UAEU Law Journal

Volume 2024
Number 99 *Year 39 Issue No. 99 September 2024*

Article 10

January 2024

The Validity and Critiques of the Current Approach of Human Rights Bodies Regarding the Positive Procedural Obligations of States

The Validity and Critiques of the Current Approach of Human Rights Bodies Regarding the Positive Procedural Obligations of States

Cover Page Footnote

This paper questions whether the current approach of human rights bodies with regard to positive procedural obligations is valid according to both, the domestic legal standards of states, and the mandate given to them in the conventions. It raises important critiques about the capability of human rights bodies to effectively fulfill their newly assumed task of ordering and supervising prosecutions and punishments in criminal matters. It seems clear that the domestic justice systems of states bear the primary responsibility to bring violators of the right to life and other human rights to justice and action by human rights bodies should only take place, as subsidiary measure, when such systems prove to be inadequate. Nevertheless, human rights bodies should use their influence as widely as possible in order to encourage the improvement of domestic justice systems in securing justice for victims. In measuring and monitoring the degree of compliance of domestic justice systems with their orders of investigation, prosecution and punishment, human rights bodies have, to some extent, established an important quasi-criminal jurisdiction. In doing so, they may be said to have contributed to the improvement of the prosecutorial practices of states in dealing with criminal violations of the right to life. Therefore, it can be argued that the difficulties in applying the remedial decisions of the human rights bodies on non-compliant states have not entirely negated these decisions. These decisions may be said to have strengthened the resolve of citizens, particularly victims, to increasingly compel states to bring their criminal justice systems into full compliance with the requirements of human rights bodies. Only if the state does this, can it claim to have legitimate authority over its citizens in the sphere of human rights. This legitimacy is most likely to be found in states which possess an executive of high integrity, an independent legislature and judicial system and other robust and vigilant civil institutions. As noted above, the European system and UN Human Rights Committee practice are a weaker form of quasi-criminal review than that of the Inter-American Court. Nevertheless, they do issue orders to investigate and punish in particular cases and exercise some supervision of their implementation. This weaker form of quasi-criminal review will very likely increase as human rights bodies move towards greater dialogue with states, more specific reparatory rulings, and closer supervision of state compliance. However, in parallel with this increase, there is an essential need to find more effective mechanisms to compel states to comply with the orders of human rights bodies to achieve justice for victims of crime if the policy of these bodies is to be successful. It has been suggested by some commentators that the application of coercive measures may improve the compliance of offending states. For example, more diplomatic, economic and political pressures by neighboring states against a non-complying state may make a difference in this regard. Such external pressure, however, is not liable to be effective because it depends on the willingness of these states to play this role. Therefore, the media and other internal institutions of civil society must be active in pressing state authorities to acknowledge the orders of human rights bodies, not merely notionally, but to take serious practical steps to implement them. يتساءل هذا البحث عما إذا كان النهج الحالي لهيئات حقوق الإنسان فيما يتعلق بالالتزامات الإجرائية الإيجابية صحيحًا وفقًا للمعايير القانونية المحلية للدول والولاية الممنوحة لها في الاتفاقيات، وهذا يثير انتقادات مهمة حول قدرة هيئات حقوق الإنسان على الوفاء بفعالية بمهمتها التي كُلِّفَت بها حديثًا التي تتمثل في إصدار الأوامر ، والملاحقة القضائية، والعقوبات في المسائل الجنائية والإشراف عليها، ويبدو من الواضح أن أنظمة العدالة المحلية للدول تتحمل المسؤولية الأساسية عن تقديم منتهكي الحق في الحياة، وحقوق الإنسان الأخرى إلى العدالة ، ويجب ألا تُتَّخَذُ إجراءات من قبل هيئات حقوق الإنسان إلا كإجراء ثانوي حين تثبت هذه الأنظمة أنها غير كافية، ومع ذلك ينبغي لهيئات حقوق الإنسان استخدام نفوذها على أوسع نطاق ممكن من أجل تشجيع تحسين أنظمة العدالة المحلية في تأمين العدالة للضحايا في قياس ورصد درجة امتثال أنظمة العدالة المحلية لأوامر التحقيق والمقاضاة والعقاب ،و أنشأت هيئات حقوق الإنسان - إلى حد ما - ولاية قضائية شبه جنائية مهمة، ومن خلال القيام بذلك قد يُقال: إنهم ساهموا في تحسين ممارسات الدول في مقاضاة الانتهاكات الجنائية للحق في الحياة؛ لذلك يمكن القول: إن الصعوبات في تطبيق القرارات العلاجية لهيئات حقوق الإنسان على الدول غير الممتثلة لم تلغِ أهمية هذه القرارات تمامًا، ويمكن القول إن هذه القرارات قد عززت من حقوق المواطنين- ولا سيما الضحايا- على

إجبار الدول بشكل متزايد على جعل أنظمة العدالة الجنائية الخاصة بها متوافقة مع متطلبات هيئات حقوق الإنسان فقط، وإذا قامت الدولة بذلك يمكنها أن تدعي أن لها سلطة شرعية على مواطنيها في مجال حقوق الإنسان، والراجح أن توجد هذه الشرعية في الدول التي تمتلك سلطة تنفيذية ذات نزاهة عالية ، وهيئة تشريعية ونظاماًقضائياً مستقلاً ، ومؤسسات مدنية أخرى قوية ويقظة. ولوحظ سابقاً أن النظام الأوروبي وممارسات لجنة حقوق الإنسان هي شكل أضعف من أشكال المراجعة شبه الجنائية مقارنة بمحكمة البلدان الأمريكية، ومع ذلك فهم يصدرون أوامر للتحقيق والمعاقبة في حالات معينة ، وممارسة بعض الإشراف على تنفيذها، ومن المرجح جدًا أن يزداد هذا الشكل الأضعف من المراجعة شبه الجنائية مع تحرك هيئات حقوق الإنسان نحو حوار أكبر مع الدول ، وقرارات تعويضية أكثر تحديدًا ، وإشراف أوثق على امتثال الدولة، ومع ذلك - بالتوازي مع هذه الزيادة - فهناك حاجة أساسية لإيجاد آليات أكثر فعالية لإجبار الدول على الامتثال لأوامر هيئات حقوق الإنسان؛ لتحقيق العدالة لضحايا الجريمة إذا كان لسياسة هذه الهيئات أن تكون ناجحة، وقد اقترح بعض الباحثين أن تطبيق التدابير القسرية قد يحسن من امتثال الدول المخالفة، فعلى سبيل المثال قد تحدث المزيد من الضغوط الدبلوماسية والاقتصادية والسياسية التي تمارسها الدول المجاورة ضد دولة غيرها ممثلة فرقًا في هذا الصدد، ومع ذلك فمثل هذا الضغط الخارجي لن يكون فعالاً؛ لأنه يعتمد على استعداد هذه الدول لتأدية هذا الدور؛ لذلك يجب أن تكون وسائل الإعلام والمؤسسات الداخلية الأخرى للمجتمع المدني نشطة في الضغط على سلطات الدولة للاعتراف بأوامر هيئات حقوق الإنسان ، ليس فقط من الناحية النظرية ، ولكن لاتخاذ خطوات عملية جادة لتنفيذها.

The Validity and Critiques of the Current Approach of Human Rights Bodies Regarding the Positive Procedural Obligations of States

Dr. Faris Kareem Al-Anaibi

Hay AL-Hussain, Hillah, Iraq

f.al-anaibi@iunajaf.edu.iq

Abstract

This paper questions whether the current approach of human rights bodies with regard to positive procedural obligations is valid according to both, the domestic legal standards of states, and the mandate given to them in the conventions. It raises important critiques about the capability of human rights bodies to effectively fulfill their newly assumed task of ordering and supervising prosecutions and punishments in criminal matters. It seems clear that the domestic justice systems of states bear the primary responsibility to bring violators of the right to life and other human rights to justice and action by human rights bodies should only take place, as subsidiary measure, when such systems prove to be inadequate. Nevertheless, human rights bodies should use their influence as widely as possible in order to encourage the improvement of domestic justice systems in securing justice for victims. In measuring and monitoring the degree of compliance of domestic justice systems with their orders of investigation, prosecution and punishment, human rights bodies have, to some extent, established an important quasi-criminal jurisdiction. In doing so, they may be said to have

* **Received on 26/08/2022, and approved for publication on 07/10/2022**

contributed to the improvement of the prosecutorial practices of states in dealing with criminal violations of the right to life. Therefore, it can be argued that the difficulties in applying the remedial decisions of the human rights bodies on non-compliant states have not entirely negated these decisions. These decisions may be said to have strengthened the resolve of citizens, particularly victims, to increasingly compel states to bring their criminal justice systems into full compliance with the requirements of human rights bodies. Only if the state does this, can it claim to have legitimate authority over its citizens in the sphere of human rights. This legitimacy is most likely to be found in states which possess an executive of high integrity, an independent legislature and judicial system and other robust and vigilant civil institutions.

As noted above, the European system and UN Human Rights Committee practice are a weaker form of quasi-criminal review than that of the Inter-American Court. Nevertheless, they do issue orders to investigate and punish in particular cases and exercise some supervision of their implementation. This weaker form of quasi-criminal review will very likely increase as human rights bodies move towards greater dialogue with states, more specific reparatory rulings, and closer supervision of state compliance. However, in parallel with this increase, there is an essential need to find more effective mechanisms to compel states to comply with the orders of human rights bodies to achieve justice for victims of crime if the policy of these bodies is to be successful. It has been suggested by some commentators that the application of coercive measures may improve the compliance of offending states. For example, more diplomatic, economic and political pressures by neighboring states against a non-complying state may make a difference in this regard. Such external pressure, however, is not liable to be effective because it depends on the willingness of these states to play this role. Therefore, the media and other internal institutions of civil society

must be active in pressing state authorities to acknowledge the orders of human rights bodies, not merely notionally, but to take serious practical steps to implement them.

Keywords: The Right to Justice, Positive Obligations, State Responsibility, Victimization, Human Rights.

صلاحية وانتقادات النهج الحالي للهيئات المعنية بحقوق الإنسان فيما يتعلق بالالتزامات الإجرائية الإيجابية للدول

د. فارس كريم العنيبي
حي الحسين - الحلة – بابل - العراق
f.al-anaibi@iunajaf.edu.iq

ملخص البحث

يتساءل هذا البحث عما إذا كان النهج الحالي لهيئات حقوق الإنسان فيما يتعلق بالالتزامات الإجرائية الإيجابية صحيحًا وفقًا للمعايير القانونية المحلية للدول والولاية الممنوحة لها في الاتفاقيات، وهذا يثير انتقادات مهمة حول قدرة هيئات حقوق الإنسان على الوفاء بفعالية بمهمتها التي كُلِّفَت بها حديثًا التي تتمثل في إصدار الأوامر ، والملاحقة القضائية، والعقوبات في المسائل الجنائية والإشراف عليها، ويبدو من الواضح أن أنظمة العدالة المحلية للدول تتحمل المسؤولية الأساسية عن تقديم منتهكي الحق في الحياة، وحقوق الإنسان الأخرى إلى العدالة ، ويجب ألا تُتَّخَذُ إجراءات من قبل هيئات حقوق الإنسان إلا كإجراء ثانوي حين تثبت هذه الأنظمة أنها غير كافية، ومع ذلك ينبغي لهيئات حقوق الإنسان استخدام نفوذها على أوسع نطاق ممكن من أجل تشجيع تحسين أنظمة العدالة المحلية في تأمين العدالة للضحايا في قياس ورصد درجة امتثال أنظمة العدالة المحلية لأوامر التحقيق والمقاضاة والعقاب ،و أنشأت هيئات حقوق الإنسان - إلى حد ما - ولاية قضائية شبه جنائية مهمة، ومن خلال القيام بذلك قد يُقال: إنهم ساهموا في تحسين ممارسات الدول في مقاضاة الانتهاكات الجنائية للحق في الحياة؛ لذلك يمكن القول: إن الصعوبات في تطبيق القرارات العلاجية لهيئات حقوق الإنسان على الدول غير الممتثلة لم تلغِ أهمية هذه القرارات تمامًا، ويمكن القول إن هذه القرارات قد عززت من حقوق المواطنين- ولا سيما الضحايا- على إجبار الدول بشكل متزايد على جعل أنظمة العدالة الجنائية الخاصة بها متوافقة مع متطلبات هيئات حقوق الإنسان فقط، وإذا قامت الدولة بذلك يمكنها أن تدعي أن لها سلطة شرعية على مواطنيها في مجال حقوق الإنسان، والراجح أن توجد هذه الشرعية في الدول التي تمتلك سلطة تنفيذية ذات نزاهة عالية ، وهيئة تشريعية ونظامأقضائياً مستقلاً ، ومؤسسات مدنية أخرى قوية ويقظة.

***استُلم بتاريخ 2022/08/26، و أجيز للنشر بتاريخ 2022/10/07.**

ولوحظ سابقاً أن النظام الأوروبي وممارسات لجنة حقوق الإنسان هي شكل أضعف من أشكال المراجعة شبه الجنائية مقارنة بمحكمة البلدان الأمريكية، ومع ذلك فهم يصدرون أوامر للتحقيق والمعاقبة في حالات معينة ، وممارسة بعض الإشراف على تنفيذها، ومن المرجح جدًا أن يزداد هذا الشكل الأضعف من المراجعة شبه الجنائية مع تحرك هيئات حقوق الإنسان نحو حوار أكبر مع الدول ، وقرارات تعويضية أكثر تحديدًا ، وإشراف أوثق على امتثال الدولة، ومع ذلك - بالتوازي مع هذه الزيادة - فهناك حاجة أساسية لإيجاد آليات أكثر فعالية لإجبار الدول على الامتثال لأوامر هيئات حقوق الإنسان؛ لتحقيق العدالة لضحايا الجريمة إذا كان لسياسة هذه الهيئات أن تكون ناجحة، وقد اقترح بعض الباحثين أن تطبيق التدابير القسرية قد يحسن من امتثال الدول المخالفة، فعلى سبيل المثال قد تحدث المزيد من الضغوط الدبلوماسية والاقتصادية والسياسية التي تمارسها الدول المجاورة ضد دولة غيرها ممثلة فرقًا في هذا الصدد، ومع ذلك فمثل هذا الضغط الخارجي لن يكون فعالاً؛ لأنه يعتمد على استعداد هذه الدول لتأدية هذا الدور؛ لذلك يجب أن تكون وسائل الإعلام والمؤسسات الداخلية الأخرى للمجتمع المدني نشطة في الضغط على سلطات الدولة للاعتراف بأوامر هيئات حقوق الإنسان ، ليس فقط من الناحية النظرية ، ولكن لاتخاذ خطوات عملية جادة لتنفيذها.

الكلمات المفتاحية: الحق في العدالة، الالتزامات الإيجابية ، مسؤولية الدولة، علم الضحية، حقوق الإنسان

1. : The Current Provisions of International and Regional Law Regarding the Right to Remedy

Introduction

The international community has put in place a comprehensive set of legal instruments to ensure that victims of violent crimes are adequately provided with a remedy. However, the state's positive obligation[1] to investigate the violation of human rights and prosecute these perpetrators under international law is not expressly referred to in general human rights instruments. [2] This is because these multilateral human rights instruments which have entered into force since the founding of the United Nations in 1945 define the substantive rights of individuals vis-a-vis their own states. They are mainly focused on individuals' rights and not on the state responsibility. Nevertheless, these instruments recognize the right of victims to a remedy when violation of human rights has occurred.[3] The first recognition of the right to a

[1] The notion of the positive obligation to prevent violation by private parties has developed as a standard requiring due diligence; this concept is recognised in many domestic tort law systems. See Sheri P. Rosenberg, 'Responsibility to Protect: A Framework for Prevention' (2009) 1 *Global Responsibility to protect* 442, 453-454; the HRC has comprehensively articulated the due diligence standard in General Comment No. 31. It considers that 'there may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by states parties of those rights, as a result of states parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.' UN Human Rights Committee, *General Comment No 31: The nature of the general legal obligation imposed on States Parties to the Covenant,* 26 May 2004, CCPR/C/21/Rev.1/Add.13, para 8.

[2] For further details, see Faris Kareem Mohammad AL-Anaibi, The Rights of Victims of Violence by None-State Actors in Iraq post-2003 (PhD thesis, Durham University 2018) 26-40.

[3] Naomi Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78 *California Law Review* 449, 474-475; Al-Anaibi (n 2) 59-84, 113-129.

remedy was documented in 1948 as a part of the Universal Declaration of Human Rights. [4] Article 8 of the UDHR stipulates that:

"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law". [5]

The Declaration in stipulating the right to an effective remedy for the violation of essential rights, also presumably includes in this the right to life, freedom from torture and arbitrary detention.[6] Since then, the right to a remedy has been contained in several instruments. Among these is the International Covenant on Civil and Political Rights (ICCPR)[7] which is considered to be a near-universal instrument covering a broad range of civil and political rights in over 160 member states.[8] While the Covenant primary requires states to take preventive and protective measures, it also deals with their duties after a violation has occurred.[9] Article 2 (3) of the Covenant states that member states are obliged to ensure that:

a. "Any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

[4] Roht-Arriaza (n 3) 475.
[5] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 5.
[6] Roht-Arriaza (n 3).
[7] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[8] See Anja Seibert-Fohr, Prosecuting Serious Human Rights Violations (Oxford University Press 2010) 11.
[9] Ibid.

b. Any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

c. The competent authorities shall enforce such remedies when granted".

While the Covenant does not identify precise courses of action which member states must follow to provide a remedy for the violation of protected rights, it does, undoubtedly, envisage that such a remedy be applied effectively both in law and in practice.[10] The history of the drafting of the Covenant reveals that the UN Commission on Human Rights was concerned to ensure the accountability of state authorities for violation of human rights, particularly to dismiss any claim to the sovereign immunity of the state. Therefore, the right to a remedy according to the drafters of Article 2(3) extends to violations by state officials themselves.[11] This is essential to ensure that any violation of human rights should be remedied regardless of whether this violation was committed by 'persons acting in an official capacity'[12] or by private persons.[13] In addition to Article 2(3) of the Covenant which establishes an obligation contracting states

[10] See M. Cherif Bassiouni, 'International Recognition of Victims' Rights' (2006) 6 *Human Rights Law Review* 203, 214.

[11] Roht-Arriaza (n 3) 476; The Human Rights Committee has extended its interpretation of Article 2 (3) (a) concerning the right to an effective remedy. This extension requires member states of the Covenant, over and above their positive obligation to investigate, prosecute and punish those responsible for violation of individuals' right to life, to also provide reparation for such violation and to acknowledge that victims have the corresponding right to it. For further details, see AL-Anaibi (n 2) 60-65.

[12] Bassiouni (n 10).

[13] Seibert-Fohr (n 8) 33.

to grant remedies in their domestic legal systems, the Covenant also identifies the right of victims to bring a complaint against the state should that state fail in any of its obligations. However, it should be borne in mind that the right of complaint applies only if the state has essentially accepted the jurisdiction of the Human Rights Committee by becoming party to the relevant Optional Protocol of the International Covenant on Civil and Political Rights.[14]

The most important endeavour to promote remedial action for victims of criminal acts is contained in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the Basic Principles and Guidelines).[15] According to Principle 3, the state's duties to respect and guarantee respect for and implementation of international obligations includes:

"the duty to (a) take appropriate legislative and administrative and other appropriate measures to prevent violations; (b) investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those

[14] UN General Assembly, Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, 171 UNTS 999; see Conor McCarthy, 'Victim Redress and International Criminal Justice, Competing Paradigms, or Compatible Forms of Justice?' (2012)10 *Journal of International Criminal Justice* 351, 356. The Committee also can review the reports of member states concerning compliance with the requirements of the Covenant and can issue General Comments about them, see David Weissbrodt and Connie de la Vega, International Human Rights Law: An Introduction (University of Pennsylvania Press 2007) 273.

[15] Proclaimed by General Assembly resolution 60/147 of 16 December 2005. These Principles are called the 'Van Boven/Bassiouni Principles' after Theo van Boven and Cherif M. Bassiouni, who were appointed to develop them by the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, see Marten Zwanenburg, 'The Van Boven/Bassiouni Principles: An Appraisal' (2006) 24 *Netherlands Quarterly of Human Rights* 641, 641-645.

allegedly responsible in accordance with domestic and international law; (c) provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and (d) provide effective remedies to victims, including reparation".[16]

However, it should be noted that while the Basic Principles and Guidelines have made a reference to the 1985 Basic Principles of Justice (The Victims' Declaration),[17] which considers that all victims have a right to remedy for acts of violence, it has failed to extend these rights to victims of non-state crime.[18] While the principles enshrined in the Victims' Declaration are not legally binding on states, they provide guidance to governments on how victims should be treated within their criminal justice systems.[19] According to Principle 4 of the Victims' Declaration, all types of victims 'should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress'. However, Doak notes that the Declaration does not contain any explicit provision concerning a duty to investigate, prosecute and punish criminal acts or reveal the truth about acts of violence which have been committed, and that this has given leeway for a variety of interpretations.

[16] See Bertrand G. Ramcharan, 'The National Responsibility to Protect Human Rights' (2009) 39 *Hong Kong Law Journal* 361, 382-384.
[17] United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. 40/34, annex, 40 U.N. GAOR Supp. (No. 53) at 214, U.N. Doc. A/40/53 (1985).
[18] Jonathan Doak, Victim's Rights, Human rights and Criminal Justice: Preconceiving the Role of Third Parties (Hart Publishing 2008) 164.
[19] The intention of the Declaration is 'to assist Governments and the international community in their efforts to secure justice and assistance for victims of crime and victims of abuse power'. See Jo-Anne Wemmers, 'Victims' Rights are Human Rights: The importance of recognizing victims as persons (2012) *Timida* 71, 75-76.

Therefore, it is reasonable to claim that Principle 4 is not only inadequate to achieve a remedy for the victims of crime, but even positively adds to the problem of achieving reparation for these victims.[20] Nevertheless, the Declaration importantly draws explicit attention to the rights of victims in criminal processes internationally.[21]

A great deal of attention has also been paid by regional human rights' courts to the obligation of a state to investigate, prosecute and punish grave violations of human rights. However, it should be noted that the European and American Conventions on Human Rights do not impose any explicit duty on member states to make criminal law provisions to investigate allegations of human rights abuses, and prosecute and punish those responsible for them.[22] In spite of this, member states of these treaties are clearly expected to ensure human rights and provide victims with an effective remedy.[23] In recent years the nature and scope of an 'effective remedy' and related positive procedural obligations with respect to the right to life have been demonstrated by the monitoring bodies of human rights through

[20] Doak (n 18).
[21] Mykola Sorochinsky, 'Prosecuting Torturers 'Child Molesters': Toward a Power Balance Model of Criminal Process for International Human Rights' (2009) 31 *Michigan Journal of International Law* 157,182. The UN Victims' Declaration has been described as the Magna Carta of victims' rights because it provided an example for states to follow. As a result, some states modified their criminal justice systems in order to meet the standards of the Declaration. See Marc Groenhuijsen, 'The Development of International Policy in Relation to Victims of Crime' (2014) 20 *International Review of Victimology* 31, 32.
[22] see Juan Carlos Ochoa, The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations (Martinus Nijhoff Publishers, 2013) 40; Micah S. Myers, 'Prosecuting Human Rights Violations in Europe and America: How Legal System Structure Affects Compliance with International Law' (2004) 25 *Michigan Journal of International Law* 211, 221.
[23] Michael Scharf, 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes' (1996) 59 *Law and Contemporary Problems* 41, 48; Myers (n 22).

a rich body of case law which has provided a legal basis for the establishment of the concept that a state owes victims a remedy of criminal investigation and prosecution.[24] This has, also, contributed to the establishment of the right of victims to participate effectively in the judicial procedures.[25] The object of this obligation, from the perspective of victims of crime, should be to revive and strengthen their trust in the states' protection of them and confidence that their criminal justice systems will deliver them with justice.[26] However, important criticisms have been raised about the capability of human rights bodies to effectively fulfill their newly assumed task of ordering and supervising prosecutions and punishments in criminal matters. In addition, this paper questions whether the current approach of these bodies with regard to the positive procedural obligations is valid according to both the domestic legal standards of states, and the mandate given to them in the conventions. For instance, the problem of legitimacy of the interpretative techniques used by these bodies to create further positive procedural obligations on states is one of the questions attracting the attention of legal scholars.[27] This problem has been identified by Colombine Madelaine in the authority enjoyed by an international judge to

[24] Ochoa (n 22) 103.

[25] Raquel Aldana-Pindell, 'An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes' (2004) 26 *Human Rights Quarterly* 605, 621.

[26] See interviews held by Wemmers and Manirabona with 10 victims whose human rights were violated under the previous Haitian regime. The interviews aimed to explore victims' perceptions of justice and, in particular, how to restore victims' sense of justice following gross violations of their human rights. The interviewers noted that, from the perspective of victims, unless justice is guaranteed for victims of crime, trust in state authorities cannot be restored. Jo-Anne Wemmers and Amissi Manirabona, 'Regaining trust: The Importance of Justice for Victims of Crimes against Humanity' (2013) 9 *International Review of Victimology* 1, 4-8.

[27] Krešimir Kamber, Prosecuting Human Rights Offences: Rethinking the *Sword* Function of Human Rights Law (Brill Nijhoff**,** 2017) 78.

impose positive obligations on the states.[28] Thereby this can be considered as a substitute of the national legislator which is attained via asserting the respective constitution. Such a claim, according to Madelaine, can potentially create a misunderstanding between the international court and national authorities which are associated with a relationship of common need to strengthen the standards of human rights and democracy.[29] The importance of this study is to provide a revealing analytical approach of human rights

bodies in terms of scrutinizing the viewpoints regarding criticisms referred to above.

The contribution of this study resides in introducing a revealing analysis approach of human rights bodies and the results yielded by this analysis. Whereas positive procedural obligations issued by human rights bodies received some valid criticisms, this does not negate the important role of monitoring the degree of compliance of domestic justice systems with the bodies' orders of investigation, prosecution and punishment. They have, to some extent, established an important quasi-criminal jurisdiction. Hence, it can be argued that they have contributed to the improvement of the prosecutorial practices of states in dealing with criminal violations of human rights. This study is intended to shed light on this issue.

In order to support the argument raised above, the validity of these human rights' decisions and criticisms will be discussed thoroughly by exploring and comparing the approach of Human Rights Committee, the Inter-American and European Court of human rights. These three bodies have been chosen for this work due to their active interpreting of the notion of 'the right to remedy'

[28] Ibid.
[29] Ibid.

as illustrated above. They have introduced various important general principles concerned with the positive procedural obligations required by the states to follow. Besides, while UN Human Rights Committee is considered a close universal instrument for issuing decisions in accordance with ICCPR, the Inter-American and European Court of human rights are regional ones. However, as revealed by analyses conducted by this work, the decisions / recommendations of these bodies are not of equal weight. The European system and Human Rights Committee practice represent a weaker form of quasi-criminal review than that of the Inter-American Court.

2. The Validity and Criticisms of Human Rights' Decisions

Where large-scale violations of the right to life have occurred, it is questionable whether a state and its legal system are equipped to take adequate measures to restore to its victims a sense of both justice and future safety. Obviously, this is particularly so when a state has been shown to be unable or unwilling to bring violators to justice. Accordingly, one aspect of the role of the international and regional human rights bodies is to provide impetus for effective criminal justice reform to offer future protection against illegal deprivations of the right to life and other human rights violations. This positive role is recognized by and provided for in the jurisprudence of the Inter-American Court, the European Court and the Human Rights Committee. For instance, although the Inter American Court has repeatedly explained that, as it is not a criminal court, it cannot hold individuals accountable, it has creatively interpreted the remedial powers it possesses, to include orders that member states of the Convention comply with their duty to investigate, prosecute and punish violators of human

rights.[30] Moreover, the Court, in the course of its creative interpretation, gave itself the authority to supervise the states' fulfilling of its orders. The supervisory power includes the holding of compulsory hearings and the issuing of compliance reports monitoring the improvement, under its guidance, of previously inadequate criminal measures taken by any of its member states.[31] This initiative of the Inter-American Court has also been followed by the Inter-American Commission, the Human Rights Committee, the European Court and the Committee of Minsters of the Council of Europe (COM).[32]

Unlike international criminal courts which prosecute directly those who have grossly violated human rights, the human rights' bodies entrust to the domestic justice systems of member states the right and duty to prosecute and punish violations of the right to life. However, they do monitor the compliance of these states with the orders they have given and give guidance on measures necessary to achieve it.[33] In other words, it is the responsibility of the states rather than that of the international community to bring offenders to justice. If any of the states fail to comply with the jurisprudence of the human rights bodies, these bodies can hold

[30] See Alexandra Huneeus, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 *The American Journal of International Law* 1, 1. According to Article 68 (1) of the American Convention of Human Rights, 'The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.' American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978). Similarly, Article 46 (1) of the European Convention of Human Rights states that 'The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.' Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 3.

[31] Huneeus (n 30) 1.

[32] Ibid.

[33] See Courtney Hillebrecht, 'The power of Human Rights Tribunals: Compliance with European Court of Human Rights and Domestic Policy Change' (2014) 0(0) *European Journal of International relations* 1, 4; Huneeus (n 30) 2.

those states responsible, in what is called a '*quasi-criminal review* or *quasi-criminal jurisdiction*' which, according to Alexandra Huneeus, is a 'mechanism for accountability' by which the practice of an international body in ordering, monitoring, and guiding national prosecutions is governed.[34]

Some sceptics have objected that human rights bodies, especially in the case of the jurisprudence of the Inter-American Court, in applying *quasi-criminal review* do not possess mechanisms strong enough to enforce their orders of prosecution, so much so, that the orders have been obeyed only where a domestic justice systems has already been capable and willing to prosecute.[35] Ratner, Abrams and Bischoff have argued that there are crucial disadvantages for the achievement of accountability by resorting to human rights courts.[36] They asserted that:

"Their physical distance from the victims and the abstract nature of their judgments can render quite small the psychological impact of their rulings. . . . There can also be no guarantee that states will comply with decisions; . . . While it might conceivably be possible to fashion cases involving the adjudication of individual accountability, the courts appear unwilling to act as quasi-criminal tribunals, and their evidentiary practices and capabilities are ill-suited to the task".[37]

[34] Huneeus (n 27) 2.
[35] Ibid.
[36] See Steven R. Ratner, Jason S. Abrams and James L. Bischoff, Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy (3d ed, Oxford University Press, 2009) 257.
[37] Ibid; see Huneeus (n 30) 3.

Similarly, Sonja Grover considers the European Court of Human Rights to be a 'pathway to impunity for international crimes'.[38] However, whether or not the *quasi-criminal jurisdiction* of these courts is effective in achieving compliance, is an empirical question. Empirical studies of this kind, up to the present time, have not yet been comprehensively undertaken.[39] In addition, if these human rights bodies succeed in obtaining domestic prosecutions, it weakens the criticisms of Ratner and colleagues that these courts are at a 'physical distance from the victims' and that their judgments are merely 'abstract'.[40] It is true that the Court does not have the ability to compel the states to comply with their orders, as Ratner and colleagues argue;[41] this is because it lacks the force of international criminal courts in that it does not have the power to ensure domestic prosecution, nor can it threaten to open a prosecution of its own.[42] All the Court can do is to post on its website yet another report that compliance has not taken place, or report such non-compliance to the General Assembly of an indifferent Organization of American States (OAS). Nevertheless, in practice, the states do, sometimes, actually comply with the orders of the Court.[43]

[38] See Sonja C. Grover, The European Court of Human Rights as a Pathway to Impunity for International Crimes (Springer, 2010).
[39] Huneeus (n 30) 3.
[40] Ibid.
[41] Ratner, Abrams and Bischoff (n 36).
[42] Huneeus (n 30) 3.
[43] For instance, Huneeus noted that compliance reports published by the Court revealed that in nine cases brought before it, states have fulfilled the orders of the Court to prosecute and punish those responsible for violations of the human rights of victims; nevertheless, the Court continues to monitor these cases until a remedy has been fully implemented. These cases are: *Barrios Altos v. Peru*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Dec. 7, 2009); *Blake v. Guatemala*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Jan. 22, 2009); *Castillo Pa´ez v. Peru*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. May 19,

Analysis of new data about the extent of compliance of the states indicates that, in 1000 different orders issued by the European Court of Human Rights requiring states to amend their policies, compliance very much depends on the existence of a states' robust domestic institutions, such as an upright, pro-active executive, an independent legislature and judicial process, and a healthy civil society.[44] Thus, when state institutions implement the Court's orders, the result will be an improvement in a state's compliance.[45] Consequently, it can be argued, although there may be no guarantee that a state will comply with the rulings of human rights bodies, it does not mean that such rulings fail to have any positive effect. They do, in fact, have a positive effect in confronting a state with its duty to revive in its citizens a sense that they are being protected and that victims of crime are being granted justice. This positive effect would be more likely to succeed where state institutions have a record of strong human

2011); *Mack Chang v. Guatemala*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Nov. 16, 2009); *Servello´n Garcı´a v. Honduras*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Aug. 5, 2008); *Escue´ Zapata v. Colombia*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Feb. 21, 2011); *Goiburu´ v. Paraguay*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Nov. 19, 2009); *La Cantuta v. Peru*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Nov. 20, 2009); *Las Palmeras v. Colombia*, Monitoring Compliance with Judgment (Inter- Am. Ct. H.R. Feb. 3, 2010). For further details, see Ibid 16-17.

[44] Hillebrecht (n 33) 1-6; also, scholars have referred to three factors which affect the compliance of the states, international enforcement, good management and healthy domestic politics. For further details, see Darren Hawkins and Wade Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights' (2010) 6 *Journal of International Law and International Relations* 35, 41-43.

[45] Hillebrecht (n 33); Laurence Helfer and Anne-Marie Slaughter consider that the measures of the European Court which have proved to be successful could be employed helpfully in other international systems. These include 'functional capacity, fact-finding capacity, quality of legal reasoning and independence from political interests.' Laurence Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* 273, 300-336.

rights practices.[46] For instance, because of the high degree of respect for the rule of law in Western European countries, Dina Shelton suggests that the judgments of the European Court have clearly influenced in concrete changes in policy and practice of criminal law and the administration of justice in these countries.[47] She notes:

"Austria, for example, has modified its Code of Criminal Procedure; Belgium has amended its Penal Code, its laws on vagrancy, and its Civil Code; Germany has modified its Code of Criminal Procedure regarding pre-trial detention, given legal recognition to transsexuals, and taken action to expedite criminal and civil proceedings; the Netherlands has modified its Code of Military Justice and the law on detention of mental patients…"[48]

The *quasi-criminal review* of the human rights bodies has also been faced with other political and legal objections. First, that its mandates are illegitimate.[49] The Human Rights Committee, the Inter-American Court and the ECtHR were created to monitor the extent to which states comply with human rights conventions; they were to judge the conduct of states in doing this, not to judge individuals.[50] As well as lacking the mechanisms to judge

[46] Hillebrecht (n 33) 5; for instance, Helfer and Slaughter noted in 1997 that since some European countries have a high level of respect for the rule of law and for human rights in their institutions, the degree of compliance among these countries with the decisions of the European Court in individual cases has been 'extremely high'. Helfer and Slaughter (n 45) 296; see James L. Cavallaro and Stephanie Erin Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court' (2008) 102 *The American Journal of International Law* 768, 786.
[47] Dinah Shelton, 'The Boundaries of Human Rights Jurisdiction in Europe' (2003) 13 *Duke Journal of Comparative& International Law Review* 95, 147; Cavallaro and Brewer (n 46) 772.
[48] Shelton (n 47).
[49] Huneeus (n 30) 3.
[50] Ibid.

individuals, they do not have any legitimate authority to do so. This objection of lack of legitimacy has, particularly, been levelled at the Inter-American system.[51] Some states in Latin-America have called on the OAS to curb the mandate of the Inter-American Commission.[52] For instance, Venezuela, on 10 September 2012, denounced the Convention and, thereby, placed itself outside of the jurisdiction of the Inter-American Court.[53] The intervention of the Inter-American System (IAS), on the basis of *quasi-criminal review,* in monitoring and interfering in the judicial processes of criminal prosecution goes beyond what the states subscribing to IAS authorized it to do.[54] Certainly, the Inter-American Court has shown itself to be deeply involved in investigating and reviewing domestic criminal procedures and,

[51] Ibid; in contrast, the rulings of the European Court of Human Rights have been, generally, perceived as legitimate mandates, especially with regard to human rights reform. The Court's legitimacy and moral authority in the sphere of human rights adds weight to the claims of those seeking major improvements in domestic human rights policy. See Hillebrecht (n 33) 7. On the other hand, some have questioned the constitutional legitimacy of some of the Court's decisions. For instance, Lord Hoffman has done so regarding some of the rulings of the Court against the United Kingdom. See Lord Leonard Hoffman, 'The Universality of Human Rights' (2009) 125 *Law Quarterly Review* 416, 430. Nevertheless, Michale O' Boyle states that these criticisms of legitimacy have no justification in fact. They are based on dislike of the fact that the Court has the right to review decisions of national courts; some national judges reject the supremacy of Strasbourg law over national law, Michale O' Boyle, 'The Future of the European Court of Human Rights' (2011) 12 *German Law Journal* 1862, 1867.

[52] The Commission in response launched in 2012 a reform process, named *Position Document on the Process for Strengthening the Inter-American System for the Protection of Human Rights* (2012) <http://www.oas.org/en/iachr/mandate/strengthening.asp> accessed 16/09/2016; see Huneeus (n 30) 3.

[53] See Press Release, OAS General Secretary, OAS General Secretary Communicates Venezuela's Decision to Denounce the American Convention on Human Rights (Sept. 10, 2012) <http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-307/12> accessed 16/09/2016.

[54] Huneeus (n 30) 4, 12.

in some circumstances, has referred by name to those who should be investigated.[55] This has been considered by some member states to exceed its duty of measuring the compliance of states with the Convention.

Although, some attempts to resist the evolution of the Court's supervision have been made, many of the states have agreed to comply with its judgements.[56] However, mere submission to the Court's orders is a weaker way of recognizing legitimacy rather than, for example, a ratification of a protocol explicitly changing the policy of the Convention. Some states, however, such as Colombia, do not welcome the Court's interference in their criminal procedural affairs.[57] The result has been that such states have failed to comply with orders of the Court; Colombia, in particular, has argued that the Court has no authority to question its legitimate right to exercise its own discretion.[58] In addition, Colombia stated:

"Unless there is an alleged due process violation, this Tribunal is not allowed to analyze in depth and decide on the procedural actions because this is within the scope of the domestic procedure and, in this case, of the prosecutor in charge of the investigation who, according to the information of the court file, shall make the appropriate legal decisions".[59]

[55] Ibid 3.
[56] For instance, the Inter-American Court rejected the challenge of Panama to its authority to supervise compliance with its rulings. However, some states recognise the Court's authority to make such supervision. See *Baena Ricardo v. Panama* Competence, Inter-Am. Ct. H.R. (ser. C) No. 104 (Nov 28, 2003).
[57] Huneeus (n 30) 12.
[58] Ibid.
[59] *Mapiripan Massacre v Colombia*, Monitoring Compliance with Judgment, 'considering', Inter-Am. Ct. H.R. July 8, 2009, para 20.

The Court in response, makes a clear distinction between the function of a criminal court and a human rights court. It asserts

"The Court reiterates . . . that it is not a criminal court where the criminal responsibility of individuals can be analyzed, reason for which in this phase it shall not analyze the entire scope of the domestic investigations and processes, but only the degree of compliance with that ordered in the Judgment".[60]

Such an assertion has been said to 'ring hollow'[61] as the Court's practices underline that the review of domestic criminal investigations and procedures of offending states in detail is a core element of the Court's remit. However, this criticism of the Court's assertion may be understandable when the Court's orders are issued in a broad manner and when there is no clear boundary to its jurisprudence regarding the duty to punish in which it explains in detail which matters belong to the Court and which to the legitimate discretion of state authorities.[62] The Court, in fact, sometimes, in supervising a prosecution, instructs a state what kind of procedural investigation should be taken, refers to by name those who should be investigated, and suggests that the processes of previously well-conducted cases should be followed.[63] The report of compliance in the case of *La Rochela Massacre v Colombia,* mentioned above, provides a good example.[64] In that case, twelve judiciary officials, who were conducting criminal investigations into crimes committed in the Santander department, had been killed by a group of

[60] *Pueblo Massacre v Colombia*, Monitoring Compliance with Judgment, 'considering', Inter-Am. Ct. H.R. July 8, 2009, para 11.
[61] Ezequiel Malarino, 'Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights' (2012) 12 *International Criminal Law Review* 665, 691.
[62] Huneeus (n 30)13.
[63] Ibid 11, 13.
[64] *Mapiripan Massacre v Colombia* (n 59).

paramilitaries.[65] In its reparation ruling of 2007, the Court ordered the state authorities to conduct more comprehensive criminal investigation.[66] The Court found that 21 years after the crime had been committed and three years after its original reparation ruling, the investigation into the murder had still not been conducted with due diligence.[67]

The Court's conclusions depend on whether it has received sufficient information from the parties to the case, the state, the victims, and the Commission. If sufficient information has been provided, the Court is able to intervene in the criminal matter in detail and make procedural and substantive demands.[68] In addition, this supervisory engagement of the Court in the domestic prosecutions of states, allows it to review prosecutions as they unfold and, thus, evaluate their outcome. This review is independent of the Court's reparation orders to states which have not complied with their duties of investigation and punishment.[69]

Another criticism is that the ability of human rights bodies to supervise domestic criminal procedures is limited as they are not designed to do so. This limitation, according to Ratner and

[65] *La Rochela Massacre v. Colombia*, Merits, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 163 (May 11, 2007).
[66] Ibid, para 314.
[67] *La Rochela Massacre v. Colombia*, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Aug. 26, 2010); see Huneeus (n 30) 10.
[68] Huneeus (n 30); paras 60, 61, 63 and 64 of the case of *La Rochela Massacre v. Colombia* (n 65) explain what procedural and substantive demands are required by the Court and how deeply it engages itself in criminal matters.
[69] The Court has made the following distinction between the processes of adjudication and supervision: 'during the monitoring of compliance with the Judgment, the Tribunal's duty is no longer the determination of the facts of the case and the State's potential international responsibility, but instead only the verification of the compliance with the obligations stated in the judgment by the State responsible'. See *Pueblo Massacre v Colombia* (n 60), para 10; Huneeus (n 30) 11.

colleagues, is because the Court's 'evidentiary practices and capabilities are ill-suited to the task' of holding individuals responsible.[70] The Court does not have a mechanism of its own to investigate, and, therefore, relies on the Commission, applicants and the states to provide information about the case. Moreover, the increasing caseload of the Court has limited its capacity to process and analyze whatever information has been provided by the parties involved.[71] From the perspective of the Court, it is the responsibility of the state to investigate and prosecute in criminal cases acts and not that of the Court. This can be seen in the report of compliance in the case of *Moiwana Community v. Suriname*,[72] concerning the alleged massacre of over 40 men, women and children in an attack by members of the armed forces of Suriname which razed the village of the N'djuka Maroon of Moiwana in 1986. In that case the criminal prosecution had been stopped at the domestic level, partly because witnesses were afraid to testify. During the supervision stage, the state suggested that the testimony of the witnesses could be given at the Inter-American Court where their safety could be assured.[73] The Court firmly rejected this suggestion in the following statement:

"In light of the State's proposal that witnesses be interrogated at its seat, the Tribunal reminds the parties that it is not a criminal court in which the criminal responsibility of individuals may be analyzed. The State must be able to fulfil its duties relating to the protection of witnesses subject to its jurisdiction. The Court

[70] Ratner, Abrams and Bischoff (n 36) 257.
[71] In 2011, the Inter-American Commission noted that twenty-two cases had been brought before the Court, which was seven more than in the previous year; see Huneeus (n 30) 13.
[72] *Moiwana Community v. Suriname*, Monitoring Compliance with Judgment, "Considering," (Inter-Am. Ct. H.R. Nov. 22, 2010).
[73] Huneeus (n 30) 14.

reiterates that it is the State's responsibility to "provide adequate safety guarantees to [. . .] victims, [. . .] witnesses, judicial officers, prosecutors, and other [. . .] law enforcement officials" participating in the investigation and prosecution of crimes".[74]

Further criticism is that individual criminal defendants do not have the right to appear before the Court, even, though, its judgments directly affect their rights and freedoms.[75] For instance, in a recent compliance report, it was held that the Supreme Court of Peru had been mistaken when it ruled that a particular crime was a lesser offence, when, in fact, it was a crime against humanity.[76] This mistake would have affected the length of the sentence given handed though, though the defendants were not entitled to appear before the Court in order to defend themselves. A number of concerns have thus been expressed that procedural safeguard against defendants, such as limitations laws and the principle of *res judicata*, et alia, had not prevented prosecutions in cases of serious violations of human rights, considered that the Court gave too much power to the state against defendants which could undermine due process of law.[77]

---

[74] *Moiwana Community v. Suriname* (n 72), para 12.

[75] Malarino (n 61) 692; the European Court also makes it clear that its task is not to rule on criminal guilt or civil liability. In addition, it has underlined that 'its task is not to act as a court of appeal, or a court of fourth instance, in respect of the decisions taken by domestic courts. It thus considers that it is the role of national courts to interpret and apply the relevant rules of procedural or substantive law and that they are best placed for assessing the credibility of witnesses and the relevance of evidence to the issues in a particular case'. Jeremy McBride, The Case Law of the European Court of Human Rights on Evidentiary Standards in Criminal Proceedings, *European Union – Council of Europe joint project*, 6 <https://rm.coe.int/council-of-europe-georgia-european-court-of-human-rights-case-study-ev/16807823c3> accessed 30 September 2022.

[76] See *Barrios Altos v. Peru* (n 43).

[77] The debate came to a head when the Court ordered Argentina to reopen the case of *Bulacio v Argentina, Merits, Reparations & Costs, Inter-Am. Ct. H.R., (Ser. C) No.*

From a due process perspective, another significant concerns the extent to which the orders and monitoring processes of human rights bodies regarding prosecutions in criminal matters were effective from the perspective of human rights law which is different in nature to international criminal law. If these bodies want to improve the conduct of states, would it not be more effective to seek the reform of the domestic law of states?[78] While some commentators applaud the prohibition of amnesties, others are concerned that, in demanding punishment, the Court is effectively removing an important negotiating tool.[79] Therefore, according to the latter, the demanding of the priority of punishment is not always achievable, nor is it the best solution for the many atrocities facing societies.[80]

3. Discussion of these Criticisms

The above criticisms are important and create challenges to the capability of human rights bodies to effectively fulfill their newly assumed task of ordering and supervising prosecutions and punishments in criminal matters.[81] To address such challenges, empirical research is needed into the effectiveness of human rights bodies in making states comply with their rulings.[82] Such

100 (September 18, 2003), which the Supreme Court of Argentina had closed because the statute of limitations had run out. Although the Supreme Court of Argentina disagreed with the Inter-American Court's ruling, it duly reopened the case; See Fernando Felipe Basch, 'The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers' (2007) 23 *American University International Law Review* 195, 207-210; Malarino (n 61); Huneeus (n 30) 14.

[78] Huneeus (n 30).

[79] Ibid.

[80] Ibid 15.

[81] Ibid.

[82] Ibid; it should be noted that some commentators make a distinction between compliance and effectiveness. For instance, Kal Raustiala considers that

research could, perhaps, indicate whether these bodies should adhere to a strict reading of their original mandate or whether this should be extended, as a living document, in the light of changing circumstances.[83]

In spite of the absence of such research, criticisms of the interference of the Inter-American Court in the criminal matters has not prevented many European scholars from urging the Council of Europe to follow the Inter-American Court which issues clear orders to prosecute and punish criminals and supervises their implementation.[84] This indicates that whatever criticisms are made, the positive impact of the regional human rights bodies of the Inter-American and the European systems in their interference in criminal matters cannot be entirely denied. It can be argued that one of the most significant achievements of these bodies is bolstering the level of compliance among judicial domestic systems. As human rights bodies issue orders when a state's domestic legal systems have proven to be inadequate in providing just remedies, these orders are subsidiary.[85] This principle of subsidiarity means that state authorities have priority

compliance is 'conformity between behaviour and a legal rule or standard, and effectiveness, understood as the degree to which a legal rule or standard induces desired changes in behaviour'. See Kal Raustiala, 'Compliance & Effectiveness in International Regulatory Cooperation' (2000) 32 *Case Western Reserve Journal of International Law* 387, 388.

[83] For further details about effectiveness and what the Inter-American Court has achieved in practice through quasi-criminal review see the analysis of 145 rulings and 238 compliance reports of the Court made by Huneeus (n 30) 15-23.

[84] See Kirill Koroteev, 'Legal Remedies for Human Rights Violations in the Armed Conflict in Chechnya: The Approach of the European Court of Human Rights in Context' (2010) 1 *International Humanitarian Legal Studies* 275, 279, 302; Huneeus (n 30) 26.

[85] Huneeus (n 30) 20; the principle of subsidiarity, by its nature, 'is an express manifestation of the diversified character of the implementation of human rights guarantees at national level'. See Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 *Human Rights Law Review* 487, 491.

in dealing with violations of human rights; only if state fails to deal with them adequately, can appeal be made to the higher authority of international and regional human rights bodies. This subsidiarity is also strengthened by the fact that state authorities enjoy a margin of appreciation in dealing with domestic human rights issues because it is in a better position to make judgments over more distant international courts.[86] In spite of the principles of subsidiarity, the international courts can still expedite changes in the structure of domestic systems to improve their ability to provide just remedies.[87] For instance, the European Court of Human Rights has demanded member states where there has been excessive delay in their judicial processes, to put in place more stringent procedures.[88] Similarly, the Inter-American Court held that the military justice systems existing in several states must be curbed or reformed, particularly through legislation.[89] In addition, the Court has regularly ordered states to strength their institutional capacities by ensuring that their judicial officials take courses in human rights.[90]

The positive impact of the Inter-American Court is not confined to structural reform orders that strengthen a state's institutional abilities, but also it extends to its supervision stage which, in

[86] See George Letass, Two Concepts of the Margin of Appreciation' (2006) 26 *Oxford Journal of Legal Studies* 705, 721-722; For further details about the nature of the principle of subsidiarity and margin of appreciation, see Dean Spielmann, 'Whither the Margin of Appreciation' UCL- Current Legal Problems (CLP) lecture (2014) 1-13.
[87] Huneeus (n 30).
[88] See *Lukenda v Slovenia* app no 23032/02 (ECHR, 10 June 2005); *Bottazzi v Italy* app no 34884/97 (ECHR, 28 July 1999); *Scordino v Italy* app no 36813/97 (ECHR, 29 July 2004); and *Kudla v Poland* app no 30210/96 (ECHR, 26 October 2000).
[89] See Huneeus (n 30) 21.
[90] The Court, for example, in the case of *Radilla Pacheco v Mexico*, Preliminary Objections, Merits, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 209, para. 346 (Nov. 23, 2009), declared that 'this Tribunal considers it important to strengthen the institutional capacities of the State of Mexico through the training of public officials.'

itself, is a teaching opportunity that allows the Court to keep open a dialogue with a state's authority on how to comply with its orders.[91] Indeed, according to many scholars of judicial review, dialogue is highly important between all judicial courts and parties involved in a particular case.[92] According to Cesar Rodriguez-Garavito, when courts order remedies which are difficult to enforce, they can still achieve significant progress in compliance if, in continuing dialogue, the courts issue deadlines, hold public hearings involving all participants and issue follow-up judgments based on ongoing enquires and investigations which fine-tune their remedial orders.[93] Such practices, in encouraging dialogue between state's authorities and other bodies of society, will lead, to positive results, [94] among which are 'unlocking policy processes' and 'improving coordination among disconnected state agencies'.[95] Through employing this variety of dialogue in its monitoring stage, the Court is able to receive greater details from all parties concerning the prosecution process, thus, allowing it to make its orders more accurate and precise, which may render them more acceptable to both a state's authorities and victims.[96] In this way, perhaps, real difficulties and obstacles to the implementation of its orders may be overcome.[97]

[91] Huneeus (n 30) 21.
[92] See Mark Tushnet, Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law (Princeton University Press, 2009) 43-76; Rosalind Dixon, 'Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited' (2007) 5 *International Journal of Constitutional Law* 391, 391-394.
[93] César Rodríguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (2011) 89 *Texas Law Review* 1.
[94] Huneeus (n 30) 12.
[95] Rodríguez-Garavito (n 93) 29.
[96] Huneeus (n 30).
[97] Ibid 21.

In spite of the criticisms outlined above, it is submitted that the Inter-American Court has established a unique by combining its remedial orders with ongoing supervision of compliance.[98] Such a combination, as the compliance reports have indicated, has improved the prosecution practices of states in dealing with a legacy of mass violations of the right to life.[99] Moreover, by ordering states to keep victims informed of the details of prosecutions as they unfold, the role of victims in their domestic justice systems is enhanced.[100] The Court in exercising its *quasi-criminal jurisdiction* monitors compliance with its remedial orders. This has been described by some commenters as 'checklist compliance' enabling the Court to measure how its specific judgments have been observed by an offending state and how far the checklist has been complied with. If compliance has been inadequate, the Court then continues to issue reports until full compliance is achieved.[101] However, although the Court has been conceived as a unique quasi-criminal court, its judgments in criminal matters have not resulted in full compliance by every state.[102] As Antkowiak notes, only in one case (*Castillo-Paez v*

[98] Ibid 23.

[99] Ibid.

[100] For instance, the Court held in the case of *19 Merchants v. Colombia*, Merits, Reparations& Costs, Inter-Am. Ct. H.R. (ser. C) No. 109 (July 5, 2004), paras 263, 271 that 'The next of kin of the victims must have full access and competence to act at all stages and in all bodies of these investigations, in accordance with domestic law and the provisions of the American Convention' and 'The Court considers that it is fair and reasonable to order Colombia to conduct a genuine search, making every possible effort to determine with certainty what happened to the remains of the victims and, should it be possible, to return these to their next of kin'; see Huneeus (n 30).

[101] See Hawkins and Jacoby (n 44) 44.

[102] See Morse Tan, 'Member State Compliance with the Judgments of the Inter-American Court of Human Rights' (2005) 33 *International Journal of Legal Information* 319, 329; Thomas M Antkowiak, 'An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice' (2011) 47 *Stanford Journal of International Law* 279; Cecilia M Bailliet, 'Measuring Compliance with the

Peru, Judgment, Inter-American Court of Human Rights (Inter-Am. Ct. H.R.), 3 November 1997) out of fifty-four have the orders of the Court to investigate and prosecute been obeyed.[103] He also observes that unless continuous initiatives are taken to overcome the disregard of the rule of law in the political and judicial systems of Latin American states, compliance with the Court's orders to investigate and prosecute will not be achieved:

"Latin American criminal justice systems often have feeble conviction rates. Moreover, those responsible for abuses were, at times, high-ranking military officials or influential state agents. Many are still powerful, even decades after the crimes, and fiercely defend their impunity. As a result, individuals who have assisted state investigations, including family members of victims and their attorneys, have withstood attacks upon their lives. Not every scenario before the Court has involved societal powerbrokers or officials in the armed forces. But nearly all of these cases point to breakdowns in investigative capacity, resources, and the will of governments to prosecute sensitive cases from the past. These are problems that reveal structural fissures in Latin American states; as long as this is the case, a broad order to investigate and prosecute will not be resolved without concerted and sustained efforts".[104]

Inter-American Court of Human Rights: The Ongoing Challenge of Judicial Independence in Latin America' 31 (2013) *Nordic Journal of Human Rights* 477, 483; Cavallaro and Brewer (n 46) 785-786; Fernando Basch et al 'The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions' (2010) 7 *International Journal on Human Rights* 8, 22.

[103] Antkowiak (n 102) 303.

[104] Ibid 304. For further details about the compliance of the Latin American states with the rulings of the Inter-American Court, see Bailliet (n 102) 481-485. According to Helfer and Slaughter, for human rights bodies to benefit from the levels of state compliance seen in Europe, certain political and structural conditions must be met.

The pragmatic problems of non-compliance, however, do not entirely diminish the value of the remedial orders of the Inter-American Court in criminal matters. For instance, they can be seen to go beyond the mere traditional remedies for the violation of the right to life as they, actually, institutionalize such violation which upgrades the responsibilities of the state towards victims and society.[105] In addition, such remedial orders cannot be interpreted to be dependent on the willingness or non-willingness of states to uphold the rights of victims to justice. Non-compliance may be said to be an additional failure to comply with the American Convention.[106]

The binding nature of the remedial orders of the American Court is different from that of both the European system and Human

---

They noted that 'the existence (in states subject to the jurisdiction of a supranational tribunal) of domestic government institutions committed to the rule of law, responsive to the claims of individual citizens, and able to formulate and pursue their interests independently from other government institutions, is a strongly favourable precondition for effective supranational adjudication. It may even be a necessary (although not sufficient) condition for maximally effective supranational adjudication'. Helfer and Slaughter (n 45) 333-334.

[105] See Alexandra R. Harrington, 'Institutionalizing Human Rights in Latin America: The Role of the Inter-American Court of Human Rights System' (January 6, 2012). Available at SSRN: https://ssrn.com/abstract=1980796 or http://dx.doi.org/10.2139/ssrn.1980796 accessed 8 Aug 2022.

[106] Judge Cançado Trindade, former President of the Inter-American Court of Human Rights, has noted that 'the Court is an international tribunal, not a conciliatory organ that seeks to persuade states to implement its decisions'. In his opinion, 'it cannot "pragmatically" accept partial implementation of its orders; rather it is essential to maintain a principled approach to compliance because the protection system exists in order to safeguard the interests of victims'. See Bailliet (n 102) 479; however, available evidence indicates that the Court 'wields less rather than more political power to cause governments to undertake human rights reforms' and throughout its lifetime the Court 'has had to contend with explicit challenges to its authority, widespread noncompliance with certain elements of its decisions, and a shortage of political support from its parent organization, the Organization of American States'. See Cavallaro and Brewer (n 46) 774.

Rights Committee.[107] The policy of the European Court of Human Rights is that effective investigation alone by the state is sufficient for compliance with its orders for remedying the violation of the right to life.[108] This policy of the Court is clear, for example, in the over 150 rulings issued in cases of human rights abuses that took place during the conflict in Chechnya between 1999-2003, in which the Court refused to order states to prosecute.[109] Such rulings of the Court in remedial matters are considered to be merely 'declaratory'; they usually require the financial compensation of victims, but allow states to adopt their own means of bringing their practices into compliance with the European Convention.[110] According to Darren Hawkins and Wade Jacoby, even when the Court has reached final decisions that individuals' rights have been violated, decisions which, according to Article 46 (1), all member states of the Convention must obey, these decisions of the Court 'do not overrule the domestic courts' decisions, invalidate national laws, or even make specific orders for legislative reform'.[111] In general, the Court requires an offending state to look backwards at its inadequate procedures and arrive at a more appropriate remedy

[107] Huneeus (n 30) 27.
[108] For further details, see Al-Anaibi (n 2) 74-83.
[109] Philip Leach asserts that the Court should order such remedies in cases of forced disappearance as "making an order for an investigation to be undertaken is arguably the only step which could get near to 'remedying' the violation". Philip Leach 'The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights' (2008) 6 *European Human Rights Law Review* 732, 758-759; see also Koroteev (n 84) 275; Huneeus (n 30) 24.
[110] This means that the Court is merely charged to find whether the state has violated its obligation under the Convention and, therefore, it is still left to the state to decide how to bring its practices into line with the protection of human rights according to the Convention. However, in recent cases the practice of the Court has begun to change. See Valerio 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) 7 *Human Rights Law Review* 396, 397; Huneeus (n 30) 24.
[111] Hawkins and Jacoby (n 44) 51.

in specific cases, and formulate effective mechanisms to avoid future violations. Thus, the Court while finding that individuals' rights have been violated, does not comment specifically on the practices of a state.[112] This means that the judgments of the Court have not been 'prescriptive'.[113]

However, under the Council of Europe system, it is for the Committee of Ministers, a political body, rather than the Court itself, to supervise state compliance.[114] As the Committee of Ministers does not have a mechanism to enforce the decisions of the Court, implementation of them depends on 'the principle of subsidiarity and the need to ensure that domestic remedies become truly effective'.[115] The European Court effectively provides a protection for rights that is subsidiary to that offered nationally and its task, then, is not 'to take the place of the competent national courts but rather to review ... the decisions they delivered in the exercise of their power of appreciation'.[116]

---

[112] Ibid 51-52.

[113] See Rolv Ryssdal, The Enforcement System Set up under the European Convention on Human Rights, in Mielle Bulteman and Martin Kuijer, eds., *Compliance with judgments of International Courts* (The Hague: Nijhoff, 1996) 50.

[114] See Hillebrecht (n 33) 4, 10; Hawkins and Jacoby (n 44) 52; Lize R. Glas, 'Changes in the Procedural Practice of the European Court of Human Rights: Consequences for the Convention System and Lessons to be Drawn' (2014) 14 *Human Rights Review* 671, 680.

[115] See Yonatan Lupu and Erik Voeten, 'Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights' (2012) 42 *British Journal of Political Science* 413, 420.

[116] However, it is a misunderstanding to consider that subsidiarity refers to state authorities in a general way based on traditional sovereignty grounds. Rather it means that 'the Convention mechanism is subsidiary to the national systems in safeguarding human rights.' This point is crucial to a correct understanding of the margin of appreciation, its nature and its purpose. As some Strasburg Judges have remarked, 'The doctrine of margin of appreciation is a valuable tool for the interaction between national authorities and the Convention enforcement mechanism; it was never intended to be a vehicle of unprincipled differentialism'. See Spielmann (n 86) 4.

This subsidiary position is becoming more formally recognized, for example under the Brighton Declaration, as well as Protocol 15 which has been adopted by the Parliamentary Assembly of the Council of Europe but has yet to come into force.[117] A number of states consider that they should accept the enhanced subsidiarity which they reflect. The reinforcement and promotion of the subsidiary nature of the Court's function is reflected by Judge Dean Spielmann, the president of the Court, when he stated:

"One may be tempted to think that the amendment [under Protocol 15] is of limited significance – a mere rhetorical flourish, or form of window-dressing. But that would be incorrect, of course…I need hardly recall, that under the Vienna Convention on the Law of Treaties, the preamble to a treaty is an integral part of the instrument and thus is relevant to its interpretation".

…

"Let it not be overlooked that the new paragraph also brings the term subsidiarity into the Convention, a fact that the Court has welcomed. That it does so is consistent with the essential thrust of the reform process – the Interlaken process- which takes as

[117] Article 11 of Brighton Declaration and Protocol 15 states that 'The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation'. See Brighton Declaration (2012), available at:<http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf> ; Protocol No 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms 2013, CETS 213 with Explanatory Report.

its major premise the need to improve the protection of human rights at the domestic level. This is the only sustainable way to alleviate the huge pressure on the European mechanism, which, I recall, is subsidiary to the national mechanism, by original design and by practical necessity".[118]

This subsidiary role of the Court is clearly apparent in a series of articles contained in the Convention.[119] For instance, the placing of primary responsibility on Member States, under Article 13, to secure an effective remedy for violations of the right to life logically means that the role of the Court is subsidiary.[120] The fact that the Court may only deal with complaints after all domestic remedies have been exhausted also underlines the Court's subsidiarity.[121] However, it is important to stress that if a state's procedure has already been found to be in breach of the ECHR, such a state cannot claim that it must be allowed to exhaust all domestic remedies before a claim against it should be

[118] Dean Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (2013) *Max Planck Institute for Comparative Public Law and International Law*, Heidelberg, 8.

[119] See Glas (n 114) 685; Letass (n 86) 721. According to Article 1 of the European Convention, contracting states undertake to secure to everyone within their jurisdiction the rights and freedoms of the Convention.

[120] Glas (n 114) 685.

[121] Article 35 § 3 (b) which includes Protocol 14 provides that the Court "shall declare inadmissible" individual applications if it considers that: 'the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on its merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal'. For further details about the admissibility criterion of exhaustion of domestic remedies under Article 35(1) of the Convention and Protocol 14, see Antoine Buyse, 'Significantly Insignificant? The Life in the Margins of the Admissibility Criterion in Article 35 § 3 (b) ECHR' in Brianne McGonigle Leyh, Yves Haeck, Clara Burbano Herrera, and Diana Contreras Garduno (eds.), *The realization of human rights: when theory meets practice. Studies in honour of Leo Zwaak* (Antwerp: Intersentia 2013, Forthcoming) 1-13; Spano (n 85) 499-500; Glas (n 114) 674, 685-686.

considered to be admissible before the Court.[122] This is to say, that the Court gives priority to the effectiveness principle over the subsidiarity principle.[123] Based on the principle of effectiveness, the Court's influence is considered no longer to be limited to the examination of the merits of a complaint and the issue of remedial orders for violations of rights under the ECHR, but increasingly extends to actively engage in overseeing that their remedial orders are executed.[124]

However, such engagement of the Court does not often bring a successful outcome to its remedial judgments.[125] For instance, in cases where the decisions of the Court have not been executed, the Committee of Ministers is permitted to refer such cases back to the Court, in accordance with Article 46 of the ECHR as amended by Protocol 14.[126] In such cases, the Court can decide

[122] Glas (n 114) 685; Spano (n 85) 500.
[123] The Court takes the position that the ECHR 'is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory'. See Glas (n 114) 685; Spano (n 85) 500.
[124] According to Glas, the developments by the Court in reforms and case law regarding request for the re-interpretation of a judgment, infringement proceedings, pilot judgment procedure and 'judgments with indication of interest for execution under Article 46', demonstrate how these developments have come into existence and to what aspects of the execution phase they relate. See Glas (n 114) 680-683; the increased interaction between the Court and the Committee of Minsters in the execution process is an example of these developments. See Council of Europe, Committee of Minsters, Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights (2013) 7th Annual Report of the Committee of Ministers, 22-23.
[125] See Kanstantsin Dzehtsiarou and Alan Greene, 'Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners' (2011) 12 *German Law Journal* 1707, 1709.
[126] Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention 2004, CETS 194 with Explanatory Report, entry into force 2010.

whether or not a state has executed its judgments.[127] However, as the Court has, in fact, not as yet delivered even on decision of this kind, its influence has, so far, been mainly a psychological one on the member parties of the Convention.[128] Moreover, even if the Court had issued a decision about the non-execution of a judgment, the member states using the principle of subsidiarity could argue that they still have a broad freedom to decide which measures to put in place in order to meet the Court's remedial judgments.[129] Nevertheless, this freedom discretion is not without limits and, as the Court has stated, 'it must go hand-in-hand with supervision by the Committee of Ministers'.[130] Accordingly, in the course of its supervision, the Committee of Ministers (thereafter: Com), may take stock of how well the execution of the Court's decisions is progressing and, where appropriate, express any concerns it has and give directions to make sure that they are fully carried out.[131]

Further, the Committee of Ministers has begun, in practice, to engage in quasi criminal review, irrespective of the ECtHR's

[127] Under Article 46 (4) of the Convention, '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 of whether that Party has failed to fulfil its obligation under paragraph1'.

[128] See Dzehtsiarou and Greene (n 125) 1710.

[129] Ibid. However, it should be noted that the Court can, in some circumstances, specifically determine the precise measures which member states must take. For instance, the Court has stressed 'with a view to helping the respondent State to fulfil its obligations under Article 46, it may seek to indicate the type of individual and/or general measures that might be taken in order to put an end to the situation it has found to exist'. See Council of Europe, Committee of Minsters (n 124) 66.

[130] Council of Europe, Committee of Minsters (n 124) 18.

[131] Ibid.

more deferential approach in prosecutorial matters.[132] This engagement has two features. First, it considers that the successful prosecution of individual cases is an essential prerequisite in measuring the extent to which the state has complied with its duty to provide effective remedies in accordance with the rulings of the Court.[133] For instance, in monitoring the compliance of Russia in the case of *Kashiyev v Russia*,[134] the COM stated that 'The Committee of Ministers' examination is presently focused on the state of domestic investigations carried out following the judgments of the European Court . . . . It has been emphasized that the effectiveness of general measures adopted so far will very much depend on the results achieved in the concrete cases'.[135] Second, it issues compliance reports concerning its supervision of individual prosecutions in order to influence progress in

[132] See for example the role of the Committee of Minsters (COM) in supervising the rulings of the European Court concerning the Chechen Conflict, Huneeus (n 30) 24-26.

[133] Ibid.

[134] See *Khashiyev and Akayeva v Russia* Applications no 57942/00, 57945/00 (ECHR, 24 February 2005).

[135] Council of Europe, Committee of Ministers, Annotated Agenda and Decisions (Adopted, 1115th meeting (DH), 7–8 June 2011), at 43, CoE Doc. CM/Del/Dec (2011)1115 (June 10, 2011) (*Khashiyev Group v Russian* Federation); See Huneeus (n 30) 24. However, the Russian authorities, after repetitive requests by the COM to revise their strategy for handling this case and other cases, provided a revised plan of action in 2013. The following are crucial points of this plan:

'1- Improving the legislation and law enforcement practices related to counter-terrorism activity;

2- Improving the legislation and law enforcement practices in order to prevent illegal detentions, ill-treatment of detainees and disappearances of citizens;

3- Increasing the effectiveness of criminal investigations into the factual situations underlying the violations found, including

4- Ensuring the investigative authorities independence, as well as their organisational, personnel, technical and other equipment needs;

5- Cooperation with the victims and ensuring their rights during investigations'. See Council of Europe, Committee of Minsters (n 124) 81.

domestic institutional reforms.[136] Nevertheless, this approach still differs from that of the Inter-American Court, because the Committee's reports of compliance are not legally binding. It is, also doubtful, whether the European Court will change its position of refusing to order states to prosecute.[137] As the Committee of Ministers tends to be more deferential to states and has many more cases to deal with than the Inter-American Court, it is more likely to be unable to conduct its supervisory role as exhaustively.[138]

The practice of the UN Human Rights Committee of quasi-criminal review is also dissimilar to that of the Inter-American Court. In its 2011 Annual Report, the Committee reported that it had reviewed 151 individual cases, 53 of which it followed up with supervisory orders. 28 of these cases included recommendations on investigation and punishment.[139] However, the binding legal status of its rulings do not have the same power as court verdicts, and even its supervision of the implementation of its views has not been as detailed or extensive as that of the Inter-American Court.[140]

4. Conclusion

[136] Huneeus (n 30) 25.
[137] Ibid 26.
[138] Ibid; however, the 2013 report of the Committee of Minsters 'confirms the trend and reveals a first decrease ever in the total number of pending cases and an all-time high in the number of cases closed through final resolutions. In addition, it is a welcome signal that the decrease in the number of repetitive cases in which the Court has been compelled to render a judgment has continued. The statistics 2013 further reveal improvements in the respect of payment deadlines and confirm the trend that new cases are rapidly executed'. See Council of Europe, Committee of Minsters (n 124) 9.
[139] United Nation General Assembly, Report of the Human Rights Committee (2011) I A/66/40; see Huneeus (n 30) 26.
[140] Huneeus (n 30) 27.

This paper questions whether the current approach of human rights bodies with regard to positive procedural obligations is valid according to both, the domestic legal standards of states, and the mandate given to them in the conventions. It raises important criticisms about the capability of human rights bodies to effectively fulfill their newly assumed task of ordering and supervising prosecutions and punishments in criminal matters. It seems clear that the domestic justice systems of states bear the primary responsibility to bring violators of the right to life and other human rights to justice and action by human rights bodies should only take place, as subsidiary measure, when such systems prove to be inadequate. Nevertheless, human rights bodies should use their influence as widely as possible in order to encourage the improvement of domestic justice systems in securing justice for victims.[141] In measuring and monitoring the degree of compliance of domestic justice systems with their orders of investigation, prosecution and punishment, human rights bodies have, to some extent, established an important quasi-criminal jurisdiction. In doing so, they may be said to have contributed to the improvement of the prosecutorial practices of states in dealing with criminal violations of the right to life. Therefore, it can be argued that the difficulties in applying the remedial decisions of the human rights bodies on non-compliant states have not entirely negated these decisions. These decisions may be said to have strengthened the resolve of citizens, particularly victims, to increasingly compel states to bring their criminal justice systems into full compliance with the requirements of human rights bodies. Only if the state does this, can it claim to have legitimate authority over its citizens in the sphere of human rights. This legitimacy is most likely to be found in states which possess an executive of high integrity, an

[141] See Cavallaro and Brewer (n 46) 777.

independent legislature and judicial system and other robust and vigilant civil institutions.[142]

As noted above, the European system and UN Human Rights Committee practice are a weaker form of quasi-criminal review than that of the Inter-American Court.[143] Nevertheless, they do issue orders to investigate and punish in particular cases and exercise some supervision of their implementation.[144] This weaker form of quasi-criminal review will very likely increase as human rights bodies move towards greater dialogue with states, more specific reparatory rulings, and closer supervision of state compliance.[145] However, in parallel with this increase, there is an essential need to find more effective mechanisms to compel states to comply with the orders of human rights bodies to achieve justice for victims of crime if the policy of these bodies is to be successful. It has been suggested by some commentators that the application of coercive measures may improve the compliance of offending states.[146] For example, more diplomatic, economic and political pressures by neighboring states against a non-complying state may make a difference in this regard.[147] Such external pressure, however, is not liable to be effective because it depends on the willingness of these states to play this role.[148] Therefore, the media and other internal institutions of civil society must be active in pressing state authorities to

[142] See Hillebrecht (n 33) 18-19.
[143] Ibid; see Tushnet (n 92) 3-17 defining the difference between weak-form and strong-form judicial review.
[144] Huneeus (n 30) 27.
[145] See Lorna McGregor, 'The Role of Supranational Human Rights Litigation in Strengthening Remedies for Torture Nationally' (2012) 16 *International Journal of Humane Rights* 737, 740. For instance, the Committee of Minsters declared in its 2013 report that dialogue with states authorities to overcome the obstacles to the execution of the remedial rulings of the Court has improved. See Council of Europe, Committee of Minsters (n 124) 7.
[146] See Hillebrecht (n 33) 5.
[147] Ibid.
[148] Ibid.

acknowledge the orders of human rights bodies, not merely notionally, but to take serious practical steps to implement them.[149]

[149] Ibid 18-19.

Bibliography

AL-Anaibi F K M, The Rights of Victims of Violence by None-State Actors in Iraq post-2003 (PhD thesis, Durham University 2018).

Aldana-Pindell R, 'An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes' (2004) 26 *Human Rights Quarterly* 605.

Antkowiak T M, 'An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice' (2011) 47 *Stanford Journal of International Law* 279.

Bailliet C M, 'Measuring Compliance with the Inter-American Court of Human Rights: The Ongoing Challenge of Judicial Independence in Latin America' 31 (2013) *Nordic Journal of Human Rights* 477.

Basch F et al 'The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions' (2010) 7 *International Journal on Human Rights* 8.

Basch Fernando Felipe, 'The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers' (2007) 23 *American University International Law Review* 195.

Bassiouni M. C, 'International Recognition of Victims' Rights' (2006) 6 *Human Rights Law Review* 203.

Buyse A, 'Significantly Insignificant? The Life in the Margins of the Admissibility Criterion in Article 35 § 3 (b) ECHR' in Brianne McGonigle Leyh, Yves Haeck, Clara Burbano Herrera, and Diana Contreras Garduno (eds.), *The realization of human rights: when theory meets practice. Studies in honour of Leo Zwaak* (Antwerp: Intersentia 2013, Forthcoming).

Cavallaro J L and Brewer S E, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the

Inter-American Court' (2008) 102 *The American Journal of International Law* 768.
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.
Council of Europe, Committee of Ministers, Annotated Agenda and Decisions (Adopted, 1115th meeting (DH), 7–8 June 2011), at 43, CoE Doc. CM/Del/Dec (2011)1115 (June 10, 2011) (*Khashiyev Group v Russian* Federation).
Council of Europe, Committee of Minsters, Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights (2013) 7th Annual Report of the Committee of Ministers.
Dean Spielmann D, 'Whither the Margin of Appreciation' UCL-Current Legal Problems (CLP) lecture (2014).
Dixon R, 'Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited' (2007) 5 *International Journal of Constitutional Law* 391.
Doak J, Victim's Rights, Human rights and Criminal Justice: Preconceiving the Role of Third Parties (Hart Publishing 2008).
Dzehtsiarou Kand Greene A, 'Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners' (2011) 12 *German Law Journal* 1707.
George Letass G, Two Concepts of the Margin of Appreciation' (2006) 26 *Oxford Journal of Legal Studies* 705.
Glas L R, 'Changes in the Procedural Practice of the European Court of Human Rights: Consequences for the Convention System and Lessons to be Drawn' (2014) 14 *Human Rights Review* 671.
Groenhuijsen M, 'The Development of International Policy in Relation to Victims of Crime' (2014) 20 *International Review of Victimology* 31.

Grover S C, The European Court of Human Rights as a Pathway to Impunity for International Crimes (Springer, 2010).
Harrington A R, 'Institutionalizing Human Rights in Latin America: The Role of the Inter-American Court of Human Rights System' (January 6, 2012). Available at SSRN: https://ssrn.com/abstract=1980796 or http://dx.doi.org/10.2139/ssrn.1980796 accessed 8 Aug 2022.
Hawkins D and Jacoby W, 'Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights' (2010) 6 *Journal of International Law and International Relations* 35.
Helfer L and Slaughter A M, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* 273.
Hillebrecht C, 'The power of Human Rights Tribunals: Compliance with European Court of Human Rights and Domestic Policy Change' (2014) 0(0) *European Journal of International relations* 1.
Hoffman L L, 'The Universality of Human Rights' (2009) 125 *Law Quarterly Review* 416.
Huneeus A, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 *The American Journal of International Law* 1.
Koroteev K, 'Legal Remedies for Human Rights Violations in the Armed Conflict in Chechnya: The Approach of the European Court of Human Rights in Context' (2010) 1 *International Humanitarian Legal Studies* 275.
Krešimir Kamber, Prosecuting Human Rights Offences: Rethinking the *Sword* Function of Human Rights Law (Brill Nijhoff, 2017).
Leach P 'The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights' (2008) 6 *European Human Rights Law Review* 732.

Lupu Y and Voeten E, 'Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights' (2012) 42 *British Journal of Political Science* 413.
Malarino E, 'Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights' (2012) 12 *International Criminal Law Review* 665.
McBride J, The Case Law of the European Court of Human Rights on Evidentiary Standards in Criminal Proceedings, *European Union – Council of Europe joint project*, 6 <https://rm.coe.int/council-of-europe-georgia-european-court-of-human-rights-case-study-ev/16807823c3> accessed 30 September 2022.
McCarthy C, 'Victim Redress and International Criminal Justice, Competing Paradigms, or Compatible Forms of Justice?' (2012)10 *Journal of International Criminal Justice* 351.
McGregor L, 'The Role of Supranational Human Rights Litigation in Strengthening Remedies for Torture Nationally' (2012) 16 *International Journal of Humane Rights* 737.
Myers M S, 'Prosecuting Human Rights Violations in Europe and America: How Legal System Structure Affects Compliance with International Law' (2004) 25 *Michigan Journal of International Law* 211.
O' Boyle M, 'The Future of the European Court of Human Rights' (2011) 12 *German Law Journal* 1862.
Ochoa J C, The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations (Martinus Nijhoff Publishers, 2013).
Press Release, OAS General Secretary, OAS General Secretary Communicates Venezuela's Decision to Denounce the American Convention on Human Rights (Sept. 10, 2012) <http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-307/12> accessed 16/09/2016.

Ramcharan B G, 'The National Responsibility to Protect Human Rights' (2009) 39 *Hong Kong Law Journal* 361.
Ratner S R, Jason S. Abrams and James L. Bischoff, Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy (3d ed, Oxford University Press, 2009).
Raustiala K, 'Compliance & Effectiveness in International Regulatory Cooperation' (2000) 32 *Case Western Reserve Journal of International Law* 387.
Rodríguez-Garavito C, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (2011) 89 *Texas Law Review* 1.
Roht-Arriaza N, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78 *California Law Review* 449.
Rosenberg S P, 'Responsibility to Protect: A Framework for Prevention' (2009) 1 *Global Responsibility to protect* 442.
Ryssdal R, The Enforcement System Set up under the European Convention on Human Rights, in Mielle Bulteman and Martin Kuijer, eds., *Compliance with judgments of International Courts* (The Hague: Nijhoff, 1996).
Scharf M, 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes' (1996) 59 *Law and Contemporary Problems* 41.
Seibert-Fohr A, Prosecuting Serious Human Rights Violations (Oxford University Press 2010).
Shelton D, 'The Boundaries of Human Rights Jurisdiction in Europe' (2003) 13 *Duke Journal of Comparative& International Law Review* 95.
Sorochinsky M, 'Prosecuting Torturers 'Child Molesters': Toward a Power Balance Model of Criminal Process for International Human Rights' (2009) 31 *Michigan Journal of International Law* 157.

Spano R, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 *Human Rights Law Review* 487.

Spielmann D, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (2013) *Max Planck Institute for Comparative Public Law and International Law*, Heidelberg, 8.

Tan M, 'Member State Compliance with the Judgments of the Inter-American Court of Human Rights' (2005) 33 *International Journal of Legal Information* 319.

The Inter-American Commission, *Position Document on the Process for Strengthening the Inter-American System for the Protection of Human Rights* (2012) <http://www.oas.org/en/iachr/mandate/strengthening.asp> accessed 16/09/2016.

Tushnet M, Courts W, Rights S: Judicial Review and Social Welfare Rights in Comparative Constitutional Law (Princeton University Press, 2009).

UN Human Rights Committee, *General Comment No 31: The nature of the general legal obligation imposed on States Parties to the Covenant,* 26 May 2004, CCPR/C/21/Rev.1/Add.13.

United Nation General Assembly, Report of the Human Rights Committee (2011) I A/66/40.

Weissbrodt D and de la Vega C, International Human Rights Law: An Introduction (University of Pennsylvania Press 2007).

Wemmers J-A, 'Victims' Rights are Human Rights: The importance of recognizing victims as persons (2012) *Timida* 71.

Wemmers J-W and Manirabona A, 'Regaining trust: The Importance of Justice for Victims of Crimes against Humanity' (2013) 9 *International Review of Victimology* 1.

Zwanenburg M, 'The Van Boven/Bassiouni Principles: An Appraisal' (2006) 24 *Netherlands Quarterly of Human Rights* 641

List of Conventions

American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978).
Brighton Declaration (2012), available at:<http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf>.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 3.
International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
UN General Assembly, Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, 171 UNTS 999.
United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. 40/34, annex, 40 U.N. GAOR Supp. (No. 53) at 214, U.N. Doc. A/40/53 (1985).
Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 5.

List of Case Law

19 Merchants v. Colombia, Merits, Reparations& Costs, Inter-Am. Ct. H.R. (ser. C) No. 109 (July 5, 2004).
Baena Ricardo v. Panama Competence, Inter-Am. Ct. H.R. (ser. C) No. 104 (Nov 28, 2003).
Barrios Altos v. Peru, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Dec. 7, 2009).
Blake v. Guatemala, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Jan. 22, 2009).
Bottazzi v Italy app no 34884/97 (ECHR, 28 July 1999).
Bulacio v Argentina, Merits, Reparations & Costs, Inter-Am. Ct. H.R., (Ser. C) No. 100 (September 18, 2003).

Castillo Pa´ez v. Peru, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. May 19, 2011).
Escue´ Zapata v. Colombia, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Feb. 21, 2011).
Goiburu´ v. Paraguay, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Nov. 19, 2009).
Khashiyev and Akayeva v Russia Applications no 57942/00, 57945/00 (ECHR, 24 February 2005).
Kudla v Poland app no 30210/96 (ECHR, 26 October 2000).
La Cantuta v. Peru, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Nov. 20, 2009).
La Rochela Massacre v. Colombia, Merits, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 163 (May 11, 2007).
La Rochela Massacre v. Colombia, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Aug. 26, 2010).
Las Palmeras v. Colombia, Monitoring Compliance with Judgment (Inter- Am. Ct. H.R. Feb. 3, 2010).
Lukenda v Slovenia app no 23032/02 (ECHR, 10 June 2005).
Mack Chang v. Guatemala, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Nov. 16, 2009).
Mapiripan Massacre v Colombia, Monitoring Compliance with Judgment, 'considering,' Inter-Am. Ct. H.R. July 8, 2009.
Moiwana Community v. Suriname, Monitoring Compliance with Judgment, "Considering," (Inter-Am. Ct. H.R. Nov. 22, 2010).
Pueblo Massacre v Colombia, Monitoring Compliance with Judgment, 'considering,' Inter-Am. Ct. H.R. July 8, 2009.
Radilla Pacheco v Mexico, Preliminary Objections, Merits, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 209, para. 346 (Nov. 23, 2009).
Scordino v Italy app no 36813/97 (ECHR, 29 July 2004).
Servello´n Garcı´a v. Honduras, Monitoring Compliance with Judgment (Inter-Am. Ct. H.R. Aug. 5, 2008).