33. In general, the same basic principles govern this question as those which the Court has deemed applicable to the first question. That is to say, if a person, for a reason such as the one stated above, is prevented from availing himself of the domestic legal remedies necessary to assert a right which the Convention guarantees, he cannot be required to exhaust those remedies. The state's obligation to guarantee such remedies, is, of course, unaffected by this conclusion …

35. It follows therefrom that where an individual requires legal representation and a generalized fear in the legal community prevents him from obtaining such representation, the exception set out in Article 46(2)(b) is fully applicable and the individual is exempted from the requirement to exhaust domestic remedies.

36. The Court is of the opinion that, in the cases posited by the Commission, it is the considerations outlined that render the remedies adequate and effective in accordance with generally recognized principles of international law to which Article 46(1) refers; namely, remedies 'suitable to address an infringement of a legal right and capable of producing the result for which [they were] designed' (*Velásquez Rodríguez* Case, *supra* 23, paras. 64 and 66; *Godínez Cruz* Case, *supra* 23, paras. 67 and 69, and *Fairén Garbi and Solís Corrales* Case, *supra* 34, paras. 88 and 91).

The merits phase

Once the Inter-American Commission on Human Rights has determined that the petition is admissible, it may seek to reach a friendly settlement between the parties. If that fails or if there is no room for such a friendly settlement, the case proceeds to the merits stage. The Commission investigates whether the violation alleged in the petition existed, and if it arrives at the conclusion that such a violation has indeed occurred, it shall 'draw up a report setting forth the facts and stating its conclusions' (Art. 50 ACHR). This report contains the proposals and recommendations of the Commission. It is transmitted to the parties. This may lead to the issue being solved, either because a friendly settlement is reached on the basis of the Commission's report, or because the State agrees with the conclusions and follows the recommendations of the Commission. If not, the case may be transmitted to the Inter-American Court, either by the Commission or by the State concerned, if this State is a party to the Convention. If the case is not presented to Court, the Commission publishes a second report, as provided for in Article 51 ACHR:

American Convention on Human Rights, Article 51:

1. If, within a period of three months from the date of the transmittal of the report of the Commission to the states concerned, the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration.
2. Where appropriate, the Commission shall make pertinent recommendations and shall prescribe a period within which the state is to take the measures that are incumbent upon it to remedy the situation examined.

3. When the prescribed period has expired, the Commission shall decide by the vote of an absolute majority of its members whether the state has taken adequate measures and whether to publish its report.

If the case is transmitted to the Court, the Court shall receive memorials from the Commission, the representatives of the petitioner, and the State, all of which also take part in the hearings. Article 63(1) ACHR describes the effect of a Court judgment finding that the Convention has been violated:

American Convention on Human Rights, Article 63(1):

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

The supervision of compliance with the judgments of the Inter-American Court of Human Rights

Apart from the compensatory damages it may award, the Court has no means under the ACHR to enforce its judgments. It nevertheless took the initiative of requesting States to report back about the measures taken to implement the judgments. Its power to do so was occasionally challenged. In the *Baena Ricardo et al.* case *(270 Workers* v. *Panama)*, the Comité Panameño por los Derechos Humanos denounced the State of Panama before the Inter-American Commission on Human Rights for having laid off 270 public officials and union leaders who had taken part in several rallies against the administration's policies and to defend their labour rights, and were alleged by the Government to have collaborated with a military uprising. After the employees were dismissed, a law was passed under which any actions started by the workers to challenge their dismissal had to be lodged with courts dealing with administrative matters – instead of labour courts, as normally required by the applicable law. The actions filed with the Supreme Court of Panama failed. After examining the petition and having found it admissible, the Inter-American Commission of Human Rights transmitted the case to the Inter-American Court of Human Rights. In a judgment of 2 February 2001, the Court concluded the State of Panama had violated the rights of freedom of association, judicial guarantees and judicial protection, as well as the principles of legality and freedom from *ex post facto* laws in detriment of the 270 workers. The Court also stated that minimum due process guarantees set forth in Article 8(2) ACHR must be observed in the course of an administrative procedure, as well as in any other procedure leading to a decision that may affect the rights of persons. The Court decided

that the State had to reassign the workers to their previous positions and pay them the outstanding wages.

Following its initial judgment on the merits, the Court adopted a series of decisions on the measures adopted by Panama to comply with the judgment. However, Panama soon took the view that by seeking to monitor compliance with its own judgment, the Court 'ha[d] interpreted its own judgment', and that the stage of monitoring compliance with judgment was 'a post-judgment stage ... that did not fall within the judicial sphere of the Court, but strictly within the political sphere'. The Court felt compelled to justify its practice of monitoring compliance with its judgments. It adopted the following judgment on its competence:

Inter-American Court of Human Rights, *Baena Ricardo et al.* case (270 *Workers* v. *Panama*), judgment on competence, 28 November 2003:

58. Panama has been a State Party to the Convention since June 22, 1978, and, in accordance with Article 62 of this treaty, it accepted the contentious jurisdiction of the Court on May 9, 1990. On February 2, 2001, the Court delivered judgment on merits, and the reparations and costs.

59. Given that this is the first time that a State Party in a case before the Inter-American Court questions the competence of the Court to monitor compliance with its judgments, a function carried out in all the cases on which judgment has been passed and invariably respected by the States Parties, this Court considers it necessary to refer to the obligation of the States to comply with the decisions of the Court in any case to which they are parties, and to the competence of the Inter-American Court to monitor compliance with its decisions and issue instructions and orders on compliance with the measures of reparations it has ordered.

60. When the Court has ruled on the merits and the reparations and costs in a case submitted to its consideration, the State must observe the norms of the Convention that refer to compliance with that judgment or those judgments. In accordance with the provisions of Article 67 of the American Convention, the State must comply with the judgments of the Court promptly and fully. Moreover, Article 68(1) of the American Convention stipulates that '[t]he States parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties'. The treaty obligation of the States Parties to comply promptly with the Court's decisions binds all the State's powers and bodies.

(A) State obligations

(a) Pacta sunt servanda 61. The obligation to comply with the provisions of the Court's decisions corresponds to a basic principle of the law on the international responsibility of the State, which is supported by international case law; according to this, a State must comply with its international treaty obligations in good faith (pacta sunt servanda) and ... as established in Article 27 of the 1969 Vienna Convention on the Law of Treaties, a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. As regards execution of the reparations ordered by the Court in the sphere of domestic law, the responsible State may not modify or fail to comply with them by invoking the provisions of domestic law.

(b) Obligation to repair 62. The obligation to repair, all aspects of which (scope, nature, methods and determination of the beneficiaries) are regulated by international law, may not be

modified or not complied with by the State which has this obligation, by invoking provisions or difficulties of domestic law …

64. Article 63(1) ACHR [cited above] grants the Inter-American Court a wide margin of judicial discretion to determine the measures that all the consequences of the violation to be repaired.

65. As the Court has stated, Article 63.1 of the Convention reproduces the text of a customary law norm that is one of the fundamental principles of the law of the international responsibility of States. And that is how this Court has applied it. When an unlawful act occurs that may be attributed to the State, this entails the latter's international responsibility for violating an international norm. Based on this responsibility, a new juridical relationship is born for the State consisting in the obligation to make reparation.

(c) Scope of 'effet utile' 66. The States Parties to the Convention must guarantee compliance with treaty provisions and their effects (*effet utile*) at the level of their respective domestic laws. This principle is applicable not only with regard to the substantive norms of the human rights treaties (namely, those that contain provisions on protected rights), but also with regard to the procedural norms, such as those referring to compliance with the decisions of the Court (Articles 67 and 68(1) of the Convention). The provisions contained in the said articles must be interpreted and applied so as to ensure that the protected guarantee is truly practical and effective, recalling the special nature of human rights treaties and their collective implementation.

67. Regarding the said principle of *effet utile*, in the *Corfu Channel* case, the International Court of Justice reiterated what the Permanent Court of International Justice had said, to the effect that: '… regarding the specific question on the competence pending decision, it may be sufficient to observe that, when determining the nature and scope of a measure, the Court must observe its practical effect instead of the predominant motive that it is believed inspired it' [*Corfu Channel* case, judgment of 9 April 1949: I.C.J. Reports 1949, p. 24; and P.C.I.J, Advisory Opinion No. 13 of July 23rd, 1926, Series B, No. 13, p. 19].

(B) Scope of the competence of the Court to determine its own competence

68. The Court, as any body with jurisdictional functions, has the authority inherent in its attributions to determine the scope of its own competence (*compétence de la compétence/ Kompetenz-Kompetenz*). The instruments accepting the optional clause on obligatory jurisdiction (Article 62(1) of the Convention) assume that the States submitting them accept the Court's right to settle any dispute relative to its jurisdiction, such as the dispute in this case on the function of monitoring compliance with its judgments. An objection or any other action of the State intended to affect the competence of the Court has no consequence, because, in all circumstances, the Court retains the *compétence de la compétence*, as it is master of its own jurisdiction …

70. The Court cannot abdicate the prerogative to determine the scope of its own jurisdiction, which is also an obligation imposed upon it by the American Convention in order to exercise its functions according to Article 62(3) thereof. That provision reads as follows: 'The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of th[e] Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration … or by a special agreement.'

71. As the Courts has stated in its constant case law, acceptance of the contentious jurisdiction of the Court is a binding clause that does not admit limitations that are not included

expressly in Articles 62(1) and 62(2) of the American Convention. Given the fundamental importance of this clause for the operation of the Convention's system of protection, it cannot be subject to unanticipated limitations invoked by States Parties for reasons of domestic policy.

(C) Effectiveness of decisions on reparations

72. When it has determined the international responsibility of the State for violation of the American Convention, the Court proceeds to order measures designed to remedy this violation. Its jurisdiction includes the authority to administer justice; it is not restricted to stating the law, but also encompasses monitoring compliance with what has been decided. It is therefore necessary to establish and implement mechanisms or procedures for monitoring compliance with the judicial decisions, an activity that is inherent in the jurisdictional function. Monitoring compliance with judgments is one of the elements that comprises jurisdiction. To maintain otherwise, would mean affirming that the judgments delivered by the Court are merely declaratory and not effective. Compliance with the reparations ordered by the Court in its decisions is the materialization of justice for the specific case and, ultimately, of jurisdiction; to the contrary, the *raison d'être* for the functioning of the Court would be imperiled.

73. The effectiveness of judgments depends on their execution. The process should lead to the materialization of the protection of the right recognized in the judicial ruling, by the proper application of this ruling.

74. Compliance with judgment is strongly related to the right to access to justice, which is embodied in Articles 8 (Right to a Fair Trial) and 25 (Judicial Protection) of the American Convention …

77. The Court has established that the formal existence of remedies is not sufficient; these must be effective; in other words, they must provide results or responses to the violations of rights included in the Convention. In this respect, the Court has stated that: '… those remedies that, owing to the general conditions of the country or even the particular circumstances of a case, are illusory cannot be considered effective. This may occur, for example, when their uselessness has been shown in practice, because the jurisdictional body lacks the necessary independence to decide impartially or because the means to execute its decisions are lacking; owing to any other situation that establishes a situation of denial of justice, as happens when there is unjustified delay in the decision.'

78. '[T]he safeguard of the individual in the face of the arbitrary exercise of the power of the State is the primary purpose of the international protection of human rights'; such protection must be genuine and *effective*.

79. States have the responsibility to embody in their legislation and ensure due application of effective remedies and guarantees of due process of law before the competent authorities, which protect all persons subject to their jurisdiction from acts that violate their fundamental rights or which lead to the determination of the latter's rights and obligations. However, State responsibility does not end when the competent authorities issue the decision or judgment. The State must also guarantee the means to execute the said final decisions.

80. In this respect, the Inter-American Court declared the violation of Article 25 of the Convention in '*Five Pensioners*' v. *Peru*, when it stated that the defendant State did not execute the judgments issued by the domestic courts for a long period of time.

81. Likewise, when considering the violation of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter 'the European Convention'), which embodies the right to a fair trial, the European Court established in *Hornsby* v. *Greece*,

that: '… that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party … *Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial"* …' (emphasis added).

82. In light of the above, this Court considers that, in order to comply with the right to access to justice, it is not sufficient that a final ruling be delivered during the respective proceeding or appeal, declaring rights and obligations, or providing protection to certain persons. It is also necessary that there are effective mechanisms to execute the decisions or judgments, so that the declared rights are protected effectively. The execution of such decisions and judgments should be considered an integral part of the right to access to justice, understood in its broadest sense, as also encompassing full compliance with the respective decision. The contrary would imply the denial of this right.

83. The above-mentioned considerations are applicable to international proceedings before the inter-American system for the protection of human rights. In the judgments on merits and reparations and costs, the Inter-American Court decides whether the State is internationally responsible and, when it is, orders the adoption of a series of measures of reparation to make the consequences of the violation cease, guarantee the violated rights, and repair the pecuniary and non-pecuniary damage produced by the violations. As previously stated (*supra* paras. 61 and 62), the responsible States are obliged to comply with the provisions of the decisions of the Court and may not invoke provisions of domestic law in order not to execute them. If the responsible State does not execute the measures of reparations ordered by the Court at the domestic level, it is denying the right to access to international justice.

(D) Legal grounds for monitoring compliance with the decisions of the Court

… 88. The American Convention does not establish a specific body responsible for monitoring compliance with the judgments delivered by the Court, as provided for in the European Convention [in which Article 46(2) ECHR provides that the Committee of Ministers of the Council of Europe, composed of the Foreign Affairs Ministers of the Council of Europe Member States or their delegates, monitors the execution of the judgments of the European Court of Human Rights]. When the American Convention was drafted, the model adopted by the European Convention was followed as regards competent bodies and institutional mechanisms; however, it is clear that, when regulating monitoring compliance with the judgments of the Inter-American Court, it was not envisaged that the OAS General Assembly or the OAS Permanent Council would carry out a similar function to the Committee of Ministers in the European system.

… 90. [On the basis of the preparatory works of the American Convention on Human Rights, t]he Court considers that, when adopting the provisions of Article 65 of the Convention [according to which: 'To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations'], the intention of the States was to grant the Court the authority to monitor compliance with its decisions, and that the Court should be responsible for informing the OAS General Assembly, through its annual report, of the cases in which the decisions of the Court had not been complied with, because it is not possible to apply Article 65 of the Convention unless the Court monitors compliance with its decisions.

… 92. According to the provisions of Article 62(1) of the Convention, the Court has jurisdiction in all matters relating to the interpretation or application of the American Convention …

93. From this, it is evident that, the matters relating to the application of the Convention encompass everything related to monitoring compliance with the judgments of the Court. It is obvious that, in the issues related with the application of the Convention, is included everything referring to the monitoring of the compliance of the judgments of the Court.

94. Article 31(1) of the 1969 Vienna Convention on the Law of Treaties states that: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

95. Moreover, Article 29(a) of the American Convention establishes that no provision of the Convention shall be interpreted as permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in the Convention or to restrict them to a greater extent than is provided for therein. An interpretation of the American Convention that did not allow any body to monitor compliance with judgments by the responsible States would run counter to the goal and purpose of this treaty, which is the effective protection of human rights, and would deprive all the beneficiaries of the Convention of the guarantee of protection of those rights by the actions of its jurisdictional body, and the consequent execution of the latter's decisions. Allowing States to comply with the reparations ordered in the judgments without adequate monitoring would be equal to leaving the execution of the Court's decisions to their free will.

… 101. In order to comply with the mandate established in [the Convention] to monitor compliance with the commitment assumed by the States Parties to 'comply with the judgment of the Court in any case to which they are parties' (Article 68(1) of the Convention) and, in particular, to inform the OAS General Assembly of the cases in which 'a State has failed to comply with the Court's ruling', the Court must first know the degree of compliance with its decisions. To this end, the Court must monitor that the responsible States comply effectively with the reparations ordered by the Court, before advising the OAS General Assembly that they have failed to comply with a ruling.

102. Moreover, the Court's authority to monitor compliance with its judgments and the procedure adopted to this end, are also grounded in the constant and standard practice of the Court and in the resulting *opinio juris communis* of the States Parties to the Convention, with regard to whom the Court has issued various orders on compliance with judgment. The *opinio juris communis* means the expression of the universal juridical conscience through the observance, by most of the members of the international community, of a determined practice because it is obligatory. This *opinio juris communis* has been revealed because these States have shown a general and repeated attitude of accepting the monitoring function of the Court, which has been clearly and amply demonstrated by their presentation of the reports that the Court has asked for, and also their compliance with the decisions of the Court when giving them instructions or clarifying aspects on which there is a dispute between the parties regarding compliance with reparations.

103. Moreover, in all the cases before the Court, the Inter-American Commission and the victims or their legal representatives have accepted its monitoring function, have forwarded their comments on the reports submitted by the States to the Court, and have abided by the decisions of the Court regarding compliance with judgment. Thus, the activity of the Court and the conduct of both the States, and the Inter-American Commission and the victims or their legal representatives, have been complementary in relation to monitoring compliance with judgments, so that the Court has exercised the function of carrying out this monitoring and, in turn, the

States, the Inter-American Commission and the victims or their legal representatives have respected the decisions issued by the Court in the exercise of this supervisory function.

104. Contrary to what Panama has affirmed (*supra* para. 54(e)), as regards the lapse of time required in order to consider that constant practice exists, this Court considers that the important point is that the practice is observed without interruption and constantly, and that it is not essential that the conduct should be practiced over a specific period of time. This is how it has been understood by international legal writings and case law [*North Sea Continental Shelf*, judgment, I.C.J. Reports 1969, paras. 73 and 74; and *Free City of Danzig and International Labour Organization*, Advisory Opinion, 1930, P.C.I.J., Collection of Advisory Opinions, Series B–No. 18, pp. 12–13]. International case law has even recognized the existence of customary norms that were developed over very short periods [*Free City of Danzig and International Labour Organization*, cited above, pp. 12–13].

(E) Procedure applied to monitoring compliance with the decisions of the Court

105. Neither the American Convention, nor the Statute and Rules of Procedure of the Court indicate a procedure that should be observed for monitoring compliance with the judgments delivered by the Court, or with regard to other matters, such as urgent and provisional measures. The Court has carried out this monitoring using a written procedure, which consists in the responsible State presenting the reports that the Court requests, and the Inter-American Commission and the victims or their legal representatives forwarding comments on these reports. Likewise, with regard to the stage of monitoring compliance with judgments, the Court has adopted the constant practice of issuing orders or sending communications to the responsible State in order, *inter alia*, to express its concern in relation to aspects of the judgment pending compliance, to urge the State to comply with the Court's decisions, to request detailed information on the measures taken to comply with specific measures of reparation, and to provide instructions for compliance, as well as to clarify aspects relating to execution and implementation of the reparations about which there is a dispute between the parties.

106. This written procedure allows the Courts to monitor compliance with its judgments and guarantees respect for the adversarial principle, since both the State and the Inter-American Commission and the victims or their legal representatives are able to provide the Court with all the information they deem relevant concerning compliance with the Court's decisions. Hence, the Court does not issue an order or, through another act, consider the status of compliance with its judgment without first examining the reports presented by the State and the respective comments forwarded by the Commission and the victims or their legal representatives. However, it should be explained that, although the stage of monitoring compliance with judgment has been developed through this written procedure and a public hearing has never been convened during this stage, if, in the future, the Court considers it appropriate and necessary, it can convene the parties to a public hearing to listen to the arguments on compliance with the judgment. There is no provision in the Convention or in the Statute and the Rules of Procedure of the Court that requires the latter to hold public hearings to decide on the merits of a case and order reparations, so it may be inferred that neither is it necessary to hold hearings to consider compliance with judgments, unless the Court considers it essential.

107. Since it issued its first judgments on reparations in 1989, the Court has monitored compliance with the judgments delivered in the contentious cases through this written procedure constantly and without interruption – even in the cases in which the defendant States acknowledged their international responsibility – and, to this end, has issued communications

and orders on compliance with its judgments in all the cases, in order to ensure the full and effective implementation of its decisions ...

109. [A]nother example that reveals the acceptance by the States of the competence of the Court to monitor compliance with its decisions occurred when a State consulted the Court about whether filing the investigation into the facts that constituted the matter of the case at the domestic level relieved it of the responsibility established in the Court's judgment. In its reply to this State communication, the Court decided that the State must 'continue to investigate the facts and prosecute and punish those responsible; consequently, reopening the respective judicial proceeding'.

(F) Position of the OAS General Assembly on monitoring compliance with the decisions of the Court

110. [A]s of the very first cases heard by the Court, when presenting its annual report, the Court has informed the OAS General Assembly of the procedure followed to monitor compliance with judgments and their compliance status. If monitoring compliance with the judgments of the Court were the 'exclusive [competence] of the General Assembly of the Organization of American States' [as alleged by Panama], this political body would already have ruled in this respect, and this has not happened. It is not possible to suppose that, since 1989, the Court has been exercising a function that belongs to the maximum political body of the OAS and that the latter, knowing this, has allowed it ...

114. Consequently, the OAS General Assembly's position concerning monitoring compliance with the judgments of the Court has been to consider that this supervision falls under the authority of the Court and that the latter should indicate the cases in which a State has not complied with its judgments in its annual report ...

(G) Acceptance by the State of the authority of the Court to monitor compliance with its decisions

... 121. The Court observes that the State first questioned its competence to monitor compliance with its judgments more than two years after the Court had delivered the judgment on merits and reparations and costs – in which it stated that it would monitor compliance with the judgment. Since that judgment was rendered, Panama has presented 14 briefs on compliance with that decision to the Court ..., in which it has kept the Court informed about the different measures taken in order to comply with this judgment of the Court. Likewise, the State has manifested 'its intention to comply with the judgment of February 2, 2001'. After the Court had issued a second order, in which it referred to the general parameters that the State should respect when complying with the reparations ordered in this case, Panama questioned the Court's competence to monitor compliance with its decisions. However, it in no way questioned the first order issued by the Court.

122. Even though Panama submitted two briefs ... in which it contested the Court's competence to monitor compliance with its judgments, in these same briefs, the State informed the Court about different measures taken to comply with the decisions of the Court ...

124. Furthermore, Panama not only complied with its obligation to present reports to the Court and carry out acts that reveal its acknowledgment of the Court's monitoring function, but also it never mentioned its disagreement about the meaning or scope of the judgment delivered in this case; specifically with regard to the Court's competence to monitor compliance with this judgment and, accordingly, it abstained from filing a request for interpretation of judgment.

125. [A]ccording to Article 67 of the Convention: 'The judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment.' [I]n paragraph 213 of the judgment of February 2, 2001, the Court 'reserve[d] the power to supervise the overall compliance with th[e] judgment', and in the tenth operative paragraph of this judgment 'it decided[d] that it [would] supervise compliance with th[e] judgment …'

126. After examining the measures taken by the State in its different briefs, the Court concludes the following: (a) although it had the authority to request an interpretation of the judgment, owing to disagreement on the meaning and scope of the provisions relating to the Court's competence to monitor compliance with the judgment, the State did not use the procedural measures established in Article 67 of the Convention; (b) the State presented numerous reports on compliance with the judgment; (c) the State did not contest the first order issued by the Court on compliance with the judgment of June 21, 2002 …; (d) the constant conduct of the State implied a recognition of the Court's authority to monitor compliance with the judgment on merits and reparations and costs delivered in this case; (e) Panama only contested the Court's authority to monitor compliance with its judgments after the Court issued a second order on compliance with judgment on November 22, 2002. It is worth emphasizing that this occurred two years after delivery of the judgment on merits and reparations and costs in the case; and (f) despite questioning the Court's monitoring function, the State has continued to provide the Court with information on the measures taken to comply with its judgment, which reveals its recognition of the Court's competence to monitor compliance with its decisions.

127. In conclusion, the Court considers that there is no doubt that the State's conduct reveals that it recognized the Court's competence to monitor compliance with its decisions, and, in consequence, it has behaved thus during almost all the monitoring procedure.

IV Conclusions with regard to monitoring compliance with the decisions of the Court

128. The Court, like any body with jurisdictional functions, has the authority, inherent in its attributions, to determine the scope of its own competence, and also of its orders and judgments, and compliance with the latter cannot be left to the discretion of the parties, because it would be inadmissible to subordinate the mechanism established in the American Convention to restrictions that make the Court's function and, consequently, that of the human rights protection system embodied in the Convention inoperable.

129. Monitoring compliance with judgments is one of the elements of jurisdiction. The effectiveness of the judgments depends on compliance with them.

130. Likewise, compliance with the decisions and judgments should be considered an integral part of the right of access to justice, understood it is broadest sense. The contrary would presume the very denial of this right. If the responsible State does not execute the measures of reparation ordered by the Court at the national level, this would deny the right of access to international justice.

131. The Court has the authority inherent in its jurisdictional function to monitor compliance with its decisions. The States undertake to comply with 'the judgment of the Court in any case to which they are parties', according to Article 68(1) of the Convention. To this end, the State must ensure implementation at the national level of the Court's decisions in its judgments.

132. The Court has the authority inherent in its jurisdictional function to issue, at the request of a party or *motu proprio*, instructions for the compliance with and implementation of the

measures of reparation that it has ordered, so as to comply effectively with the function of supervising genuine compliance with its decisions. The decisions issued by the Court in the procedure for monitoring compliance relate directly to the reparations ordered by the Court, so that they do not modify its judgments, but clarify their scope in light of the State's conduct, and try to ensure that compliance and implementation of the reparations is carried out as indicated in the said decisions and so as to best protect human rights.

133. The legal grounds for the competence of the Inter-American Court to monitor compliance with its decisions are established in Articles 33, 62(1), 62(3) and 65 of the Convention, and also in Article 30 of the Statute of the Court. The Court must exercise the authority that is inherent and non-discretional in its attributions to monitor compliance with its decisions, in order to comply with the mandate established in the said norms of the American Convention, specifically in order to comply with the provisions of Article 65 of the Convention, in order to inform the General Assembly when a State fails to comply with its decisions.

134. Monitoring compliance with the orders of the Court implies, first, that the Court requests information from the State on the activities carried out to ensure this compliance, and also to receive the comments of the Commission and the victims or their legal representatives. When the Court has this information, it can assess whether its decisions have been complied with, guide the corresponding actions of the State, and comply with its obligation to inform the General Assembly in the terms of Article 65 of the Convention.

135. The position of the OAS General Assembly on the monitoring of compliance with the judgments of the Court has been to consider that this monitoring is a function of the Court itself …

137. The conduct of the Panamanian State implies recognition of the Court's authority to monitor compliance with its decisions, and the objection that the State now makes to this authority, to the detriment of the general principle of legal certainty, is inadmissible. Furthermore, the States Parties to the Convention with regard to whom the Court has issued orders on compliance with judgment have established an *opinio juris communis* by exhibiting a general and repeated attitude of acceptance of the Court's monitoring function (*supra* para. 102).

138. For the above reasons, this Court has the authority to continue monitoring full compliance with the judgment of February 2, 2001, in the *Baena Ricardo et al.* case.

2.3 The approach of the Inter-American Court of Human Rights

Perhaps the most remarkable feature of the Inter-American Court of Human Rights, however, resides in its original understanding of its role in the development of international human rights law, particularly under the influence of Judge Cançado Trindade, a member of the Court 1995–2008 and its President 1999–2004. The following excerpts of the case law offer a good exposition of this philosophy:

Inter-American Court of Human Rights, The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of Law, Advisory Opinion OC-16/99 of 1 October 1999, Series A No. 16, para. 115:

The *corpus juris* of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its

dynamic evolution has had a positive impact on international law in affirming and building up the latter's faculty for regulating relations between States and the human beings within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the human person in contemporary international law.

Inter-American Court of Human Rights, Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03 of 17 September 2003, requested by the Union of Mexican States – concurring opinion of Judge Antônio Augusto Cançado Trindade:

[Mexico requested, in substance, whether an American State could establish in its labour legislation a differential treatment between legal residents or citizens, on the one hand, undocumented migrant workers, on the other hand, in the enjoyment of their labour rights. The request also questioned the Court about 'the status that the principles of legal equality, non-discrimination and equal and effective protection of the law have achieved in the context of the progressive development of international human rights law and its codification'. The Court concludes, unanimously, that 'the fundamental principle of equality and non-discrimination forms part of general international law, because it is applicable to all States, regardless of whether or not they are a party to a specific international treaty. At the current stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the domain of *jus cogens*.' In addition, 'the fundamental principle of equality and non-discrimination, which is of a peremptory nature, entails obligations *erga omnes* of protection that bind all States and generate effects with regard to third parties, including individuals'. It takes the view that 'the migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labor-related nature', and that the State is under an obligation to protect workers from discrimination. In the 'Epilogue' to his concurring opinion, the President of the Court, Judge Antônio Augusto Cançado Trindade, explains thus the underlying philosophy of the opinion:]

86. The fact that the concepts both of the *jus cogens* and of the obligations (and rights) *erga omnes* already integrate the conceptual universe of International Law discloses the reassuring and necessary opening of this latter, in the last decades, to certain superior and fundamental values. This significant evolution of the recognition and assertion of norms of *jus cogens* and *erga omnes* obligations of protection ought to be fostered, seeking to secure its full practical application, to the benefit of all human beings. Only thus shall we rescue the universalist vision of the founding fathers of the *droit des gens*, and shall we move closer to the plenitude of the international protection of the rights inherent to the human person. These new conceptions impose themselves in our days, and, of their faithful observance, in my view, will depend in great part the future evolution of the present domain of protection of the human person, as well as, ultimately, of the International Law itself as a whole.

87. It is not the function of the jurist simply to take note of what the States do, particularly the most powerful ones, which do not hesitate to seek formulas to impose their 'will', including in relation to the treatment to be dispensed to the persons under its jurisdiction. The function

of the jurist is to show and to tell what the Law is. In the present Advisory Opinion …, the Inter-American Court of Human Rights has determined, firmly and with clarity, what the Law is. This latter does not emanate from the inscrutable 'will' of the States, but rather from human conscience. General or customary international law emanates not so much from the practice of States (not devoid of ambiguities and contradictions), but rather from the *opinio juris communis* of all the subjects of International Law (the States, the international organizations, and the human beings). Above the will is the conscience.

88. The fact that, despite all the sufferings of past generations, persist in our days new forms of exploitation of man by man, – such as the exploitation of the labour force of the undocumented migrants, forced prostitution, the traffic of children, forced and slave labour, amidst a proved increase of poverty and social exclusion and marginalization, the uprootedness and family disruption, – does not mean that 'regulation is lacking' or that Law does not exist. It rather means that Law is being ostensibly and flagrantly violated, from day to day, to the detriment of millions of human beings, among whom the undocumented migrants all over the world. In reacting against these generalized violations of the rights of the undocumented migrants, which affront the juridical conscience of humankind, the present Advisory Opinion of the Inter-American Court contributes to the current process of the necessary *humanization* of International Law.

89. In so doing, the Inter-American Court bears in mind the universality and unity of the human kind, which inspired, more than four and a half centuries ago, the historical process of formation of the *droit des gens*. In rescuing, in the present Advisory Opinion, the universalist vision which marked the origins of the best doctrine of International Law, the Inter-American Court contributes to the construction of the new *jus gentium* of the XXIst century, oriented by the general principles of law (among which the fundamental principle of equality and non-discrimination), characterized by the intangibility of the due process of law in its wide scope, crystallized in the recognition of *jus cogens* and instrumentalized by the consequent obligations *erga omnes* of protection, and erected, ultimately, on the full respect for, and guarantee of, the rights inherent to the human person.

3 THE AFRICAN SYSTEM OF PROTECTION OF HUMAN AND PEOPLES' RIGHTS

Although the African Union (AU) (until 2002 the Organization of African Unity) has other achievements in the area of human rights (see chapter 1, section 2.3.), the focus here will be on the African Charter on Human and Peoples' Rights and its Protocol on the Rights of Women in Africa (the latter, which entered into force in 2005, is subject to the same monitoring mechanisms as the Charter itself). The circumstances in which the Charter was adopted in 1981 have already been recalled. The Charter entered into force on 21 October 1986, and the African Commission on Human and Peoples' Rights began functioning in 1987. In 1998, the African system of human rights protection was further strengthened by the adoption of the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights. The Protocol entered into force on

25 January 2004, but the setting up of the new Court proceeded slowly, in no small part because of discussions about the merger of the African Court on Human and Peoples' Rights and the Court of Justice established by the Constitutive Act of the African Union, the principle of which was agreed by the AU Assembly of Heads of State and Government in July of that same year: the 2008 Protocol on the Statute of the African Court of Justice and Human Rights provides for the merger, in the future, of the two judicial bodies.

3.1 The African Commission on Human and Peoples' Rights

The Commission comprises eleven commissioners, elected by the Assembly of Heads of State and Government for six-year terms and serving in their personal capacity (Arts. 31–32 of the Charter). They meet for two annual sessions of fifteen days each, in addition to which they have held extraordinary sessions on rare occasions (four such extraordinary sessions were held over twenty years, most recently in February 2008). The functions of the Commission may be described as falling under three categories, although these are not water-tight and a number of activities of the Commission serve simultaneously more than one of these functions.

(a) Promoting human and peoples' rights

The Commission has among its duties to 'promote Human and Peoples' Rights', a task which the Charter describes as comprising in particular:

African Charter on Human and Peoples' Rights (Banjul Charter) (1981), Art. 45(1):

(a) To collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments.
(b) To formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations.
(c) Co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.

The Commission has been inventive in fulfilling these promotional duties. It has, for instance, appointed thematic Special Rapporteurs, following the practice of the UN Commission on Human Rights or the Inter-American Commission on Human Rights, on issues such as prisons and conditions of detention in Africa, human rights defenders in Africa, refugees and displaced persons in Africa, or the rights of women in Africa. It has created thematic working groups such as the Working Group on Economic, Social and Cultural Rights in Africa, the Working Group on the Death Penalty, or the Working Group on the Situation of Indigenous Peoples/Communities in Africa. And

it has adopted a number of resolutions, similar in kind to the general comments or recommendations adopted by the UN human rights treaty bodies, providing the States parties to the Charter with an authoritative reading of their obligations under this instrument. The low visibility of the African Commission, however, which stems to a large extent from the lack of publicity of its reports and decisions, has constituted a major obstacle not only to the enforcement of its recommendations to States, but also to the effectiveness of its promotional efforts (see M. Killander, 'Confidentiality versus Publicity: Intepreting Article 59 of the African Charter on Human and Peoples' Rights', *African Human Rights Law Journal*, 6, No. 2 (2006), 572).

(b) Providing an authoritative interpretation of the Charter

The Commission is also empowered under Article 45(3) of the Charter to provide an interpretation of the Charter 'at the request of a State party, an institution of the OAU [now the AU] or an African Organization recognized by the OAU'. Although this competence was used only on one occasion, the resulting Advisory Opinion, which concluded that the draft of the UN Declaration on the rights of indigenous peoples was compatible with the African Charter on Human and Peoples' Rights, is credited for having convinced the African Governments to support the Declaration towards which, initially, they were sceptical (see Advisory Opinion of the African Commission on Human and Peoples' Rights on the UN Declaration on the Rights of Indigenous Peoples, adopted by the African Commission on Human and Peoples' Rights at its forty-first ordinary session, Accra, Ghana, May 2007).

(c) Protecting human and peoples' rights

The Commission may also 'ensure the protection of human and peoples' rights', as stipulated by Article 45(2) of the Charter. It is the protective function of the Commission which it has exercised most effectively. The Commission has occasionally conducted fact-finding missions in countries after receiving allegations of serious human rights violations, in order to investigate such allegations, publishing recommendations addressed to the State concerned about how to improve the situation of human rights. As provided for by Article 62 of the African Charter, it also receives reports submitted by States every two years, on the basis of which it adopts concluding observations containing recommendations to the State concerned. This function has been gaining in importance over the years: according to one observer, 'States in Africa are now taking seriously the work of the African Commission, as is evident in the increasingly high-ranking state officials who personally present, thoroughly engage, and respond to queries as well as points of clarifications during state reporting' (G. M. Wachira, *African Court on Human and Peoples' Rights: Ten Years on and Still no Justice* (Minority Rights Group, African Centre for Democracy and Human Rights Studies, and Centre for Minority Rights Development, 2008, p. 10)).

The Commission also exercises its protective function by considering any communications submitted by individuals or non-governmental organizations or States. Indeed, quite remarkably, the Charter provides for the possibility of inter-State communications, without it being necessary for the State concerned to have made a separate

declaration accepting this competence of the Commission (Arts. 47–53 of the Charter). As to individual communications, they may be filed not only by the direct victims of the violation denounced or by their duly mandated representatives, but by any individual or organization, without it being necessary to demonstrate that the victims directly affected are unable to file the complaint themselves. In practice therefore, most communications filed with the Commission were authored by non-governmental organizations, including, in a significant proportion of cases, northern-based international non-governmental organizations (such as the UK-based Interights). The Commission has thus adopted a broad reading of Article 56 of the Charter, which lists the conditions of admissibility of communications. This is also reflected in its interpretation of the condition according to which communications will only be admissible if they are sent 'after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged' (Art. 56(5) of the Charter).

African Commission on Human and Peoples' Rights, *Purohit and Moore* v. *Gambia*, Comm. No. 241/2001 (2003):

[The complainants are mental health advocates, submitting the communication on behalf of patients detained at Campama, a Psychiatric Unit of the Royal Victoria Hospital, and existing and 'future' mental health patients detained under the Mental Health Acts of the Republic of the Gambia. They allege that legislation governing mental health in the Gambia is outdated. Specifically, they allege that the Lunatics Detention Act (the instrument governing mental health) contains no definition of who is a lunatic, and that there are no provisions and requirements establishing safeguards during the diagnosis, certification and detention of the patient. They also allege that the Psychiatric Unit is overcrowded, that there is no requirement of consent to treatment or subsequent review of continued treatment, and that there exists no independent examination of administration, management and living conditions within the Unit itself. According to the complainants, there is no provision for legal aid and the Act does not make provision for a patient to seek compensation if his/her rights have been violated. The African Commission concludes that the communication is admissible, since the victims of the alleged violations do not have an effective remedy at their disposal. It takes into account the fact that those people represented in the communication 'are likely to be people picked up from the streets or people from poor backgrounds and as such it cannot be said that the remedies available in terms of the Constitution are realistic remedies for them in the absence of legal aid services':]

24. Article 56 of the African Charter governs admissibility of communications brought before the African Commission in accordance with Article 55 of the African Charter. All of the conditions of this Article are met by the present communication. Only Article 56(5), which requires that local remedies be exhausted, necessitates close scrutiny …

25. The rule requiring exhaustion of local remedies as a condition of the presentation of a complaint before the African Commission is premised on the principle that the Respondent State must first have an opportunity to redress by its own means within the framework of its own domestic legal system, the wrong alleged to have been done to the individual.

26. The Complainants submit that they could not exhaust local remedies because there are no provisions in the national laws of the Gambia allowing for the Complainants to seek remedies where a violation has occurred.

27. The Respondent State concedes that the Lunatics Detention Act does not contain any provisions for the review or appeal against an order of detention or any remedy for detention made in error or wrong diagnosis or treatment. Neither do the patients have the legal right to challenge the two separate Medical Certificates, which constitute the legal basis of their detention.

28. The Respondent State submits that in practice patients found to be insane are informed that they have a right to ask for a review of their assessment. The Respondent State further states that there are legal provisions or procedures within the Gambia that such a vulnerable group of persons could have utilised for their protection. Section 7(d) of the Constitution of the Gambia recognises that Common Law forms part of the laws of the Gambia. As such, Respondent State argues, the Complainants could seek remedies by bringing an action in tort for false imprisonment or negligence where a patient held at Campama Psychiatric Unit is wrongly diagnosed.

29. The Respondent State further submits that patients detained under the Lunatics Detention Act have every right to challenge the Act in a Constitutional Court claiming that their detention under that Act deprives them of their right to freedom of movement and association as provided for under the Gambian Constitution.

30. The concern raised in the present communication is that in the Gambia, there are no review or appeal procedures against determination or certification of one's mental state for both involuntary and voluntary mental patients. Thus the legislation does not allow for the correction of an error assuming a wrong certification or wrong diagnosis has been made, which presents a problem in this particular case where examination of the said mental patients is done by general practitioners and not psychiatrists. So if an error is made and there is no avenue to appeal or review the medical practitioners' assessment, there is a great likelihood that a person could be wrongfully detained in a mental institution.

31. Furthermore, the Lunatics Detention Act does not lay out fixed periods of detention for those persons found to be of unsound mind, which, coupled with the absence of review or appeal procedures could lead into a situation where a mental patient is detained indefinitely.

32. The issue before the African Commission is whether or not there are domestic remedies available to the Complainants in this instance.

33. The Respondent State indicates that there are plans to amend the Lunatics Detention Act, which, in other words is an admission on part of the Respondent State that the Act is imperfect and would therefore not produce real substantive justice to the mental patients that would be detained.

34. The Respondent State further submits that even though the Act itself does not provide review or appeal procedures, there are legal procedures or provisions in terms of the constitution that the Complainants could have used and thus sought remedies in court. However, the Respondent State has informed the African Commission that no legal assistance or aid is availed to vulnerable groups to enable them access the legal procedures in the country. Only persons charged with Capital Offences get legal assistance in accordance with the Poor Persons Defence (Capital Charge) Act.

35. In the present matter, the African Commission cannot help but look at the nature of people that would be detained as voluntary or involuntary patients under the Lunatics Detention Act and ask itself whether or not these patients can access the legal procedures available (as stated by the Respondent State) without legal aid.

36. The African Commission believes that in this particular case, the general provisions in law that would permit anybody injured by another person's action are available to the wealthy and those that can afford the services of private counsel. However, it cannot be said that domestic remedies are absent as a general statement – the avenues for redress are there if you can afford it.

37. But the real question before this Commission is whether looking at this particular category of persons the existent remedies are realistic. The category of people being represented in the present communication are likely to be people picked up from the streets or people from poor backgrounds and as such it cannot be said that the remedies available in terms of the Constitution are realistic remedies for them in the absence of legal aid services.

38. If the African Commission were to literally interpret Article 56(5) of the African Charter, it might be more inclined to hold the communication inadmissible. However, the view is that, even as admitted by the Respondent State, the remedies in this particular instance are not realistic for this category of people and therefore not effective and for these reasons the African Commission declares the communication admissible.

[On the merits, the Commission finds the Gambia in violation of a number of provisions of the African Charter. It 'strongly urges' the Gambian Government to 'repeal the Lunatics Detention Act and replace it with a new legislative regime for mental health in the Gambia compatible with the African Charter on Human and Peoples' Rights and International Standards and Norms for the protection of mentally ill or disabled persons as soon as possible', and in the interim, to create 'an expert body to review the cases of all persons detained under the Lunatics Detention Act and make appropriate recommendations for their treatment or release'; and to 'provide adequate medical and material care for persons suffering from mental health problems in the territory of the Gambia'].

The Commission proceeds to examine the merits of the communications it receives having decided on their admissibility. The African Charter on Human and Peoples' Rights contains no provisions on the implementation of the findings of the Commission. Well-informed and perceptive commentators have identified this as a particularly weak aspect of the protective mandate of the Commission (F. Viljoen and L. Louw, 'The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation', *Journal of African Law*, 48 No. 1 (2004), 1; F. Viljoen and L. Louw, 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1993–2004', *American Journal of International* Law, 101 (2007), 1; F. Viljoen, 'The African Regional Human Rights System' in C. Krause and M. Scheinin (eds.), *International Protection of Human Rights: a Textbook* (Turku: Åbo Akademi University Institute for Human Rights, 2009), p. 503 at p. 512; and, for a proposal from two former employees of the African Commission, arguing in favour of a strengthened role of the AU's Assembly of Heads of State and Government or of the African Court in the enforcement of the decisions of the Commission, see G. M. Wachira and A. Ayinla, 'Twenty Years of Elusive Enforcement of the Recommendations of the African Commission on Human and Peoples' Rights: a Possible Remedy', *African Human Rights Law Journal*, 6, No. 2 (2006), 465). This is further compounded by the fact that the Commission examines communications in private sessions, and no information about the Commission's

treatment of them may be made public before its annual report of activities is presented to the African Union's Assembly of Heads of State and Government: only after such presentation is the report published, so that at this point the procedure loses its confidential character.

In order to compensate for this liability as far as implementation is concerned, the Commission typically requests the States found to be in violation of their obligations under the Charter to provide information in their next periodic report (submitted in accordance with Art. 62 of the African Charter) on the measures taken to comply with the recommendations and directions of the African Commission in the decisions rendered against them. In 2006, it also adopted a Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights (ACHPR/Res. 97(XXXX)06, 29 November 2006), in which it announced its decision to submit at every session of the AU Executive Council a report on the situation of the compliance with its recommendations by the State Parties, as an annex to its Annual Activity Report, and in which it requests all State parties to the African Charter on Human and Peoples' Rights to 'indicate the measures taken and/or the obstacles in implementing the recommendations of the African Commission within a maximum period of ninety days starting from the date of notification of the recommendations'.

3.2 The African Court on Human and Peoples' Rights

The first eleven members of the African Court of Human and Peoples' Rights have been elected at the AU Summit held in Khartoum in January 2006, and they were sworn in in June of that year. Yet, its first communication reached the Court only on 11 August 2008, leading to the first ruling of the Court on 15 December 2009 in the *Matter of Michelot Yogogombaye* v. *Republic of Senegal* (Appl. No. 001/2008). The Court concluded it had no jurisdiction to hear the case: the applicant requested a suspension of the proceedings brought in Senegal against Hissène Habré, the former Head of State of Chad, but the Court dismissed the petition because Senegal had not entered a declaration accepting the Court's jurisdiction to hear individual petitions as required under Article 34(6) of the 1998 Protocol establishing the Court. It is therefore too early to assess its contribution to strengthening the protection of human rights on the African continent. It is already clear, however, that the jurisdiction of the Court shall be very wide-ranging: it shall extend to 'all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned' (Art. 3 of the Protocol to the African Commission on Human and Peoples' Rights on the establishment of the African Court on Human and Peoples' Rights).

The Court has the competence to deliver advisory opinions at the request of any Member State of the AU, the AU or any of its organs, or any African organization recognized by the AU (Art. 4). The Court may receive complaints either from the Commission, from the State party which had lodged a complaint to the Commission, or from the State party against which the complaint has been lodged at the Commission;

the State party whose citizen is a victim of human rights violation and African intergovernmental organizations also have access to the Court (Art. 5). Individuals or non-governmental organizations shall have direct access to the Court only exceptionally, when the defending State has made a specific declaration to that effect, as provided for in Article 34(6) and Article 5(3) of the Protocol. The provisions of the Protocol on enforcement of judgments represent a clear step forward in comparison to the existing situation as regards the decisions of the African Commission: the AU's Executive Council, composed of the Foreign Affairs Ministers of the AU Member States or their delegates (still called the Council of Ministers in the Protocol) 'shall also be notified of the judgment and shall monitor its execution on behalf of the Assembly' (Art. 29(2)). This will significantly raise the political cost for a State refusing to comply with the judgment delivered in a case to which it is a party.

11.1. Questions for discussion: the effectiveness of regional systems of protection of human rights

1. Compare the supervision of the execution of judgments of the European Court of Human Rights and of the Inter-American Court of Human Rights, respectively. What advantages does the involvement of political organs, as in the European Convention on Human Rights' model of enforcement, present? Which problems do you see in such a model? Is the continued involvement of the Court in monitoring implementation, as in the *Baena Ricardo et al. (270 Workers* v. *Panama)* of the Inter-American Court of Human Rights, a more desirable alternative?
2. On 13 May 2004, Protocol No. 14 to the European Convention on Human Rights amending the control system of the Convention was concluded, in particular in order to improve the ability of the European Court of Human Rights to manage its increasing caseload. The Protocol is in force since 1 June 2010. One of the provisions of Protocol No. 14 amends Article 46 ECHR in order to provide in para. 3 that: 'If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation.' Is this a recognition that entrusting a political organ with the task of monitoring the execution of judgments entails the risk of the monitoring becoming excessively politicized, and departing from the intent of the court? Note that, in its task of supervising the execution of the judgments of the Court, the Committee of Ministers of the Council of Europe is assisted by a special section of the Council of Europe's Secretariat, the Department for the Execution of Judgments of the European Court of Human Rights, that examines with great care whether the necessary execution measures have been taken, sometimes even seeming to go beyond what the judgment in fact seems to imply, according to the States concerned.
3. One influential theory of compliance in international law presents itself as 'managerial', as opposed to based on 'enforcement'. Its argument is essentially that, in an increasingly interdependent community of States, no State can afford to remain isolated: '... for all but a few self-isolated nations, sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing in the

regimes that make up the substance of international life. To be a player, the state must submit to the pressures that international regulations impose. Its behavior in any single episode is likely to affect future relationships not only within a particular regime involved but in many others as well, and perhaps its position within the international system as a whole … The need to be an accepted member in this complex web of international arrangements is itself a critical factor in ensuring acceptable compliance with regulatory agreements … Sovereignty, in the end, is status – the vindication of the state's existence as a member of the international system' (A. Chayes and A. Handler Chayes, *The New Sovereignty. Compliance with International Regulatory Agreements* (Cambridge, Mass.: Harvard University Press, 1995), p. 27). If this is correct – if compliance really is reliant on the self-interest of the State in being an 'accepted member' of the international community, as a repeat-player in international relations – are regional systems of human rights protection, developed within political organizations such as the Council of Europe, the Organization of American States, or the African Union, more likely to succeed in ensuring compliance than human rights systems developed at broader, universal level? Or rather is it the opposite? Would it depend on which State is concerned?

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