingsályktunar um fullgildingu breytinga á Rómarsamþykktinni um Alþjóðlega sakamáladómstólinn viðvíkjandi glæpum gegn friði, Þingskjal 1115–687. mál, Alþingi 145 löggjafarþing 2015–2016.

one on aggression. Its royal resolution on ratification notes that ratification of the later amendment will be considered when the jurisdiction of the Court has finally been decided in 2017.[97] Sweden does not foresee ratification in the near future. The 600-page Swedish bill from 2014 simply states that the ratification of the amendment with respect to aggression is under review by the ministry.[98] Similarly, Denmark has not begun on the process of ratification. At the time of writing, 30 states have ratified the amendment on the crime of aggression, including several European states such as Austria, Belgium, Croatia, Cyprus, Czech Republic, Estonia, Germany, Latvia, Liechtenstein, Luxembourg, Malta, Poland, Slovakia, Spain and Switzerland.[99]

In its implementation of provisions covering the crime of aggression, Finland followed the approach taken in Kampala. Its penal code now defines and criminalizes aggression (*cf.* Article 4a, Chapter 11, of the Finnish Penal Code). The definition of the crime is the same as in Article 8 *bis* of the Rome Statute. It defines the criminal act of the individual and limits criminal responsibility to leaders. The state act of aggression is defined using the core element of the 1974 General Assembly definition of aggression. A threshold clause is added, under which the act of aggression must constitute "by its character, gravity and scale" a "manifest violation of the Charter of the United Nations".[100] Iceland is following the same approach as Finland with respect to the implementation of provisions on the crime of aggression. As in Finland, the crime is defined exactly the same way as in the Rome Statute.

9 Entry into Force and the Question of Retroactive Applicability

One of the key questions that had to be decided in the new implementing legislations was the commencement of the application of the new provisions.

97 Kongelig resolusjon, Ratifikasjon af endring af 10. Juni 2010 i Artikkel 8 nr. 2 bokstav e) i Roma-vedtektene om den Internasjonale straffedomstol av 17. July 1998, 7 May, para. 3.

98 Regeringens proposition 2013/14:146, *supra* note 33, p. 54.

99 Numerous other states are in active process of ratification, *see* R.S. Clark, 'The Crime of Aggression', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (OUP, Oxford, 2015). The European Parliament has adopted a resolution on the crime of aggression in which they reiterate its full support for the International Criminal Court and call on member states to ratify the Kampala amendment with respect to the crime of aggression, and to swiftly align national legislation with the Kampala amendments definitions, European Parliament resolution of 17 July 2014 on the crime of aggression (2014/2724(rsp)), P8 TA(2014)0013.

100 *Handbook, Ratification and Implementation of the Kampala Amendments*, *supra* note 91.

For the two countries that did not have any prior legislation on the international crimes, Norway and Iceland, this was a particularly tricky question. Would crimes such as genocide and war crimes, committed prior to the commencement of the legislation, be prosecuted under the new legislation? Both states are parties to the Geneva Conventions and are accordingly obligated to investigate and prosecute the grave breaches of the conventions. Of course, as originally intended by the states, they could prosecute some crimes under the general provisions of their criminal codes, and Norway had also a provision in its Military Code covering some war crimes. However, both states became parties to the Rome Statute of the International Criminal Court prior to enactment of the new legislation and therefore the jurisdiction of the ICC was active prior to that date. Also, it was perhaps a matter of more practical concern for the states, that they could prosecute individuals who were already in their own countries, escaping justice elsewhere, and even the risk of becoming safe havens for such individuals, due to weak legislation.

The legislations in Sweden and Finland took effect from the day they were adopted. Crimes committed prior to the commencement of the new provisions are to be prosecuted under the older provisions on international crimes. In both countries, a new provision on a statute of limitation should apply retroactively, although it should not apply to actions which were already covered by the statute of limitation according to the older law.

The Norwegian implementing legislation of 2008 contained a provision on retroactive applicability, *cf*. Article 3, paragraph 2, provided that the act committed was criminal according to the criminal code at the time of commission and constituted genocide, crime against humanity or war crimes according to international law. However, the penalty applied could not exceed that provided for in the general penal code at the time of commission.[101] Interestingly, this retroactive application was not considered or proposed in the first draft bill. During the legislative process, however, several actors proposed such a retroactive application, including non-governmental organizations such as the Norwegian Center for Human Rights and Norwegian Red Cross, and governmental offices like the Ministry of Foreign Affairs, the Norwegian Prosecution Authority, the National Criminal Investigation Service (Kripos), and the National Police Authority. The key arguments for retroactive application were that these acts were international crimes at the times of commission. It could be expected that prosecutions and jurisdiction in Norway would primarily consist of cases covered by universal jurisdiction. For instance,

101 As an example it is illustrated that individuals participating in the genocide in Rwanda in 1994, will be prosecuted for genocide according to the new law, but the sentencing will follow the frame provided the general penal code on murder.

there were already dozens of war criminals from the Balkan war hiding in the country. It would not be consistent to prosecute such crimes as ordinary crimes in Norway, as they would be prosecuted as international crimes before International Criminal Tribunals for the former Yugoslavia, or under other national jurisdictions. According to legal analyses by the government, retroactive application would not be in violation of Article 97 of the Norwegian Constitution stipulating the principle of non-retroactivity.[102] A precedent from the Supreme Court was also considered to confirm this interpretation.[103] These were international crimes that Norway had long been under an obligation to prosecute, and they would otherwise have been prosecuted under general provisions of the penal code. To comply with the principle of legality the sentencing would follow parameters of relevant provisions of the general penal code, which would have applied to the conduct. This approach was also considered to be in accordance with the principle of legality and non-retroactivity as stipulated in Article 7 of the European Convention on Human rights and Article 15 of the Convention on Civil and Political Rights.

Under a legislative amendment in 2015 the retroactive application of the Norwegian law was abandoned.[104] The reason for this turnaround was a decision by the Supreme Court of Norway, which determined that the retroactivity of the law was in violation of Article 97 of the Norwegian Constitution.[105] The majority of the Court (11 judges against 6) considered that it was a violation of Article 97 of the Constitution to apply the new provisions on crimes against humanity and war crimes for conduct committed prior to the adoption of the law. According to this decision it would also be more onerous for the accused to be sentenced according to a provision describing conduct as genocide, crimes against humanity or a war crime, rather than under the general provision of the penal code.[106]

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102 O.t.prp.nr.8 (2007–2008), Om lov om endringer i straffeloven 20. mai 2005 nr. 28 mv. (skjerpende og formildende omstendigheter, folkemord, rikets selvstendighet, terrorhandlinger, ro, orden og sikkerhet, og offentlig myndighet), *supra* note 30, pp. 62–63.

103 *Klinge-saken*, Rt. 1946, p. 198.

104 LOV-2015-06-19-65. 19 June 2015.

105 Norges Høyestrett, 03.12.2010 i sak HR-2010-2057-P – Rt-2010-1445. The panel split 11–6. The case regarded prosecution of crimes committed in Bosnia-Hercegovina in 1992, prosecuted and sentenced as war crimes and crimes against humanity under the new provisions of Chapter 16 of the penal code of 2005.

106 Norges Høyestrett, 03.12.2010, HR-2010-2057-P – Rt-2010-1445, para. 106. For a critique of the judgment, *see* S. O´Connor, *War Crimes before the Norwegian Supreme Court: The Obligation to Prosecute and the Principle of Legality – An Incumbrance or Opportunity?* (Oxford Institute for Ethics, Law and Armed Conflict, 2013).

The Icelandic draft bill proposes retroactive application of the law. The legal arguments for such an effect are similar to those advanced in Norway. The offences in question could have been prosecuted under the provisions of the general penal code and were considered as international crimes at the time of commission. They constituted serious international crimes, as defined under the Genocide Convention, the Geneva Conventions and the Rome Statute, and their criminalization is foreseeable. For instance, Icelandic citizens can already be prosecuted for these crimes before international courts and various national jurisdictions. It is argued that this application of law would be in accordance with Article 69 of the Icelandic Constitution, which allows punishment for conduct if it is totally analogous to a criminal offence according to the law at the time when it was committed.[107] The application would be in accordance with Article 7 of the European Convention on Human Rights and Article 15 of the Convention on Civil and Political Rights. As in Norway, sentencing would follow the parameters of the provisions which would otherwise have been used.

10 Conclusion

The Nordic countries are keen supporters of the International Criminal Court and enforcement of international criminal law. Effective implementation is dependent on proper legislation at the national level, providing for the prosecution of serious crimes. While they were states parties to all major treaties on serious crimes prior to the commencement of the Rome Statute, the Nordic countries' legislation was fragmented, and in some cases not even in compliance with the international obligations undertaken to prosecute serious crimes. It is perhaps somewhat ironic, as the Rome Statute does not oblige its states parties to prosecute the crimes that lie within the jurisdiction of the Court, that its principle of complementarity has truly transformed legislation in the Nordic countries, as it has in many others. Today, it can be stated that the Nordic countries' legal frameworks give their national authorities the legal tools to fight impunity and to honour international commitments to do so.

The new legislations in the Nordic countries reflect a new approach to criminalization of serious crimes within the countries. The countries, apart from Denmark, now have in place comprehensive criminalization of serious crimes, whether in a separate law or a separate chapter in the domestic penal code.

107 In this sense the provision of the Icelandic Constitution is different from the Norwegian one.

Furthermore, the states chose to adopt much more clearly defined provisions than before, some even departing entirely from older provisions that relied on general references to violations of international law. Iceland and Norway abandoned their earlier approach of relying on general penal provisions. The Rome Statute and the jurisprudence of the ad hoc international criminal tribunals facilitated this development, providing more refined area of the law than before.

The Nordic states' legislations reveal how flexible their domestic systems need to be to be able to implement complex and fast-developing area of international law. Moving beyond a definition of adhering to a dualistic system, with their new implementing legislations the Nordic countries are embracing new international norms and principles into their domestic penal systems, inspired by the international criminal jurisdictions. In all systems, international terminology has been used, which calls for interpretation against other references than what would otherwise be used in the domestic system. Some provisions refer also to customary international law, reflecting how varied the relationship between international and domestic law can be in these countries.

This major undertaking within the Nordic countries contributes to a common position and strong footing in their shared international pledge for effective enforcement of international law. While remaining true to the Rome Statute in their implementing legislation, they all avoided the compromises made in Rome and strove to have their legislation reflect their international obligations and customary international law. Their broader provisions on weapons of mass destruction and child soldiers reflect that approach. And in some matters they pushed the boundaries of international law from the home front and facilitated progressive development of the law. The departure by the majority of the Nordic countries from the traditional distinction between law applicable in international armed conflict and in armed conflict that is not of international character is remarkable. In other matters, e.g. in defining what groups would be protected from the crime of genocide, they chose to remain mainstream. And the apparent hesitation of some of the Nordic countries to ratify the Kampala amendment with respect to the crime of aggression, the inclusion of which they supported in Rome, is also interesting.

The impact of the new legislations on serious crimes in the Nordic countries remains to be seen. Hopefully will the codification of the crimes at the national level have some deterrent effect. Whether the new legislations will enhance national investigation and prosecutions depends on various factors. Without doubt the relevant legal professions will need thorough education of this new domestic crimes, in order to be able to investigate them, and to successfully prosecute and adjudicate them. That expertise may also lead to more effective

collaboration and cooperation with other states exercising jurisdiction over serious crimes. States´ view on the need of the legislation may have changed in the fifteen years since the Rome Statute entered into force. Their concern to be able to exercise complementary jurisdiction of the Rome Statute has faded as the limited reach of the Court has dawned, it will only focus on few situations and will only focus on few primary perpetrators. At the same time, recent large-scale conflicts and atrocities have made enforcement by the states pertinent and will activate the jurisdiction of the Nordic states in various ways.

10

Enforcement of Decisions of International Courts at the National Level

THORDIS INGADOTTIR

I. Introduction

The international obligation to comply with judgments of international courts is rarely questioned and the compliance record with decisions of those tribunals is relatively good. In the instances of non-compliance, the matter can be brought to an enforcement mechanism at the international level, most often a political process, controlled by states parties to the treaty of the relevant tribunal. In all, the matter is being settled or enforced at the international level. With the development of international courts, the content and remedies of international judgments has changed.[1] Increasingly, decisions of international courts require implementation at the national level, and address not only interests of states but also of individuals. Indeed, today most decisions of international courts come from human rights tribunals, followed by decisions of international criminal tribunals. To some extent, traditional state-to-state courts are following a similar path. For instance, in recent years the International Court of Justice (ICJ) has issued a number of judgments requiring implementation at the national level, and some of them concerned major interests of individuals—even life or death.

This development has put pressure on compliance with decisions of international courts. As a response efforts have been made to strengthen the enforcement mechanism at the international level.[2] Furthermore, as illustrated by the ILDC reports, it can be ascertained that decisions of international courts are increasingly being enforced before domestic courts at the national level.[3] The enforcement has raised various issues, both regarding national and international law. For the purpose of this chapter, national courts have addressed key international law issues, such as the international obligation to comply with decisions of international courts, the possibility of direct effect of decisions of international courts at the national level, the scope of remedies international courts can provide, competing international obligations, and standing. This chapter will present and analyse some of this national jurisprudence. The chosen ILDC cases are enforcement of decisions of the ICJ, international human rights courts, and international criminal tribunals, presented in that order.

1 On the large and growing array of international courts see C P Romano, K J Alter, and Y Shany, 'Mapping International Adjudicative Bodies' in C P Romano, K J Alter, and Y Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2014).

2 See Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (adopted 13 May 2004, entered into force 1 June 2010) *CETS* No 194.

3 For the purposes of this chapter, enforcement of decisions of international courts at the national level refers to proceedings that are commenced before a domestic court in order to have an international judgment complied with.

II. International Court of Justice

Enforcement of decisions of the ICJ before national courts is rare.[4] Various reasons explain this. First of all, decisions of the ICJ are binding on states parties, cf Article 94(1) of the Charter of the United Nations (UN Charter), and the compliance record with decisions of the ICJ is good.[5] Secondly, in the occurrence of non-compliance the UN Charter sets up an enforcement mechanism at the international level via the Security Council, cf Article 94(2) of the UN Charter. Thirdly, parties to cases before the ICJ can only be states, cf Article 34(1) of the Statute of the ICJ, and due to sovereignty and political reality, states are not eager to commence a proceeding before a national court of another state. Finally, in light of carefully framed submissions, many decisions of the ICJ are purely declaratory, being only a milestone in ongoing negotiations between the parties to settle a dispute.

The three ILDC cases discussed below are examples of enforcement of decisions of the ICJ before domestic courts. One of the cases stems from the so-called consular relations cases before the ICJ,[6] which led to several decisions taken by national courts in the United States (US).[7] The consular relations cases before the ICJ all involved the breach of the US to fulfil her obligation under Article 36(1)(b) of the Vienna Convention on Consular Relations by not informing, without delay, foreign nationals of their rights to consular assistance in accordance with the convention, and depriving the relevant foreign state of the right to render diplomatic protection provided for in the convention.[8] In the case discussed, *Medellín v Texas*, the US Supreme Court analyses thoroughly the international obligations to comply with decisions of the ICJ, as well as self-executing character of ICJ decisions in US courts.[9] The analysis is valuable, as at this point in time the binding nature of ICJ orders indicating provisional measures had been confirmed by the ICJ, and final judgment in the case had been delivered.[10] The case also illustrates well the nature of some

4 The chapter is limited to cases of enforcement of decisions of the ICJ and does not include cases where national courts are interpreting decisions of the ICJ. For such an effect see discussion in S Ordonez and D Reilly, 'Effect of the Jurisprudence of the International Court of Justice on National Courts' in T M Franck and G H Fox (eds), *International Law Decisions in National Courts* (Brill 1996) 335, 359. Furthermore, the chapter does not include cases regarding Advisory Opinions of the ICJ; see, eg, *Mara'abe and ors v Prime Minister of Israel*, Original Petition, HCJ 7957/04: ILDC 157 (IL 2005); and *Marchiori v Environment Agency and ors*, Appeal judgment, (2002) EWCA Civ 03: ILDC 241 (UK 2002).

5 See C Schulte, *Compliance with Decisions of the International Court of Justice* (OUP 2004); B A Ajibola, 'Compliance with Judgments of the International Court of Justice' in M K Bulterman and M Kuijer (eds), *Compliance with Judgments of International Courts* (Martinus Nijhoff Publishers 1996).

6 *Vienna Convention on Consular Relations* (*Paraguay v United States of America*) (Provisional Measures, Order of 9 April 1998) [1998] ICJ Rep 248, *LaGrand* (*Germany v United States of America*) (Judgment) [2001] ICJ Rep 466, and *Avena and Other Mexican Nationals* (*Mexico v United States of America*) (Judgment) [2004] ICJ Rep 12.

7 Extensive commentaries have been made on these cases, eg, B Simma and C Hoppe, 'From LaGrand and Avena to Medellín: A Rocky Road Towards Implementation' (2005) 14 *Tulane Journal of International and Comparative Law* 7. Other national courts have also interpreted ICJ decisions in the consular relation cases; see, eg, Court of Appeal of Singapore (*Van v Public Prosecutor*, Appeal, (2004) SGCA 47: ILDC 88 (SG 2004)), and Federal Constitutional Court of Germany (*German Consular Notification Case*, Joint constitutional complaint, BVerfG, 2 BvR 2115/01: ILDC 668 (DE 2006)).

8 Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 18 March 1967) 596 UNTS 261. The jurisdiction of the ICJ in the consular relation cases was based on the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes (signed 24 April 1963, entered into force 19 March 1967) 596 UNTS 487, Article 1.

9 *Medellín v Texas*, Appeal judgment, Docket No 06-984, ILDC 947 (US 2008), 552 US 491 (2008), 128 S Ct 1346 (2008), 170 L Ed 2d 190 (2008), 76 USLW 4143 (2008), 21 Fla L Weekly Fed S 126 (2008), 2008-1 US Tax Cas (CCH) P50, 242, 25 March 2008, United States; Supreme Court [US]. On self-execution treaties in the US see T Buergenthal, *Self-Executing and non-self-executing treaties in national and international law* (Collected Courses of the Hague Academy of International Law, 1992, IV, 1993) 382.

10 For ILDC commentaries on the earlier cases see: *Breard v Greene*, Application for stay of execution and on writ of certiorari, 523 US 371, 118 S Ct 1352 (1998): ILDC 684 (US 1998), and *Germany and LaGrand v United States and Governor of Arizona*, Application for temporary restraining order or preliminary injunction and on motion for leave to file a bill of complaint, 526 US 111 (1999): ILDC 689 (US 1999).

of the cases before the ICJ, having individuals as major subjects of the decisions of the court. In the second case presented, *Re Member of Parliament*, a member of the Hungarian Parliament tried to enforce a decision of the ICJ before the Hungarian Constitutional Court.[11] Finally, in the last case, *Frascá v Germany*, the Court of Cassation dealt with the question of whether Italian courts could apply an earlier precedent in light of a judgment of the ICJ.[12] With respect to these cases, the discussion in this chapter will be limited to four aspects of enforcement of ICJ decisions: (1) the binding nature of Article 94 of the UN Charter; (2) enforceability of ICJ decisions before domestic courts; (3) remedies; and (4) standing.[13]

1. ILDC cases

Medellín v Texas, Appeal Judgment, Docket No 06-984, ILDC 947 (US 2008), 552 US 491 (2008), 128 S.Ct. 1346 (2008), 170 L.Ed 2d 190 (2008), 76 USLW 4143 (2008), 21 Fla. L. Weekly Fed S 126 (2008), 2008-1 US Tax Cas (CCH) P50, 242, 25th March 2008, United States; Supreme Court [US]

In *Avena and Other Mexican Nationals* the ICJ determined that the US was among others obligated to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of named individuals who had not been informed of their right of consular relations.[14] One of the Mexican individuals referred to in the judgment brought proceedings before US courts arguing that the ICJ decision was binding on US federal and state courts. The ICJ later dealt with the obligation in its decision in *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals* (*Mexico v United States of America*).[15]

> 19 No one disputes that the Avena decision—a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—constitutes an international law obligation on the part of the United States. But not all international law obligations automatically constitute binding federal law enforceable in United States courts. The question we confront here is whether the Avena judgment has automatic domestic legal effect such that the judgment of its own force applies in state and federal courts.
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> 20 This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law. … In sum, while treaties "may comprise international commitments … they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms."
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> 22 Medellin and his amici nonetheless contend that the Optional Protocol, United Nations Charter, and ICJ Statute supply the "relevant obligation" to give the Avena judgment binding effect in the domestic courts of the United States. Reply Brief for Petitioner 5–6. Because none of these treaty sources creates binding federal law in

11 *Re Member of Parliament, Individual constitutional complaint petition*, Decisions of the Constitutional Court Vol XII No 10 (31 October 2003) pp 1281–91; ILDC 601 (HU 2003).

12 *Frascà v Germany and Giachini (guardian of Priebke) and Italy (joining)*, Preliminary order on jurisdiction, No 4284/2013, ILDC 1998 (IT 2013), 21 February 2013, Italy [i].

13 The term 'direct enforceability' is used by the ICJ in its decision in *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals* (*Mexico v United States of America*) (Judgment) [2009] ICJ Rep 3, para 44. The ICJ also uses the term 'direct effect'.

14 *Avena and Other Mexican Nationals* (n 6) para 153(9) and (11).

15 *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals* (n 13).

the absence of implementing legislation, and because it is uncontested that no such legislation exists, we conclude that the Avena judgment is not automatically binding domestic law.

26 The obligation on the part of signatory nations to comply with ICJ judgments derives not from the Optional Protocol, but rather from Article 94 of the United Nations Charter—the provision that specifically addresses the effect of ICJ decisions. … The Executive Branch contends that the phrase "undertakes to comply" is not "an acknowledgement that an ICJ decision will have immediate legal effect in the courts of U. N. members," but rather "a commitment on the part of U. N. Members to take future action through their political branches to comply with an ICJ decision."

27 We agree with this construction of Article 94. The Article is not a directive to domestic courts. It does not provide that the United States "shall" or "must" comply with an ICJ decision, nor indicate that the Senate that ratified the U. N. Charter intended to vest ICJ decisions with immediate legal effect in domestic courts. Instead, "[t]he words of Article 94 … call upon governments to take certain action." … In other words, the U. N. Charter reads like "a compact between independent nations" that "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it."

28 The remainder of Article 94 confirms that the U. N. Charter does not contemplate the automatic enforceability of ICJ decisions in domestic courts. Article 94(2)—the enforcement provision—provides the sole remedy for noncompliance: referral to the United Nations Security Council by an aggrieved state.

29 The U. N. Charter's provision of an express diplomatic—that is, nonjudicial—remedy is itself evidence that ICJ judgments were not meant to be enforceable in domestic courts. … And even this "quintessentially international remed[y]," id., at 355, is not absolute. First, the Security Council must "dee[m] necessary" the issuance of a recommendation or measure to effectuate the judgment. Art. 94(2), 59 Stat. 1051. Second, as the President and Senate were undoubtedly aware in subscribing to the U. N. Charter and Optional Protocol, the United States retained the unqualified right to exercise its veto of any Security Council resolution.

31 If ICJ judgments were instead regarded as automatically enforceable domestic law, they would be immediately and directly binding on state and federal courts pursuant to the Supremacy Clause. Mexico or the ICJ would have no need to proceed to the Security Council to enforce the judgment in this case. Noncompliance with an ICJ judgment through exercise of the Security Council veto—always regarded as an option by the Executive and ratifying Senate during and after consideration of the U. N. Charter, Optional Protocol, and ICJ Statute—would no longer be a viable alternative. There would be nothing to veto. In light of the U. N. Charter's remedial scheme, there is no reason to believe that the President and Senate signed up for such a result.

32 In sum, Medellin's view that ICJ decisions are automatically enforceable as domestic law is fatally undermined by the enforcement structure established by Article 94. His construction would eliminate the option of noncompliance contemplated by Article 94(2), undermining the ability of the political branches to determine whether and how to comply with an ICJ judgment.

33 The ICJ Statute, incorporated into the U. N. Charter, provides further evidence that the ICJ's judgment in Avena does not automatically constitute federal law judicially enforceable in United States courts. Art. 59, 59 Stat. 1062. To begin with, the ICJ's "principal purpose" is said to be to "arbitrate particular disputes between national

governments." Sanchez-Llamas, supra, at 355 (citing 59 Stat. 1055). Accordingly, the ICJ can hear disputes only between nations, not individuals. Art. 34(1), 59 Stat. 1059 ("Only states [i.e., countries] may be parties in cases before the [ICJ]"). More important, Article 59 of the statute provides that "[t]he decision of the [ICJ] has no binding force except between the parties and in respect of that particular case." Id., at 1062 (emphasis added). The dissent does not explain how Medellin, an individual, can be a party to the ICJ proceeding.

34 Medellin argues that because the Avena case involves him, it is clear that he—and the 50 other Mexican nationals named in the Avena decision—should be regarded as parties to the Avena judgment. Brief for Petitioner 21–22. But cases before the ICJ are often precipitated by disputes involving particular persons or entities, disputes that a nation elects to take up as its own. . . . That has never been understood to alter the express and established rules that only nation-states may be parties before the ICJ, Art. 34, 59 Stat. 1059, and—contrary to the position of the dissent, post, at 23—that ICJ judgments are binding only between those parties, Art. 59, id., at 1062.

43 Our conclusion that Avena does not by itself constitute binding federal law is confirmed by the "postratification understanding" of signatory nations. See Zicherman, 516 U. S., at 226. There are currently 47 nations that are parties to the Optional Protocol and 171 nations that are parties to the Vienna Convention. Yet neither Medellin nor his amici have identified a single nation that treats ICJ judgments as binding in domestic courts.

45 Moreover, the consequences of Medellin's argument give pause. An ICJ judgment, the argument goes, is not only binding domestic law but is also unassailable. As a result, neither Texas nor this Court may look behind a judgment and quarrel with its reasoning or result. (We already know, from Sanchez-Llamas, that this Court disagrees with both the reasoning and result in Avena.) Medellin's interpretation would allow ICJ judgments to override otherwise binding state law; there is nothing in his logic that would exempt contrary federal law from the same fate. See, e.g., Cook v. United States, 288 U. S. 102, 119 (1933) (later-in-time self-executing treaty supersedes a federal statue if there is a conflict). And there is nothing to prevent the ICJ from ordering state courts to annul criminal convictions and sentences, for any reason deemed sufficient by the ICJ. Indeed, that is precisely the relief Mexico requested. Avena, 2004 I. C. J., at 58–59.

51 The dissent worries that our decision casts doubt on some 70-odd treaties under which the United States has agreed to submit disputes to the ICJ according to "roughly similar" provisions. See post, at 4, 16–17. Again, under our established precedent, some treaties are self-executing and some are not, depending on the treaty. That the judgment of an international tribunal might not automatically become domestic law hardly means the underlying treaty is "useless." See post, at 17; cf. post, at 11 (describing the British system in which treaties "virtually always requir[e] parliamentary legislation"). Such judgments would still constitute international obligations, the proper subject of political and diplomatic negotiations. See Head Money Cases, 112 U. S., at 598. And Congress could elect to give them wholesale effect (rather than the judgment-by-judgment approach hypothesized by the dissent, post, at 24) through implementing legislation, as it regularly has.

53 In addition, Congress is up to the task of implementing non-self-executing treaties, even those involving complex commercial disputes. Cf. post, at 24 (Breyer, J., dissenting). The judgments of a number of international tribunals enjoy a different status because of implementing legislation enacted by Congress. . . . Such language demonstrates that

> Congress knows how to accord domestic effect to international obligations when it desires such a result.
>
> 54 Further, Medellin frames his argument as though giving the Avena judgment binding effect in domestic courts simply conforms to the proposition that domestic courts generally give effect to foreign judgments. But Medellin does not ask us to enforce a foreign-court judgment settling a typical commercial or property dispute. … Rather, Medellin argues that the Avena judgment has the effect of enjoining the operation of state law. What is more, on Medellin's view, the judgment would force the State to take action to "review and reconside[r]" his case. The general rule, however, is that judgments of foreign courts awarding injunctive relief, even as to private parties, let alone sovereign States, "are not generally entitled to enforcement." See 2 Restatement §481, Comment b, at 595.

Member of Parliament, Re, Individual constitutional complaint petition, Decisions of the Constitutional Court Vol XII No 10 [31 October 2003] pp 1281-1291, ILDC 601 (HU 2003), 7th October 2003, Hungary; Constitutional Court

A member of the Hungarian parliament asked the Constitutional Court to declare that the Parliament and the Government had failed to fulfil their legislative tasks arising from the *Gabčíkovo-Nagymaros Project* judgment of the ICJ.[16] In the judgment, the ICJ found that Hungary was not entitled to suspend a treaty and abandon works on the Nagymaros and Gabčíkovo projects, and found among others that Hungary and Slovakia must negotiate in good faith, and must take all necessary measures to ensure the achievement of the objectives of the treaty. Negotiations failed and the case went back to the ICJ.[17] A member of the Hungarian parliament asked the Constitutional Court of Hungary to declare that the Gabcíkovo-Nagymaros problem should have been solved by the legislative organs and the government as required by the ICJ's judgment.

> 3.3. According to the opinion of the Constitutional Court the judgement of the International Court of Justice in the Hague—when exercising the rules of jurisdiction set forth in the Act on the Constitutional Court (Abtv.)—is not considered a generally recognized principle of international law, neither such an obligation of international law as the obligations contained in international treaties that have become national law. Even though the proceedings of the International Court are based on the consent of the countries involved acknowledging the jurisdiction, as contained in an international treaty, the judgement is not a norm, not a contract, but the resolution of a specific dispute, even if some of its statements gain theoretical content or the value of a precedent.
>
> The International Court has no jurisdiction to annul an internal legal norm, to oblige the participating states to create law. The International Court cannot oblige the state to create law even if the state can only fulfil the obligation contained in the judgement by creating law.
>
> Considering the above the Constitutional Court rejected the petition in this respect due to lack of jurisdiction.

Frascà v Germany and Giachini (guardian of Priebke) and Italy (joining), Preliminary order on jurisdiction, No 4284/2013, ILDC 1998 (IT 2013), 21st February 2013, Italy

The issue in this case was whether Italian courts could apply an earlier precedent on the existence of an exception to state immunity in light of the judgment of the ICJ in *Jurisdictional Immunities*

16 *Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*) (Judgment) [1997] ICJ Rep 7.

17 *Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*) Slovakia requests an additional Judgment, Communiqué No 98/28, 3 September 1998.

of the State, Germany v Italy.[18] In its judgment, the ICJ considered that such an exception did not exist in international law and declared that Italy must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that decisions of its courts infringing the immunity which Germany enjoyed under international law ceased to have effect.

> H1 Germany was entitled to immunity from jurisdiction for acta iure imperii, regardless of the heinous character of the acts complained of by the plaintiff. As the First Criminal Section of the Court of Cassation had already pointed out in Criminal Proceedings against Albers and ors, Final appeal judgment, No 32139/2012; ILDC 1921 (IT 2012); 9 August 2012 ('Albers'), the Ferrini precedent could not be further applied, since it remained isolated in the international landscape and had been expressly disavowed by the ICJ in Jurisdictional Immunities of the State. (paragraph 4)
>
> H2 This approach had been affirmed by the Italian Parliament with the enactment of Law No 5/2013, 14 January 2013 (Italy) ('Law No 5/2013'). Article 3(1) of Law No 5/2013 compelled Italian courts to declare a lack of jurisdiction whenever 'the International Court of Justice, in a judgment settling a dispute in which Italy is a party, excluded the possibility of subjecting a specific conduct of another State to civil jurisdiction'. (paragraph 5)

2. Commentary

(a) The obligation to comply with ICJ decisions—Article 94 of the Charter of the United Nations

According to Article 94 of the UN Charter, each member of the United Nations undertakes to comply with the decisions of the ICJ in any case to which it is a party. The obligation is a fundamental principle of the law governing litigation before the court. Furthermore, Article 59 of the statute of the court stipulates that the decision of the court has no binding force except between the parties and in respect of that particular case. In *Medellín v Texas* the US Supreme Court firmly stipulated the state's international obligation to comply with decisions of the ICJ. Very different from the US Supreme Court, the Court of Cassation in Italy chose to remain silent on the binding nature of decisions of the ICJ. In its reference to the Italian legislation, excluding Italian courts' jurisdiction based on the decision of the ICJ in *Jurisdictional Immunities of the State*, the Court of Cassation analyses the legislation more as a response to development of customary law, or lack thereof, rather than a response to Italy's international obligation to comply with the decision of the ICJ.

While the US Supreme Court addressed extensively in its decision the international obligation of the US to comply with decisions of the ICJ, it did not seek to interpret domestic law in conformity with that international obligation, nor did it mention the legal consequences of its decision to breach the international obligation.[19] No comments are made on the fundamental principle of international law that a state cannot invoke a provision of its internal law as justification for its failure to perform a treaty, and that conduct of national courts is attributable to a state and can therefore entail the international responsibility of the relevant state.[20]

18 *Jurisdictional Immunities of the State* (*Germany v Italy: Greece intervening*) (Judgment) [2012] ICJ Rep 99.

19 On such interpretation in the US see Third Restatement of the Law of the Foreign Relations Law of the US (1990), 62–69; M N Shaw, *International Law* (6th edn, CUP 2008) 164–65.

20 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Article 27; ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' UN Doc A/56/10, Article 4. Mr Medellín was executed without being afforded the review and reconsideration provided for by paras 138 to 141 of the judgment in *Avena and Other Mexican Nationals*, contrary to what was directed by ICJ in its Order indicating provisional measures of 16 July 2008. The ICJ found that the US did not discharge its obligation under the Court's Order, *Request for Interpretation of the*

Article 94(2) of the UN Charter stipulates the competence and action of the Security Council in the case of non-compliance with judgments of the ICJ. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the court, the aggrieved state may have recourse to the Security Council, 'which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment'. The US Supreme Court views unhesitatingly that the US has the right to use its veto right regarding such enforcement by the Security Council and even considers that this right was a fundamental factor for the state's acceptance of the system, and therefore a condition for US ratification of the UN Charter itself. The US Supreme Court presumption is interesting as the application of veto by a complying state has been questioned in the past, and little practice exists on the matter.[21] The answer to the question depends on the interpretation of Article 27 of the UN Charter, ie whether the matter is a procedural or substantive one. The little practice that exists endorses that the matter is a substantive one and therefor a veto is applicable.[22] That has also been the prevailing view among scholars, and now the US Supreme Court has joined that school of thought.[23]

The US Supreme Court considers international judgments, such as those of the ICJ, being 'the proper subject of political and diplomatic negotiations'.[24] Correctly, in the majority of cases compliance is worked out via diplomatic channels. However, when it fails, attempts have been made to enforce compliance before domestic courts, such as happened in the *Gabčíkovo-Nagymaros Project*. But even when diplomatic negotiations succeed constitutional competences can prevent compliance. Following the judgment of the ICJ in *Avena and Other Mexican Nationals* the US president took measures and called for compliance with the judgment. Those measures did not have any impact on the US Supreme Court´s interpretation of the enforceability of the ICJ decisions at the national level—as it construed the president's memorandum not as binding law.[25] The US Supreme Court´s view is in line with the understanding that internal 'organs are not directly obliged by virtue of the judgment unless a direct obligation is provided for in the constitutional law of the state concerned'.[26] The ICJ has partly subscribed to this reasoning, as it stated in the *LaGrand* case that the 'order did not require the United States to exercise powers it did not have', and in its analysis of compliance with the order it considered more what the state could have done more, rather than stipulating an obligation of result.[27]

Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (n 13) paras 53 and 61. At the same time, the Court found that Article 60 of the Statute of the Court did not allow it to consider possible violations of the judgment, which it was called upon to interpret: ibid para 56.

21 K Oellers-Frahm, 'Article 94' in B Simma, D E Khan, G Nolte, and A Paulus (eds), *The Charter of the United Nations, A Commentary* (3rd edn, OUP 2012) 1957, 1970.

22 In 1986, when the Security Council voted on a draft resolution calling for full and immediate compliance with the judgment of the ICJ in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, a negative vote of the United States prevented a resolution from being taken, UNSC Draft Res (31 July 1986) UN Doc S/18250.

23 On 28 March 2014, Mexico sent a letter to the Security Council bringing to the attention of the Council the fact that the US had not complied with a judgment of the Court in the *Avena* Case between the two countries. The Council did not consider the letter or take any action; Security Council Report, 'The Rule of Law: Can the Security Council Make Better Use of the International Court of Justice?' *Security Council Report*, 20 December 2016, 6 http://www.securitycouncilreport.org/research-reports/ (last accessed 31 January 2018).

24 *Medellín v Texas* (n 9) para 51 see also *Breard v Greene* (n 10) para 11.

25 On particular weight given to views of executive branch in the US see Restatement of the Law Third the foreign relations law of the United States (1990) 59.

26 H Mosler, 'Article 94' in B Simma (ed), *The Charter of the United Nations, A Commentary* (2nd edn, OUP 2002) 1005, and Oellers-Frahm (n 21) 1962.

27 *LaGrand* (n 6) paras 110–15.

(b) Enforceability of ICJ Decisions before domestic courts—direct effect

In *Medellín v Texas* the US Supreme Court analyses thoroughly the self-executing character of ICJ decisions. The Constitutional Court of Hungary approaches the issue of direct enforceability in a very different manner in *Re Member of Parliament*. The former considers that international judgments can have direct enforceability at the domestic level, given that they were meant to be self-executing or have been made enforceable with implementing legislation. The Constitutional Court of Hungary simply excludes the possibility of decisions of the ICJ to become part of domestic law at all. According to the Constitutional Court of Hungary, decisions of the ICJ can never be customary law or a treaty which has been given the status of national law by an act of parliament. Differently, in *Medellín v Texas* it was uncontested that there had not been implemented a national legislation giving ICJ decisions the status of national law, but the possibility of such a legislation in the future was not excluded by the US Supreme Court, which cited a number of US domestic legislation giving decisions of international courts such a status.[28]

In *Medellín v Texas* the US Supreme Court built its decision on the US distinction between self-executing and non-self-executing treaties, the former being able to operate automatically at the domestic level as opposed to the latter. For this purpose it *inter alia* analysed the wording and purpose of Article 94, the relevance of the enforcement mechanism set up via the Security Council, the intent of the drafters of the UN Charter, and then the intent of the US at the time of ratification, concluding that the Article was not meant to be self-executing. While the analysis is based on principles of US domestic law, its methodology and conclusion may be of relevance for other monist states that have to make this distinction when called upon to apply international agreements (whether they use the term self-executing treaty or not),[29] and for dualist states that need to consider implementing legislation. And from the viewpoint of international law, international courts need at times to consider whether treaties were meant to be directly enforceable or not.[30] In *Jurisdiction of the Court of Danzig*, the Permanent Court of Justice (PCIJ) concluded that '[i]t cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts'.[31] Similarly, in articulating its doctrine of direct effect, the European Court of Justice in *Van Gend en Loos* noted that 'to ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme, and the wording of those provisions', concluding that the Treaty on establishing the EEC created rights having direct effect and creating individual rights which national courts must protect.[32] The ICJ had the opportunity to address the issue of direct effect in its decision in *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals*. The Court referred to an obligation of result rather than an obligation on the US to give direct enforceability to its decision. The Court also refers to the possibility of domestic law to give its decisions such an effect:

> The *Avena* Judgment nowhere lays down or implies that the courts in the United States are required to give direct effect to paragraph 153(9). The obligation laid down

28 *Medellín v Texas* (n 9) para 51.

29 See discussion by Buergenthal on that the US distinction between self-executing and non-self-executing treaties is not unique to the US, and that the courts of most monist states also apply this distinction; Buergenthal (n 9) 382.

30 In his thorough analysis of self-executing and non-self-executing treaties in national law and international law, Buergenthal concludes that international courts are in general much more reluctant to conclude that a treaty provision is directly applicable than are domestic courts in holding it to be self-executing; Buergenthal (n 9) 340.

31 PCIJ, Ser B, No 15, at 17–18.

32 Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, 12. On this landmark decision see J Weiler, 'The Community System: the Dual Character of Supranationalism' (1981) I *Yearbook of European Law* 267, 274.

> in that paragraph is indeed an obligation of result which clearly must be performed unconditionally; non-performance of it constitutes internationally wrongful conduct. However, the Judgment leaves it to the United States to choose the means of implementation [. . .] Nor moreover does the *Avena* Judgment prevent direct enforceability of the obligation in question, if such an effect is permitted by domestic law.[33]

This arm's length approach and an argued lack of requirement on states by international law to allow their courts to apply international law directly have been commented on as 'perhaps the single greatest limitation of the role of national courts as a systemic force in the protection of the international rule of law'.[34]

(c) Remedies

Both the US Supreme Court and the Constitutional Court of Hungary considered that they have large discretion on how to implement remedial awards by the ICJ. The former court in *Medellín v Texas* notes that it is recognized in international law that implementation of ICJ judgments is left to states.[35] The Constitutional Court of Hungary goes further: 'The International Court of Justice has no jurisdiction to annul an internal legal norm, to oblige the participating states to create law. The International Court cannot oblige the state to create law even if the state can only fulfill the obligation contained in the judgement by creating law'.[36] These views are in line with the position that state sovereignty precludes any specific directions given by international courts on how a state party should implement a decision against it at the national level.[37] This is to some extent in line with practice at the ICJ. As discussed earlier, in its decision in *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals* the ICJ gave the US flexibility on how to implement its judgment at the national level. State practice has largely followed this school of thinking, and hesitance by litigants to demand specific measures can be ascertained in some cases.[38] However, the ICJ made clear in *Avena and Other Mexican Nationals* that depending on the subject-matter of a dispute, it could make remedies of this kind, citing the example in a cancellation of arrest warrant in *Arrest Warrant of 11 April 2000*.[39] And there are several recent ICJ decisions which are quite specific on performance, despite having to be carried out by 'means of own choosing'. There is *de facto* not much room for any discretion in ICJ orders of stay of execution in *LaGrand* and *Avena and Other Mexican Nationals*,[40] transfer of individuals to International Criminal Tribunal for the former Yugoslavia (ICTY), and cooperation with that tribunal in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*,[41] prosecution of a named individual in *Questions relating to the Obligation to Prosecute or Extradite*,[42] and ceasing of effect of decisions of Italian courts which infringe the immunity of the Federal Republic of Germany in

33 *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals* (n 13) 44.

34 A Nollkaemper, *National Courts and the International Rule of Law* (OUP 2011) 126.

35 *Medellín v Texas* (n 9) paras 45, 51; *Breard v Greene* (n 10) para 6.

36 *Re Member of Parliament* (n 11) para 3.3.

37 See C Brown, *A Common Law of International Adjudication* (OUP 2007) 209–16; C Gray, *Judicial Remedies in International Law* (OUP 1987) 98; M N Shaw, 'A Practical Look at the International Court of Justice' in M D Evans (ed), *Remedies in International Law: The Institutional Dilemma* (Hart Publishing 1998') 3–16.

38 T Ingadottir, 'The Role of the International Court of Justice in the Enforcement of the Obligation of States to Investigate and Prosecute Serious Crimes at the National Level' (2014) 47(2) *Israel Law Review* 285, 291–93.

39 *Avena and Other Mexican Nationals* (n 6) para 124.

40 *LaGrand* (n 6) para 59.

41 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*) (Merits) [2007] ICJ Rep 43, para 471.

42 *Questions Relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal*) (Judgment) [2012] ICJ Rep 442, para 122.

Jurisdictional Immunities of the State.[43] And states have complied with the above remedies, such as the US with respect to *LaGrand* and *Avena and Other Mexican Nationals*,[44] Belgium with respect to *Arrest Warrant of 11 April 2000*,[45] and Italy with respect to *Jurisdictional Immunities of the State*.[46] Certainly, the ICJ is becoming bolder in awarding remedies, while it can be argued that it has still not made full use of them as set out in Draft Articles on State Responsibility.[47]

(d) Standing

The *Medellín v Texas* case illustrates well the changing nature of some of the cases before the ICJ, having individuals as major subjects of its decisions, and how that affects enforcement at the national level. Medellín argued that because the *Avena and Other Mexican Nationals* judgment involved him, he should be regarded as a party to the ICJ judgment, capable of enforcing it before the US courts. The US Supreme Court rejected this argument by referring to Article 59 of the Statute of the ICJ, stipulating that the court´s decisions are only binding on the parties to the case. Furthermore, the Supreme Court noted that '[t]he dissent does not explain how Medellín, an individual, can be a party to the ICJ proceedings'.[48] Citing cases before the ICJ regarding diplomatic protection, the Supreme Court continued that '[t]hat has never been understood to alter the express and established rules that only nation-states may be parties before the ICJ'.[49] Similar reasoning was held by the US Court of Appeals for the District of Columbia Circuit in *The Committee of United States Citizens Living in Nicaragua et al, v Reagan et al*.[50] According to the Appellate Court in that case '[n]either individuals nor organizations have a cause of action in an American Court to enforce I.C.J. judgments'.[51]

Indisputably, individuals and legal entities are not parties to a case before the ICJ, cf Article 34(1) of the Statute of the ICJ. Also, in the instances where the enforcement mechanism of Article 94 has been used it has been states that have commenced that process before the Security Council, not individuals or legal entities. And as the US Supreme Court stated, a number of ICJ decisions stem from diplomatic protection, and that does not change who are parties to the case before the ICJ. However, while parties to the cases before the ICJ are states, the cases before

43 *Jurisdictional Immunities of the State* (n 18) para 139(4).

44 *LaGrand* (n 6) para 29; *Avena and Other Mexican Nationals* (n 6) para 59.

45 *Arrest Warrant of 11 April 2000* (*Congo v Belgium*) (Judgment) [2002] ICJ Rep 3. On 15 February 2002, the day after the ICJ delivered its findings in the case, the international arrest warrant for the former Congolese Democratic Republic of Congo foreign minister was withdrawn after consultations between the examining magistrate and Brussels crown prosecutor see discussion in Schulte (n 5) 270.

46 See Law No. 5/2013, 14 January 2013, compelling Italian courts to declare a lack of jurisdiction whenever the International Court of Justice, in a judgment settling a dispute in which Italy is a party, excluded the possibility of subjecting a specific conduct of another state to civil jurisdiction.

47 On the remedies of the International Court of Justice see R Higgins, 'Remedies and the International Court of Justice: An Introduction' in M Evans (ed), *Remedies in International Law: The Institutional Dilemma* (Hart Publishing 1998); C Gray, 'Remedies' in C Romano, K J Alter, and Y Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2014) 875–83. For a criticism that ICJ is not making full use of ILC's Draft Articles on State Responsibility see S Villalpando, 'Editorial: On the International Court of Justice and the Determination of the Rules of Law' (2013) 26 *Leiden Journal of International Law* 243, 250.

48 *Medellín v Texas* (n 9) para 33.

49 ibid, para 34.

50 859 F 2d 929 (DC Cir 1988). The case was an attempt to enforce the ICJ's decision in *Military and Paramilitary Activities in and against Nicaragua* before the US domestic court, in which the US was to stop activities found unlawful in the ICJ decision, including funding for the Contras, and to negotiate a payment of damages to Nicaragua; see *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) (Merits) [1986] ICJ Rep 14, paras 292 (12) and 292 (13). Since the ICJ decision and prior to the judgment of the appellate court the US Congress had approved continued funding for the Contras, and in addition, the US had used its veto to block consideration of a resolution of the Security Council concerning enforcement of the ICJ decision, cf Article 94(2).

51 859 F 2d 929 (DC Cir 1988) 934.

the court increasingly deal with individual's rights and obligations under international law. In *LaGrand* and *Avena and Other Mexican Nationals* the ICJ concluded that Article 36(1) of the Vienna Convention created not only a state´s right but also an individual right, rights which the US had violated.[52] Furthermore, this 'interdependence of the rights of the State and of individual rights' led the ICJ to conclude that the duty to exhaust local remedies, which applies to cases of diplomatic protection, did not apply.[53] Furthermore, in *Avena and Other Mexican Nationals*, the ICJ considers remedies both with regard to address the injury done to Mexico and as well its nationals.[54] Thus, the cases became more than one of these 'traditional' diplomatic protection cases listed by the US Supreme Court. Similarly, in its advisory judgment from 2012, the ICJ gives great weight to rights of individuals, having an effect on its consideration of the court´s discretion to decide whether it should give an opinion and on the manner of later proceedings before the court.[55]

While individuals do not have standing before the ICJ, the above cases illustrate how the fast evolving position of the individual in international law is having an impact on the jurisdiction of the court, admissibility of cases before it, its findings and remedial awards. 'While the Court is not in a position to reform this system', in some cases, the Court is attempting to ensure the protection of rights of individuals and mitigate their lack of standing before the Court.[56] In doing so, the court has made attempt to keep pace with established rights of individuals in international law, as well as to contribute to development of the law.[57] Inevitably, this development at the Court and its findings of violations of rights of individuals has had an impact on enforcement before domestic courts, although so far without much success.

III. International Criminal Tribunals

Four of the six cases discussed in this chapter relate to enforcement of arrest warrants and requests for a transfer from two ad hoc criminal tribunals of the United Nations (UN)—the ICTY and the International Criminal Tribunal for Rwanda (ICTR). In these cases, the decision on transfer by a national judicial authority is challenged and appealed by the defendant. In the fifth case the failure of the government of South Africa to arrest the president of Sudan, in accordance with an arrest warrant issued by the International Criminal Court (ICC), gave rise to the litigation. In the last case, the constitutional validity of a degree on cooperation with the ICTY, issued by the executive branch, is reviewed by the Serbian Supreme Court.

The legal framework of the duty of states to enforce decisions of the ICTY and ICTR is strong, both from the international and the domestic point of view. Both tribunals were established by the Security Council of the UN, cf Article 41 of the UN Charter.[58] Statutes of both tribunals, which were annexed to relevant decisions of the Security Council, contain explicit provisions of the duty of states to cooperate with the tribunals (Articles 7 and 29 of the Statute of the ICTY and Articles 8 and 28 of the Statute of the ICTR), and the Security Council has also

52 *LaGrand* (n 6) para 77; *Avena and Other Mexican Nationals* (n 6) para 40. This reading by the Court of Article 36 of the Vienna Convention on Consular Relations has not been followed by courts in the US; see Simma and Hoppe (n 7) 29–30.

53 *Avena and Other Mexican Nationals* (n 6) para 40.

54 ibid, paras 129 and 140.

55 *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a complaint filed against the International Fund for Agricultural Development* (Advisory Opinion) [2012] ICJ Rep 10, para 44.

56 ibid.

57 See, eg, Draft Articles on Diplomatic Protection leave open the question of whether the state exercising diplomatic protection does so in its own right or that of its national, and the draft articles also recommend that the state should give due consideration to the possibility of exercising diplomatic protection and should also transfers to the injured person any compensation obtained; ILC, 'Draft Articles on Diplomatic Protection, with commentaries' (2006) UN Doc A/61/10, Article 1(5) and Article 19.

58 UNSC Res 827 (25 May 1993) UN Doc S/RES/827; UNSC Res 955 (8 November 1994) UN Doc S/RES/955.

called on states to cooperate with the tribunals in accordance with the statutes.[59] Furthermore, citing these provisions, the tribunals' rules of procedure and evidence expressly stipulate that the obligations of the state will prevail over any legal impediment to the surrender or transfer of the accused to the tribunal which may exist under the national law or extradition treaties of the state concerned.[60]

As to the ICC, according to Part 9 of the Rome Statute of the International Criminal Court, states parties shall cooperate fully with the court in its investigation and prosecution of crimes within the jurisdiction of the court. According to Article 98, the court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person of a third state, unless the court can first obtain the cooperation of that third state for a waiver of immunity.

1. ILDC cases

Croatia v N-T, Appeal Judgment, Case No IKž 690/1999-4, ILDC 384 (HR 1999), 13th October 1999, Croatia; Supreme Court

N-T was detained and prosecuted before the county court in Zagreb. The ICTY requested that Croatia would surrender N-T to face charges brought against him there. The county court´s decision on the surrender of N-T to the ICTY was appealed to the Supreme Court of Croatia. Among N-T's arguments was that, owing to his nationality, he would not face a fair proceeding before the tribunal. The Constitutional Act on the Cooperation of Croatia with the International Criminal Tribunal was adopted by the Croatian Parliament in 1996 as a legal means for regulating and enabling cooperation with the ICTY. The Act had supremacy over ordinary parliamentary legislation.

> 9. … According to this provision, the chamber of the County Court issued a decision complying with the request for transfer as it established the identity of the person whose transfer was requested (which is not disputable) and that the crimes in question were those over which the International Criminal Tribunal had jurisdiction. The crimes of which M.N. was accused are expressly specified in the provisions of the Statute (Articles 2, 3 and 5). Consequently, the jurisdiction of the International Criminal Tribunal for these crimes is indisputable.
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> 11. The provisions of the Statute of the International Criminal Tribunal (Articles 7, 29) and the Rules of Procedure and Evidence (Articles 8–13, 58) refer to the primacy of the jurisdiction of the International Criminal Tribunal over national jurisdiction. Rule 58 of the Rules of Procedure and Evidence expressly states that the obligations of the State concerned pursuant to Article 29 of the Statute will prevail over any legal impediment to the transfer of the accused to the Tribunal which may exist under the national law of the State concerned.
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> 18. The Constitutional Law has been part of the internal legal order of the Republic of Croatia since its adoption (Article 134 of the Constitution of the Republic of Croatia) and, consequently, so have the Statute and Rules of Procedure and Evidence of the International Criminal Tribunal. The provisions of Article 29 of the Statute of the International Criminal Tribunal clearly lay down the obligation of the Republic of Croatia to co-operate with the International Criminal Tribunal and specify that the

59 See, eg, UNSC Res 827 (25 May 1993) UN Doc S/RES/827, para 4.

60 Rule 58 of the ICTY Rules of Procedure and Evidence (adopted 11 February 1994, as amended 10 July 2015) UN Doc IT/32/Rev.50; rule 58 of the ICTR Rules of Procedure and Evidence (adopted 29 June 1995, as amended 13 May 2015).

Tribunal's request for legal assistance must be complied with without delay, which also definitely means the transfer of the accused to the Tribunal. The transfer of the accused to the International Criminal Tribunal upon the execution of its warrant should also be regarded as the implementation of the coercive measures referred to in Article 91 (Chapter VII) of the Charter of the United Nations.

19. The fact that the Republic of Croatia is fulfilling its obligations towards the International Criminal Tribunal—even though the indictment brought by the International Criminal Tribunal mentions the Croatian Army and even the Government of the Republic of Croatia in an extremely negative context arbitrarily and without any arguments—clearly shows that Croatia observes and dutifully carries out its obligations towards the international community assumed under the Constitutional Law on Co-operation with the International Criminal Tribunal.

International Arrest Warrant ('Lukic'), Re, International Criminal Tribunal for the Former Yugoslavia v Lukic (Milan), Decision on arrest, surrender, and extradition, Case No 11807/05, ILDC 1083 (AR 2006), 10th January 2006, Argentina

ML was detained in Argentina pursuant to a warrant of arrest and surrender issued by the ICTY. The following day, Argentina received a request for extradition of ML from Serbia and Montenegro. Argentina had not enacted any law implementing the ICTY statute or ICTY rules into the domestic legal order. Domestic Law No 24767 regulates mutual assistance in criminal matters between Argentina and requesting states in the absence of an applicable treaty. The case was before the National Court on Federal Criminal and Correctional Matters No 8.

51. In that sense it must be stated that in accordance with what was decided in the context of the issue of lack of jurisdiction as formulated in the pleadings, the rules applicable to the surrender application shall be those of international law, including Resolution no. 827 of the Security Council of the United Nations and the Rules on Procedure and Evidence of the ICTY. In addition, the International Cooperation in Criminal Matters Act 24,767 may be applied at a supplementary level to areas that are not covered by the above provisions.

52. Thus, national legislation serves as a support mechanism for checking the requirements an application must contain, as in this case, and also the rights of the defendant and the powers of this court to establish certain relief measures, without losing sight of the guiding principle that favours the overriding interest of the international community which our country is subject to by virtue of the fact that it is part of that community.

53. Following the proposed analysis, and as regards the offences for which the ICTY is bringing charges against Milan Lukic, it should be stated that there is no doubt that he must face punishment, as our country, as a member of the International Community, through its signing of various treaties and conventions, expressly incorporated into its legislation the Geneva Conventions and their respective Additional Protocols, the Rome Statute and the Convention on the Prevention and Punishment of the Crime of Genocide, *inter alia*, which condemn such atrocities.

58. From the foregoing, it is clear that all the requirements needed to grant the application submitted by the International Criminal Tribunal for the former Yugoslavia have been met.

68. It follows from this that the Argentine State, as a founder member of the United Nations, is obliged to enforce applications from the ICTY and to ensure that they

prevail over any other obligation, because failure to do so would involve the Republic's responsibility under international law.

69. Thus, the Statute of the ICTY provides in Articles 9 and 29 that States shall co-operate with the Court in the investigation and prosecution of persons who come within its jurisdiction; that they shall, without delay, process and comply with any application and/or decision made by a Court of First Instance relating to, *inter alia*, the surrender of defendants so as to put them at the disposal of the International Tribunal.

70. Meanwhile, Article 58 of the Rules on Procedure and Evidence of the ICTY provides that the obligations under Article 29 of the Statute shall override all legal obstacles or extradition treaties which the State in question is a party to, or which could obstruct the surrender of a defendant to the Court.

71. In this way, it is clear that by reason of these legal provisions, without prejudice to the provisions of the s. 16 of Act 24,767, there is no doubt that the application submitted by the ICTY overrides the one submitted by the Belgrade Court of First Instance.

75. In that sense, s. 18 of Act 24,767 provides that a person extradited from this country may not be re-extradited to another State without Argentina's prior authorization, save where the extradited person freely and expressly waives that right before an Argentine diplomatic or consular authority, after having had the benefit of legal advice.

Rukundo (Emmanuel) v Federal Office of Justice, Appeal Judgment, Case No 1A.129/2001, Case no 1A.130/2001, ILDC 348 (CH 2001), 3rd September 2001, Switzerland; Federal Supreme Court [BGer]; First Public Law Division

R was arrested in Geneva, following a request for arrest and transfer from the ICTR. R argued before the Federal Supreme Court that he could not be transferred as the ICTR did not guarantee the right to fair trial as contained in European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the International Covenant on Civil and Political Rights (ICCPR).

H1 Switzerland did not extradite or transfer persons to states or institutions that failed to guarantee the respect of minimal procedural rights, as recognized in democratic states and defined, in particular, by the Convention or the ICCPR; or that violated certain rules accepted as being part of the international *ordre public*. (paragraph 3a).

H2 With regard to the transfer of a person to an international criminal tribunal like the ICTR, however, Switzerland applied a presumption that the above guarantees were fulfilled. The problems existing at the time with regard to the management and the functioning of the ICTR did not reverse this presumption. In view of the various steps taken to improve the functioning of the Tribunal, there was no evidence that the ICTR was not able to execute its tasks in conformity with the guarantees of due process contained in the ICCPR. (paragraph 3b).

Ntawukuriryayo (Dominique), Appeal judgment, Appeal No 08-81262, ILDC 879 (FR 2008), 7th May 2008, France; Court of Cassation [Cass]; Criminal Division

Dominique Ntawukuriryayo appealed an order of transfer to the ICTR before the Court of Cassation in France. He contented, *inter alia*, that his transfer from France was illegal because the completion strategy of the ICTR showed that he would not be tried by the ICTR, but would be transferred to Rwanda to face trial in Rwandan courts, in accordance with rule 11*bis* of the Rules of the Procedure and Evidence.

24 First, the Court is not at present in possession in this particular case of evidence or other elements from which it is able to deduce that the International Criminal Tribunal for Rwanda will be substantively unable to try the person whose extradition is requested, as the Tribunal's completion strategy report to the UN Security Council simply recounts the work of that jurisdiction and defines provisional timetables, from which no legal consequences can be drawn, especially not that Dominique X. is certain to be extradited to Rwanda.

25 Second, be that as it may, the International Criminal Tribunal for Rwanda alone has powers to refer the indictment to another court pursuant to Rule 11bis of its Rules of Procedure and Evidence and determines whether or not to do so in light, in particular, of its conviction 'that the accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out'; that conviction unequivocally reflects the legitimate concern expressed by counsel for Dominique X. that his trial should be guaranteed by the fundamental principles governing rules of procedure and the rights of the parties.

32 The Court is not in a position to review of the regularity of the evidence adduced by the International Criminal Tribunal for Rwanda.

Minister of Justice and Constitutional Development and ors v The Southern African Litigation Centre, Appeal judgment, 867/15, [2016] ZASCA 17, 2016 (4) BCLR 487 (SCA), [2016] 2 All SA 365 (SCA), 2016 (3) SA 317 (SCA), ILDC 2533 (ZA 2016), 15th March 2016, South Africa; Supreme Court of Appeal [SCA]

South Africa ratified the Rome Statute of the International Criminal Court on 27 November 2000. On 31 March 2005, the Security Council of the UN referred the situation in Darfur, Sudan to the ICC. The ICC issued two warrants of arrest of the Sudanese president Al-Bashir. The 25th Assembly of the African Union (AU) took place in Johannesburg, South Africa, from 7 to 15 June 2015. South Africa was required to enter into a hosting agreement with the Commission of the AU. Sudanese president Al-Bashir was among the guests. On 13 June 2015, the day of Al-Bashir's arrival in South Africa, the ICC's Pre-Trial Chamber II issued an order for the immediate arrest and surrender of Al-Bashir. South Africa argued that the 'special arrangements' made with the AU for hosting the Assembly sought to grant Al-Bashir immunity from arrest and surrender to the ICC for the Assembly's duration and two days thereafter.

56 … The Security Council referred the situation in Darfur to the Prosecutor in terms of this provision. While there is debate among commentators as to the full effect of such a referral, it is accepted by all that it confers jurisdiction upon the ICC in respect of the actions of a non-party state and its citizens. UN member states are obliged to accept the authority of the decision by the Security Council to refer the situation in Darfur to the Prosecutor. (paragraph 56)

59 Article 27 of the Rome Statute deals with the possibility that the crime being prosecuted is likely in many instances to have been perpetrated by a state actor, ranging from a head of state to a humble official or soldier, and therefore the possibility would exist of the accused person raising a claim to immunity in accordance with long-established principles of customary international law, to be considered later in this judgment. … The undisputed effect of this provision is that it is not open to a person being prosecuted before the ICC to claim immunity from prosecution or advance a defence of superior orders. It is agreed by all commentators that, because Party States have bound themselves to the Statute including this provision, all Party States have waived any immunity that their nationals would otherwise have enjoyed under customary international law.

62 The Constitution makes international customary law part of the law of South Africa, but it may be amended by legislation. It provides a specific mechanism whereby obligations assumed under international agreements become a part of the law of South Africa. And it decrees that, when interpreting any legislation, the Courts must prefer a reasonable interpretation that is consistent with international law over any alternative interpretation that is inconsistent with international law. …

69 … The argument proceeded, as does this judgment, on the basis that once a head of state has been brought before the ICC no plea of head of state immunity can be invoked. But, as a number of commentators have pointed out, that does not necessarily mean that a state is entitled to ignore head of state immunity when requested to cooperate with the ICC to bring such a person before it. It is in this context that the question of an international crimes exception to head of state immunity arises.

82 … Its current position appears to accept that President Al Bashir would enjoy head of state immunity, were it not, so it believes, for the fact that it has been waived by the Security Council.

90 Some of these features warrant stressing in the light of the fact that there is no dispute that President Al Bashir is subject to the jurisdiction of the ICC and can be prosecuted by it for his alleged crimes. He has been stripped of any immunity when before the ICC. It is therefore important that the purpose of the Implementation Act is to provide a framework to ensure the effective implementation of the Rome Statute. It is to ensure that South Africa conforms to its obligations under the Rome Statute. In that regard there is no doubting its obligation to endeavour to bring President Al Bashir before the ICC for trial. The head of state immunity claimed for him is only a procedural bar to the enforcement of that obligation in this country. It is not an immunity that confers impunity for any wrongdoing on his part.

93 … The section is in a part of the Implementation Act conferring jurisdiction on South African Courts to try international crimes in certain circumstances. It would have been absurd and non-compliant with its international obligations for South Africa in such a case to permit the accused to raise immunity either ratione personae or ratione materiae, or obedience to orders, to avoid conviction or reduce any sentence. In the circumstances the section paraphrased the provisions of Article 27(1) of the Rome Statute and made them applicable in trials for international crimes in South Africa or, as Professor du Plessis expressed matters, it 'trumps' the immunities that would otherwise attach to individuals. The difficulty lies in taking it further to create in South Africa an international crimes exception to head of state immunity. Nevertheless, that does not mean that it is irrelevant to the interpretational exercise. It is a clear indication that South Africa does not support immunities when people are charged with international crimes.

102 DIPA is a general statute dealing with the subject of immunities and privileges enjoyed by various people, including heads of state. The Implementation Act is a specific Act dealing with South Africa's implementation of the Rome Statute. In that special area the Implementation Act must enjoy priority.

103 I conclude therefore that when South Africa decided to implement its obligations under the Rome Statute by passing the Implementation Act it did so on the basis that all forms of immunity, including head of state immunity, would not constitute a bar to the prosecution of international crimes in this country or to South Africa cooperating with the ICC by way of the arrest and surrender of persons charged with such crimes before the ICC, where an arrest warrant had been issued and a request for cooperation made. I accept, in the light of the earlier discussion of head of state

immunity, that in doing so South Africa was taking a step that many other nations have not yet taken. If that puts this country in the vanguard of attempts to prevent international crimes and, when they occur, cause the perpetrators to be prosecuted, that seems to me a matter for national pride rather than concern. It is wholly consistent with our commitment to human rights both at a national and an international level. And it does not undermine customary international law, which as a country we are entitled to depart from by statute as stated in s 232 of the Constitution. What is commendable is that it is a departure in a progressive direction.

Constitutionality and legality of the decree on process of cooperation with the International Criminal Tribunal, Socialist Party of Serbia and ors v Federal Republic of Yugoslavia, Original petition for constitutional review, ILDC 29 (CSXX 2001), 6th November 2001, Serbia and Montenegro (historical); Federal Constitutional Court (historical)

The case before the Federal Constitutional Court of Serbia and Montenegro dealt with the constitutionality and legality of a 2001 degree, issued by the federal government of the Federal Republic of Yugoslavia. The main issues before the court concerned the question of whether the cooperation with the ICTY could be regulated by degree, and whether the Constitution permitted the transfer to the ICTY of FRY nationals.

15. In particular, the challenged Decree is not in accordance with the Constitution of the FRY since under the Decree a body without appropriate authority has regulated the procedure (method) for exercising certain freedoms and rights of man and citizen laid down by the Constitution of the FRY. Namely, pursuant to the provision of Article 67, para 2 of the Constitution of the FRY, the method (procedure) for exercising certain freedoms and rights of man and citizen may only be laid down by law and only if this is envisaged by the Constitution of the FRY or if it is necessary for the exercise of such freedoms and rights. Furthermore, pursuant to the provision of Article 26, para 1 of the Constitution of the FRY, everyone is entitled to equal protection of his or her rights in a procedure prescribed by law. Under the challenged Decree, the Federal Government, as a body with executive power—prescribing the possibility of a procedure for transferring criminal proceedings conducted by a domestic court to the International Criminal Tribunal at the Tribunal's request, prescribing the appropriate application of the provisions of Chapter XXXI of the Criminal Procedure Act, including the arrest of a person whose extradition to the International Criminal Tribunal has been requested, and prescribing the authority of the International Criminal Tribunal to take investigative measures against persons in the territory of the FRY—set down, by means of a sub-law, the method (procedure) for exercising, restricting and safeguarding certain freedoms of man and citizen. As already stated, such a procedure may only be set down by law by a body with legislative power, which, with regard to criminal-law protection, has been done through the Criminal Procedure Act.

25. The Federal Constitutional Court is of the opinion that UN Security Council Resolution 827 concerning the founding of the International Criminal Tribunal cannot be subsumed under the international law that constitutes an integral part of the national legal system referred to in Article 16 of the Constitution of the FRY. The reason for this is that the *ad hoc* measure adopted by the UN Security Council under this Resolution—the setting up of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law—does not contain international legal norms that produce "validity" or have "binding force". Without those properties, this Resolution is only a political document producing political obligations and acquiring legal validity

only after being given legal force by a legitimate and legal body in the individual legal system of each particular State.

26 Namely, UN Member States, by adopting the Charter of the United Nations, adopted the legal validity of all of its norms, including the legal documents enacted by UN bodies, in accordance with and in the manner specified by the Charter. However, UN Member States did not transfer the judicial powers to UN bodies except, of course, for those powers expressly specified by the Statute of the International Court of Justice, as set down in Chapter XIV of the Charter. The matter under discussion is not such a case. For that reason, Item 4 of UNSC Resolution 827 specifies the political obligation of all States to "cooperate fully with the International Tribunal" and "take any measures necessary under their domestic law to implement the provisions" of the Resolution. In other words, only after investing the obligations from the aforementioned UNSC Resolution with legal norms in accordance with national laws, do the Statute and Rules of Procedure of the International Criminal Tribunal acquire a normative nature which produces legal validity. Without that, they are special political obligations, whose non-fulfilment, of course, may have very serious consequences for individual States.

30. By contrast, as has already been shown, this Court is of the opinion that it does not follow from the substance of the Charter of the United Nations that the Security Council has the express power to create and set up judicial bodies, as a measure to protect peace, for holding accountable citizens of countries that have violated peace and security in the world. It follows from the substance of the quoted provisions of the Charter that such a measure may be considered an international fait accompli binding on any UN Member State. This gives rise to the obligation of legally regulating issues that concern the constitutionally guaranteed freedoms and rights of citizens, the status of state bodies in providing such protection and the activities of national bodies in the provision of legal assistance for the purpose of protecting international peace. One of the rights of a Member State in this case is to make a reasoned appeal to UN bodies to check the regularity of proceedings.

2. Commentary

(a) Article 25 and 41 of the UN Charter, direct effect

The Supreme Court of Croatia and the National Court on Federal Criminal and Correction Matters of Argentina refer to the obligation of the state to cooperate with the ad hoc tribunals, undertaken in Chapter VII of the UN Charter, cf Article 25. The latter court underlines also that failure to cooperate would mean responsibility under international law for the state. Both courts consider this obligation having direct effect in domestic law. In Argentina there was no national implementing legislation, while the Supreme Court of Croatia refers to this obligation in addition to the duty already incorporated in domestic law. In contrast, the Federal Constitutional Court of Serbia and Montenegro considered that the state could not comply with a decision of the UN Security Council unless it had been incorporated into national law, as decisions of the Security Council were not legal norms but rather political decisions. According to the Federal Constitutional Court such implementation would have to take place via the legislator, not the executive branch. Furthermore, the Federal Constitutional Court considered the state not obligated under international law to cooperate with the ICTY as the Security Council had acted *ultra vires* in establishing the tribunal. As the commentator of the case notes, in its deliberation on this point, the Constitutional Court ignores the acceptance of other states of this action of the UN Security Council. The Security Council´s authority under Article 41 to order measures

regarding prosecutions and judicial cooperation has also been reaffirmed in later practice, eg, the Security Council resolution on the establishment of the ICTR,[61] its resolution on the trial of Charles Taylor in the Netherlands,[62] and its resolutions of a referral of situations to the ICC.[63]

Similarly, in its analysis, the Supreme Court of Appeal of South Africa considers it vital that the jurisdiction of the ICC in the case at hand is based on referral by the Security Council. Citing Article 25 of the UN Charter, it considers member states of the UN, also non-members of the ICC, obliged by the authority of the Security Council's decision. As a result of the referral of the Security Council, Article 27 of the Rome Statute was made applicable to non-state parties and they were therefore unable to rely on Article 98 of the Rome Statute.[64] South Africa, as a member of the UN and of the ICC, was to cooperate fully with the ICC and enforce the arrest warrant issues by the court.

Both the Supreme Court of Croatia and the National Court on Federal Criminal and Correction Matters of Argentina treat the Rules of Procedure and Evidence of the ICTY in the same way as the Statute of the ICTY, and having direct effect in domestic law. This is noteworthy as the Rules of Procedure and Evidence are issued by the judges of the tribunal and not the Security Council.

(b) Competing international obligations

The issues of competing obligations under international law and the supremacy of UN Charter obligations over other international obligations, set out in Article 103 of the UN Charter, are indirectly referred to by the National Court on Federal Criminal and Correction Matters of Argentina. Facing two competing requests of transfer and extradition, the court determines that the state has to ensure the enforcement of application from the ICTY: 'that they prevail over any other obligation, because failure to do so would involve the Republic's responsibility under international law'.[65]

Competing international obligations are also an issue in some of the other cases. This relates to the relations between obligations under Chapter VII of the UN Charter and obligations under human rights treaties, such as the ECHR and the ICCPR. The national courts deliberate whether they can review the procedure at the ad hoc tribunals when deciding on a transfer, and interestingly, reach a different conclusion. In the cases where the transferee raised that he would not receive a fair trial before the ad hoc tribunal in accordance with international human rights treaties, neither the Supreme Court of Croatia nor the Court of Cassation in France considered they could review the proceedings at the relevant tribunal. All they could do was to verify the identity of the relevant person and whether the alleged crimes were within the statute of the ad hoc tribunals. Similarly, the Court of Cassation in France considered that it was not able to review whether the ICTR would re-extradite the relevant person to national proceedings. On the contrary, the National Court on Federal Criminal and Correction Matters of Argentina

61 UNSC Res 955 (8 November 1994) UN Doc S/RES/955.

62 UNSC Res 1688 (16 June 2006) UN Doc S/RES/1688.

63 Regarding the situation in Darfur, UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593; regarding the situation in the Libyan Arab Jamahiriya, UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970.

64 For an opposing view see D Tladi, 'The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law' (2015) 13(5) *International Criminal Justice* 1027. See also other writings on the case, eg, E De Wet, 'The implications of President Al-Bashir's visit to South Africa for international and domestic law' (2015) 13(5) *Journal of International Criminal Justice* 1049; D Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7(2) *Journal of International Criminal Justice* 342; P Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?' (2009) 7(2) *Journal of International Criminal Justice* 328.

65 *International Arrest Warrant ('Lukic'), Re, International Criminal Tribunal for the Former Yugoslavia v Lukic (Milan)*, Decision on arrest, surrender, and extradition, Case No 11807/05, ILDC 1083 (AR 2006), 10 January 2006, Argentina, para 68.

did consider that it was able to do so and when transferring to the ICTY it set the condition that there would not be a re-extradition. Nevertheless, the ICTY extradited the individual to a national court. The Federal Supreme Court in Switzerland stressed that it would not transfer individuals to states or institutions that failed to guarantee the respect of minimal procedural rights. At the same time it made the assumption that as the ICTR was an international tribunal it would fulfil such requirement. The commentator on the Swiss case notes:

> The Federal Supreme Court incidentally reviewed the legality of a Security Council resolution when scrutinizing measures that implemented the resolution. In doing so, it reviewed the actions of the Security Council against the obligations resulting from human rights instruments, such as the Convention or the ICCPR. Thereby, the Court 'affirmed—at least in principle—the normative superiority of both human rights instruments vis-à-vis binding Security Council resolutions'.[66]

The issue of competing obligations between UN Security Council Resolutions and human rights instruments has gained wide attention since the *Kadi* decision of the European Court of Justice.[67] However, the arguments made that a transfer of an individual may give rise to an issue under the human right conventions, due to lack of fair proceedings, and hence engage the responsibility of that state under the conventions, may be hard to sell. Certainly, the jurisprudence of the European Court of Human Rights (ECtHR) in cases regarding deportation and extradition does not support such a claim. It is established in the court's case-law that an issue might exceptionally be raised under Article 6 by an expulsion or extradition decision in circumstances where the fugitive had suffered or risked suffering a flagrant denial of justice in the requesting country.[68] However, that test is very high. As stated by the court in the case of *Othman (Abu Qatada) v United Kingdom*:

> 260. It is noteworthy that, in the twenty-two years since the *Soering* judgment, the Court has never found that an expulsion would be in violation of Article 6. This fact, when taken with the examples given in the preceding paragraph, serves to underline the Court's view that 'flagrant denial of justice' is a stringent test of unfairness. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.[69]

The issue of competing international obligations was also a key element in the debate whether South Africa was obligated to comply with an order of the ICC on arrest of Al-Bashir. The Supreme Court of Appeal considered that the resolution of the Security Council had waived

66 A R Ziegler, Analysis, *Rukundo (Emmanuel) v Federal Office of Justice*, ILDC 348 (CH 2001) A2.

67 Joined Cases C-402/05 P & C-415/05 P, *Kadi & Al Barakaat v Council of the European Union and EC Commission* [2008] 3 CMLR 41. For a commentary see, eg, P De Sena and M C Vitucci, 'The European Courts and the Security Council: Between Dédoublement Fonctionnel and Balancing of Values' (2009) 20(1) *EJIL* 193; and M Scheinin, 'Is the ECJ Ruling in Kadi Incompatible with International Law?' (2009) 29(1) *Yearbook of European Law* 637.

68 That principle was first set out in ECtHR, *Soering v UK*, App No 14038/88 (7 July 1989) para 113, and has been subsequently confirmed by the Court in a number of cases (see, *inter alia*, ECtHR, *Mamatkulov and Askarov v Turkey*, App No 46827/99 and 46951/99 (4 February 2005) paras 90–91; ECtHR, *Al-Saadoon and Mufdhi v UK*, App No 61498/08 (2 March 2010) para 149).

69 ECtHR, *Othman (Abu Qatada) v UK*, App No 8139/09 (12 January 2012). See also the judgment of the ECtHR regarding extradition from Sweden to national courts in Rwanda, in which extradition was not considered violation of Article 3 or Article 6 of the ECHR, *Ahorugeze v Sweden*, App No 37075/09 (27 October 2011).

the immunity of Al-Bashir and that therefore it was not faced with any competing international obligations.

IV. Human Rights Courts

The ECtHR and the Inter-American Court of Human Rights (IACHR)[70] have jurisdiction to award reparations to complainants, cf Article 41 of the ECHR,[71] and Article 63 of the American Convention on Human Rights (ACHR).[72] Both human rights instruments have provisions on the binding force of judgments of the respective human rights courts, cf Article 46 of the ECHR and Article 68 of the ACHR.

The ECtHR has reiterated that the general logic of Article 41 on just satisfaction is directly derived from the principles of public international law relating to state responsibility, and that it has to be construed in that context.[73] Furthermore, the ECtHR interprets the provision in accordance with principles of international law on reparations.[74] According to Article 46(1) of the ECHR, member states are obliged to abide by the final judgment of the ECtHR in any case to which they are parties. The ECtHR frequently describes the obligation to comply with its judgments as following:

> It follows, inter alia, that a judgment in which the Court finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and make all feasible reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.[75]

According to Article 68(1) of the American Convention 'State Parties to the Convention undertake to comply with the Court's decisions in any case to which they are parties'. Furthermore, that part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state, cf Article 68(2). According to Article 63(1) of the ACHR, if the IACHR finds that there has been a violation, 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

70 National cases regarding enforcement of decisions of human rights bodies, such as of the Human Rights Committee, are not included in the chapter. Different from the IACHR and ECtHR, which decisions are binding under international law, these bodies can only issue views. For discussion on these cases see commentaries in *Hauchemaille v France*, Judicial review, No 238849; ILDC 767 (FR 2001), 11 October 2001; *Commonwealth of Pennsylvania v Judge*, Appeal judgment, 916 A 2d 511 (Pa 2007); 591 Pa 126; ILDC 1218 (US 2007); *Singarasa v Attorney General*, Application for judicial review, SC Spl (LA) No 182/99; ILDC 518 (LK 2006); *Dar v Norwegian Immigration Appeals Board*, Appeal decision, Case No HR-2008-681-A; ILDC 1326 (NO 2008).

71 European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entry into force 3 September 1953) 87 UNTS 103.

72 American Convention on Human Rights (adopted 22 November 1969, entry into force 18 July 1978) 1144 UNTS 123.

73 ECtHR, *Cyprus v Turkey* (just satisfaction) App No 25781/94 (12 May 2014) para 40.

74 ibid, para 41.

75 ECtHR, *Cocchiarella v Italy*, App No 64886/01 (29 March 2006) para 125; ECtHR, *Maestri v Italy*, App No 39748/98 (17 February 2004) para 47; ECtHR, *Menteş and ors v Turkey*, App No 23186/94 (24 July 1998) para 24; ECtHR, *Scozzari and Giunta v Italy*, App No 39221/98 and 41963/98 (13 July 2000) para 249; ECtHR, *Ilaşcu and ors v Moldova and Russia*, App No 48787/99 (8 July 2004) para 487; ECtHR, *Cyprus v Turkey* (just satisfaction), App No 25781/94 (12 May 2014) para 27.

that fair compensation be paid to the injured party.[76] As repeatedly stated by the IACHR, 'to this end, states must ensure the domestic implementation of the provisions of the Court's decision'.[77]

Both human rights regimes have set up an enforcement mechanism with respect to states' compliance with decisions of the courts. With respect to the ECtHR, its the Committee of Ministers of the Council of Europe, which supervises the execution of judgments, cf Article 46(2) of the ECHR.[78] As for decisions of the IACHR, it is the court itself that monitors compliance with its judgments, cf Article 69 of the court´s Rules of Procedure.[79]

The ECHR and ACHR enjoy strong standing in national law, in particular the ECHR, which has been incorporated into the law of all its contracting members.[80] However, while the conventions have in many instances been given status of domestic law (or even superior to domestic law), and are directly applicable at the national level, there seems to be a varied practice with respect to the national effect of judgments of the human rights courts.[81] The cases below illustrate how differently domestic courts treat the issue. Furthermore, while decisions of international human rights bodies cannot quash national legislation or annul a decision taken by national authorities, inevitably, a full remedy may require such measures.[82]

1. ILDC cases

Al-Nashif v National Police Directorate at the Ministry of the Interior, Judicial Review, Administrative Case No 11004/2002, Decision No 4332, ILDC 608 (BG 2003), 8th May 2003, Bulgaria; Supreme Administrative Court

Al-Nashif maintained that the rulings at the national level should be revoked pursuant to Article 231(1)(h) of the Civil Procedure Code of Bulgaria, which stated that the interested party might request the revocation of a final decision where a judgment of the ECtHR alleged a violation of the ECHR. In its judgment in *Al-Nashif v Bulgaria* the ECtHR had found a violation of Articles 8 and 13 of the ECHR.[83]

According to Article 13 ECHR, everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority, notwithstanding that the violation has been committed by persons acting in an official capacity.

> [ref 9] The person shall have the opportunity to contest the executive claim that this is a matter of national security. Naturally, the judgment of the executive body regarding what poses a threat to national security is of substantial significance; however, the independent body shall be able to respond in cases where the reference to national security has no reasonable grounding in the facts, or exposes an illicit or contrary to

76 The language adopted in Article 63(1) is considered broader than Article 41 of the ECHR see Gray (n 47) 894.

77 cf IACHR, *Case of Baena Ricardo et al Competence*, Series C No 104 (28 November 2003) para 60; *Case of the Dismissed Congressional Workers (Aguado Alfaro et al) v Peru* (Order, Monitoring compliance with judgment) (24 November 2010) third considering para, and *Case of Vargas Areco v Paraguay* (Order, Monitoring compliance with judgment) (24 November 2010) third considering para.

78 The recent Protocol 14 to the ECHR strengtens the enforcement mechanism by giving an enforcement role also to the ECtHR. See new Articles 46(3) and 46(4), which empower the Committee of Ministers to seek a further judgment from the court in relation to enforcement.

79 In 2003, the IACHR asserted its competence to monitor the execution of its judgments, *Baena Ricardo and Others v Panama* (Judgment on Jurisdiction) (28 November 2003). In 2011, the IACHR issued 32 orders on monitoring compliance with judgment. On the mechanism see IACHR Annual Report 2011, 13–30.

80 D J Harris, M O'Boyle, E P Bates, and C M Buckley, *Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights* (2nd edn, OUP 2009) 23.

81 Nollkaemper (n 34) 75–76.

82 This is the general view with respect, to the jurisdiction of the ECtHR; *Papamichalopoulos and Others v Greece* (just satisfaction), App No 14556/89 (31 October 1995) para 34; *Le Compte, Van Leuven and De Meyere v Belgium*, Apps No 6878/75 and 7238/75 (18 October 1982) para 13.

83 ECtHR, *Al-Nashif v Bulgaria* (Final Judgment), App No 50963/99 (20 June 2002).

the general meaning of and an arbitrary interpretation of the concept of "national security". Where such guarantees are absent, the police or other state bodies will be able to arbitrarily abuse the rights that the Convention guarantees" (§ 124).

[ref 10] In § 132 of the Decision, the Court reminds that "it has had multiple occasions to state that Article 13 of the Convention guarantees the existence, on the national level, of a remedy that shall enjoin observance of the substance of the rights and freedoms under the Convention, in whatever form they may be guaranteed by the national legislative order . . . By enabling a direct expression of the obligation of countries to protect human rights first and foremost within the framework of their own legal systems, Article 13 establishes an additional guarantee for the individual in order to guarantee that he or she shall effectively exercise his or her rights.

[ref 11] According to the European Court of Human Rights, "even where it is claimed that a threat to national security exists, the guarantee for an effective remedy requires, at a minimum, that a competent appellate body be informed of the reasons upon which the deportation decision is grounded, even where said reasons are not accessible to the public. The body should be competent to reject the claim of the executive authority that a threat to national security is present, should it find this claim to be arbitrary and groundless. Some form of competitive proceedings should exist if it is necessary for this to be done via a special representative holding a permit to obtain secret information. It is also necessary to examine the question of whether the contested measure would affect the person's right to family life, and if yes, whether the just balance between the public interest affected and the rights of the individual is respected" (§ 137).

[ref 12] In its decision of 20 June 2002, the European Court of Human Rights finds that there has been a violation of Article 8 of the Convention as "Al-Nashif's deportation was ordered pursuant to a legal regime that does not provide necessary safeguards against arbitrariness" (§ 128 and item 3 of the operative part) and there has been a violation of Article 13 of the Convention "as no remedy affording such guarantees of effectiveness was available to the applicants (§ 138 and item 4 of the operative part).

Červeňáková (Margita) and ors v Regional Court in Ústí nad Labem and District Court in Ústí nad Labem and Municipality of Ústí nad Labem (intervening), Decision on Constitutional Complaint, II ÚS 604/02, Sb n u ÚS 7/2004, ILDC 877 (CZ 2004), 26th February 2004, Czech Republic; Constitutional Court

The ECtHR had approved a friendly settlement between the plaintiffs and the Czech Republic and consequently struck out the application from the court's list. However, the plaintiffs partly continued their constitutional complaints.

23 The Constitutional Court therefore began by answering the question of whether the final decision given in this matter by the international court represents an obstacle of res judicata for the Constitutional Court. Article 10 of the Constitution of the Czech Republic incorporates into Czech law a large group of international treaties by which the courts are bound (the principle of monism). However, no provision of Constitutional law incorporates into Czech law a decision given by the international court on the basis of an international treaty which, according to Article 10 of the Constitution, is [already] component to the law. Therefore, within the Czech Republic, this decision does not have effect equal to a decision of Czech courts (the principle of dualism). Hence, neither on the basis of the Constitution nor on the basis of any other component to constitutional order can it be concluded that an obstacle

of res judicata exists for the Constitutional Court due to the fact that the international court has issued a final decision on the case.

[. . .] 26 The Constitutional Court is in no doubt that the content of the binding judgment of the European Court in the case against the Czech Republic represents an obligation for the Czech Republic arising from international law. The Czech Republic is obliged to observe such obligations, not only under international law, but also with reference to the provision of Article 1 (2) of the Constitution. The Constitutional Court is a constitutional authority of the Czech Republic, and is therefore itself subject to the provision of Article 1 (2) of the Constitution. Consequently, it is the duty of the Constitutional Court, within the scope of its competence, to observe the Czech Republic's obligations arising from the content of a judgment of the European Court. Furthermore, the same conclusion follows from the provision of Article 87 (1) (i) of the Constitution, according to which the Constitutional Court has the jurisdiction to decide on the measures necessary to implement a decision of an international court which is binding on the Czech Republic, should it prove impossible to implement such measures otherwise.

27 In the case in question, the Constitutional Court is not required to 'implement' the judgment, because the government of the Czech Republic has implemented its content within the scope of its competence. However, the above-mentioned provision of the Constitution can only be meaningfully interpreted against the background of the Constitutional Court's general obligation to 'observe' the decisions of international courts, with the understanding that over and above this general obligation, it is actually obligated to 'implement' the content of some of these judgments. A special obligation to 'implement' binding decisions of an international court, without a simultaneous general obligation to 'observe' them as international obligations of the Czech Republic, is conceptually unthinkable.

35 Under the circumstances, the Constitutional Court considers it neither useful nor necessary to dispute or, conversely, to confirm any of the above-mentioned different interpretations by the parties to the settlement. The 'international obligation' that the Constitutional Court is obliged to observe is the binding judgment of the European Court which took into account the settlement reached, accepting it in terms of its compliance with the Convention and the Protocols. Thus the settlement acquired a new legal quality which is distinct from the legal quality of the actual contractual settlement reached between the complainants and the government of the Czech Republic. Hence, the Constitutional Court considers itself competent to interpret the amicable settlement solely in the context of the binding judgment of the European Court dated 29.7.2003, of which such amicable settlement forms a part.

42 The Constitutional Court therefore had to state its opinion on the relevance of the will of the complainants which was expressed at a later date (on 11.6.2003). In a situation where neither the Convention nor the Constitutional Court Act resolves the question, the Constitutional Court was obliged to make appropriate use of Act no. 99/1963, Code of Civil Procedure, as amended (hereinafter the 'CCP'), as provided for in Section 63 of the Constitutional Court Act. Section 99 of the CCP ['Court Settlement'], in paragraph 3, recognises that a settlement approved by the court has the 'effects of a final judgment'. This means that the contents of the Settlement are binding on the parties and on all authorities (Section 159a (4) of the CCP). A settlement constitutes an obstacle of res judicata (Section 159a (5) of the CCP). It is therefore clear that it is legally impossible for a unilateral expression of will by one of the parties to alter the contents of the court settlement.

The complainants' expression of will submitted on 11.6.2003 is therefore irrelevant for the Constitutional Court. The same conclusion must be drawn with reference to Article 1 (2) of the Constitution. The judgment of the European Court dated 29.7.2003, containing an amicable settlement, represents an 'international obligation' for the Constitutional Court. The contents of this 'international obligation' cannot be conceptually changed by a unilateral expression of will submitted under national rather than international law, by a party subject to the jurisdiction of the Czech Republic (by a submission in the course of proceedings relating to a constitutional complaint).

Solicitor General of the Republic v Venezuela, Final Award on Jurisdiction of the Constitutional Chamber, File No 08-1572, No 1939, ILDC 1279 (VE 2008), 18th December 2008, Venezuela; Supreme Tribunal of Justice [TSJ]

In its decision on 5 August 2008, the IACHR found Venezuela in violation of the ACHR and ordered payment of monetary compensation costs and the state to reinstate three judges in their former or similar judicial positions or pay them US$100,000. The IACHR also ordered Venezuela to pass a Code of Judicial Ethics. The Venezuelan Solicitor General requested the Supreme Court of Justice to determine whether Venezuela had to enforce the IACHR's judgment.

35 It must first be noted that the American Convention on Human Rights is a multilateral treaty that has constitutional hierarchy and prevails in the domestic system only "insofar as they contain provisions concerning the enjoyment and exercise [of such rights] that are more favorable" than those established by the Constitution, in compliance with the provisions of Article 23 of our fundamental text.

36 Said Article 23 of the Constitution, reads:

"Article 23.

The treaties, pacts and conventions relating to human rights which have been executed and ratified by Venezuela have a constitutional rank, and prevail over internal legislation, insofar as they contain provisions concerning the enjoyment and exercise of such rights that are more favorable than those established by this Constitution and the laws of the Republic, and shall be immediately and directly applied by the courts and other organs of Government".

44 Now, notice is taken of the failure of the Inter-American Court of Human Rights, in that this body demands that the Venezuelan State indemnify the former judges of the First Court of Administrative Disputes Ana María Ruggeri Cova, Perkins Rocha Contreras and Juan Carlos Apitz, whom it classes as "victims" for having allegedly had their personal rights violated; however in the alleged finding by said Court of the violation of the rights or freedoms protected by the Convention, it laid down compulsory rules on the government and administration of the Legal Power that are the exclusive and excluding competence of the Supreme Court of Justice and established guidelines for the Legislative Power, on matters of legal careers and the liability of judges, violating the sovereignty of the Venezuelan State in the organization of its public powers and the selection of its functionaries, which is inadmissible.

46 Consequently, apart from any antimony there may be between the rules protecting personal rights and those relating to the common good, it is clear that, in failing to merely order an indemnity for the alleged violation of rights, the Inter-American Court of Human Rights used the award analyzed to unacceptably intervene in the government and legal administration that pertains exclusively to the Supreme Court of Justice, in compliance with the Constitution of 1999.

48 On the other hand, the Constitutional Chamber of the Supreme Court of Justice, in its decision No. 1942/2003 specified as follows with regard to Article 23 of the Constitution: "In the opinion of the Chamber, two key elements are clear from Article 23: 1) This concerns human rights that apply to natural persons; 2) It refers to rules that establish rights, not to awards or rulings of institutions, resolutions of organizations, etc., prescribed in the Treaties, but rather only to rules that create human rights. (. . .)

The Chamber repeats that it is the prevailing of the rules forming the Treaties, Pacts and Conventions (synonymous terms) in relation to human rights, but not of the reports or opinions of international organizations, which seek to interpret the scope of the rules of the international instruments, as Article 23 of the Constitution is clear: the constitutional hierarchy of the Treaties, Pacts and Conventions refers to their provisions, which, in being integrated into the current Constitution, means that the only party able to interpret them with respect to Venezuelan Law is the Constitutional Judge, in compliance with Article 335 of the current Constitution, in particular, the recognized interpreter under the 1999 Constitution, and the Constitutional Chamber, and thus is declared (...)

Thus it is the Constitutional Chamber that determines which rules on human rights of these treaties, pacts and conventions shall prevail in the domestic system; in the same way as which human rights not considered in said international instruments shall be valid in Venezuela.

This competence of the Constitutional Chamber for such matters, which stems from the Fundamental Charter, cannot be reduced by additional rules contained in Treaties or any other international texts on Human Rights that may have been signed by the country, which enable the States party to the Treaty to consult international organizations about the interpretation of the rights referred to in the Convention or Pact, as established in Article 64 of the Law Approving the American Convention on Human Rights, the Pact of San José, given that, were this possible, it would be a form of constitutional amendment on the matter, without all the relevant proceedings having been followed, reducing the competence of the Constitutional Chamber and transferring it to these multinationals or transnationals (internationals), who would make them binding interpretations. (. . .)

The decisions of these organizations will be fulfilled in the country, in compliance with that established by the Constitution and the laws, as long as they are not in conflict with the provisions of Article 7 of the current Constitution, which reads: "The Constitution is the supreme law and foundation of the legal order. All persons and organs exercising Public Authority are subject to this Constitution" and as long as they comply with the organic competences recorded in the Conventions and Treaties. Because of this, despite the respect of the Legal Power for the awards or rulings of these organizations, they cannot violate the Constitution of the Bolivarian Republic of Venezuela, just as they cannot infringe the legislation of Treaties and Conventions, which govern these areas or other decisions.

If an international organization, legally recognized by the Republic, should protect anyone, violating the human rights of groups or persons within the country, said decision must be rejected even if issued by international organizations that protect human rights. . . (. . .)

The Chamber considers that there is no legal body above the Supreme Court of Justice and for the purpose of Article 7 of the Constitution, unless the Constitution or law should thus rule, and even in this latter case, any decision in conflict with the rules of the Venezuelan Constitution shall not be applied in the country, and thus declared. (. . .) 251

Articles 73 and 153 of the Constitution consider the possibility of Venezuelan areas of jurisdiction being transferred to supranational bodies, which are acknowledged as potentially able to compromise national sovereignty.

However, the same Constitution highlights the areas in which this may take place, which are – for example – Latin America and Caribbean integration (Article 153 eiusdem). Different areas to that of Human Rights per se, and where the judgments issued are of immediate application in the territory of the member countries, as specified by Article 91 of the Law Approving the Statute of the Court of Justice of the Andean Community.

The Chamber understands that outside these specific areas, national sovereignty cannot in any case be removed by virtue of Article 1 of the Constitution, which establishes that independence, liberty, sovereignty, immunity, territorial integrity and national self-determination are unrenounceable rights of the Nation. Said constitutional rights are unrenounceable, cannot be relaxed, except where the Fundamental Charter so rules, together with the mechanisms that make it possible, as contemplated by Articles 73 and 336.5 of the Constitution, for example.

The consequence of the foregoing is that, in principle, the enforcement of the awards of Supranational Courts cannot undermine the sovereignty of the country, or the fundamental rights of the Republic" (underlined by this award).

51 In addition to the foregoing, the judgment questioned seeks to disregard the firm nature of the administrative and legal decisions that have acquired the status of res judicata, in ordering the reinstatement of the dismissed judges. In this sense, it must be pointed out that former judge Ana María Ruggeri Cova did not appeal for the reconsideration or any legal review against the deed of dismissal (a fact acknowledged in paragraph 183 of the sentence of the Inter-American Court of Human Rights and at point 10 of chapter X of this same award). On the other hand, the deed of dismissal issued against former judges Perkins Rocha Contreras and Juan Carlos Apitz is final by decision No. 634 of May 21, 2008, issued by the Political Administrative Chamber of the Supreme Court of Justice, whereby it was declared that the administrative dispute of nullity had been abandoned, brought against said deed, as the writ of summons was not collected, published and delivered to the third parties concerned within the terms established in Article 21 of the Organic Law of the Supreme Court of Justice, a situation moreover omitted from the award of the Inter-American Court of Human Rights. Hence, in the opinion of this Constitutional Chamber, it is not possible to disregard the matter of res judicata which involves the deeds of dismissal of the former judges of the First Court of Administrative Dispute, when the administrative or legal resources envisaged by the internal legal system were not urged or were dismissed by definitive ruling by the Highest Court of the Republic, as this would be in conflict with one of the essential values of the Venezuelan Justice System, as is legal safety.

52 It is not a matter of interpreting the content and scope of the judgment of the Inter-American Court of Human Rights, nor of disregarding the treaty validly signed by the Republic, which supports it, or of avoiding the undertaking to enforce decisions in accordance with the provisions of Article 68 of the American Convention on Human Rights, but rather of applying a minimum standard of adjustment of the award to the internal constitutional system, which has occurred in other cases, as when the unenforceability was declared of the award issued by the Inter-American Court of Human Rights on May 30, 1999, in the case: Castillo Petruzzi et al., by the Plenary Chamber of Peru's Supreme Court of Military Justice, for considering, amongst other aspects, that the judicial power "is autonomous and in the exercise

of its functions, its members do not depend on any administrative authority, which shows a blatant disregard for Peruvian legislation on the matter"; that "they seek to disregard Peru's Political Constitution and to subject it to the American Convention on Human Rights in the interpretation that the judges of said Court may make, ad-libitum, in this judgment"; that the award in question, issued by the Special Military Supreme Court, acquired the status of res judicata "and it could not, therefore, be subject to a new ruling as this would constitute an infraction of a constitutional principle"; that "in the hypothetical case that the judgment issued by the American Court should be enforced in accordance with the terms and conditions it contains, there would be a legal impossibility to fulfill it under the demands made by said supranational jurisdiction", as "it would first require the Constitution to be amended" and "the acceptance and enforcement of the sentence of the Court in this matter would seriously endanger the internal security of the Republic".

54 By virtue of the foregoing considerations, this Constitutional Chamber declares the award of the Inter-American Court of Human Rights dated August 5, 2008 unenforceable, resulting in an order for the reinstatement to office of the former magistrates of the First Court of Administrative Disputes, Ana María Ruggeri Cova, Perkins Rocha Contreras and Juan Carlos Apitz B.; based on Articles 7, 23, 25, 138 and 156.32 of Chapter III of Title V of the Constitution of the Republic and case law partially transcribed of the Constitutional and Administrative Policy Chambers. Thus ruled.

56 In the same way, based on the same principle and in compliance with the provisions of Article 78 of the American Convention on Human Rights, the National Executive is asked to denounce this Convention, in view of the clear usurpation of powers committed by the Inter-American Court of Human Rights with the award concerned by this decision; and the fact that this implementation lies institutionally and in terms of competence with the mentioned Treaty. Thus ruled.

58 In light of what has been explained, this Supreme Court of Justice, in its Constitutional Chamber, administering justice in the name of the Republic, by the authority of the law, hereby declares:

1) that the award of the Inter-American Court of Human Rights dated August 5, 2008, whereby the reinstatement to office was ordered of the former magistrates of the First Court of Administrative Dispute, Ana María Ruggeri Cova, Perkins Rocha Contreras and Juan Carlos Apitz B. were ordered, is UNENFORCEABLE, and the Bolivian Republic of Venezuela is ordered to pay the amounts of money and make the publications referred to in the judge disciplinary system.

2) On the basis of the principle of cooperation between authorities (Article 136 of the Constitution of the Bolivarian Republic of Venezuela), and in accordance with the provisions of Article 78 of the American Convention on Human Rights, the National Executive is asked to report this Treaty or Convention in view of the evident usurpation of powers committed by the Inter-American Court of Human Rights, with the award concerned by this resolution.

Dorigo (Paolo), Appeal judgment, No 2800/2007, (2007) Rivista di diritto internazionale 601, ILDC 1096 (IT 2007), 25th January 2007, Italy; Supreme Court of Cassation; 1st Criminal Section

The core issues in the case were whether the judgments of the ECtHR had binding force and enjoyed direct effect within the Italian legal system, and whether final judgments of the ECtHR trumped domestic criminal *res judicata*.

H2 According to Article 670 of the Code of Criminal Procedure, the enforcing judge had to declare unenforceable any final domestic criminal conviction in relation to which the ECtHR had established, first, that the conviction had been pronounced in violation of Article 6 of the ECHR, and, second, that the convicted person had the right to a new trial. This was so even though the legislator had failed to introduce a specific remedy allowing the reopening of the proceedings. (paragraph 8)

H4 The binding force of the judgments of the ECtHR in proceedings to which Italy had been a party could also be inferred from two sources, namely the ratification of Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (13 May 2004), and the adoption of Law No 12, 9 January 2006. Protocol No 14 reinforced the obligation deriving from Article 46 of the ECHR, while Law No 12 established that the Prime Minister should promote all government measures which appeared necessary to guarantee the enforcement of the judgments of the ECtHR. (paragraph 5)

H5 Judgments of the ECtHR produced direct effect in the domestic legal order, in the sense that they created rights and obligations, not only for states, but also for individuals. Indeed, when such judgments established a violation of the ECHR's rights, individuals might rely upon a right to reparation, either of a pecuniary nature or as restitution in integrum, which the courts were obligated to enforce. (paragraph 5)

Dorigo and President of the Council of Ministers (intervening), Constitutional review, No 113/2011, (2011) 94 RDI 960, ILDC 1732 (IT 2011), 7th April 2011, Italy; Constitutional Court

This case arises from the same events as the case above. The issues before the Constitutional Court were whether the ECHR had constitutional rank within the Italian legal order and whether a decision of the ECtHR against Italy required the reopening of concluded criminal proceedings.

4 .— Art. 46 of the ECHR—cited by the judge in these proceedings as the "interposed law" – imposes an obligation on contracting States, in paragraph 1, "to comply with the final judgments of the Court [European Court of Human Rights] in connection with disputes to which they are parties"; adding, in paragraph 2, that "the Court's final judgment is sent to the Committee of Ministers who oversee its execution".

This is a provision of particular importance in the European system for the protection of fundamental rights, vested in the Court of Strasbourg: indeed, it is clear that the scope of the Contracting States' primary obligation arising out of the ECHR – recognition that each person has the rights and freedoms guaranteed by the Convention (art. 1) – depends, to a large extent, on the specific "nature" of the individual offences identified.

In this regard it must be noted that, subsequent to the ruling for referral to the Constitutional Court, art. 46 of the ECHR has been amended by the implementation (on 1 June 2010) of Protocol no. 14 to the Convention (ratified and made enforceable in Italy by law no. 280 of 15 December 2005). However, this amendment does not cancel the requirements underlying the question of constitutionality, but rather strengthens them. Indeed, by adding a further three paragraphs it is envisaged that the Committee of Ministers may ask the Court of Strasbourg to make an interpretative decision when there are any doubts concerning the content of a previously adopted final judgment, with the effect of preventing its execution (paragraph 3 of art. 46); and, above all, that it may ask the Court to issue a further pronouncement to ascertain a contracting Party's violation of the obligation to comply with its judgments (paragraphs 4 and 5). A specific violation procedure is therefore introduced for the purpose of providing a more incisive means of putting pressure on the defendant State.

With regard to the content of the obligation, art. 46 is to be read systematically in conjunction with art. 41 of the ECHR, according to which, "if the Court declares that there has been a violation of the Convention and its Protocols, and if the other contracting Party's national law only partially permits removing the consequences of the violation, where appropriate the Court will grant the injured party fair redress".

In this regard the most recent consolidated case law of the Court of Strasbourg has affirmed that, "when the Court finds there has been a violation, the defendant State has a legal obligation, not only to pay the interested parties the sums that they are awarded as fair redress, but also to adopt the necessary general measures and/or, if applicable, individual measures" (among many others, Grand Chamber, judgment of 17 September 2009, Scoppola v. Italy, point 147; Grand Chamber, judgment of 1 March 2006, Sejdovi v. Italy, point 119; Grand Chamber, judgment of 8 April 2004, Assanidzé v. Georgia, point 198). The reason for this, in light of art. 41 of the ECHR, is that the sums awarded as fair redress are aimed only at "granting compensation for the damages suffered by the interested parties insofar as these constitute a consequence of the violation that cannot in any case be cancelled" (judgment of 13 July 2000, Scozzari and Giunta v. Italy, point 250).

In contrast, the purpose of the individual measures that the defendant State is required to implement is that defined by the European Court as restitutio in integrum in favour of the interested party. In other words these measures must place "the claimant, where possible, in a situation equivalent to that in which he would have found himself had there not been a violation […] of the Convention" (among many others, Grand Chamber, judgment of 17 September 2009, Scoppola v. Italy, point 151; judgment of 10 November 2004, Sejdovic v. Italy, point 55; judgment of 18 May 2004, Somogyi v. Italy, point 86). With this in mind the defendant State is also called upon to remove the impediments that, at the national legislation level, prevent achievement of the objective: "by ratifying the Convention"; in fact, "the contracting States undertake to ensure that their national law is compatible with the latter" and thus also, "in their own national provisions of law to remove any obstacle to a suitable re-establishment of the claimant's situation" (Grand Chamber, judgment of 17 September 2009, Scoppola v. Italy, point 152; Grand Chamber, judgment of 8 April 2004, Assanidzé v. Georgia, point 198).

With regard in particular to offences associated with the conducting of proceedings, and with criminal proceedings in particular, the Court of Strasbourg, taking the cited premises as its starting point, identified in the re-opening of proceedings the most suitable mechanism for restitutio in integrum, i.e. in cases of an established violation of the guarantees laid down in art. 6 of the Convention. In accordance with the information already provided by the Committee of Ministers, and in Recommendation R (2000)2 of 19 January 2000 in particular, in which the contracting Parties were specifically invited "to examine the respective national legal provisions in order to ensure the existence of adequate scope for the re-examination of a case, including the re-opening of proceedings, when the Court has found a violation of the Convention".

The Strasbourg judges have affirmed, in particular – in what has now become consistent case law – that when a private entity has been found guilty at the end of proceedings characterised by the non-observance of art. 6 of the Convention, the most appropriate means of remedying the identified violation is, as a general rule, "new proceedings or the re-opening of proceedings, at the request of the interested party", in compliance with all the conditions for a fair trial (among many others, the judgment of 11 December 2007, Cat Berro v. Italy, point 46; judgment of 8 February 2007, Kollcaku v. Italy, point 81; judgment of 21 December 2006, Zunic v. Italy, point 74; Grand Chamber, judgment of 12 May 2006, Öcalan v. Turkey, point 210). It is, however,

necessary to recognise that the defendant State has a discretionary right to choose the method of fulfilling its obligation, under the scrutiny of the Committee of Ministers and within the limits of the compatibility of pleadings contained in the Court judgment (among many, Grand Chamber, judgment of 17 September 2009, Scoppola v. Italy, point 152; Grand Chamber, judgment of 1 March 2006, Sejdovic v. Italy, points 119 and 127; Grand Chamber, judgment of 12 May 2005, Öcalan v. Turkey, point 210).

[. . .]

6. —[ref 5] On the other hand the absence of an appropriate remedy for this purpose under Italian law has been censured by the bodies of the European Council, including and most importantly in relation to the case concerning the defendant in the proceedings in question.

In this regard it should be noted first of all – as a correction to what has been stated in the ruling for referral [to the Constitutional Court] – that the European Court of Human Rights has not actually pronounced on the said case. The ruling that the referring judge identifies as the "judgment of 9 September 1998" of the Court of Strasbourg is in fact a report of that same date by the European Commission of Human Rights (a body dissolved by Protocol no. 11): this report was accepted by the Committee of Ministers in its decision of 15 April 1999 (Internal Resolution DH(99)258). Pursuant to art. 32 of the ECHR, in the text that preceded implementation of Protocol no. 11 (which occurred on 1 November 1998, but with application of the previous rules to cases that were pending at that date, under the transitional provision of art. 5), the Committee of Ministers was in fact competent to take decisions on cases submitted to them for examination after the drawing up of a report by the European Commission, which was not followed by deferment of the dispute to the Court of Strasbourg within three months.

The circumstances now presented do not, however, affect the relevance of the question, since under the original art. 32, paragraph 4, of the ECHR, the Committee of Ministers' decisions were binding on contracting States in the same way as the final judgments of the European Court of Human Rights: which means that – retroactively – there is full equivalence of the one type to the other for the purposes under consideration.

With precisely this in mind, both the Committee of Ministers (interim Resolutions ResDH(2000)30 of 19 February 2002, ResDH(2004)13 of 10 February 2004 and ResDH(2005)85 of 12 October 2005), and the Parliamentary Assembly of the Council of Europe (see, among others, Resolution no. 1516(2006) of 2 October 2006) were increasingly critical of Italy's failure to fulfil its obligation to remove the consequences of the violation ascertained in the case in question: default in the specific form of the absence, under national law, of a mechanism appropriate for allowing the re-opening of proceedings declared to be "unfair".

The request to introduce such a mechanism "as quickly as possible" was also sent to the Italian authorities once again, by the Committee of Ministers, on the occasion of the decision to close the monitoring procedure relating to that case: a decision adopted following the said pronouncement of the Court of Cassation which had declared as unenforceable the judgment pronounced against the defendant, ordering its release (Final resolution CM/ResDH(2007)83 of 19 February 2007).

[. . .]

8. —A different conclusion must be reached regarding the question of constitutional legitimacy now under examination which firstly invests art. 630 of the Code of Criminal Procedure in its entirety, and secondly is proposed with reference to the different and more appropriate parameter specified in art. 117, paragraph one, of

the Constitution, assuming art. 46 (in correlation with art. 6) of the ECHR to be the "interposed law.

As of judgments nos. 348 and 349 of 2007 this Court's case law has consistently adopted the position that the ECHR rules – in the sense ascribed to them by the European Court of Human Rights, specifically instituted for their interpretation and application (art. 32, paragraph 1, of the Convention) – constitute, as "interposed laws", the constitutional parameter referred to in art. 117, paragraph one, of the Constitution, in the part that requires that the national legislation comply with the requirements deriving from the "international obligations" (judgment no. 1 of 2011; judgments nos. 196, 187 and 138 of 2010; judgments nos. 317 and 311 of 2009, and no. 39 of 2008; on the enduring validity of that reconstruction even after the Lisbon Treaty of 13 December 2007 came into effect, judgment no. 80 of 2011). From which perspective, if any difference is found to exist between a national law and the provisions of the ECHR, the ordinary judge must first of all ascertain whether an interpretation of the former in a sense that accords with the Convention is practicable, making use of every hermeneutical instrument at his disposal; and, if this produces a negative result – it not being possible to remedy this by simply not applying the differing national law – he must declare the incompatibility found, proposing a question of constitutional legitimacy with reference to the parameter in question. In its turn the Constitutional Court, which is invested with powers of scrutiny, although it cannot censure the European Court's interpretation of the ECHR, has a legitimate right to ascertain whether the provision of the Convention – which nevertheless occupies a level below that of the Constitution – is in fact in conflict with other provisions of the Constitution: in which case it will be necessary to exclude the suitability of the provision of the Convention for integrating the parameter in question.

In the present case it has already been pointed out (point 4 of the legal Considerations, above) that, in what has now become consistent case law, the Court of Strasbourg takes the view that the obligation to comply with its final judgments, which art. 46, paragraph one, of the ECHR imposes on contracting Parties, also involves the requirement that contracting States permit the re-opening of proceedings, at the request of the interested party, whenever this appears necessary for the purpose of restitutio in integrum in favour of the said party, in cases of violation of the guarantees recognised by the Convention, particularly with regard to fair trials.

This interpretation cannot be seen as conflicting with the forms of protection offered by the Constitution. In particular – albeit in light of the doubtful relevance of the degree of certainty and suitability of the res judicata – it is not possible to regard as contrary to the Constitution the envisaged absence of the corresponding precluding effects in the context of particularly important commitments – such as those determined by the Court of Strasbourg, with regard to the judicial matter in its entirety – in terms of the guarantees relating to fundamental rights of the person: guarantees that, with particular reference to the provisions of art. 6 of the Convention, are amply reflected in the applicable text of art. 111 of the Constitution.

Moreover, the judge has, with good reason, identified the basis for the requested additional intervention in art. 630 of the Code of Criminal Procedure: indeed, in that a review, as an extraordinary means of challenging a decision in general terms, involves the re-opening of proceedings, which requires revisiting the procedural activities of an investigative nature, extended to the gathering of evidence, such a review constitutes the mechanism, among those currently existing in the criminal procedure system, that presents characteristics most in accord with that whose introduction appears necessary for ensuring that the national rules are in accordance with the parameter in question. 257

Furthermore, contrary to what the Attorney General maintains, acceptance of the matter in dispute cannot be precluded by the fact that – as has been pointed out (point 5 of the legal Considerations, above) – the possible re-opening of proceedings associated with the obligation under the ECHR is found to differ from the other cases of revision currently contemplated in the challenged rules, either because it is contrary to the reasoning adopted in those cases in terms of the nature of the link between "procedural truth" and "historic truth", arising out of factors "outside" the scope of the proceedings already conducted; or because that possibility is at variance with the rigid alternative, contemplated under the existing rules regarding the outcome of the revision judgment, between acquittal and confirmation of the previous judgment.

Faced with a constitutional 'wound' that cannot be resolved by means of interpretation – especially where fundamental rights are involved – the Court is nevertheless required to provide a remedy: and it must do so independent of the fact that the wound is dependent on what the rule provides or, conversely, on what the rule (or, to be more accurate, the rule of most relevance for the matter under discussion) fails to provide. Nor is it possible, in light of this Court's clear findings (judgment no. 59 of 1958), to regard as precluded from a declaration of the constitutional illegitimacy of laws the real or apparent absence of rules that may be derived therefrom, with respect to given relations. Indeed it will, on the one hand, be the responsibility of the ordinary judges to draw from the decision the necessary corollaries in terms of its application, making use of the hermeneutic instruments at their disposal; while, on the other hand, it will be the responsibility of the legislator to make provision, in the most needed and appropriate manner, for aspects that appear to require appropriate regulation.

In the present case, art. 630 of the Code of Criminal Procedure must be declared constitutionally illegitimate precisely because (and in the part where) it fails to contemplate a "different" case for revision, apart from those currently regulated, aimed specifically at permitting (for proceedings resolved by one of the pronouncements referred to in art. 629 of the Code of Criminal Procedure) the re-opening of proceedings – for the purpose, in the latter case, and as a general functional principle, for the re-opening of activities already conducted and, if necessary, for the re-opening of activities necessary for a judgment – when such re-opening is found necessary, in accordance with art. 46, paragraph 1, of the ECHR, in order that it be in conformity with a final judgment of the European Court of Human Rights (which, for the reasons already given, is equated with the decision adopted by the Committee of Ministers under the aforesaid text of art. 32 of the ECHR).

The need for a re-opening will be assessed – in addition to taking account of the objective nature of the violation established (it is thus quite clear that a re-opening will not be triggered by failure to observe the principle of the reasonable duration of the proceedings, contemplated in art. 6, paragraph 1, of the ECHR, since the resumption of procedural activities would determine the details of the offence) – taking account, of course, of the provisions contained in the judgment the execution of which is being considered, and in the "interpretative" judgment required of the Court of Strasbourg by the Committee of Ministers, in accordance with art. 46, paragraph 3, of the ECHR.

Furthermore, it is understood that, when the eventuality being considered occurs, the judge must examine the compatibility of the individual provisions relating to the revision proceedings. It is necessary, in fact, to regard as inapplicable any provisions that appear irreconcilable from the logical/legal perspective, in light of the objective pursued (to place the interested party in the situation in which

he would have found himself had the acknowledged violation not occurred, and not to remedy a defective assessment of the facts by the judge, resulting from factors outside the matter being judged), and above all – as already pointed out – those that reflect the traditional intended use of revision proceedings solely for the acquittal of the defendant. Therefore, by way of example, the condition of admissibility, based on the absolute prognosis referred to in art. 631 of the Code of Criminal Procedure, will not apply. Equally inapplicable – in the appropriate cases – will be the provisions of paragraphs 2 and 3 of art. 637 of the Code of Criminal Procedure (according to which, respectively, admission of the request necessarily involves the acquittal of the defendant, and the judge cannot pronounce this exclusively on the basis of a different assessment of evidence admitted in the previous proceedings).

Furthermore, it is necessary to take into account that the possibility of the revision contemplated here necessarily involves a departure – imposed by the need for fulfilling international obligations – from the recognised principle whereby procedural defects remain covered by the matter on which judgment is passed. In this context the revision judge will also assess how the causes of the unfairness of the proceedings, as determined by the European Court, must be defined as defects in the procedural process with reference to national law, adopting all the appropriate measures to eliminate them when pronouncing a new judgment.

2. Commentary

(a) The obligation to comply with decisions of international human rights courts

The constitutional courts in Europe in the above cases firmly underscore the international obligation of their states to comply with decisions of the ECtHR, cf Article 46 of the ECHR. Based on this international obligation, the Bulgarian Constitutional Court concluded that its domestic courts had to apply the ECHR directly as it was interpreted in the ECtHR's judgment in the case, although it would contradict national law. The Constitutional Court of the Czech Republic stated that it was obliged to observe within its competences obligations arising from the content of a binding judgment of the ECtHR. It equated friendly settlement at the ECtHR to such a judgment and therefore ceased national proceedings by the applicants. The Italian courts also gave Protocol 14 considerable weight, considering it strengthened the obligation of states to comply with decisions of the court. The importance that the Court of Cassation gave to the Italian ratification of the protocol is noteworthy as the protocol had not taken effect at the time of decision.

Another interesting conclusion by the Constitutional Court in Italy regards the nature of the decisions of the Committee of Ministers of the Council of Europe. In accordance with the rules of the ECHR at the time, prior to the entry into force of Protocol 11, the Committee of Ministers of the Council of Europe had adopted a report finding a violation of Italy of the convention, through a legally binding decision. The Commission played a different role the entry into force of Protocol 11 to the ECHR. Although former Article 32(4) of the ECHR established the obligation of states to comply with the decisions of the Committee of Ministers, this did not automatically mean that those decisions were to be equated with judicial decisions, such as the judgments of the ECtHR.

(b) Enforceability of ECtHR and IACHR decisions in national courts—direct effect

While the human rights treaties have been given direct effect in national law, there seems to be a varied practice with respect to direct effect of judgments of the relevant human rights courts. In the case of *Dorigo Paolo* the Court of Cassation of Italy concluded that judgments of the ECtHR produced direct effect in the domestic legal order, in the sense that they created rights

and obligations, not only for states, but also for individuals. The Bulgarian Constitutional Court noted that while the Bulgarian constitution gave constitutional status to the ECHR it did not afford constitutional status to the decisions of the competent bodies of international organizations, or international jurisdictions and quasi-jurisdictions concerning the implementation of human rights treaties. Similarly, as stated by the Constitutional Court of the Czech Republic, 'none of the provisions of the Constitution incorporated decisions of international courts based on an international treaty which was part of the Czech legal order'. Similarly to the courts in Bulgaria and the Czech Republic, the Supreme Tribunal of Justice in Venezuela distinguished between a direct effect of a treaty and international judgments issued by monitoring bodies supervising that treaty. The court refused to give the same status to international judgments or reports issued by the monitoring bodies supervising human rights treaties as the human rights provisions in those treaties have.

Italy fits into the group of a majority of states described by the Council of Europe as giving direct effect to judgments of the ECtHR.[84] The Czech Republic and Bulgaria do not make it to that category. However, the findings of their constitutional courts, based on the international obligation of their state to comply with the decision of the ECtHR, gave the decisions the same impact as having direct effect.

(c) Remedies

Just as in the case of the ICJ, human rights courts are increasingly leaving less choice to states with respect to remedies. The IACHR has been progressive in this respect, illustrated by its case with respect to Venezuela. In response to that judgment of the IACHR, the Venezuelan court considered it in contradiction with the constitution, to violate the national sovereignty of the country, and to affect the fundamental rights of the state. It even went on, stating that: 'the executive branch should have denounced the ACHR given the IACHR's apparent usurpation of powers when issuing that judgment'. In the last years, the ECtHR has to some extent followed the path of the IACHR as it has become more direct with respect to what means states have to use in their domestic legal order to discharge their obligation to comply with a decision of the court, stating that: '[i]n certain cases, the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate a specific measure'.[85] With the same argument, the ECtHR has decided on specific measures, such as a return of a land,[86] a release from custody as soon as possible,[87] that a state must replace detention on remand with other reasonable and less stringent measure of restraint,[88] and to restore title to a flat and to reverse an order for conviction.[89]

The reopening of domestic proceedings has become of fundamental importance for the execution of the ECtHR's judgments. Indeed, in some cases, this is the only form of *restitutio in integrum* possible, ie the only effective means of redressing the violation of the convention. In response to execution problems, caused in certain cases by the lack of appropriate national legislation on the re-opening of proceedings, the Committee of Ministers adopted a recommendation to member states on the re-examination or reopening of certain cases at the domestic level following judgments of the ECtHR, inviting them to ensure that there existed at national level adequate possibilities for achieving, as far as possible, *restitutio in integrum*, including the

84 Council of Europe, Practical impact of the Council of Europe monitoring mechanisms in improving respect for human rights and the rule of law in member states, H/Inf (2010) 7.

85 ECtHR, *Öcalan v Turkey*, App No 46221/9 (12 May 2005) paras 194–95.

86 ECtHR, *Papamichalopoulos and Others v Greece* (just satisfaction), App No 14556/89 (31 October1995) para 38.

87 ECtHR, *Assanidzé v Georgia*, App No 71503/01 (8 April 2004) para 203; *Ilaşcu v Moldova and Russia* (n 75); ECtHR, *Fatullayev v Azerbajdzhan*, App No 40984/07 (22 April 2010) paras 176–77.

88 ECtHR, *Aleksanyan v Russia*, App No 46468/06 (22 December 2008) para 240.

89 ECtHR, *Stolyarova v Russia*, App No 15711/13 (29 January 2015) para 75.

reopening of proceedings.[90] Building on the practice of the committee, the court itself is more and more deciding on such measures.[91]

In *Dorigo Paolo*, the Constitutional Court stated in clear terms that in cases involving violations of Article 6 of the ECHR, the state had an obligation, pursuant to Article 46, to reopen criminal proceedings, as a form of *restitutio in integrum*, in accordance with what was affirmed by the Court of Cassation in its decisions in *Somogyi* and *Dorigo*. A national legislation on re-opening cases is put to a test in *Al-Nashif v Bulgaria*, where the core issues were whether a judgment of the ECtHR against Bulgaria had binding effect in the Bulgarian legal order, and whether a judgment of the ECtHR had primacy over final judgments or rulings rendered by a Bulgarian court and required revocation of the court's final judgments or rulings. Some states have provision in the constitution on implementation of decisions of international courts in general. For instance, in the Czech Republic, according to Article 87(1)(i) of the Constitution the Constitutional Court should decide about implementation of decisions of an international court that are binding on the Czech Republic and which could not be implemented in a different way.

V. Conclusions

The ILDC reports demonstrate that judgments of international courts are being enforced before domestic courts. With respect to judgments of the international criminal tribunals, the ICTY, ICTR, and ICC, and of the international human rights courts, the ECtHR and IACHR, such enforcement has often been successful. The possibility for individuals to enforce decisions of the ICJ before domestic courts has been rejected in the cases covered.

Domestic courts acknowledge the obligation of their relevant states to comply with decisions of international courts. At times, that obligation overrides domestic legal hurdles for enforcement. The cases relating to enforcement of judgment of the international human rights tribunals reflect this. The power of the Security Council and the international obligation by member states of the UN, undertaken in the UN Charter, to comply with its decisions also carried great weight with respect to enforcement of decisions of international criminal courts at the national level; and again, at times prevailed over legal impediments at the national level. The obligation of UN member states, undertaken in the same treaty, to comply with decisions of the ICJ has not has been given the same weight by domestic courts.

Whether decisions of international courts have direct effect in national law is addressed directly by some domestic courts. In many cases, domestic courts consider that international decisions can have such a direct effect. Some domestic courts consider it necessary that the national law explicitly allows such a direct effect, while others *de facto* give decisions of international courts such a direct effect, in order for the state to comply with its international obligations and binding force of international decisions.

Remedies provided by international courts today call for various forms of implementation at the national level, many directed at individuals and other non-state actors. That development has inevitably put the spotlight on compliance of states with decisions of international courts. On the whole, states are complying with international judgments requiring specific remedies at

90 Recommendation No R (2000) 2 of the Committee of Ministers to member States on the re-examination or reopening of certain cases at the domestic level following judgments of the European Court of Human Rights; Explanatory Memorandum on the Recommendation No R (2000) 2 of the Committee of Ministers on the re-examination or reopening of certain cases at domestic level following judgments of the ECtHR.

91 ECtHR, *Gençel v Turkey*, App No 53431/99 (23 October 2003) para 27; ECtHR, *Somogyi v Italy*, App No 67972/01 (18 May 2004) para 86; ECtHR, *Stoichkov v Bulgaria*, App No 9808/02 (24 March 2005) para 81; ECtHR, *Lungoci v Rumania*, App No 62710/00 (26 January 2006); ECtHR, *Claes and Others v Belgium*, Apps No 46825/99, 47132/99, 47502/99, 49010/99, 49104/99, 49195/99, and 49716/99 (2 June 2005); and ECtHR, *Salduz v Turkey*, App No 36391/02 (27 November 2008) para 72.

the national level, and by doing so acknowledging this enhanced power of international courts. At the same time, the practice illustrates how enforcement of international rights and obligations of the individual is dependent on both the international and the national regimes. The practice of who can enforce these remedies before domestic courts is still not settled. With international courts becoming confident in awarding remedies, reparations reflecting international law on state responsibility, and the high interest at stakes for various actors, it can only be expected that enforcement of international decisions before domestic courts will increase. That practice will continue to test compliance of states with decisions of international courts, the enforcement mechanism at the international level, and the relationship between international and domestic law.

Table of treaties and national legislation

Treaties

Hague Convention (II) With Respect to the Laws and Customs of War on Land and its Annex: Regulation concerning the Laws and Customs of War on Land, 29 July 1899, Reprinted in 1 AJIL 129 (1907), entered into force 4 September 1900.

Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, Reprinted in 2 AJIL 90 (1908), entered into force 26 January 1910.

Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles), 28 June 1919, Reprinted in 2 Bevans 43, entered into force 10 January 1920.

Statute of the Permanent Court of International Justice, 13 December 1920, League of Nations, Treaty Series, vol. 6, p. 379 and p. 390.

Agreement for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945, Charter of the International Military Tribunal, 82 U.N.T.S. 279, entered into force 8 August 1945.

Charter of the United Nations and the Statute of the International Court of Justice, 26 June 1945, 1 U.N.T.S. xvi, entered into force 24 October 1945.

Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277, entered into force 12 January 1951.

Statute of the Council of Europe, 5 May 1949, ETS 1, entered into force 3 August 1949.

Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 U.N.T.S. 31, entered into force 21October 1950.

Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 U.N.T.S. 85, entered into force 21 October 1950.

Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949, 75 U.N.T.S. 135, entered into force 21 October 1950.

Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. 287, entered into force 21 October 1950.

European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 9, 11, 14 and 15, 4 November 1950, 218 U.N.T.S. 221, ETS 5, entered into force 3 September 1953.

Vienna Convention on Consular Relations, 24 April 1963, 596 U.N.T.S. 261, entered into force 18 March 1967.

Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, 24 April 1963, 596 U.N.T.S. 487, entered into force 19 March 1967.

International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 U.N.T.S. 195, entered into force 4 January 1969.

International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, entered into force 23 March 1976.

Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, entered into force 23 March 1976.

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S. 3, entered into force 3 January 1976.

Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, entered into force 27 January 1980.

The American Convention on Human Rights, 22 November 1969, 1444 U.N.T.S. 123, entered into force 18 July 1978.

The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 10 April 1972, 1015 U.N.T.S., entered into force 26 March 1975.

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 14 December 1973, 1035 U.N.T.S. 167, entered into force 20 February 1977.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 3, entered into force 7 December 1978.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 609, entered into force 7 December 1978.

Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 U.N.T.S. 13, entered into force 3 September 1981.

African Charter on Human Rights and People's Rights, 27 June 1981, 1520 U.N.T.S. 217, entered into force 21 October 1986.

Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 22 November 1984, ETS 117, entered into force 1 November 1988.

United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85, entered into force 26 June 1987.

Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3, entered into force 2 September 1990.

The African Charter on the Rights and Welfare of the Child, 11 July 1990, OAU Doc. CAB/LEG/24.9/49(1990), entered into force 29 November 1999.

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, 2220 U.N.T.S. 3, entered into force 1 July 2003.

The Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, 2 May 1992, OJ 344 p 3, entered into force on 1 January 1994, as amended.

Convention on the Prohibition of the Development, Production, Stockpiling and the Use of Chemical Weapons and on their Destruction, 3 September 1992, 1975 U.N.T.S. 45, entered into force 29 April 1997.

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997, 2056 U.N.T.S. 211, entered into force 1 March 1999.

Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000, 2172 U.N.T.S. 222, entered into force 12 February 2002.

Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 18 December 2002, 2375 U.N.T.S. 237, entered into force 22 June 2006.

Convention on the Rights of Persons with Disabilities, 13 December 2006, 2515 U.N.T.S. 3, entered into force 3 May 2008.

Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 3, entered into force 1 July 2002, as last amended 2010.

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 6 October 1999, 2131 U.N.T.S. 83, entered into force 22 December 2000.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem, 8 December 2005, 2404 U.N.T.S. 261, entered into force 14 January 2007.

Arms Trade Treaty, 2 April 2013, 3013 U.N.T.S., entered into force 24 December 2014.

National legislation

Denmark

Lov om Straf for Krigsforbrydelser, LOV nr 395 af 12/07/1946.

Lov om straf for folkedrab, LOV nr 132 af 29/04/1955.

Lov om Den Internnationale Straffedomstol, LOV nr 342 af 16/05/2001.

Militær straffelov, LOV nr 530 af 24/06/2005.

Finland

Strafflag 19.12.1889/39.

Lag om ikraftträdande av de bestämmelser som hör till området för lagstiftningen i Romstadgan för Internationella brottmålsdomstolen och om tillämpning av stadgan 1284/2000.

Law om ändring av strafflagen 212/2008.

Lag om ändring av strafflagen 1718/2015.

Iceland

General Penal Code No. 19/1940 [*Almenn hegningarlög*].

Constitution of Iceland No. 33/1944 [*Stjórnarskrá lýðveldisins Íslands*].

Code of Civil Procedure No. 91/1991 [*Lög um meðferð einkamála*].

Act on European Economic Area No. 2/1993 [*Lög um Evrópska efnahagssvæðið*].

Act on the European Convention on Human Rights No. 62/1994 [*Lög um mannréttindasáttmála Evrópu*].

Act on amendment to the Constitution of Iceland No. 97/1995 [*Stjórnskipunarlög um breyting á stjórnarskrá lýðveldisins Íslands*].

Act on the execution of the Rome Statute of the International Criminal Court No. 43/2001 [*Lög um framkvæmd Rómarsamþykktar um Alþjóðlega sakamáladómstólinn*].

Act on Icelandic peace-keeping and its participation in international peace-keeping No. 73/2007 [*Lög um íslensku friðargæsluna og þátttöku hennar í alþjóðlegri friðargæslu*], as amended.

Code of Criminal Procedure No. 88/2008 [*Lög um meðferð sakamála*], as amended.

Act on the Judiciary No. 50/2016 [*Lög um dómstóla*], as amended.

Norway

Almindelig borgerlig Straffelov (Straffeloven), LOV-1902-05-22-10.

Militær Straffelov, LOV-1902-05-22-13.

Lov om straff for utlendske krigsbrotsmenn, LOV-1946-12-13-14.

Lov om rettergangsmåten i straffesaker (Straffeprosessloven) [Code on Criminal Procedure], LOV 1981-05-22-25.

Lov om gjennomføring i norsk rett av Den internasjonale straffedomstols vedtekter 17. juli 1998 (Roma-vedtektene), LOV-2001-06-15-65.

Lov om straff (straffeloven), LOV-2005-05-20-28.

Lov om mekling og rettergang i sivile tvister (tvisteloven), LOV 2005-06-17-90.

Lov om endringer i straffeloven 20. mai 2005 nr. 28 mv. (skjerpende og formildende omstendigheter, folkemord, rikets selvstendighet, terrorhandlinger, ro, orden og sikkerhet, og offentlig myndighet), LOV-2008-03-07-4.

Lov om ikraftsetting av straffeloven 2005 (straffelovens ikraftsettingslov), LOV-2015-06-19-65.

Sweden

Brottsbalk (1962:700).

Lag (1964:169) om straff för folkmord.

Lag (2002:329) om samarbete med Internationella brottmålsdomstolen.

Lag (2014:406) om straff för folkmord, brott mot mänskligheten och krigsförbrytelser.

Table of cases

International courts

Court of Justice of the European Communities

Van Gend en Loos v Nederlandse Administratie der Belastingen [Plenary], Case 26/62, 5 February 1963, ECR I-12.

P *Kadi & Al Barakaat v Council of the European Union and EC Commission* [GC], Joined Cases C-402/05 P & C-415/05, 3 September 2008, ECR I-06351

European Court of Human Rights

De Wilde, Ooms and Versyp ("Vagrancy") v. Belgium (Article 50) [Plenary], No. 2832/66, 2835/66 and 2899/66, 10 March 1972.

Marckx v. Belgium [Plenary], No. 6833/74, 13 June 1979.

Le Compte, Van Leuven and De Meyere v. Belgium, No 6878/75 and 7238/75, 18 October 1982.

Ekbatani v. Sweden [Plenary], No. 10563/83, 26 May 1988.

Hauschildt v. Denmark, No. 10486/83, 24 May 1989.

Soering v. United Kingdom [Plenary], No. 14038/88, 7 July 1989.

Jon Kristinsson v. Iceland, No. 12170/86, 22 February 1990.

Thorgeir Thorgeirsson v. Iceland, No. 13778/88, 25 June 1992.

Sigurður Sigurjónsson v. Iceland, No. 16130/90, 30 June 1993.

Dombo Beheer B.V. v. Netherlands, No. 14448/88, 27 October 1993.

Van de Hurk v. Netherlands, No. 16034/90, 19 April 1994.

Barberà, Messegué and Jabardo v. Spain (Article 50) [Plenary], No. 10588/83, 10589/83 and 10590/83, 13 June 1994.

McCann and Others v. United Kingdom, No. 18984/91 [GC], 27. September 1995.

Papamichalopoulos et al. v. Greece (article 50) (just satisfaction), No. 14556/89, 31 October 1995.

Aksoy v. Turkey, No. 25781/94 [GC], 18 December 1996.

Menteş and others v. Turkey [GC], No 23186/94, 24 July 1998.

Nikolova v. Bulgaria, No. 31195/96 [GC], 25 March 1999.

Ogur v. Turkey, No. 21594/93 [GC], 20 May 1999.

- Partly dissenting opinion of Judge Bonello.

Siglfirðingur ehf. v. Iceland, No. 34142/96, 30 May 2000.

Vilborg Yrsa Sigurðardóttir v. Iceland, No. 32451/96, 30 May 2000.

Scozzari and Giunta v. Italy, No. 39221/98 and 41963/98 [GC], 13 July 2000.

Beyeler v. Italy (just satisfaction), No. 33202/96 [GC], 28 May 2002.

- Dissenting opinion of Judge Greve.

Kingsley v. United Kingdom, No. 35605/97 [GC], 28 May 2002.

Al-Nashif v Bulgaria, No 50963/99, 20 June 2002.

Pétur Thór Sigurðsson v. Iceland, No. 39731/98, 10 April 2003.

- Concurring Opinion of Judge Ress.
- Concurring Opinion of Judge Zupančić.
- Partly Concurring and Partly Dissenting Opinion of Judge Greve.

Sigurthór Arnarsson v. Iceland, No. 44671/98, 15 July 2003.

Gençel v. Turkey, No. 53431/99, 23 October 2003.

Maestri v. Italy, No. 39748/98 [GC], 17 February 2004.

Assanidze v. Georgia, No. 71503/01 [GC], 8 April 2004.

Somogyi v. Italy, No. 67972/01, 18 May 2004.

Hilda Hafsteinsdóttir v. Iceland, No. 40905/98, 8 June 2004.

Broniowski v. Poland, No. 31443/96 [GC], 22 June 2004.

Ilaşcu and others v. Moldovia and Russia, No. 48787/99 [GC], 8 July 2004.

Kjartan Ásmundsson v. Iceland, No. 60669/00, 12 October 2004.

Mamatkulov and Askarov v. Turkey, No 46827/99 and 46951/99 [GC], 4 February 2005.

Stoichkov v. Bulgaria, No. 9808/02, 24 March 2005.

Öcalan v. Turkey, No. 46221/99 [GC], 12 May 2005.

Claes et al. v. Belgium, No. 46825/99, 47132/99, 47502/99, 49010/99, 49104/99, 49195/99, 49716/99 and 49195/99, 2 June 2005.

Lungoci v. Romania, No. 62710/00, 26 January 2006.

Sejdovic v. Italy, No. 56581/00 [GC], 1 March 2006.

Cocchiarella v. Italy, No. 64886/01 [GC], 29 March 2006.

Scordino v. Italy, No. 43662/98, 6 March 2007.

Sara Lind Eggertsdottir v. Iceland, No. 31930/04, 5 July 2007.

Súsanna Rós Westlund v. Iceland, No. 42628/04, 6 December 2007.

Saadi v. Italy, No. 37201/06 [GC], 28 February 2008.

Salduz v. Turkey, No. 36391/02 [GC], 27 November 2008.

Aleksanyan v. Russia, No. 46468/06, 22 December 2008.

Andrejeva v. Latvia, No. 55707/00 [GC], 18 February 2009.

Verein gegen Tierfabriken Schweiz v. Switzerland , No. 32772/02 [GC], 30 June 2009.

Varnava et al. v. Turkey, No. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 [GC], 18 September 2009.

Suljagić v. Bosnia-Hercegovina, No 27912/02, 30 November 2009.

Al-Saadoon and Mufdhi v. United Kingdom, No 61498/08, 2 March 2010.

Fatullayev v. Azerbajdzhan, No. 40984/07, 22 April 2010.

Tchitchinadze v. Georgia, No. 18156/05, 27 May 2010.

Fener Rum Patrikliği (Ecumenical Patriarchy) v. Turkey (just satisfaction), No. 14340/05, 15 June 2010.

Kjartan Asmundsson v. Iceland, No. 60669/00, 12 October 2010.

Rumpf v. Germany, No. 46344/06, 2 September 2010.

Greens and M.T. v. United Kingdom, No 60041/08 and 60054/08, 23 November 2010.

Paskas v. Lithuania, No. 34932/04 [GC], 6 January 2011.

Al-Skeini et al. v. United Kingdom, No. 55721/07 [GC], 7 July 2011.

Stoycheva v. Bulgaria, No. 43590/04, 19 July 2011.

Ahorugeze v. Sweden, No. 37075/09, 27 October 2011.

Othman (Abu Qatada) v. United Kingdom, No. 8139/09, 12 January 2012.

Hirsi Jamaa et al. v. Italy, No. 27765/09 [GC], 23 February 2012.

Erla Hlynsdóttir v. Iceland, No. 43380/10, 10 July 2012.

Björk Eiðsdóttir v. Iceland , No. 46443/09, 10 July 2012.

Oleksandr Volkov v. Ukraine, No. 21722/11, 9 January 2013.

Savriddin Dzhurayev v. Russia, No. 71386/10, 25 April 2013.

Nizamov et al. v. Russia, No. 22636/13, 24034/13, 24334/13 and 24528/13, 7 May 2014.

Cyprus v. Turkey (just satisfaction), No. 25781/94 [GC], 12 May 2014.

- Partly Concurring Opinion of Judges Tulkens, Vajić, Raimondi and Bianku, joined by Judge Karakaş.

- Concurring Opinion of Judge Pinto de Albuquerque, joined by Judge Vučinić.

Al Nashiri v. Poland, No. 28761/11, 24 July 2014.

Erla Hlynsdóttir (No. 2) v. Iceland, No. 54125/10, 21 October 2014.

Stolyarova v. Russia, No. 15711/13, 29 January 2015.

Erla Hlynsdóttir ((No. 3) v. Iceland, No. 54145/10, 2 June 2015.

J.K. et al. v. Sweden, No. 59166/12 [GC], 23 August 2016.

Inter-American Court of Human Rights

Case of Baena-Ricardo et al v. Panama (Competence), Series C No. 104, 28 November 2003.

Case of the Dismissed Congressional Employees (Aguado - Alfaro et al) v. Peru (Monitoring compliance with judgment, and request for provisional measures), Series C No. 158, 24 November 2010.

Case of Vargas Areco v. Paraguay (Monitoring compliance with judgment), 24 November 2010.

International Court of Justice

Corfu Channel Case (United Kingdom v. Albania), Judgment, I.C.J. Reports 1949, p. 4.

Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 174.

Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 15.

Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 3.

Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 175.

Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment, I.C.J. Reports 1980, p. 3.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14.

Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988, p. 12.

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226.

Case concerning the Gabčíkovo-Nagymaros Project (Hungary and Slovakia), Judgment, I.C.J. Reports 1997, p. 7.

Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998, p. 248.

LaGrand Case (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999, p. 9.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Yugoslavia), Application Instituting Proceedings, 2 July 1999.

LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001, p. 466.

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3.

- Separate Opinion of President Guillaume.
- Dissenting Opinion of Judge Oda.
- Declaration of Judge Ranjeva.
- Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal.
- Separate Opinion of Judge Rezek.
- Dissenting Opinion of Al-Khasawneh.
- Separate opinion of Judge Bula-Bula.
- Dissenting Opinion of Judge ad hoc Van den Wyngaert.

Avena and Other Mexican Nationals (Mexico v. United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003, p. 77.

Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I. C. J. Reports 2004, p. 12.

The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136.

Case concerning Armed Activities on the Territory of Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 168.

- Declaration of Judge Tomka

Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 6.

Application Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412.

Case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008, p. 177.

Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America), Judgment, I.C.J. Reports 2009, p. 3.

Case concerning Certain Criminal Proceedings in France (Republic of Congo v. France), Press Release No. 2010/36 17 November 2010.

Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011, p. 70.

Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012, p. 10.

Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, p. 99.

- Dissenting Opinion of Judge Cançado Trindade.

Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012, p. 324.

Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, p. 422.

- Declaration of Judge Owada.
- Separate Opinion of Judge Skotnikow.
- Dissenting Opinion of Judge Xue.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015, p. 3.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, p. 3.

International Criminal Tribunal for Rwanda

*Prosecutor v. Michel Bagaragaza (*Decision on Rule 11bis) ICTR-2005-86-PT, 30 August 2006.

Prosecutor v. Akayesu (Judgment) ICTR-96-4-T, T Ch I, 2 September 1998.

International Criminal Tribunal for the former Yugoslavia

Prosecutor v. Kunarac et.al. (Judgment) IT-96-23-A, 12 June 2002.

Prosecutor v. Duško Tadić aka "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72, 2 October 1995.

Prosecutor v. Kunarac et.al. (Judgment) IT-96-23-A, 12 June 2002.

International Military Tribunal at Nuremberg

The Trial of German Major War Criminals (Judgment), Proceedings of the International Military Tribunal sitting at Nuremberg Germany, Part. 22, 22 August 1946 to 1 October, 1946.

Permanent Court of International Justice

Question Concerning Acquisition of Polish Nationality, Advisory Opinion, 1923 P.C.I.J. Series B No. 7.

Status of Eastern Carelia Case, Advisory Opinion, 1923 P.C.I.J. Series B No. 5.

Factory at Chorzów (Germany v. Poland), Claim for Indemnity/Jurisdiction, Judgment, 1927 P.C.I.J. Series A, No. 9.

Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932 P.C.I.J Series A/B, No. 44.

Jurisdiction of the Courts of Danzig (Pecuniary claims of Danzig Railway officials who have passed into the Polish service, against the Polish Railways Administration), Advisory Opinion, 1928 P.C.I.J. Series B No. 15.

The Case of the SS "Lotus", Judgment, 1927 PCIJ Series A, No. 10.

National Courts

Argentina

National Court on Federal Criminal and Correction Matters, *International Arrest Warrant ('Lukic'), Re, International Criminal Tribunal for the Former Yugoslavia v. Lukic (Milan)*, Decision on arrest, surrender, and extradition, Case No 11807/05, 10 January 2006; ILDC 1083 (AR 2006).

Bulgaria

Supreme Administrative Court, *Al-Nashif v. National Police Directorate at the Ministry of the Interior*, Case No 11004/2002, Decision No 4332, 8 May 2003; ILDC 608 (BG 2003).

Croatia

Supreme Court, *Croatia v. N-T*, No IKž 690/1999-4, 13 October 1999.

Czech Republic

Constitutional Court, *Červeňáková (Margita) and ors v Regional Court in Ústí nad Labem and District Court in Ústí nad Labem and Municipality of Ústí nad Labem (intervening)*, No II ÚS 604/02, 26 February 2004; ILDC 877 (CZ 2004).

France

Court of Cassation, *Ntawukuriryayo (Dominique)*, No 08-81262, 7th May 2008; ILDC 879 (FR 2008).

Council of State, *Hauchemaille v. France*, No 238849, 11 October 2001; ILDC 767 (FR 2001).

Germany

Constitutional Court, *F v. T., Joint constitutional complaint*, No. 2 BvR 2115/01, 19 September 2006; ILDC 668 (DE 2006).

Hungary

Constitutional Court, *Member of Parliament, Re, Individual constitutional complaint petition*, Vol XII No 10, 31 October 2003; ILDC 601 (HU 2003).

Iceland

Supreme Court*, Ákæruvaldið gegn Guðmundi Breiðfjörð Ægissyni*, No 120/1989, H 1990 2, 9 January 1990.

Supreme Court*, Ingibjörg Auðunsdóttir og Guðmundur Svavarsson vegna síns og ólögráða sonar síns, Karls gegn Fjórðungssjúkrahúsinu á Akureyri*, No 162/1992, H 1992 2122, 10 December 1992.

Supreme Court, *Íslenska ríkið gegn Kristjáni Geirssyni*, H 1998 2528, 18 June 1988.

Supreme Court, *Ákæruvaldið gegn Birni Kristjánssyni, Svavari Rúnari Guðnasyni og Hyrnó ehf.*, No 12/2000, H 2000 1534, 6 April 2000; ILDC 67 (IS 2000).

Supreme Court*, Tryggingastofnun ríkisins gegn Öryrkjabandalagi Íslands og gagnsök*, No 125/2000, H 2000 4480, 19 December 2000; ILDC 68 (IS 2000).

Supreme Court*, Pálína M. Poulsen gegn Hafsteini Hafsteinssyni og Hrund Hafsteinsdóttur*, No 262/2000, H 2001 244, 25 January 2001.

Supreme Court, *Pétur Þór Sigurðsson gegn Íslenska ríkinu*, No. 604/2008, 18 June 2009.

- Dissenting Opinion of Judge Ólafur Börkur Þorvaldsson.

Supreme Court, *Víkurver ehf. gegn Landssambandi smábátaeigenda*, No 504/2008, 18 October 2010.

Supreme Court, *Ákæruvaldið gegn Sigurþóri Arnarsyni*, No 512/2012, 6 December 2012.

Supreme Court, *Félag fasteignasala gegn Brynhildi Bergþórsdóttur*, No 144/2014, 6 March 2014.

District Court of Reykjavik, *Sigurþór Arnarsson gegn Íslenska ríkinu*, No E-823/2014, 25 November 2015.

Supreme Court, *Ákæruvaldið gegn Jóni Ásgeiri Jóhannessyni og Tryggva Jónssyni*, No 12/2018, 21 May 2019.

Israel

Supreme Court, *Mara'abe and ors v. Prime Minister of Israel*, No HCJ 7957/04, 15 September 2005; ILDC 157 (IL 2005).

Italy

Supreme Court of Cassation*, Somogyi*, NO 32678, 3 October 2006; ILDC 560 (IT 2006).

Supreme Court of Cassation, *Paolo Dorigo*, No 2800/2007, (2007) Rivista di diritto internazionale 601, 25 January 2007; ILDC 1096 (IT 2007).

Constitutional Court, Paolo Dorigo and President of the Council of Ministers (intervening), No 113/2011, 94 RDI 960, 17 April 2011; ILDC 1732 (IT 2011).

Supreme Court of Cassation, *Italy Frascà v. Germany and Giachini (guardian of Priebke) and Italy (joining)*, Preliminary order on jurisdiction, No 4284/2013, 21 February 2013; ILDC 1998 (IT 2013).

Norway

Supreme Court, *Karl-Hans Hermann Klinge* [Klinge-saken], No 6 Rt. 1946, p. 198, 27 February 1946.

Supreme Court, *A mot Den påtalemyndighet; Den offentlige påtalemyndighet mot A*, HR-2010-2057-P, Rt-2010-1445, 3 December 2010.

Supreme Court, *A: NOAS mot Staten v/Utlendingsnemnda*, Case no HR-2008-681-A, Rt. 2008-513, 16 April 2008; ILDC 1326 (NO 2008).

Serbia and Montenegro

Federal Constitutional Court, *Socialist Party of Serbia and ors v. Federal Republic of Yugoslavia*, 6 November 2001; ILDC 29 (CSXX 2001).

Singapore

Court of Appeal of Singapore, *Nguyen Tuong Van v. Public Prosecutor*, No CA 5/2004 [2004] SGCA 47, [2005] 1 SLR 103, 20 October 2004, ILDC 88 (SG 2004).

Sri Lanka

Supreme Court, *Nallaratnam Singarasa v. Attorney General*, No SC Spl (LA) No 182/99, 15 September 2006; ILDC 518 (LK 2006).

Switzerland

Supreme Court, *Emmanuel Rukundo v. Federal Office of Justice*, No 1A.129/2001, Case No 1A.130/2001, 3 September 2001; ILDC 348 (CH 2001).

United Kingdom

Court of Appeal, *Marchiori v. Environment Agency and ors*, No (2002) EWCA Civ 03, 25 January 2002; ILDC 241 (UK 2002).

United States of America

Supreme Court*, Medellín v. Texas*, Docket No 06-984, 552 US 491 (2008), 128 S.Ct. 1346 (2008), 25 March 2008; ILDC 947 (US 2008).

Supreme Court, *Angel Francisco Breard v. Fred W. Greene,* No 523 US 371, 118 S Ct 1352 (1998), 14 April 1998; ILDC 684 (US 1998).

Supreme Court, *Germany and LaGrand v. United States and Governor of Arizona*, No 526 US 111 (1999), 3 March 1999; ILDC 689 (US 1999).

United States Court of Appeals for the District of Columbia Circuit, *The Committee of United States Citizens Living in Nicaragua et al, v. Reagan et al*, 859 F 2d 929 (DC Cir 1988), 14 October 1988.

Supreme Court of Pennsylvania*, Commonwealth of Pennsylvania v. Judge*, No 916 A 2d 511 (Pa 2007), 591 Pa 126, 21 February 2007; ILDC 1218 (US 2007).

Venezuela

Supreme Tribunal of Justice, *Solicitor General of the Republic v. Venezuela*, Final Award on Jurisdiction of the Constitutional Chamber, File No 08-1572, No 1939, 18December 2008; ILDC 1279 (VE 2008).

Bibliography

Aalberts TE and Gammeltoft-Hansen T (eds), *The Changing Practices of International Law* (Cambridge University Press 2018)

Abi-Saab R, 'The "General Principles" of Humanitarian Law According to the International Court of Justice' 27 International Review of the Red Cross 367

Adjei WE, 'The Development of Individual Criminal Responsibility Under International Law: Lessons from Nuremberg and Tokyo War Crimes Trials' (2020) 25 Journal of Legal Studies

Ajibola BA, 'Compliance with Judgments of the International Court of Justice' in Henry G Schermers and others (eds), *Compliance with judgments of international courts: proceedings of the symposium organized in honour of professor Henry G. Schermers by Mordenate College and the Department of International Public Law of Leiden University* (M Nijhoff 1996)

Akande D, 'The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities' (2009) 7 Journal of International Criminal Justice 342

Aldrich GH, 'Individuals as Subjects of International Humanitarian Law', *Theory of International Law at the Threshold of the 21st Century, Essays in honour of Krzysztof Skubiszewski* (Kluwer Law International 1996)

Alston P, Goodman R and Steiner HJ, *International Human Rights: Text and Materials* (Oxford University Press 2013)

Alter KJ, 'The Multiplication of International Courts and Tribunals After the End of the Cold War' in Cesare Romano, Karen J Alter and Yuval Shany (eds), *The Oxford handbook of international adjudication* (First edition, Oxford University Press 2014)

Alter KJ, Helfer LR and Madsen MR (eds), *International Court Authority* (First edition, Oxford University Press 2018)

Altwicker-Hámori S, Altwicker T and Peters A, 'Measuring Violations of Human Rights: An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage under the European Convention on Human Rights' (2016) 76 Zeitschrift fuer auslaendisches öffentliches Recht und Voelkerrecht 1

Aman AC and Greenhouse CJ, *Transnational Law: Cases and Problems in an Interconnected World* (Carolina Academic Press 2017)

Ambos K, *European Criminal Law* (Cambridge University Press 2019)

American Law Institute (ed), *Restatement of the Law, the Foreign Relations Law of the United States: Volume 1, §§ 1-488, Volume 2, §§ 501-End* (Student edition, American Law Institute Publishers 1990)

Anderson BRO, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Revised edition, Verso 2016)

Anzilotti D, *Lehrbuch Des Völkerrechts* (Berlin ; Leipzig : de Gruyter 1929)

Arendt H, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books 2006)

Arnardóttir OM, 'Organised Retreat? The Move from "Substantive" to "Procedural" Review in the ECtHR's Case Law on the Margin of Appreciation' (European Society of International Law 2015)

Arsanjani MH and Reisman WM, 'The International Criminal Court and the Congo: From Theory to Reality' in Leila Nadya Sadat and Michael P Scharf (eds), *The theory and practice of international criminal law: essays in honor of M. Cherif Bassiouni* (Martinus Nijhoff Publishers 2008)

Bårdsen A, 'Execution of Strasbourg and Geneva Decisions in Norway' in T Barkhuysen and others (eds), *The execution of Strasbourg and Geneva human rights decisions in the national legal order* (M Nijhoff Publishers : Sold and distributed in North, Central, and South America by Kluwer Law International 1999)

Barkhuysen T and others (eds), *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (M Nijhoff Publishers : Sold and distributed in North, Central, and South America by Kluwer Law International 1999)

Bassiouni MC, *Crimes against Humanity in International Criminal Law* (2nd revised edition, Kluwer Law International 1999)

Bedi SRS, *The Development of Human Rights Law by the Judges of the International Court of Justice* (Hart 2007)

Benedetti F, Bonneau K and Washburn JL, *Negotiating the International Criminal Court: New York to Rome, 1994-1998* (Martinus Nijhoff Publishers 2014)

Berman PS, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (Cambridge University Press 2012)

Bianchi A (ed), *Non-State Actors and International Law* (Ashgate Pub Co 2009)

——, *International Law Theories: An Inquiry into Different Ways of Thinking* (First edition, Oxford University Press 2016)

Biondi C-A, 'The Legacy of Ancient and Medieval Legal Thought for Modern Legal Philosophy' in Fred D Miller, Mahesh Ananth and Enrico Pattaro (eds), *A history of the philosophy of law from the ancient Greeks to the scholastics* (Second edition, Springer 2015)

Björgvinsson DT, 'Mannréttindasáttmáli Evrópu. Meginatriði, skýring og beiting.' in Björg Thorarensen (ed), *Mannréttindasáttmáli Evrópu: Meginreglur, framkvæmd og áhrif á íslenskan rétt* (Mannréttindastofnun Háskóla Íslands 2005)

——, 'Leiðardómar Mannréttindadómstóls Evrópu' (2007) 3 Úlfljótur 463

——, 'Staða Dóma Mannréttindadómstóls Evrópu í Íslenskum Rétti' (2014) 1 Tímarit Lögréttu 23

——, *The Intersection of International Law and Domestic Law: A Theoretical and Practical Analysis* (Edward Elgar Publishing 2015)

Bogdandy A von, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' (2008) 6 International Journal of Constitutional Law 397

Bogdandy A von and Dellavalle S, 'Universalism and Particularism: A Dichotomy to Read Theories on International Order' in Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit (eds), *System, order, and international law: the early history of international legal thought from Machiavelli to Hegel* (First edition, Oxford University Press 2017)

Bogdandy A von, Venzke I and Dunlap T, *In Whose Name? A Public Law Theory of International Adjudication* (First edition, Oxford University Press 2014)

Boot M and Hall CK, 'Article 7 Crimes against Humanity (k) "Other Inhuman Acts"' in O Triffterer (ed), *Commentary on the Rome Statute of the Internatinal Criminal Court – Oberservers´ Notes, Article by Articles* (Second edition, CH Beck 2008)

Borchard E, 'The Relation between International Law and Municipal Law' (1940) 27 Virginia Law Review 137

Bos M, *A Methodology of International Law* (North-Holland 1984)

Braverman I and others, *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford University Press 2015)

Bring O, Mahmoudi S and Wrange P, *Sverige Och Folkrätten* (Fifth edition, Norstedts Juridik 2014)

Brown C, *A Common Law of International Adjudication* (Oxford University Press 2007)

Buergenthal T, 'Self-Executing and Non-Self-Executing Treaties in National and International Law' (1992) 303 Collected Courses of the Hague Academy of International Law

Burton M, 'Doing Empirical Research: Exploring the Decision-Making of Magistrates and Juries' in Dawn Watkins and Mandy Burton (eds), *Research methods in law* (Second edition, Routledge 2018)

Cameron I and others (eds), *International Criminal Law from a Swedish Perspective* (Intersentia 2011)

Capps P and Olsen HP (eds), *Legal Authority beyond the State* (Cambridge University Press 2018)

Cardozo BN, *The Nature of the Judicial Process* (Yale University Press 1921)

Cassese A, 'Genocide' in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome statute of the international criminal court: a commentary* (Oxford University Press 2002)

——, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v Belgium Case' (2002) 13 European Journal of International Law 853

—— (ed), *The Human Dimension of International Law: Selected Papers* (Oxford University Press 2008)

——, 'States: Rise and Decline of the Primary Subjects of the International Community' in Bardo Fassbender and others (eds), *The Oxford handbook of the history of international law* (First edition, Oxford University Press 2012)

Charlesworth, Hillary, 'Law-Making and Sources' in James Crawford and Martti Koskenniemi (eds), *The Cambridge companion to international law* (Cambridge University Press 2012)

Chetail V, 'The Contribution of the International Court of Justice to International Humanitarian Law' 85 International Review of the Red Cross 235

Clark CM, *Iron Kingdom: The Rise and Downfall of Prussia, 1600 - 1947* (Penguin Books 2007)

Clark RS, 'Some Aspects of the Concept of International Criminal Law: Suppression Conventions, Jurisdiction, Submarine Cables and The Lotus' (2011) 22 Criminal Law Forum 519

——, 'The Crime of Aggression' in Carsten Stahn (ed), *The law and practice of the International Criminal Court* (First edition, Oxford University Press 2015)

Colandrea V, 'On the Power of the European Court of Human Rights to Order Specific Non-Monetary Measures: Some Remarks in Light of the Assanidze, Broniowski and Sejdovic Cases' (2007) 7 Human Rights Law Review 396

Cornils K, 'Om Kriminalisering Av Folkmord, Brott Mot Mänskligheten Och Krigförbrytelser' (2005) 44 Lov og rett 131

Cryer R and others, *An Introduction to International Criminal Law and Procedure* (Third edition, Cambridge University Press 2014)

Dannemann G, 'Comparative Law: Study of Similarities or Differences?' in Reinhard Zimmermann and Mathias Reimann (eds), *The Oxford handbook of comparative law* (Oxford University Press 2006)

De Vries SA, 'The Charter of Fundamental Rights and the EU´s "Creeping" Competences: Does the Charter Have a Centrifugal Effect for Fundamental Rights in the EU?' in Sionaidh Douglas-Scott and Nicholas Hatzis (eds), *Research handbook on EU law and human rights* (Edward Elgar Publishing 2017)

Deleuze G and Guattari F, *What Is Philosophy?* (Columbia University Press, 1994)

Deutsches Staats-Wörterbuch (Expedition des Staats-Wörterbuchs 1870)

Dobinson I and Johns F, 'Legal Research as Qualitative Research' in Michael McConville and Wing Hong Chui (eds), *Research methods for law* (Second edition, Edinburgh University Press 2017)

Dworkin R, *Law's Empire* (Repr, Hart 2010)

Ebobrah ST, 'International Human Rights Courts' in Cesare Romano, Karen J Alter and Yuval Shany (eds), *The Oxford handbook of international adjudication* (First edition, Oxford University Press 2014)

Ehlers AB and Lauta KC, 'Juridisk metode og retskilder: Findes "gældende ret"?' in Mikkel Jarle Christensen and others (eds), *De juridiske metoder: ti bud* (Hans Reitzel 2021)

Elholm T and Feldtmann B (eds), *Criminal Jurisdiction: A Nordic Perspective* (1. edition, DJØF Publishing 2014)

Eskeland S, *De Mest Alvorlige Forbrytelser* (Cappelen Damm As 2011)

Fassbender B, 'Hans Kelsen (1881-1973)' in Bardo Fassbender and others (eds), *The Oxford handbook of the history of international law* (First published in paperback 2014, Oxford University Press 2014)

Ferdinandusse WN, *Direct Application of International Criminal Law in National Courts* (TMC Asser Press 2006)

Fife RE, 'Criminalizing Individuals for Acts of Aggression Committed by States' in Morten Bergsmo (ed), *Human Rights and Criminal Justice for the Downtrodden* (Martinus Nijholl Publishing 2003)

Fife RE and Jervell K, 'Elements of Nordic Practice 2000: Norway' (2001) 70 Nordic Journal of International Law 531

Fitzmaurice G, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law', *Collected Courses of the Hague Academy of International Law* (Brill/Nijhoff 1957)

——, *The Law and Procedure of the International Court of Justice*, vol II (Cambridge: Grotius Publications 1986)

Fitzmaurice M, 'The History of Article 38 of the Statute of the International Court of Justice: The Journey from the Past to the Present' in Samantha Besson and Jean D'Aspremont (eds), *The Oxford handbook on the sources of international law* (First edition, Oxford University Press 2017)

Fleck D, *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford University Press 1995)

Franck TM and Fox GH (eds), *International Law Decisions in National Courts* (Transnational Publishers 1996)

Frände D, 'Finnland' in A Eser and H Kreicker (eds), *Nationale Strafverfolgung völkerrechtlicher Verbrechen – National Prosecution of International Crimes* (edition iuscrim, Max-Planck-Institut fũr ausländisches und internationals Strafrecht 2003)

Friman H, 'Political and Legal Considerations in Sweden Relating to the Rome Statute for the International Criminal Court' in RS Lee (ed), *States' responses to issues arising from the ICC Statute: Consitutional, sovereignty, judical cooperation and criminal law* (Transnational Publishers 2005)

Gaeta P, 'Does President Al Bashir Enjoy Immunity from Arrest?' (2009) 7 Journal of International Criminal Justice 328

Gaja G, 'Dualism–a Review' in André Nollkaemper and Janne Elisabeth Nijman (eds), *New perspectives on the divide between national and international law* (Oxford University Press 2007)

Gardam J, 'The Contribution of the International Court of Justice to International Humanitarian Law' (2001) 14 Leiden Journal of International Law 349

Gauksdottir G, 'Iceland' in Robert Blackburn and Jörg Polakiewicz (eds), *Fundamental rights in Europe: the European Convention on Human Rights and its member states, 1950-2000* (Oxford University Press 2001)

Gauksdottir G and Ingadottir T, 'Compliance with the Views of the UN Human Rights Committee and the Judgments of the European Court of Human Rights in Iceland' in Asbjørn Eide and others (eds), *Making peoples heard: essays on human rights in honour of Gudmundur Alfredsson* (Martinus Njhoff 2011)

Gazzini T, 'Personality of International Organizations' in Jan Klabbers (ed), *Research handbook on the law of international organizations* (Paperback ed, reprint, Edward Elgar 2014)

Godfrey-Smith P, *Theory and Reality: An Introduction to the Philosophy of Science* (University of Chicago Press 2003)

Gordon G, 'Natural Law in International Legal Theory: Linear and Dialectical Presentation' in Anne Orford, Florian Hoffmann and Martin Clark (eds), *The Oxford handbook of the theory of international law* (First edition, Oxford University Press 2016)

Gragl P, *Legal Monism: Law, Philosophy, and Politics* (First edition, Oxford University Press 2018)

Gray C, *Judicial Remedies in International Law* (Oxford University Press 1987)

——, 'Remedies' in Cesare Romano, Karen J Alter and Yuval Shany (eds), *The Oxford handbook of international adjudication* (First edition, Oxford University Press 2014)

Grewe WG, *The Epochs of International Law* (Michael Byers tr, Walter de Gruyter 2000)

Hafner G, 'The Emancipation of the Individual from the State under International Law' (2013) 358 Collected Courses of the Hague Academy of International Law

Hall S, 'Researching International Law' in Michael McConville and Wing Hong Chui (eds), *Research methods for law* (Second edition, Edinburgh University Press 2017)

Halliday TC and Shaffer GC, *Transnational Legal Orders* (Cambridge University Press 2015)

Harris D and others, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (Second edition, Oxford University Press 2009)

Hart HLA, *The Concept of Law* (Third edition, Oxford University Press 2012)

Haugevik KM and Sverdrup U, 'Ten Years On: Reassessing the Stoltenberg Report on Nordic Cooperation' (University of Iceland Press, 2019)

Heiskanen V, *International Legal Topics* (Lakimiesliiton Kustannus 1992)

Hellestveit C, 'The Geneva Conventions and the Dichotomy between International and Non-International Armed Conflict - Curse or Blessing for the "Principle of Humanity"?' in Kjetil Mujezinović Larsen, Gro Nystuen and Camilla Guldahl Cooper (eds), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (Cambridge University Press 2012)

Hetherington SC, *What Is Epistemology?* (Polity 2019)

Higgins R, 'Participants in the International Legal System', *Problems and process: international law and how we use it* (Clarendon Press 1994)

——, 'Remedies and the International Court of Justice' in Malcolm D Evans (ed), *Remedies in international law: the institutional dilemma* (Hart 1998)

——, 'Conceptual Thinking about the Individual in International Law', *Themes and theories: selected essays, speeches, and writings in international law* (Oxford University Press 2009)

Hobsbawm EJ, *Nations and Nationalism since 1780: Programme, Myth, Reality* (Second edition, Cambridge University Press 2012)

Holtermann Jakob v. h., 'Conspicuous Absence and Mistaken Presence. A Note on the Ambiguous Role of Scandinavian Legal Realism in Nordic Approaches to International Law' in Astrid Kjeldgaard-Pedersen and Københavns universitet (eds), *Nordic approaches to international law* (Brill Nijhoff 2018)

Hurd I, *International Organizations: Politics, Law, Practice* (Fourth edition, Cambridge University Press 2021)

Husa J, Nuotio K and Pihlajamaki H, 'Nordic Law - Between Tradition and Dynamism' (2008) Working Paper Series *Tilburg Institute of Comparative and Transnatinal law*

Hutchinson T, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research methods in law* (Second edition, Routledge 2018)

Hutchinson T and Duncan NJ, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83

Ingadottir T, 'Innleiðing Helstu Sáttmála á Sviði Alþjóðlegs Refsiréttar í Íslenskan Rétt [Incorporation of Key Conventions in the Area of International Crimnal Law in Icelandic Law]' in Ragnheiður Bragadóttir (ed), *Afmælisrit: Jónatan Þórmundsson sjötugur* (Codex 2007)

——, 'The ICJ Armed Activity Case – Reflections on States' Obligation to Investigate and Prosecute Individuals for Serious Human Rights Violations and Grave Breaches of the Geneva Conventions' (2009) 78 Nordic Journal of International Law 581

——, 'The Financing of International Adjudication' in Cesare Romano, Karen J Alter and Yuval Shani (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013)

——, 'The Role of the International Court of Justice in the Enforcement of the Obligation of States to Investigate and Prosecute Serious Crimes at the National Level' (2014) 47 Israel Law Review 285

——, ‘Just Satisfaction and the Binding Force of Judgments: Article 41 and 46 of the European Convention on Human Rights’ in Björg Thorarensen (ed), *Mannréttindasáttmáli Evrópu: meginreglur, framkvæmd og áhrif á íslenskan rétt* (Second edition, Bókautgafan Codex ; Mannréttindastofnun Háskóla Íslands, Lagadeild Háskólans í Reykjavík 2017)

——, ‘Enforcement of Decisions of International Courts at the National Level’ in André Nollkaemper and others (eds), *International law in domestic courts: a casebook* (First edition, Oxford University Press 2018)

——, ‘The Implementation of the Rome Statute of the International Criminal Court in the Nordic Countries: A New Comprehensive Criminalization of Serious Crimes’ in Astrid Kjeldgaard-Pedersen and Københavns universitet (eds), *Nordic approaches to international law* (Brill Nijhoff 2018)

——, ‘Election of Judges: International Criminal Court (ICC)’ [2019] Max Planck Encyclopedias of International Law [MPIL]

Ingadottir T, Ferstman C and Kristjansdottir E, ‘Victims of Atrocities – Access to Reparations’ (2003)

Ingadottir T and Haraldsdottir K, ‘Reopening of Criminal Cases in Iceland’ (2021) 7 Svensk Juristtidning 560

Ingadottir T and Tryggvadottir R, ‘Researching Icelandic Law’, [2010] GlobaLex, New York University School of Law

International Committee of the Red Cross (ed), *Commentary on the Third Geneva Convention: Treatment of Prisoners of War* (Cambridge University Press 2021)

Ip EC, ‘Globalization and the Future of the Law of the Sovereign State’ 8 International Journal of Constitutional Law 636

Jacobson A and Schlink B (eds), *Weimar: A Jurisprudence of Crisis* (Berkeley: University of California Press)

Jensen SLB, *The Making of International Human Rights: The 1960s, Decolonization, and the Reconstruction of Global Values* (Cambridge University Press 2016)

Jessberger F and Werle G, *Principles of International Criminal Law* (4e edn, Oxford University Press 2020)

Jessup PC, *Transnational Law* (Yale University Press 1956)

Kalshoven F, ‘State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of Hague Convention IV of 1907 to Article 91 of Additional Protocol I of 1977 and Beyond’ (1991) 40 The International and Comparative Law Quarterly 827

Kammerhofer J, 'International Legal Positivist Research Methods' in Rossana Deplano and Nikolaos K Tsagourias (eds), *Research methods in international law: a handbook* (Edward Elgar Publishing Limited 2021)

Keith KJ, 'The International Court of Justice and Criminal Justice' (2010) 59 International and Comparative Law Quarterly 895

Keller H, Fischer A and Kühne D, 'Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals' (2011) 21 Europan Journal of International Law 1025

Keller H and Marti C, 'Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Right's Judgments' (2015) 26 European Journal of International Law 829

Kelsen H, *General Theory of Norms* (Clarendon 1991)

——, *General Theory of Law and State* (Lawbook Exchange 2003)

——, *Pure Theory of Law* (Lawbook Exchange 2005)

——, *General Theory of Law & State* (Transaction Publishers 2006)

Kingsbury B, Krisch N and Stewart RB, 'The Emergence of Global Administrative Law' (2005) 68 Law and Contemporary Problems 15

Kingsbury B and Weiler JHH, 'Studying the Armed Activities Decision' (2008) 40 New York University Journal of International Law and Politics 1

Kjeldgaard-Pedersen A, *The International Legal Personality of the Individual* (First Edition, Oxford University Press 2018)

Kjeldgaard-Pedersen A and Københavns universitet (eds), *Nordic Approaches to International Law* (Brill Nijhoff 2018)

Klabbers J, 'Coming in from the Cold: Treaties in Finland's Legal Order' in T Koivurova (ed), *Kansainvälistyvä Oikeus: Juhlakirja Professori Kari Hakapää* (Rovaniemi: University of Lapland 2005)

——, '(I Can´t Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors' in Andrea Bianchi (ed), *Non-state actors and international law* (Ashgate Pub Co 2009)

—— (ed), *Research Handbook on the Law of International Organizations* (Paperback ed, reprint, Edward Elgar 2014)

——, 'Judging Inter-Legality' in Jan Klabbers and Gianluigi Palombella (eds), *The challenge of Inter-Legality* (Cambridge University Press 2019)

——, 'An Accidental Revolution: The ILO and the Opening Up of International Law' in Tarja Halonen and Ulla Liukkunen (eds), *International Labour Organization: Global Social Governance* (Dordrecht: Springer 2020)

——, *International Law* (Third edition, Cambridge University Press 2021)

——, 'Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties' 69 Nordic Journal of International Law

Klabbers J and Palombella G, 'Introduction, Situating Inter-Legality' in Jan Klabbers and Gianluigi Palombella (eds), *The challenge of Inter-Legality* (Cambridge University Press 2019)

—— (eds), *The Challenge of Inter-Legality* (Cambridge University Press 2019)

Klabbers J, Peters A and Ulfstein G, *The Constitutionalization of International Law* (Oxford University Press 2009)

Kleffner JK, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press 2008)

Koening D and Askin KD, 'D. M. Koening and K. D. Askin, International Criminal Law and the International Criminal Court Statute: Crimes Agains Women' in Kelly Dawn Askin and Dorean M Koenig (eds), *Women and international human rights law: Volume II* (Transnational Publishers 2000)

Kolb R, 'The Protection of the Individual in Times of War and Peace' in Bardo Fassbender and others (eds), *The Oxford handbook of the history of international law* (First edition, Oxford University Press 2012)

——, *Theory of International Law* (Hart Publishing 2016)

Koskenniemi M, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge University Press 2002)

——, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005)

——, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (2007)

——, 'Introduction' in Hersch Lauterpacht, *The function of law in the international community* (1st pbk. ed, Oxford University Press 2011)

——, *The Politics of International Law* (Hart 2011)

——, 'What Should International Legal History Become?' in Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit (eds), *System, order, and international law: the early history of international legal thought from Machiavelli to Hegel* (First edition, Oxford University Press 2017)

Kress C and Holtzendorff L von, 'The Kampala Compromise on the Crime of Aggression' (2010) 8 Journal of International Criminal Justice 1179

Krisch N (ed), *Entangled Legalities beyond the State* (Cambridge University Press 2022)

Kuhn TS and Hacking I, *The Structure of Scientific Revolutions* (Fourth edition, The University of Chicago Press 2012)

Kunz JL, 'On the Theoretical Basis of the Law of Nations' (1924) 10 British Institute of International and Comparative law 115

Lambert-Abdelgawad E, *The Execution of Judgments of the European Court of Human Rights* (Second edition, Council of Europe Publ 2008)

Laursen A, *Internationale Forbrydelser i Dansk Ret* (Jurist- og Økonomforbundets Forlag 2011)

——, 'A Danish Paradox? A Brief Review of the Status of International Crimes in Danish Law' (2012) 10 Journal of International Criminal Justice 997

Lauterpacht H, 'The Subjects of the Law of Nations' (1947) 63 The Law Quarterly Review 438

——, *International Law* (1950)

——, 'The Subjects of International Law' in E Lauterpacht (ed), *International Law. Being the Collected Papers of Hersch Lauterpacht, Volume I: The General Works* (1970)

——, *The Function of Law in the International Community* (1st pbk. ed, Oxford University Press 2011)

Leach P, 'Beyond the Bug River – A New Dawn for Redress before the European Court of Human Rights' (2005) 10 European Human Rights Law Review 148

——, 'The Effectiveness of the Committee of Ministers in Supervising the Enforcement of Judgments of the European Court of Human Rights' (2006) 3 Public Law 443

Leach P and Leverhulme Trust (eds), *Responding to Systemic Human Rights Violations: An Analysis of 'pilot Judgments' of the European Court of Human Rights and Their Impact at National Level* (Intersentia 2010)

Leary VA, *International Labour Conventions and National Law: The Effectiveness of the Automatic Incorporation of Treaties in National Legal Systems* (M Nijhoff ; Distributors for the US and Canada, Kluwer Boston 1982)

Lee RSK, Project on International Courts and Tribunals and United Nations Institute for Training and Research (eds), *The International Criminal Court: The Making of the Rome Statute--Issues, Negotiations, Results* (Kluwer Law International 1999)

Lesaffer R and Arriens J, *European Legal History: A Cultural and Political Perspective* (Cambridge University Press 2009)

Letto-Vanamo P and Tamm D, 'Cooperation in the Field of Law' in Johan Strang (ed), *Nordic cooperation: a European region in transition* (Routledge 2016)

Liechtenstein Institute on Self-Determination, *Handbook, Ratification and Implementation of the Kampala Amendments to the Rome Statute of the ICC: Crime of Aggression, War Crimes* (Woodrow Wilson School of Public and International Affairs 2012)

Loucaides LG, 'Reparation for Violations of Human Rights under the European Convention and Restitutio in Integrum' (2008) 2 European Human Rights Law Review 186

Lubell N, Pejic J and Simmons C, *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice* (International Committee of the Red Cross (ICRC)/Geneva Academy of International Humanitarian Law and Human Rights 2019)

Lundstedt L and Stockholms Universitet (eds), *Investigation and Prosecution in Scandinavia of International Crimes* (Stockholm Institute for Scandinavian Law 2020)

MacMillan M, *Peacemakers: The Paris Peace Conference of 1919 and Its Attempt to End War* (Murray 2003)

Madsen MR, Cebulak P and Wiebusch M, 'Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts' (2018) 14 International Journal of Law in Context 197

Magliveras KD, 'Membership in International Organizations' in Jan Klabbers (ed), *Research handbook on the law of international organizations* (Paperback ed, reprint, Edward Elgar 2014)

Mani VS, 'The International Court and the Humanitarian Law of Armed Conflict' (1999) 39 The Indian Journal of International Law 32

Martin S, 'Is the ECJ Ruling in Kadi Incompatible with International Law?' 28 Yearbook of European Law 637

Matthíasson VM, *Skaðabótaréttur* (Bókaútgáfan Codex 2005)

McCarthy C, 'Reparation for Gross Violations of Human Rights Law and International Humanitarian Law at the International Court of Justice' in Carla Ferstman, Mariana Goetz and Alan Stephens (eds), *Reparations for victims of genocide, war crimes and crimes against humanity: systems in place and systems in the making* (Martinus Nijhoff Publishers 2009)

McCrudden C, 'Legal Research and the Social Sciences' (2006) 122 Law Quarterly Review 632

McLeod I, *Legal Theory* (Sixth edition, Palgrave Macmillan 2012)

Micus A, *The Inter-American Human Rights System as a Safeguard for Justice in National Transitions: From Amnesty Laws to Accountability in Argentina, Chile and Peru* (Brill Nijhoff 2015)

Minkkinen P, *Sovereignty, Knowledge, Law* (Routledge 2011)

——, 'Critical Legal "method" as Attitude' in Dawn Watkins and Mandy Burton (eds), *Research methods in law* (Second edition, Routledge 2018)

Mitchell SM and Powell EJ, *Domestic Law Goes Global: Legal Traditions and International Courts* (Cambridge University Press 2011)

Möller JT and De Zayas AM, *United Nations Human Rights Committee Case Law 1977 - 2008: A Handbook* (Engel 2009)

Mosler H, 'Article 94' in Bruno Simma and others (eds), *The Charter of the United Nations: a commentary* (Second edition, Oxford University Press 2002)

Moyn S, *The Last Utopia: Human Rights in History* (1. Belknap Press of Harvard Univ. Press paperback ed, Belknap Press of Harvard University Press 2012)

Nergelius J, 'The Nordic States and Continental Europe: A Two-Fold Story', *Nordic and other European constitutional traditions* (Martinus Nijhoff 2006)

Neumann IB and Gstöhl S, 'Introduction: Lilliputians in Gulliver´s World?' in Christine Ingebritsen (ed), *Small states in international relations* (University of Washington Press ; University of Iceland Press 2006)

Nollkaemper A, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (2003) 52 International and Comparative Law Quarterly 615

——, *National Courts and the International Rule of Law* (Paperback edition, Oxford University Press 2012)

—— (eds), *International Law in Domestic Courts: A Casebook* (First edition, Oxford University Press 2018)

Nollkaemper A and Nijman JE, 'Beyond the Divide' in André Nollkaemper and Janne Elisabeth Nijman (eds), *New perspectives on the divide between national and international law* (Oxford University Press 2007)

——, 'Introduction' in André Nollkaemper and Janne Elisabeth Nijman (eds), *New perspectives on the divide between national and international law* (Oxford University Press 2007)

—— (eds), *New Perspectives on the Divide between National and International Law* (Oxford University Press 2007)

Nørgaard CA, *The Position of the Individual in International Law* (Munksgaard 1962)

Nowak M, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd, rev. ed edn, Engel 2005)

——, 'The Need for a World Court of Human Rights' (2007) 7 Human Rights Law Review 251

Nuutila A-M, 'Implementation of the Rome Statute in Finnish Law' in Matthias Neuner (ed), *National Legislation Incorporating International Crimes: Approaches of Civil and Common Law Countries* (BWV – Berliner Wissenschafts-Verlag GmbH 2003)

O´Connor S, 'War Crimes before the Norwegian Supreme Court: The Obligation to Prosecute and the Principle Of Legality – an Incumbrance or Opportunity?' [2003] Oxford Institute for Ethics Law and Armed Conflict

Oellers-Frahm K, 'Article 94' in Bruno Simma and others (eds), *The Charter of the United Nations: a commentary* (Third edition, Oxford University Press 2012)

Okowa PN, 'Congo's War: The Legal Dimension of a Protracted Conflict' (2007) 77 The British Year Book of International Law 203

Ordenez S and Reilly D, 'Effect of the Jurisprudence of the International Court of Justice on National Courts' in Thomas M Franck and Gregory H Fox (eds), *International law decisions in national courts* (Transnational Publishers 1996)

Ove Bring, 'Monism och dualism i går och i dag' in Rebecca Stern (ed), *Folkrätten i svensk rätt* (1. uppl, Liber 2012)

Paraskeva C, 'Returning the Protection of Human Rights to Where They Belong. At Home' (2008) 12 The International Journal of Human Rights 415

Parlett K, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge University Press 2011)

Pellet A, 'The Definition of Responsibility in International Law' in James Crawford and others (eds), *The law of international responsibility* (Oxford University Press 2010)

Pellet A and Muller D, 'Article 38' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: a commentary* (Third edition, Oxford University Press 2019)

Pellonpää M, 'Individual Reparation Claims under the European Convention on Human Rights' in Albrecht Randelzhofer and Christian Tomuschat (eds), *State responsibility and the individual: reparation in instances of grave violations of human rights* (M Nijhoff Publishers ; sold and distributed in North, Central, and South America by Kluwer Law International 1999)

Peters A, 'The Merits of Global Constitutionalism' (2009) 16 Indiana Journal of Global Legal Studies 397

——, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press 2016)

Picciotto CM, *The Relation of International Law to the Law of England and of the United States of America (with Introduction by L. Oppenheim)* (1915)

Pictet JS, Siordet F and Internationales Komitee vom Roten Kreuz (eds), *Commentary on the Geneva Conventions of 12 August 1949, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2. repr, International Committee of the Red Cross 2006)

Polakiewicz J, 'The Execution of Judgments of the European Court of Human Rights' in Robert Blackburn and Jörg Polakiewicz (eds), *Fundamental rights in Europe: the European Convention on Human Rights and its member states, 1950-2000* (Oxford University Press 2001)

Portmann R, *Legal Personality in International Law* (Cambridge University Press 2010)

Posner EA, *The Twilight of Human Rights Law* (Oxford Univ Press 2014)

Raimondo FO, 'The International Court of Justice as a Guardian of the Unity of Humanitarian Law' (2007) 20 Leiden Journal of International Law 595

Randelzhofer A, 'The Legal Position of the Individual under Present International Law' in Albrecht Randelzhofer and Christian Tomuschat (eds), *State responsibility and the individual: reparation in instances of grave violations of human rights* (Nijhoff 1999)

Randelzhofer A and Tomuschat C (eds), *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (Nijhoff 1999)

Rehman J, *International Human Rights Law* (Second edition, Pearson 2010)

Risini I, *The Inter-State Application under the European Convention on Human Rights: Between Collective Enforcement of Human Rights and International Dispute Settlement* (Brill Nijhoff 2018)

Roberti di Sarsina J, *Transitional Justice and a State's Response to Mass Atrocity* (Springer Berlin Heidelberg 2019)

Roberts A and others (eds), *Comparative International Law* (Oxford University Press 2018)

Roberts P, 'Interdisciplinarity in Legal Research' in Michael McConville and Wing Hong Chui (eds), *Research methods for law* (Second edition, Edinburgh University Press 2017)

Roht-Arriaza N, 'Sources in International Treaties of an Obligation to Investigate, Prosecute, and Provide Redress' in Naomi Roht-Arriaza (ed), *Impunity and human rights in international law and practice* (Oxford University Press 1995)

Romano C, Alter KJ and Shany Y, 'Mapping International Adjudicative Bodies' in Cesare Romano, Karen J Alter and Yuval Shany (eds), *The Oxford handbook of international adjudication* (First edition, Oxford University Press 2014)

Rorty R, 'Philosophy in America Today' (1982) 51 The American Scholar 183

Rosenberg A and McIntyre LC, *The Philosophy of Science: A Contemporary Introduction* (Fourth edition, Routledge, Taylor & Francis Group 2020)

Rosenne S, 'War Crimes and State Responsibility' in Yoram Dinstein and Mala Tabory (eds), *War crimes in international law* (M Nijhoff Publishers 1996)

Rosenne S, Ronen Y and Rosenne S, *The Law and Practice of the International Court, 1920-2005* (Fourth edition, M Nijhoff Publishers 2006)

Ross A, Holtermann J v H and Bindreiter U, *On Law and Justice* (Oxford University Press 2019)

Sands P, MacKenzie R and Shany Y (eds), *Manual on International Courts and Tribunals* (Butterworths 1999)

Sarkin J, 'The Interrelationship and Interconnectness of Transitional Justice and the Rule of Law in Uganda: Pursuing Justice, Truth, Guarantees of Non-Repetition, Reconciliation and Reparations for Past Crimes and Human Rights Violations' (2015) 7 Hague Journal on the Rule of Law 111

Sassen S, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Updated ed, 4 print, 1 paperback print, Princeton Univ Press 2008)

Schabas W, *Genocide in International Law: The Crime of Crimes* (2nd ed, Cambridge University Press 2009)

——, *The European Convention on Human Rights: A Commentary* (First edition, Oxford University Press 2015)

——, 'Criminal Responsibility for Violations of Human Rights' in Janusz Symonides (ed), *Human rights: international protection, monitoring, enforcement* (2018)

Schaus A, 'Article 27 Convention of 1969' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: a commentary* (Oxford University Press 2011)

Schermers HG and others (eds), *Compliance with Judgments of International Courts: Proceedings of the Symposium Organized in Honour of Professor Henry G. Schermers by Mordenate College and the Department of International Public Law of Leiden University* (M Nijhoff 1996)

Schmidt R, *Regulatory Integration across Borders: Public-Private Cooperation in Transnational Regulation* (Cambridge University Press 2020)

Schulte C, *Compliance with Decisions of the International Court of Justice* (Oxford University Press 2004)

Schwebel SM, 'Commentary' in Henry G Schermers and others (eds), *Compliance with judgments of international courts: proceedings of the symposium organized in honour of professor Henry G. Schermers by Mordenate College and the Department of International Public Law of Leiden University* (M Nijhoff 1996)

——, 'The Roles of the Security Council and the International Court of Justice in the Application of International Humanitarian Law' 27 New York University Journal of International Law and Politics 731

Schwöbel-Patel C (ed), *Critical Approaches to International Criminal Law: An Introduction* (Routledge 2014)

Seils P, 'Putting Complementarity in Its Place' in Carsten Stahn (ed), *The law and practice of the International Criminal Court* (First edition, Oxford University Press 2015)

Sena PD and Vituzzi MC, 'The European Courts and the Security Council: Between Dédoublement Fonctionnel and Balancing of Values' (2009) 20 Europan Journal of International Law 193

Shany Y, *Regulating Jurisdictional Relations Between National and International Courts* (Oxford University Press 2007)

——, *Assessing the Effectiveness of International Courts* (Oxford University Press 2014)

Shaw MN, 'A Practical Look at the International Court of Justice' in Malcolm D Evans (ed), *Remedies in international law: the institutional dilemma* (Hart 1998)

——, *International Law* (Fifth edition, Cambridge University Press 2003)

——, *International Law* (6th ed, Cambridge University Press 2008)

——, *International Law* (9th ed, Cambridge university press 2021)

Shelton D, *Remedies in International Human Rights Law* (Oxford University Press 1999)

—— (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press 2011)

——, *Remedies in International Human Rights Law* (Third Edition, Oxford University Press 2015)

Sikkink K, *Evidence for Hope: Making Human Rights Work in the 21st Century* (Princeton University Press 2017)

Simma B and Hoppe C, 'From LaGrand and Avena to Medellin: A Rocky Road Towards Implementation' 14 Tulane Journal of International and Comparative Law

Simmonds NE, *Central Issues in Jurisprudence: Justice, Laws, and Rights* (Fifth edition, Sweet & Maxwell/Thomson Reuters 2018)

Sloss D (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (First paperback edition, Cambridge University Press 2013)

Smits JM, 'What Is Legal Doctrine? On The Aims and Methods of Legal-Dogmatic Research' in Rob van Gestel, Hans-W Micklitz and Edward L Rubin (eds), *Rethinking legal scholarship: a transatlantic dialogue* (Cambridge University Press 2017)

Solis GD, *The Law of Armed Conflict*. (Cambridge University Press 2016)

Spain A, 'Integration Matters: Rethinking the Architecture of International Dispute Resolution' (2010) 32 University of Pennsylvania Journal of International Law 1

Spiermann O, 'The History of Article 38 of the Statute of the International Court of Justice: 'A Purely Platonic Discussion'?' in Samantha Besson and Jean D'Aspremont (eds), *The Oxford handbook on the sources of international law* (First edition, Oxford University Press 2017)

Stahn C, 'Introduction: Bridge over Troubled Waters? Complementarity Themes and Debates in Context' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and complementarity: from theory to practice. Vol. 1* (Cambridge University Press 2011)

Steains C, 'Gender Issues' in Roy SK Lee, Project on International Courts and Tribunals and United Nations Institute for Training and Research (eds), *The International Criminal Court: the making of the Rome Statute - issues, negotiations, results* (Kluwer Law International 1999)

Stone RW, *Controlling Institutions: International Organizations and the Global Economy* (Cambridge University Press 2011)

Strang J, 'Scandinavian Legal Realism and Human Rights: Axel Hägerström, Alf Ross and the Persistent Attack on Natural Law' (2018) 36 Nordic Journal of Human Rights 202

Straumann B, 'Series Editors´ Preface' in Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit (eds), *System, order, and international law: the early history of international legal thought from Machiavelli to Hegel* (First edition, Oxford University Press 2017)

Svater F, 'Mia idea para filosofia' in Róbert Jack and Karl Jaspers (eds), Haukur Ástvaldsson (tr), *Hvað er heimspeki? tíu greinar frá tuttgustu öld [What is philosophy? Ten articles from the twentieth-century]* (Hugvísindastofnun Háskóla Íslands 2001)

Tladi D, 'The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law' (2015) 13 International Criminal Justice 1027

Tómasson E, 'Réttur Til Réttlátrar Málsmeðferðar', *Mannréttindasáttmáli Evrópu. Meginreglur, framkvæmd og áhrif á íslenskan rétt* (Mannréttindastofnun Háskóla Íslands, Lagadeild Háskólans í Reykjavík 2005)

Tomuschat C, 'The Duty to Prosecute International Crimes Committed by Individuals' in Helmut Steinberger and Hans-Joachim Cremer (eds), *Tradition und Weltoffenheit des Rechts: Festschrift für Helmut Steinberger* (Springer 2002)

Trevino AJ, 'Transaction Introduction' in Hans Kelsen (ed), *General theory of law & state* (Transaction Publishers 2006)

Triepel H, *Völkerrecht Und Landesrecht* (Hirschfeldt, 1899)

——, *Unitarismus Und Föderalismus Im Deutschen Reiche: Eine Staatsrechtliche Und Politische Studie* (Tübingen: Mohr 1907)

——, *Die Reichsaufsicht: Untersuchungen Zum Staatsrecht Des Deutschen Reiches* (Berlin: Springer 1917)

——, *Les Rapports Entre Le Droit Interne et Le Droit International* (1 Recueil des Cours 77, 1923)

Trindade AAC, *The Access of Individuals to International Justice* (Oxford Univ Press 2011)

Twining W, *Globalisation and Legal Theory* (Northwestern University Press ed, Northwestern University Press 2001)

Urueña R, *No Citizens Here: Global Subjects and Participation in International Law* (M Nijhoff Publishers 2012)

Valverde M, 'Jurisdiction and Scale: Legal "Technicalities" as Resources for Theory' (2009) 18 Social & Legal Studies 139

van der Wilt H, 'Nullum Crimen and International Criminal Law: The Relevance of the Foreseeability Test' (2015) 84 Nordic Journal of International Law 515

Vec M, 'From the Congress of Vienna to the Paris Peace Treaties of 1919' in Bardo Fassbender and others (eds), *The Oxford handbook of the history of international law* (First published in paperback 2014, Oxford University Press 2014)

——, 'Sources of International Law in the Nineteenth-Century European Tradition' in Samantha Besson and Jean D'Aspremont (eds), *The Oxford handbook on the sources of international law* (First edition, Oxford University Press 2017)

Veenendaal WP and Corbett J, 'Why Small States Offer Important Answers to Large Questions' (2015) 48 Comparative Political Studies

Vik HH and others, 'Histories of Human Rights in the Nordic Countries' (2018) 36 Nordic Journal of Human Rights 189

——, *Nordic Histories of Human Rights* (Routledge 2021)

Villalpando S, 'Editorial: On the International Court of Justice and the Determination of the Rules of Law' (2013) 26 Leiden Journal of International Law 243, 250.' (2013) 26 Leiden Journal of International Law 243

von Hebel H and Robinsson D, 'Crimes within the Jurisdiction of the Court' in Roy SK Lee, Project on International Courts and Tribunals and United Nations Institute for Training and Research (eds), *The International Criminal Court: the making of the Rome Statute--issues, negotiations, results* (Kluwer Law International 1999)

Weiler J, 'The Community System: The Dual Character of Supranationalism', *Yearbook of European Law* (1981)

Weissbrodt D, 'Roles and Responsibilities of Non-State Actors' in Dinah Shelton (ed), *The Oxford handbook of international human rights law* (First edition, Oxford University Press 2013)

Wet E de, 'The Implications of President Al-Bashir's Visit to South Africa for International and Domestic Law' (2015) 13 Journal of International Criminal Justice 1049

White ND, *The Law of International Organisations* (Third edition, Manchester University Press 2017)

Whiteman MM, *Digest of International Law*, vol 8 (US Government Printing Office 1967)

Wind M (ed), *International Courts and Domestic Politics* (Cambridge University Press 2018)

Wolfrum R, 'Enforcement of International Humanitarian Law' in Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford University Press 1995)

Wouters J, 'The Judgment of the International Court of Justice in the Arrest Warrant Case: Some Critical Remarks' (2003) 16 Leiden Journal of International Law 253

Wrange P, *Aggressionsbrottet Och Internationella Brottmålsdomstolen* (Totalförsvarets folkrättsråd, Försvarsdepartemente 2011)

Xu X, *Responsibility to Ensure: Sponsoring States' Environmental Legislation for Deep Seabed Mining and China's Practice* (Brill Nijhoff 2021)

Zumbansen P, 'Introduction, Transnational Law, with and beyond Jessup' in Peer Zumbansen (ed), *The many lives of transnational law: critical engagements with Jessup's bold proposal* (Cambridge University Press 2020)

Zyberi G, 'The International Court of Justice and Applied Forms of Reparation for International Human Rights and Humanitarian Law Violations' (2011) 7 Utrecht Law Review 204

Þórhallsson P, 'Tjáningarfrelsi', *Mannréttindasáttmáli Evrópu. Meginreglur, framkvæmd og áhrif á íslenskan rétt* (Mannréttindastofnun Háskóla Íslands, Lagadeild Háskólans í Reykjavík 2005)

Other sources

Council of Europe

Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights (1975), vol. I.

Committee of Experts for the improvement of procedures of the protection of human rights, 'Reopening of proceedings before domestic courts following findings of violation by the European Court of Human Rights - Draft survey of existing legislation and case-law' Ref. DH-PR(2005)002).

Committee of Ministers, '9th Annual Report of the Committee of Ministers, Supervision of the Execution of judgments and decisions of the European Court of Human Rights' (2015).

Committee of Ministers, 'Explanatory Memorandum on the Recommendation No. R (2000)2 of the Committee of Ministers on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights'.

Committee of Ministers, 'Recommendation Rec (2000) 2 of the Committee of Ministers to member states on the re-examination or re-opening of cases at domestic level following judgments of the European Court of Human Rights' (19 January 2000).

Committee of Ministers, 'Recommendation Rec(2000)2 of the Committee of Ministers to Member States on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights' (19 January 2000).

Committee of Ministers, 'Recommendation (2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies' (12 May 2004).

Committee of Ministers, 'Recommendation CM/Rec(2008)2 of the Committee of Ministers to Member States on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights' (6 February 2008).

Committee of Ministers, 'Rules adopted by the Committee of Ministers for the application of Article 46, paragraph 2 of the European Convention on Human Rights' (10 May 2006).

Committee of Ministers, 'Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements' (10 May 2006), as amended.

Committee of Ministers, Res No. DH (92) (59 of 10 November 1992).

Committee of Ministers: Res No. DH (94)84 (16 November 1994).

Committee of Ministers, Res No. DH (95) (36 of 4 May 1995).

Committee of Ministers, Res No. DH (2000) 111 (2 October 2000).

Committee of Ministers, Res No. DH (2002) (67 of 24 June 2002).

Committee of Ministers, Res (2004)3 on judgments revealing an underlying systemic problem' (12 May 2004) CM/Res(2004)3.

Committee of Ministers, Res No. DH (2007) 82 (20 June 2007).

Committee of Ministers, Res No. CM/ResDH(2008)44 (25 June 2008).

Directorate General Human Rights and Rule of Law, 'Practical impact of the Council of Europe monitoring mechanisms in improving respect for human rights and the rule of law in member states' H/Inf(2010)7.

European Court of Human Rights, 'Factsheet - Pilot Judgments' (July 2021).

European Court of Human Rights, 'Position paper of the European Court of Human Rights on proposals for reform of the European Convention on Human Rights and other measures as set out in the report of the Steering Committee of Human Rights' (12 September 2003) (CDDH-GDR(2003)024).

European Court of Human Rights, 'Practice direction on just satisfaction claims: Practice direction issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 28 March 2007'.

European Court of Human Rights: 'Reply to Committee of Ministers request for comments on the CDDH Report on Execution' (9 May 2014).

European Court of Human Rights, 'Rules of the Court (as amended by the Plenary Court on 14 November 2016)'.

European Court of Human Rights, 'Rules of Court - Just satisfaction claims: Practice direction issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 28 March 2007' (19 September 2016).

European Court of Human Rights, 'The "living instrument" doctrine: Background Paper by ECtHR - Judicial Seminar 2020: The Convention as a Living Instrument at 70'.

European Court of Human rights, Registrar, 'The Pilot-Judgment Procedure. Information note issued by the Registrar' (2009).

European Court of Human Rights, Registry, 'Preparatory work on Article 1 of the European Convention on Human Rights, Information document prepared by the Registry' (31 March 1977) Cour (77) 9.

European Court of Human Rights, 'Annual report 2014'.

European Court of Human Rights, 'Annual report 2015'.

High Level Conference on the Future of the European Court of Human Rights, 'Interlaken Declaration' (19 February 2010).

High Level Conference on the Future of the European Court of Human Rights, 'Brighton Declaration' (19-20 April 2012).

High-level Conference on the 'Implementation of the European Convention on Human Rights, our shared responsibility, Brussel Declaration' (27 March 2015).

Parliamentary Assembly, 'The functioning of democratic institutions in Poland' (6 January 2020) Doc 15025.

Treaty Office, 'Explanatory Report to the Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms' (6 November 1990) Explanatory Report-ETS 140-Human Rights (Protocol No. 9).

Treaty Office, 'Explanatory Report to the Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms'.

Treaty Office, 'Explanatory Report to Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms'.

Venice Commission, European Commission for Democracy Through Law, 'Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts' (2014).

European Union

Council, 'Updated European Union Guidelines on promoting compliance with international humanitarian law (IHL) ' (15 December 2009) OJ 2009/C 303/06, OJ C 303/12.

European Parliament, Res of 17 July 2014 on the crime of aggression (2014/2724(RSP), P8 TA(2014)0013.

International Criminal Court

Assembly of States Parties, 'Elements of Crimes', Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B; International Criminal Court, ICC-PIDS-LT-03-002/11_Eng (last amended 2010).

The Office of the Prosecutor, 'Report on Prosecutorial Strategy' (14 September 2006).

League of Nations

Committee of Jurisconsults, 'Meeting at the Hague 16th June 1920', Annex No I.

Organization of American States

Inter-American Court of Human Rights, 'IACHR Annual report 2011' (30 December 2011) OEA/Ser.L/V.II, Doc 69.

United Nations

Commission on Human Rights, 'The Administration of Justice and the Human Rights of Detainees, Revised final report prepared by Mr. Joined pursuant to Sub-Commission decision 1996/119' (2 October 1997) UN Doc E/CN.4/Sub.2/1997/20/Rev.1.

Commission on Human Rights, 'Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity' (8 February 2005) UN Doc E/CN.4/2005/102/Add.1.

General Assembly, Res 217 A(III) 'Universal Declaration of Human Rights' (10 December 1948) UN Doc A/810.

General Assembly, 'Request for the inclusion of an item in the provisional agenda of the thirty-seventh session: State of signatures and ratifications of the protocols additional to the Geneva Conventions of 1949 and relating to the protection of victims of international armed conflicts (protocol I) and the protection of victims of non-international conflicts (protocol II)' (7 July 1982) UN Doc A37/192.

General Assembly, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', UNGA Res. 60/147 (16 December 2005) UN Doc A/RES/60/147.

General Assembly, 'Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts, Report of the Secretary-General' (4 August 2006) UN Doc A/61/222.

General Assembly, 'Statement on behalf of the Nordic Countries by H.E. Ambassador A. Rönquist, Director General for Legal Affairs Ministry for Foreign Affairs Sweden, in the United Nations General Assembly on the Report of the ICC Agenda item 75' (31 October 2013).

General Assembly, 'Statement on behalf of the Nordic Countries by H.E. Ambassador A. Rönquist, Director General for Legal Affairs Ministry for Foreign Affairs Sweden', in the United Nations General Assembly on the Report of the ICC, Agenda item 73' (30 October 2014).

Human Rights Committee, 'General Comment No. 07: Article 7 (Prohibition of torture or cruel, inhuman or degrading treatment or punishment' (30 May 1982) UN Doc 30/05/82.

Human Rights Committee, 'General Comment No. 31(80): Nature of the general legal obligation imposed on states parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13.

Human Rights Committee, 'Rules of procedure of the Human Rights Committee' (22 September 2005), UN Doc. CCPR/C/3/Rev.8.

Human Rights Committee, 'Report of the Human Rights Committee Volume II' (2006), UN Doc A/61/40 (Vol. II).

Human Rights Committee, 'General Comment No 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights' (5 November 2008), UN Doc. CCPR/C/GC/33.

Human Rights Committee, *Irene Bleier Lewenhoff and Rosa Valino de Bleier v. Uruguay,* Communication No. 30/1978, UN Doc CCPR/C/15/D/30/1978.

Human Rights Committee, *Orlanda Fals Borda et al. v. Colombia*, Communication No. 46/1979, UN Doc. CCPR/C/OP/1.

Human Rights Committee, *Salgar de Montejo v. Colombia*, Communication No. 64/1979, UN Doc. CCPR/C/15/D/64/1979.

Human Rights Committee, *Maria del Carmen Almeida de Quinteros and Elena Quinteros Almeida v. Uruguay*, Communication No. 107/1981, UN Doc. CCPR/C/19/D/107/1981.

Human Rights Committee, *Lúðvík Emil Kaaber v. Iceland*, Communication No. 674/1995, UN Doc. CCPR/C/58/D/674/1995.

Human Rights Committee, *Bjorn Kristjánsson v. Iceland*, Communication No. 951/2000, UN Doc. CCPR/C/78/D/951/2000.

Human Rights Committee, *Ndong et al. and Mic Abogo v. Equatorial Guinea*, Communication No. 1152 and 1190/2003, U.N. Doc. CCPR/C/85/D/1152 & 1190/2003.

Human Rights Committee, *Erlingur Sveinn Haraldsson and Örn Snævar Sveinsson v. Iceland*, Communication No. 1306/2004, UN Doc. CCPR/C/91/D/1306/2004.

Human Rights Committee, *Ivanka Kohoutek v. Czech Republic*, Communication No. 448/2006, UN Doc. CCPR/C/93/D/1448/2006.

Human Rights Committee, *Peter and Eva Gratzinger v. Czech Republic*, Communication No. 1463/2006, UN Doc. CCPR/C/91/D/1463/2006.

Human Rights Committee, *Lnenicka v. Czech Republic*, Communication No. 1484/2006, UN Doc. CCPR/C/92/D/1484/2006.

Human Rights Committee, *Vlcek v. Czech Republic*, Communication No. 1485/2006, UN Doc. CCPR/C/93/D/1485/2006.

Human Rights Committee, *Susser v. Czech Republic*, Communication No. 1488/2006, UN Doc CCPR/C/92/D/1488/2006.

Human Rights Committee, *Preiss v. Czech Republic*, Communication No. 1497/2006, UN Doc CCPR/C/93/D/1497/2006.

Human Rights Committee, *Zdenek and Milada Ondracka v. Czech Republic*, Communication No.1533/2006, UN Doc. CCPR/C/91/D/1533/2006.

Human Rights Council, 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Iceland' (22 August 2016), UN Doc. A/HRC/WG.6/26/ISL/1.

Human Rights Council, 'Working Group on the Universal Periodic Review, Compilation on Poland, Report of the Office of the United Nations High Commissioner for Human Rights' (22 February 2017) UN Doc A/HRC/WG.6/27/POL/2.

Human Rights Council, 'Working Group on the Universal Periodic Review, Compilation on Turkey, Report of the Office of the United Nations High Commissioner for Human Rights' (12 November 2019) UN Doc A/HRC/WG.6/35/TUR/2.

International Criminal Tribunal for the former Yugoslavia, 'Rules of Procedure and Evidence (adopted 11 February 1994, as amended 10 July 2015)' UN Doc IT/32/Rev.50.

International Criminal Tribunal for Rwanda, 'Rules of Procedure and Evidence (adopted 29 June 1995, as amended 13 May 2015)'.

International Law Commission, 'Report by G. G. Fitzmaurice, Special Rapporteur' Yearbook of the International Law Commission, 1956, vol. II, UN Doc A/CN.4/101.

International Law Commission, 'Second report on State Responsibility, by Aranguio-Ruiz, Special Rapporteur' (9 and 22 June 1989) UN Doc A/CN.4/425 and Add.1.

International Law Commission, 'Report of the International Law Commission on the work of its fifty-third session, 23 April-1 June and 2 July-10 August' UN Doc A/56/10.

International Law Commission, 'Responsibility of States for International Wrongful Acts' UN Doc. A/RES/56/83); UNGA Res No. 56/83 (12 December 2001) UN Doc A/56/10.

International Law Commission, 'Draft articles on Diplomatic Protection' UNGA Sixty-first Session, Supplement No. 10 (2006) UN Doc A/61/10.

International Law Commission, 'Bases for Discussion in the Working Group on the Topic 'The Obligation to Extradite or Prosecute (*aut dedere aut judicare*) prepared by Mr. Zdzislaw Galicki, Special Rapporteur' (24 June 2010) UN Doc A/CN.4/L.774.

International Law Commission, 'Report of the International Law Commission on the Work of its Sixty-Fifth Session' (2013) UN Doc A/68/10.

International Law Commission, 'First report on crimes against humanity, by Sean D. Murphy, Special Rapporteur' (17 February 2015) UN Doc A/CN.4/680.

International Law Commission, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (2018) Conclusion 5. Yearbook of the International Law Commission, 2018, vol. II, Part Two.

International Law Commission, 'First report on general principles of law' (5 April 2019) UN Doc A/CN.4/732.

Inter-committee meeting of the human rights treaty bodies, 'International Human Rights Instruments: Follow up to decisions: Overview of follow-up procedures' (11 November 2009), UN Doc HRI/ICM/2009/7.

Security Council, Draft Res (31 July 1986) UN Doc S/18250.

Security Council, Res 808 (22 February 1993) UN Doc S/RES/808.

Security Council, Res 827 (25 May 1993) UN Doc S/RES/827.

Security Council, Res 955 (8 November 1994) UN Doc S/RES/955.

Security Council, Res 1688 (16 June 2006) UN Doc S/RES/1688.

Security Council, Res 1593 (31 March 2005) UN Doc S/RES/1593.

Security Council, Res 1970 (26 February 2011) UN Doc S/RES/1970.

Treaty Series: 'Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations', Cumulative Index No. 54, UN New York 2017.

Others

Government of Denmark, 'Betænkning nr. 1407 om inkorporering af menneskerettighedskonventioner i dansk rett' (8 October 2001).

Government of Denmark, 'Dansk straffemyndighed, Betænkning nr. 1488' (June 2007).

Government of Denmark, 'Betænkning om inkorporering mv. inden for menneskeretsområdet, Betækning nr. 1546' (2014).

Government of Finland, 'Regeringens proposition till Riksdagen med förslag till ändring av strafflagens bestämmelser om krigsförbrytelser och brott mot humaniteten samt vissa lagar som har samband med dem' RP 55/2007 rd.

Government of Finland, 'Regeringens proposition till riksdagen om godkännande av ändringarna till Romstadgan för Internationella brottmålsdomstolen från översynskonferensen i Kampala 2010 samt med förslag till lagar om sättande i kraft av de bestämmelser i ändringarna som hör till området för lagstiftningen och om ändring av strafflagen och tvångsmedelslagen' 289/2014 rd.

Government of Iceland, Prime Minister's Office, Ministry of Justice and Ecclesiastical Affairs, and the Parliamentary Office, 'Handbók um undirbúning og frágang lagafrumvarpa' [tr. Handbook on preparing and finalizing parliamentary bills] 2007.

Government of Iceland, 'Committee Opinion on first-hand evidence-giving in criminal cases' [tr.]

Government of Norway, 'Det Kongelige Utenriksdepartement, St.prp. nr. 24' (1999-2000).

Government of Norway, 'O.t.prp.nr.8 (2007-2008), Om lov om endringer i straffeloven 20. mai 2005 nr. 28 mv. (skjerpende og formildende omstendigheter, folkemord, rikets selvstendighet, terrorhandlinger, ro, orden og sikkerhet, og offentlig myndighet'.

Government of Norway, 'Justis- og politidepartemented, Høringsnotat-straffebestemmelser om folkemord, forbrytelser mot menneskeheten og krigforbrytelser, Lovavdelingen' (April 2007) Saksnr. 200701831 EO HI/TRR.

Government of Norway, 'Kongelig resolusjon, Ratifikasjon af endring af 10. Juni 2010 i Artikkel 8 nr. 2 bokstav e) i Roma-vedtektene om den Internasjonale straffedomstol av 17. July 1998' (7 May 2013).

Government of Sweden, 'Regeringens proposition 144 Kungl Maj:ts proposition till riksdagen med förslag till ny strafflagstiftning för krigsmakten; given Stockholms slott den 27 februari 1948' 1948:144.

Government of Sweden, 'Regeringens proposition 142 Kungl Maj:ts proposition till riksdagen med förslag till lag om ändring i 1 och 27 kap. strafflagen, m. m.; given Stockholms slott den 13 mars 1953' 1953:142.

Government of Sweden, 'Justitiedepartementet, Internationella brott och svensk jurisdiktion' SOU 2002:98.

Government of Sweden, 'Regeringens proposition 2013/14:146, Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser'.

Human Rights Watch, 'World Report 2021: Poland'.

Human Rights Watch, 'World Report 2021: Turkey'.

International Law Association, 'Final Report: Mapping the Engagement of Domestic Courts with International Law' by Antonios Tzanakopoulos, (2016).

Parliament of Denmark, 'Folketingstidende (The Folketing Hansard)', 2000-2001, Appendix A.

Parliament of Iceland, Gazette 1988 (A edition), Parliamentary Documents 204-Case 182.

Parliament of Iceland, Gazette 1993-1994, Parliamentary Documents 105-Case 102.

Parliament of Iceland, Gazette 1994 (A edition), Parliamentary Documents 389-Case 297.

Parliament of Iceland, Gazette 1994-95 (A edition), Parliamentary Documents 423-Case 693

Parliament of Iceland, Gazette 1994-95 (A edition), Parliamentary Documents 699-Case 329.

Parliament of Iceland, Gazette 1995 (A edition), Parliamentary Documents 1-Case 1.

Parliament of Iceland, Gazette 2000-2001 (A edition), Parliamentary Documents 211-Case 201.

Parliament of Iceland, Gazette 2007-2008 (A edition), Parliamentary Documents 737-Case 463.

Parliament of Iceland, Gazette 2009-2010, Parliamentary Documents 1281-Case 661.

Parliament of Iceland, Gazette 2012-2013 (A edition), Parliamentary Documents 517 – Case 417.

Security Council Report, 'The Rule of Law: Can the Security Council Make Better Use of the International Court of Justice? ' (20 December 2016), www.securitycouncilreport.org.

Wittes BW, 'Paul Stephan on ICJ Decision in Jurisdictional Immunities of the State (Germany v. Italy)' (Lawfare, 5 February 2012) www.lawfareblog.com