REDRESS FOR VICTIMS OF TORTURE:

AN EVALUATION OF THE REGIONAL SYSTEMS FOR HUMAN RIGHTS PROTECTION

By

Tamara Dimitrijevska

Submitted to
Central European University
Department of Legal Studies

In partial fulfillment of the requirements for the degree of MA Human Rights Law

Supervisor: Professor Roger O'Keefe

Budapest, Hungary
2011

ABSTRACT

This dissertation focuses on the different redress available to victims of torture under the regional human rights systems. In addressing this issue the dissertation analyses the different approaches to the definition of torture and the different procedural and substantive remedies available.

The dissertation claims that all of the regional human rights systems attach dynamic interpretation to the definition of torture. It also maintains that all of the regional systems need to alter some of their practices in order to become effective and timely forums for redress which take into consideration the peculiar features of the cases of torture. Finally, the dissertation concludes that the Inter-American Court of Human Rights provides not only the most detailed analysis of reparations but also the widest remedial protection to the victims; the European Court of Human Right has taken a hesitant approach in the sphere of reparations; while the African human rights system offers the lowest remedial support.

Bearing in mind that the prohibition on torture is a peremptory norm, torture victims from all over the world should enjoy equal protection. This dissertation will offer suggestions for improving the operation of the regional systems in order to place them on an equal footing which complies with international standards, upholds the status of the norm and best protects victims' rights.

ACKNOWLEDGMENTS

I am heartily thankful to my supervisor, Dr Roger O'Keefe, for the support, advice, and constructive critique he rendered to me throughout the writing of this dissertation.

TABLE OF CONTENTS

INTRODUCTION

1. Overview

All of the regional systems of human rights protection, the European, the Inter-American and the African, prohibit the use of torture. However, they do not provide victims with the same level of protection. This dissertation will explore the approaches of the regional human rights systems towards the definition of torture, and the procedural and substantive remedies available to victims.

International law is clear on the non-derogability of the prohibition on torture, yet the regional bodies are inconsistent in both their interpretation of the scope of the act of torture and their award of relief. This dissertation will point out the differences in operation among the systems.

Many years of inconsistency in the decisions and judgments of the regional human rights bodies had resulted in widespread skepticism towards the universal applicability of the universal norms, and have fuelled insecurity and distrust in the systems. In addition to this, there is a great number of torture victims who have not received redress, an alarming number of survivors whose applications have been declared inadmissible and a third group who do not consider the reparation awarded to them as adequate. All of the above creates a pressing need to engage in analysis of the approaches of the regional human rights systems towards victims of torture.

The dissertation will examine the policies and practices of the regional systems. Bearing in mind that all of the systems have undergone structural changes, only the main and relevant reforms will be mentioned.

The analysis mainly focuses on the regional human rights conventions. In particular, the use of torture is prohibited in Article 3 of the European Convention on Human Rights, Article 5 of the American Convention on Human Rights and Article 5 of the African Charter on Human and People's rights. In addition, the dissertation also analyses the Inter-American Convention to Prevent and Punish Torture which can be used as a legal basis to petition the Inter-American Court of Human Rights. On the other hand, the dissertation only mentions the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which does not contain provisions on reparations, and which has not been influential factor in the development on the substantive law on torture. Lastly, the African human rights system is a relatively new human rights system and still has not produced a specific convention against torture.

The dissertation starts with a chapter on the varying approaches to the definition on torture; the second chapter will discuss the procedural aspect of the remedies in the three regional systems, while the third chapter will look at the substantive redress awarded in each of the three systems. The last chapter will provide recommendations for improvement of the operation of the systems, for bringing them into compliance with international human rights standards and decreasing the discrepancy in the relief awarded.

In order to provide a better understanding, the case law of the regional human rights bodies will be explained, empirical evidence will be analyzed and where possible statistical data will be used. Possible shortcomings of the case analysis include instances where the regional body has found a violation on the prohibition on torture in combination with other violations and where the remedy provided does not differentiate among the specific violations. The mechanisms

and bodies for prevention of an act of torture, as well as the national and UN systems, are not as such part of the research, but will be briefly mentioned where relevant.

2. Terminology

A. General

For the purposes of this dissertation, unless otherwise stated, the terms 'victim' and 'applicant' refer to a victim of an act of torture or, where the victim is deceased, his/her relatives. The term 'remedy' is used broadly to encompass both procedural and substantive aspects, while the term 'reparation' refers only to the relief awarded. Lastly, 'regional body' refers to the relevant judicial or quasi-judicial adjudicative body, such as a court or commission.

B. 'Remedy'

The concept of a 'remedy' has two aspects, namely procedural and substantive. A 'procedural remedy' refers to a judicial, quasi-judicial or other mechanism for redress available to a person who claims to be a victim, while a 'substantive remedy' refers to the reparation eventually awarded to a victim. In the words of Djajic, "procedural remedies are international legal actions available to states or persons, and substantive remedies are measures tailored to undo the harm done[1]".

The regional systems for human rights protection impose different requirements for triggering an application. The existence of different standing criteria creates a situation where person claiming to be a victim may fulfill the standing criteria in one of the systems while not in the others. Chapter two of the thesis will touch upon the specific problem of standing criteria and will elaborate on the problematic points in the matter.

[1] Djajic Sanja, *Victims and Promise of Remedies: International Law Fairytale Gone Bad*, 329 at 331, 9.SAN DIEGO INTL'L L.J., (2008).

C. 'Reparation'

State's obligation to make reparation and the various forms of reparation are specified in Article 31 and Articles 34-37 of the Articles on Responsibility of States for Internationally Wrongful Acts, which are considered to reflect customary international law. In particular, Article 31 states that:

> "1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State".

Further, Articles 34-37 list the possible forms of reparation such as restitution (art. 35), compensation (art. 36), and satisfaction (art. 37), but for the purposes of this dissertation they will be examined in detail in the third chapter.

To these forms of reparation can be added a form of redress which does not fit into any of the above categories and, indeed, is not given by the responsible State but by the court itself, namely a declaratory judgment. Declaratory judgments are also discussed in chapter 3.

CHAPTER 1 THE VARYING APPROACHES TO THE DEFINITION OF TORTURE

1.1 The European Human Rights System

The European Convention on Human Rights, which in Article 3 prohibits torture, cruel, inhuman and degrading treatment does not provide definition on the various forms of ill-treatment. Therefore, the European Commission, and later on the European Court of Human Rights [*hereinafter*: The European Court or ECtHR] played crucial role in drawing the boundaries among the various forms of ill-treatment.

The Commission in the *Greek case,* which was among the first cases in the European jurisdiction that walked the line between the various forms of ill treatment, argued that torture is "an aggravated form of inhuman treatment[2]". The ECtHR accepted this understanding; however, further accompanying it with extremely narrow interpretation. In the case of *Ireland v UK*, ECtHR reaffirmed the view of the Commission expressed in the *Greek case,* and argued that the difference among the forms of ill-treatment lays in the "intensity of the suffering inflicted"[3] and the 'deliberate' infliction of pain which causes very serious and cruel suffering[4]". As of the time there was not regional or universal instrument which provided definitions on the various forms of ill-treatment, ECtHR in drawing of that conclusion relied on UN Resolution 3452[5].

[2] YEARBOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS,THE GREEK CASE, at 186, (1969).
[3]Ireland v. the United Kingdom, 5310/71 EUR.CT.H.R., at para. 167, (1978). E.g., PIETER DIJK, GODEFRIDUS J.H. HOOF ET AL, THE THEORY AND PRACTICE OF THE EUROPEAN CONVENTION FOR HUMAN RIGHTS, at 309, (1998).
[4]See Ireland v UK, *supra note 3*, at para. 167, accord Akkoc v. Turkey, 22947/93 and 22948/93, EUR.CT.H.R.,at para. 115-117, (2000).
[5] See Article 1, Resolution 3452 (XXX) adopted on December 9th 1975, by the GA of the UN, ("torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment").

In absence of clear and comprehensive definition on torture, the categorization of the forms of ill treatment in the case *Ireland v UK,* divided not only the Commission and the Court but also the judges of the Court itself. The Commission established that the five techniques[6] used by the security forces constitute torture. The Court took more restrictive approach, changed the classification and held that the techniques in question amounted to inhuman and degrading treatment and not torture.

In the process of determining the level of severity, which is crucial component for categorization of the form of ill-treatment, accepted as such by both the Commission and the ECtHR, the ECtHR argued that the minimum level of severity is relative, and "depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects, in some cases also the sex, age, state of health of victim[7]". As the international law has clearly established the prohibition in Article 3 as unqualified and absolute, the Court failed to provide detailed explanation how the age, sex, or health of the victim affects the finding. Understandingly, many people feared that the statement of the Court opened a back door for tolerating some exceptions at the expense of the victims. However, the subsequent case law of the Court does not prove so. The jurisprudence of the ECtHR shows that the instances where the applicant was young or in good state of health, was not considered as mitigating factor in the

[6] See Ireland v. UK, *supra note 3*, at para. 96, The techniques consisted of:

(a) wall-standing: forcing the detainees to remain for periods of some hours in a "stress position", described by those who underwent it as being "spread eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers";

(b) hooding: putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation;

(c) subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;

(d) deprivation of sleep: pending their interrogations, depriving the detainees of sleep;

(e) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.

[7] See Ireland v. UK, *supra note 3*, at para. 162, accord Soering v. The United Kingdom 14038/88 EUR.CT.H.R., at para.100, (1989).

classification of the ill-treatment[8]. On the contrary, in the case *Aydin v. Turkey*, the ECtHR assessed the circumstances "having regard to (her) sex and youth[9]" and took firm approach towards protection of the vulnerable and young age of the victim.

Ireland v UK, is famous not only for setting very high threshold of the act of torture, but also for some of its dissenting opinions whose reasoning served as an inspiration for subsequent changes in the classification of the ill-treatment by the Court. Judge Zekia, in his separate opinion, claimed that it is not needed 'extreme' physical or mental suffering, in order an act to be classified as torture, but there should be gradation in its intensity[10]. In the same line Judge O'Donoghue, asserted that the act of torture does not have to have the mediaeval understanding of the methods used, and it can be "inflicted in the mental sphere[11]". Moreover, Judge Evrigenis also criticized the Court's limited understanding of torture by claiming that "torture no longer presupposes violence… torture can be practiced- and indeed is practiced- by using subtle techniques developed in multidisciplinary laboratories which claim to be scientific[12]".

All of the above opinions will find their light at the subsequent rulings of the Court. The ECtHR will gradually start to expand its interpretation of the scope of torture and will accommodate many of the above views.

The case of *Aksoy v Turkey*, clearly points out all the elements the European Court considers when determining the form of alleged ill-treatment. In order an act to be classified as an act of torture, the Court analyzed three essential elements: the level of severity, the deliberate

[8] Tomasi v. France, 12850/87 EUR.CT.H.R., at para. 114-115 (1992).
[9] Aydin v. Turkey, 23178/94 EUR.CT.H.R., at para. 87, (1997).
[10] Ireland v. UK, *supra note 3*, separate opnion of Judge Zekia at B.
[11] *Ibid.* at separate opnion of Judge O'Donoghue at 3.
[12] *Ibid.* at separate opnion of Judge Evrigenis at para. (i).

nature of the treatment which requires preparation and the purpose behind the act[13]. It has to be noted that after the adoption of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, ECtHR started to rely on the definition provided in Article 1 of the Convention which states:

> " For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity[14]".

The above UN definition was used as a guideline by the Court in the process of evaluating the alleged ill-treatment against the elements specified in the definition[15].

Besides the fact that ECtHR, has well established case law on the non-derogable character of the prohibition on torture[16], it is important to underscore the Court's assertion: "where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide plausible explanation as to the causing of the injury, failing which is a clear issue arises under Article 3[17]". This statement plays enormous significance for the torture survivors as it shifted the onus from the victim to the perpetrator. As

[13] Aksoy v. Turkey, 21987/93, EUR.CT.H.R, at para. 62-64, (1996), E.g., Aisling Reidy, *The Prohibition of torture, a guide to the implementation of Article 3 of the European Convention on Human Rights.* Human rights, handbooks, No6. http://echr.coe.int/NR/rdonlyres/0B190136-F756-4679-93EC-42EEBEAD50C3/0/DG2ENHRHAND062003.pdf (last visited November 22, 2011).

[14] Article 1, UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, GA. Res. 39/46 (1984).

[15] Selmouni v. France, 25803/94 EUR.CT.H.R., at para. 82, (1999).

[16] See Irleand v UK, *supra note 3*, para. 163, accord Aydin v. Turkey, at para. 81, accord Selmouni v. France, at para. 95, accord Saadi v. Italy, at para. 137, accord Egmez v Cuprys, at para. 77, accord Soering v.United Kingdom, at para. 88.

[17] Aksoy v. Turkey, *supra note 13*, at para. 61, accord Korobov v. Ukraine, at para. 68-70, accord Ribitisch v. Austria, at para. 34, accord Khadisov and Tsechoyev, at para. 124.

such, it takes into consideration the problems that the victims encounter to prove their allegations.

However, the landmark case on the definition on torture is the case *Selmouni v France,* where the Court departed from its previous line of cases and has stated:

> "The Convention is a living instrument which must be interpreted in the light of present-day conditions; the Court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future.
> It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies"[18].

With the above statement, the European Court lowered the high threshold for torture set in *Ireland v. UK* and opened a door for widening of the definition of an act of torture. This understanding was later endorsed in many subsequent cases, among which *Dikme v. Turkey*[19],and *Tyrer v. the United Kingdom*[20] and constitutes well established case law.

The ECtHR has repeatedly held that the "Article 3 of the Convention, enshrines one of the most fundamental values of a democratic society[21]" and in line with that statement, the Court has taken progressive approach towards the definition of an act of torture. The ECtHR has left the meaning of torture with an open ended definition which takes into consideration the scientific techniques and modern mechanism for inflicting harm.

[18] See Selmouni v. France, *supra note 15*, at para. 101, accord Korobov v. Ukraine , at para. 73, Cf. Tyrer v. the United Kingdom, at para. 31.
[19] Dikme v. Turkey, 20869/92, EUR.CT.H.R., at paragraph 93, (2000).
[20] Tyrer v. the United Kingdom, 5856/72 EUR.CT.H.R .,at para. 31(1978).
[21] Korobov v. Ukraine, 39598/03 EUR.CT.H.R., at para. 63, E.g., Dikme v. Turkey, at para. 89.

1.2 The Inter-American Human Rights System

Article 5(2) of the American Convention on Human Rights which explicitly prohibits use of torture does not provide definition of various forms of ill-treatment prohibited in the article. However, the Inter-American Convention to Prevent and Punish Torture provided the Inter-American system with broad definition which is even wider than the definition of torture stipulated in the UN Convention against Torture. In particular, Article 2 of the Inter-American Torture Convention states:

> "torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as means of intimidation, as personal punishment, as a preventive measure, as a penalty, or any other purpose. Torture shall be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish…[22]".

The Inter-American Court [*hereinafter*: I/A Court] successfully relied on the definition provided in Article 2 of the Inter-American Torture Convention to interpret the frame of the prohibition of torture of Article 5(2) of the Inter-American Convention[23], hence the I/A Court provided the victims of torture with solid and wide base of protection.

In a similar manner with its European counterpart, and in accordance with the universal standards, the I/A Court preserved the non-derogable character on the prohibition on torture and in number of occasions has stated:

[22] Inter-American Convention to Prevent and Punish Torture, 15 GA 1985, http://www.cidh.oas.org/Basicos/English/Basic9.Torture.htm on November 14th 2011(last visited on November 15th, 2011)

[23] Maritza Urrutia v. Guatemala, I/A Court H.R., Series C No. 103 , at para. 91, (2003), E.g.,Cantoral-Benavides v. Peru, at para. 98.

> "Prohibition of torture is complete and non-derogable, even under the most difficult circumstances, such as war, the threat of war, the struggle against terrorism, and any other crimes, state of siege or of emergency, internal disturbances or conflict, suspension of constitutional guarantees, domestic political instability, or other public disasters or emergencies"[24].

Notwithstanding the importance of the unqualified definition of torture, major factor from standpoint of a torture victim is the fact that the I/A Court has accepted the pleadings of the Inter-American Commission [*hereinafter*: I/A Commission], which in the case of *Tibi,* in analogous manner to the European Court, asserted that: "under the international standards that apply to abuse under custody, the State has the burden of proof, and must therefore explain how (Mr. Tibi- the alleged victim) suffered a number of injuries and physical damage while he was in custody"[25]. This statement deserves to be underlined as it reflects the Court's understanding of the problems the victims face in the process of proving their allegations, and shows respect for the universal standards.

The I/A Court has taken activist protection on categories of people who belong to a vulnerable group. In the case *Fernández Ortega et al. v. Mexico*, the I/A Court stated:

> "In order to analyze the severity of the victim's suffering, the Court must take into account the specific circumstances of each case. As such, characteristics of the action, the duration, the method used, or the way in which the suffering was inflicted, the potential physical and mental effects, and also the status of the person who endured this suffering, including their age, gender, and physical condition, among other personal details, must be considered.[26]"

The I/A Commission has also invoked the above proclamation, and in the case of *Jaliton Neri Da Foneseca v. Brazil*, the I/A Commission argued that in instances where victims of an act of

[24] Tibi v. Ecuador, I/A Court.H.R., Series C No 114, para.143, (2004), accord Maritza Urrutia v. Guatemala, at para. 89.
[25] See Tibi v. Ecuador, *supra note 24*, at para.139 (g).
[26] Fernández Ortega et al. v. Mexico, I/A Court.H.R., Series C No 215, at para. 122, (2010), accord Rosendo Cantú et al. v. Mexico, at para. 112.

torture are people with disability, the highest protection standards should be employed[27]. Further, the case *Ana, Beatriz and Celia González Pérez v. Mexico,* crystallized the previously expressed position and stated that minors enjoy special protection under the American Convention"[28] .

Very significant impact for the victims of torture is the case of *Lizardo Cabrera* where I/A Commission clarified the elements of an act of torture. In the process of qualifying the form of alleged ill-treatment it assess whether: "i) the act of method used is intentional, ii) inflicts physical or mental pain on the person, iii) had a purpose, iv) it is perpetrated by a public servant or employee or by a private person at the instigation of a public servant or employee". Notwithstanding, the explicit enumeration of the constitutive elements of an act of torture, the I/A Commission in *Lizardo Cabrera* distinguished itself from ECtHR and stated that the "The Inter-American Convention to Prevent and Punish Torture does not use as a criterion in defining torture the intensity or degree of physical or mental suffering experienced by the victim.[29]" and asserted that the American Convention and the Convention against Torture provide the Inter-American system with: "certain latitude to assess whether, in view of its seriousness or intensity, an act or practice constitutes torture or inhuman or degrading punishment or treatment[30]".

The Inter-American bodies have taken activist approach in the process of determining the borderlines of acts of torture; they have relied on accepted international standards and the case

[27] Jaliton Neri Da Foneseca v. Brazil, Case11.634, Report No. 33/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1, at para. 64,(2004), See also DIEGO RODRIGEZ-PINZON &CLAUDIA MARTIN, THE PROHIBITION OF TORTURE AND ILL-TREATMENT IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM, at 108, (2006).

[28] Ana, Beatriz and Celia González Pérez v. Mexico, Case 11.565, Report No. 53/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at para. 50, (2000).

[29] See Luis Lizardo Cabrera v. Dominican Republic, Case 10.832, Report Nº 35/96, Inter-Am. C. H. R., OEA/Ser.L/V/II.95 Doc.7, at para. 81, (1997).

[30] *Ibid.* at para. 82.

law of the ECtHR. In the case of *Cantoral-Benavides*, in drawing its conclusion for the form of ill-treatment to which the alleged victim was subjected, the Court invoked the universal standards and pointed out that "torture can be inflicted not only via physical violence, but also through acts that produce severe physical, psychological or moral suffering in the victim[31]". The Court reaffirmed this position in the case of *Urrutia*, where it differentiated among three types of torture: physical, physiological and mental. In that context the Court has stated:

> "it has been recognized that the threat or real danger of subjecting a person to physical harm produces, under determined circumstances, such a degree of moral anguish that it may be considered "psychological torture.[32]"

The progressive understanding that even a 'threat' to be subjected to physical harm may be considered as torture reflects the Courts contemporary consideration on psychological violence and its impact on victims. The Inter-American Court has seriously taken its role to act as guardian of the fundamental freedoms, to preserve them in accordance with the universal standards and respond to the real threat of the day.

1.3 The African Human Rights System

Similar to the European and Inter-American human rights Conventions, the African Charter on Human and Peoples' Rights does not provide definition on the prohibition of torture. However, in contrast to the ECtHR and I/A Court, in most of the cases that the African Commission faced, it has not put an effort into distinguishing between the various forms of ill-

[31] See Cantoral-Benavides v. Peru, I/A Court H.R., Series C No.69, at para. 100, (2000).
[32] See Maritza Urrutia v. Guatemala, *supra note 23,* at para. 92, accord Tibi v. Ecuador, at para. 147.

treatment. In many instances the Commission has found violation on Article 5, which among the other prohibitions rules out the use of torture, but failed to specify the concrete violation found. For an illustration, in the case *Orton and Vera Chriwa v. Maliwi,* the Commission found that the "conditions of overcrowding and acts of beating and torture"[33] contravened Article 5 but it has not provided any additional information on the form of the ill-treatment established. Further, in the case *Commission Nationale des Droits de l'Homme et des Libertés v.Chad,* the African Commisson has only established violation of Article 5 without engaging in any kind of analysis of the alleged form of ill-treatment[34]." Moreover, in the case of *Civil Liberties Organisation v Nigeria* the Commission has only stated that: "deprivation of light, insufficient food and lack of access to medicine or medical care constitute violations of Article 5[35]" and failed to elaborate on the issue of the form of the ill-treatment.

Some of the rare instances where the African Commission engaged into a bit deeper analysis is the case *Huri-Laws v Nigeria*[36]. In this case the Commission refereed to the UN Body of Principles of All Persons under any Form of Detention or Imprisonment, the case law of the European Court of Human Rights, in particular the case of *UK v Ireland,* and clarified that "treatment impugned as torture or cruel, inhuman or degrading treatment or punishment must attain a minimum level of severity[37]". However, the African Commission has only listed the above mentioned documents and established a violation in the particular case. It has to be

[33] Krishna Achuthan (on behalf of Aleke Banda),Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) / Malawi, 64/92-68/92-78/92, at para. 7, (1992).
[34] Commission Nationale des Droits de l'Homme et des Libertés/Chad, 74/92 ACPR, at para. 23-26 (1995), See also Viljoen Frans & Louw Lirette, *The status of the findings of the African Commission: From moral persuasion to legal obligation.* 48. 1.Journal of African Law, 1, at 38, (2004).
[35] Civil Liberties Organisation/Nigeria, 151/96, ACHPR, at para. 27,(1999).
[36] Huri-Laws/Nigeria, 225/98, ACHPR, (2000).
[37] Huri-Laws/Nigeria, *supra note 36,* at para. 41, See E.g.,Frans Viljoen, *supra note 34,* at 41.

underscored that the Commission did not provided reasoning and did not evaluated the case in question against the universal standards.

In the case *John D.Ouko v Kenya*, where during the ten month period of detention the applicant was subjected to a constant light of 250 watt and he was denied access to bathroom facilities, the victim alleged that he was subjected to 'physical and mental torture" However, the Commission only briefly stated that the applicant has not substantiate the claim and classified the ill treatment amounts to inhuman treatment[38].

Taking into Consideration that the African Convention lacks definition on torture and there is not African convention on torture, the African Commission should undertake the task to develop the law and elaborate on the matter. However, the case law of the African Commission demonstrates the extremely hesitant approach of the Commission to differentiate among the various forms of ill-treatment. The very limited number of cases where the Commission engaged in a modest explanation and which invoked universal principles and jurisprudence of the European Court of Human Rights should be acknowledged. However, it is necessary for the African Commission to take a leading position and responsibility. It is extremely important for the African Commission to act progressively in the crafting process of the protection enshrined in the Convention.

[38] See John D. Ouko/ Kenya 232/99, at para. 26, ACHPR (2000), Cf. Kazeem Aminu / Nigeria 205/97, ACHPR, at para. 16, (2000).

CHAPTER 2 THE VARYING PROCEDURAL REMEDIES

2.1 The European Human Rights System

The European System of Human Rights protection is the oldest and most advanced regional system, which in the search for effective human rights protection has undergone many structural and operational changes[39]. Notwithstanding its constant "jurisprudential, institutional and geographical"[40] expansion, today- 60 years after its inception, the system still does not provide timely, effective and consistent remedial protection for the torture victims.

The European Convention on Human Rights adopted in 1950 established a two tier system, composed from Commission and Court.[41] The individuals were entitled to petition the Commission but they had very limited powers to communicate application to the Court.

The individual is the bearer of human rights; as such the individual should be at the center of a human rights system. Hence, creating a system whose main function is to protect individual's rights and freedoms without entitlement for individuals to petition the system, is hypocritical and ineffective. In that regards, Protocol 11 from 1998, abandoned the two tier system, the Commission ceased to exist, the Court became a permanent institution and the right to individual petition became mandatory[42]. Today individuals in the European system enjoy unlimited access to the ECtHR, provided that they fulfill the admissibility criteria.

[39] See generally MARK W. JANIS, RICHARD S. KAY, ANTHONY WILFRED BRADLEY, EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS, at lvii, (Oxford University Press), (2008).
[40] Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*. 19,1. EUR.J.INT'L., 125, at 126, (2008).
[41] DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW, at 189. (2006).
[42] *Ibid.*

In contrast with the Inter-American human rights systems, where as grounds for submitting a petition several documents can be used, in the European system this is limited to the European Human Rights Convention. Article 3 from the Convention clearly prohibits use of torture and as such provides the alleged victims with right to petition the Court.

In order to petition the system, the applicant has to be a victim of a violation. Article 34 from ECHR distinguishes between three types of victims actual, potential and indirect.[43] Actual victim is the person who has been affected by the violation, potential victim is the one "who is at risk of being directly affected by a law or administrative act" and indirect victim is the one "who is immediately affected by the violation which directly affects another[44]". Bearing in mind the nature of the torturous act; in particular that it is a public servant who has perpetrated the torturous act, many victims fear to petition the Court as they or their relatives may be subjected to additional intimidation, oppression and violence. Therefore, the European system should if not to remove the requirement from the applicant to be victim of a violation, at least to widen the current rule; with regards to this the ECtHR may borrow some of the practices of the Inter-American or African system. If ECtHR allows nongovernmental organizations, who are not victims themselves or mere representatives of a victim, to petition the system on their own initiative for an incident or practice that has occurred on the best of their knowledge, even in circumstances where the individual has not instructed them to do so, it may produce deterrent impact on the governments[45]. The change of procedure would mean that the government may not use coercion in order to prevent an individual to bring a case to the ECtHR; because even if the

[43] CLEMENTS L, HOLE, SIMMONS A. EUROPEAN HUMAN RIGHTS. TAKING A CASE UNDER THE CONVENTION, at 19, (1999).
[44] *Ibid.*
[45] See generally, NAOMI ROTH- ARRIAZA, IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE, at 14.

individual is intimidated to submit a petition, a nongovernmental organization may assume a role of guardian of the rights and freedoms and file a petition.

Article 35(1) from the ECHR specifies the admissibility requirements; imposes obligation on the applicant to exhaust the domestic remedies and sets the limit of 6 months after the last domestic decision taken, to apply to the Court. However, the applicant should pursue only effective remedies, which are obvious and sensible, excluding the discretionary remedies[46]. After the applicants claimed the exhaustion of domestic remedies, it is up to the state which has the burden of proof (onus) to demonstrate that the domestic remedies have not been exhausted.

Applications which do not respect the 6 months time limit are automatically declared inadmissible. While the European Court is very strict for the six months rule, and does not accept any justification for submitting a late application, it is very liberal in the procedure needed in order to preserve the time limit. In particular, it would be sufficient, if the applicant send simple letter to the Court which states the basic details of the complaint[47]. Later on the applicant should fill the application form, and send it back to the Court. Additional facilitating element in the procedure before the European system is that the application can be filled in any of the official languages of the member states of the Council of Europe[48]. Bearing in mind that they are 47 States parties to Convention and as much official languages spoken by population of around

[46] See Clements et al. *supra note 43*, at 30-32.
[47] European Court of Human Rights, Registry of the Court, Questions and Answers, at 4, http://www.echr.coe.int/ECHR/EN/Header/Applicants/Information+for+applicants/Frequently+asked+questions/ (last visited on March 25th, 2011).
[48] Rule 34 (2) from the Rules of the Court.

800000 people[49], the system correctly envisaged that not everyone was going to be able to send a communication in one of the two working languages.

Additional convenient element, common for the regional systems, is the fact that the applicants should not come in person to the Court in Strasbourg to initiate proceedings, nor they need lawyer or legal representative. However, taking into consideration that 95% of the applications are declared inadmissible[50], legal advice is highly recommended. Similar to the other regional systems, the Court does not impose any fees to the applicants but the applicant is responsible for the fees on their own lawyers. After the logging of the applications the applicant may ask for legal aid.

The ECtHR is receiving more applications than it is able to process. In order to tackle the problem of the backlog of complaints, in 2009 the Court amended its Rules of Procedure and starting 2010 introduced its priority policy[51]. With this policy, cases are not longer examined in the order they are received but according to their assigned priority level. The Court has developed table with categories where the first category is reserved for urgent applications where there is "risk to life or health", the second category belongs to applications with "important questions of general interest" and covers structural and endemic situations, while the torture victims together with all applicants alleging violation of 2, 3, 4 and 5(1) are in the third group. The rest of the categories are reserved for the violations arising from other articles, repetitive cases etc. The prioritization is relatively new phenomenon in the function of the system and its

[49] Preparatory Contributions, High Level Conference on the Future of the European Court of Human Rights, at 6, http://www.gddc.pt/direitos-humanos/portugal-dh/acordaos/docs/Brochure_contributions_preparatoires_en.pdf (last visited November 22nd, 2011).
[50] Practical Guide on admissibility criteria, Council of Europe, at 5, (2010) http://www.gddc.pt/direitos-humanos/portugal-dh/acordaos/docs/Practical_Guide_on_Admissibility_Criteria.pdf (last visited November 20th 2011).
[51] The Court's priority Policy, European Court of Human Rights, http://www.echr.coe.int/NR/rdonlyres/DB6EDF5E-6661-4EF6-992E-F8C4ACC62F31/0/Priority_policyPublic_communication_EN.pdf (last visited November 21st, 2011).

impact on the torture applications is early to be assessed. However, this policy has the potential to speed up the process from submission to delivery of the judgment. Taking into consideration that the victims of torture from the point they submit the communication to delivery of the judgment are waiting up to 8[52] years, this policy may have detrimental impact for lowering of the processing time. Carla Fertsman, the Director of Redress[53], argues the torture victims need a "sense of acknowledgment" in order to bring some level of normalcy back in their lives[54], in that sense speeding up the process before the Court, may have a detrimental impact on faster heeling of victims.

2.2 The Inter-American Human Rights System

The Inter-American human rights system resembles the former organization of the European system and established two bodies, namely the Inter-American Commission and Inter-American Court[55]. At the beginning of its inception, the Commission was authorized with original mandate to promote human rights which was later expanded to "the power to hear individual petition[56]". While individuals are entitled to petition the I/A Commission they do not have right to petition the Court; the right to petition the Court is reserved only for the Commission and State Parties[57]. Having an access to judiciary body which delivers legally

[52] E.g.,Dikme v. Turkey, *supra note 19,* E.g., Korobov v. Ukraine, E.g.,Ribitisch v. Austria, E.g., Akkoc v. Turkey,
[53] "Redress is a human rights organization that helps torture survivors obtain justice and reparation". For detailed information please visit the official webpage. http://www.redress.org/about/who-we-are (last visited on November 15th 2011.)
[54] Watch video: Torture (Damage) Bill: Justice for torture survivors. http://www.redress.org/news-and-events/watch-our-video (last visited on November 16th 2011).
[55] Article 33, American Convention on Human Rights, " Pact of San Jose, Costa Rica", OAS, TREATY SERIES, No. 36, 1969.
[56] Center for Reproductive Rights, *Reproductive Rights in the Inter-American System for the Promotion and Protection of Human Rights* at 3, http://reproductiverights.org/sites/default/files/documents/pub_bp_rr_interamerican.pdf (last visited on October 20th, 2011).
[57] Article 61, American Convention on Human Rights, *supra note 55.*

binding decisions is from immense importance for effective protection of human rights. The mere creation of adjudicative organ without granting powers of the individual, who it intends to protect, is vague and insignificant. Taking into consideration that the current organization of the system provides access point for individuals only at the level of the I/A Commission; leaves the individual without direct access to the roadways to the Court, which is the only organ that issues legally binding decisions, and the reluctant approach of the Commission to refer cases to the Court[58], foster the conclusion that the position of the individual within the system has to be enhanced[59].

In the communications before the Inter-American bodies, many Inter-American documents may be used, including but not limited to the American Declaration of the Rights and Duties of Man the American Convention on Human Rights, and the Inter-American Convention to Prevent and Punish Torture[60]. While the Inter-American Convention prohibits torture, the Convention against Torture imposes additional obligations on the State parties. The empowering of the applicant to invoke provisions from the Inter-American Torture Convention creates wider and deeper access point for the alleged victims.

With regards to the procedural requirements, the IACHR in Article 46 of the Convention requires from the applicant to exhaust the domestic remedies and sets the time limit of 6 months after the exhaustion of the domestic remedies to apply to the Commission[61]. Further, Article 41 from the Convention stipulates that "Any person, group of persons or nongovernmental entity

[58] The Inter- American Court was established in 1979 but the Commission has not referred case to it until 1986, See JO. M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS, at 7, (2003).

[59] See generally DAVID JOHN HARRIS &STEPHEN LIVINGSTONE, THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS, (Oxford University Press), at 423, (1998).

[60] See Shelton, *supra note 41*, at 208, See also Rules of Procedure of the Inter-American Commission on Human rights, at article 23.

[61] Official webpage of the OAS, http://www.cidh.oas.org/what.htm (last visited on November 4th, 2011).

that is legally recognized in a Member State of the OAS may file a petition alleging that an individual's rights have been violated"[62]. The remarkable element in the Inter-American system is that in order to have access to the system, there is no requirement for the applicant to be a victim of a violation[63]. This in facilitating factor in the process because allows for NGOs to apply instead of the victims, who in the cases of torture may be subjected to threats or intimidation, or are placed under police custody with limited access to the outside world.

Additional feature that protects the interest of the torture victims is that after the communication is filled, at the phase when Commission request information from the state, withholds the "identity of the petitioner from the State, unless the petitioner expressly authorizes the disclosure[64]". This is important step, as many of the alleged victims may be in detention and as such they are especially vulnerable.

After the Commission has declared the case admissible and ruled on the merits it will issue recommendation to the State and set a limit in which the state should comply with the recommendations. Later, the Commission may choose to submit second report or if considers that the state has not complied with its recommendations may transfer the case to the Court[65].

The devotion of the system to render justice could be observed through one of the safeguard measures: even in instances where applicant decides to withdraw the petition, the Commission reserves the right to continue with the petition[66]. This is an important aspect as

[62] See Jo. M. Pasqualucci, *supra note 58*,at 6.
[63] *Ibid.* at 6.
[64] *Ibid.* at 136.
[65] Official webpage of the OAS, http://www.cidh.oas.org/what.htm (last visited on November 4th , 2011), See also See Rules of Procedure of the Inter-American Commission on Human rights, at article 48.
[66] See Jo. M. Pasqualucci, *supra note58*, at 137.

many torture victims are coerced or threatened after filing of communication. This measure allow for the case to proceed if the interest of justice require so.

One serious disadvantage for the effective functioning of the system is the long processing time. Many victimas were forced to wait an average 6,5 years for the procedure before the Commission and additional 19 months years for the procedures before the Court[67]. The two-tier structure may not be problematic if the bodies process the applications faster. However, spending 5-6 years with a hope for a friendly settlement or waiting on the good will of the violating government to implement the Commission's recommendations is not an effective procedural remedy. As a result, the suggestion of David Padilla for transforming the Inter-American human rights institutions, namely the Court and the Commission in full time institutions[68] might be valid and useful solution of the problem.

2.3 The African Human Rights System

The Organization of African Unity (OAU)[69] in the African (Banjul) Charter on Human and People's Rights laid down provision for establishment of Commission[70]. However, the widespread criticism for the Charter itself and the weak powers of the Commission fostered changes in the system. In 1998, with a Protocol to the Charter, an establishment of an African Court on Human and People's right was adopted, and transformed the system into two tier model.

[67] IRCT, Inter-American Court of Human Rights, http://www.irct.org/legal-instruments---mechanisms/complaint-mechanisms-and-legal-proceedings/regional-mechanisms/american-mechanisms/inter-american-court-of-human-rights.aspx (last visited on November 23rd, 2011)
[68] David Padilla, *The Future of the Inter-American Human Rights System*, at last para. http://www.wcl.american.edu/hrbrief/v3i1/iahr31.htm (last visited November 21st, 2011)
[69] The OAU in 2002 transformed itself into African Union (AU).
[70] OBIORA CHINEDU OKAFOR, THE AFRICAN HUMAN RIGHTS SYSTEM, ACTIVIST FORCES AND INTERNATIONAL INSTITUTIONS, at 65, (2007).

One of the serious weaknesses of the Charter is lack of entitlement of individuals as beneficiaries of the right to submit communications; the Charter empowers the Commission to receive inter-state communications (art. 49) and also other communications (art.55). However, it has to be noted that the Commission in its Rules of Procedure progressively interpreted its mandate to accept communications from individuals, and today it is well established practice.

Bright element of the procedure before the Commission is the authorization of NGOs to submit petitions on behalf of a specific victim. As result most of the torture cases before the African Commission are submitted by non-governmental organizations[71]. Further, Article 56(6) from the Banjul Charter requires communications to be submitted "within reasonable period from the time local remedies are exhausted", however, does not specify what does 'reasonable time' means and there is no explicit mentioning of the 6 months rule.

The lack of clarity of the text of the Charter about the force of the Commission decisions, the general impression of the inability of the Commission; and in general perception of the system as weak and ineffective pushed for creation of a Court. Article 7 of the Protocol to the Court authorizes the Court to apply the Charter and "any other relevant human rights instruments ratified by the state concerned[72]".

The main problem related with the functioning of the African Court is the limit it imposes on the applications. In particular, there two types of access to the Court: automatic and optional. In the first instance once state ratifies the Protocol, the Commission, State parties and Intergovernmental organization have direct access to the Court. For the second one, the Court in Article 5(3) from protocol to the African Charter on Human and Peoples' Rights on the

[71] See generally Rachel Murray, *Decisions by the African Commission on Individual Communications under the African Charter on Human and People's Rights*, 412, at 420, 46(2) INT'L & COMP.L.Q.,(1997).
[72] FATSAH OUGERGOUZ, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS, A COMPREHENSIVE AGENDA FOR HUMAN DIGNITY AND SUITABLE DEMOCRACY IN AFRICA, at 735, (2003).

establishment of an African Court on Human and Peoples' rights, and Article 33 from the Rules of the Court, provides access to individuals and NGOs only if the states has accepted the jurisdiction of the Court to hear that type of cases and second, the Court has "discretion to grant or deny such access[73]". The individual should be the center of a human rights system and the primary beneficiary of its protection. However, the current operation of the African Court does not prove so. Therefore, the African Court should borrow the practice of the ECtHR and provide for mandatory right of individual petition.

Similar to the European and Inter-American system, in the proceedings before the Court, the individual does not necessarily have to be represented by a professional lawyer, but by any other person or NGO representative whom the applicant freely has chosen[74]. Article 10(2) of the Protocol to the Charter authorizes the Court to provide free legal aid in the cases where the 'interests of the justice so require', however, this is not right to the victim but it is up to the Court to decide when to grant this aid. Bearing in mind the economic hardships on the African continent this provision may appear to play significant importance in the future.

Additional novelty in the African court is the time limit in which the Court should deliver its judgments. In contrast to the European and Inter-American Court, Article 28 from the Protocol the Charter specifies that the Court "shall render its judgment within ninety days of having completed its deliberations[75]". Taking into consideration the lengthy proceeding before the ECtHR as well as the two Inter-American organs, this novelty will have the potential, if implemented properly, to speed up the process before the African Court and contribute towards providing the victims with timely redress.

[73] Makau Mutua, *The African Human Rights System, A critical evaluation*, at 28,http://hdr.undp.org/en/reports/global/hdr2000/papers/MUTUA.pdf (last visited on November 7, 2011).
[74] See Fatsah Ougergouz, *supra note 72*, at 737.
[75] *Ibid.* at 745.

CHAPTER 3 THE VARYING SUBSTANTIVE REMEDIES

3.1 Modalities of Reparation

The mere access to justice will do not have significance without effective reparation which is:"capable of redressing the harm that was inflicted[76]". The Articles on State Responsibility, which enjoy status of international customary law stipulate:

> 1. The responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of the state[77].

In that light, the Articles on State Responsibility enumerate several forms of reparation: restitution, compensation and satisfaction.

Before entering into the depths of the case law of regional human rights systems and the pattern of reparation provided, it is important to briefly explain the different forms of reparation.

A. Restitution

Restitution is the preferred type or reparation which creates obligation to the state: "to wipe out, insofar as possible, all the consequences of the illegal act and reestablish the situation which would have existed had the internationally wrongful act not been committed[78]". Article 35 from the Articles on Responsibility of States for internationally wrongful acts states:

> A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:
> (a) Is not materially impossible;
> (b) Does not involve a burden out of all proportion to the benefit deriving

[76] See Shelton, *supra note 41*, at 9.
[77] See Article 31, Responsibility of States for Internationally wrongful acts.
[78] Conor Mc Carthy, *Reparations and Victim Support under the Rome Statute of the International Criminal Court*, Phd Thesis, University of Cambridge, at 136. (2010).

from restitution instead of compensation.

The term 'restitution' comes from the Roman law, also known as *restitutio in integrum*, meaning re-establishment of a prior situation[79]. Although, many claim that restitution should be the guiding principle in the sphere of remedies, its applicability in the cases of torture is very limited or impossible. Subjecting a person to a torturous act is a grave violation which leaves deep physical, physiological and mental consequences on the victim that cannot be undone; in that sense torture victims are impossible to be 'untutored'. As some human rights violations, among which the harm inflicted by an act of torture, cannot be repaired with the restitution, other forms of reparation have shown to be appropriate and to certain degree effective.

B. Compensation

Mc Carthy argues that:"monetary compensation is the most commonly sought and frequently granted form of reparation in international law generally and the international human rights law in particular[80]". Bearing in mind that in the cases of torture, restitution is materially impossible, compensation is the best available form of reparation. Article 36 from the State responsibility states:

> 1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
> 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

In the above light, the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights law and Serious Violations of

[79] See Shelton, *supra note 41*, at 272.
[80] Conor Mc Carthy, *supra note 78*, at 138.

International Humanitarian Law, stipulates that "compensation should be provided for any economically accessible damage" [81] and includes:

> (*a*) Physical or mental harm;
> (*b*) Lost opportunities, including employment, education and social benefits;
> (*c*) Material damages and loss of earnings, including loss of earning potential;
> (*d*) Moral damage;
> (*e*) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

Having an access to medical and psychological services is from crucial importance for successful recovery of the tortured victims. As it is recognized that this aggravated form of ill-treatment to which the victim has been subjected often have lead to trauma, depression, fear, anxiety the immense importance of process of healing cannot be overstated.

C. Satisfaction

Satisfaction as form of reparation has received a different attention in the respective regional human rights systems. It scope is specified in Article 37 of the Articles on State Responsibility:

> 1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
> 2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
> 3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State".

Although, some systems are more prone towards using forms of satisfaction than others, the importance of the satisfaction for the torture victims is enormous as it helps the victims receive appropriate public acknowledgment as such.

[81] Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of ross Violations of International Human Rights law and Serious Violations of International Humanitarian Law, GA Res 60/147 2005, at 20 http://www2.ohchr.org/english/law/remedy.htm (last visited November 22, 2011)

D. Declaratory Judgments

Shelton argues that declaratory judgments are mostly used to solve legal uncertainty and it is the least coercive form of remedy[82]. Bearing in mind that most of the states, in most of the times reject the claims that torture practices or incidents have occurred under the territory of their jurisdiction, a Court's judgment may serve as starting point for acknowledging a concrete violation. However, if the allegations of torture are proven, than it is more than obvious that the torture victim will need more than just a declaratory judgment in order to undo or alleviate the harm inflicted to him/her.

The reparation awarded depends from the nature of the case and the specific violation; however, it is generally accepted that the first remedial aim is to do restorative justice, and in the cases where that is impossible, it aims to create compensatory justice[83]. This recognize that violations on some fundamental rights are impossible to be restored, and in the cases where that is so, the victims should be compensated.

If one accepts the Aristotelian understanding that: "what judge does is to restore equality[84]" then it becomes obvious that in cases of the torture the judges are faced with tremendous difficult task. Acknowledging that the harm inflicted cannot be undone, the judges are in constant search for effective forms of compensation and satisfaction.

[82] See Shelton, *supra note 41*, at 34.
[83] *Ibid.*at 9.
[84] *Ibid.* at 10.

3.2 The European Human Rights System

The jurisprudence on torture of the ECtHR demonstrates the willingness of the Court to afford compensation to the victims and its reluctance to afford modalities of satisfaction. The Court has a practice to award compensation for non-pecuniary damages and it does not afford any form of reparation other than monetary compensation

The remedial powers of the European Court on Human Rights are specified in Article 41 (former Article 50) of the ECHR which states:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party".

It should be stressed that the wording of the Article suggests that not every victim will be afforded a just satisfaction, but the Court enjoys discretion to decide in each particular case. In this context it should be pointed out that the Court will not afford reparation to the victim, unless the victims submit specific claim in accordance with Rule 60 from the Rules of the Court[85]. However, the jurisprudence of the Court demonstrates that the Court does not consider the judgment alone, as a sufficient form or reparation[86].

The European Court has taken hesitant approach towards the claims for pecuniary damages and in number of cases it dismissed the claims[87]. When the ECtHR decides whether to afford compensation for pecuniary damages, it tries to establish the relation between the violation found and the alleged damage. This was underscored in number of cases, among which the case of *Korobov v Ukraine,* where the ECtHR has stated that it "does not discern any causal link between the violation found and the pecuniary damage alleged: it therefore rejects this

[85] Irelnad v UK, *supra note 3,* at para. 244-6, See also Cf. Slyusarev v. Russia, at para.47.
[86] Selmouni v. France, *supra note 15,* at para.123, accord Khadisov and Tsechoyev v. Russia, at para. 183.
[87] Aydin v. Turkey, *supra note 9,* at para. 131, Korobov v Ukraine, at para. 99.

claim[88]". It has to be noted that in the cases where the Court has established the casual link between the violation and the alleged the damages as it was in the case *Mikheyev v. Russia*, the ECtHR determined the quantum of the award "given the seriousness of the applicant's condition, the need for specialized and continuous medical treatment and his complete inability to work in the future...[89]". The Court awarded a lump sum for pecuniary compensation without specifically categorizing the amount in sub categories. However, the above statement implies that the Court in the affording of the quantum included sum for lost earnings and costs for medical treatments.

The reluctance of the ECtHR to afford compensation for non pecuniary damages and the high casual link required among the violation found and the alleged pecuniary damage, has discouraged many applicants of submitting claims for pecuniary damages. The recent case law of the Court, in particular the cases *Gurgurov v. Moldova, Ipate v. Moldova, Chitayev and Chitayev v. Russia, Khadisov and Tsechoyev v. Russia* where in all instances the Court has found violation of Article 3 amounting to torture, the applicants have not included claims for non pecuniary damages[90].

The approach of the Court towards claims for non-pecuniary compensation was more liberal. The Court almost always afforded non-pecuniary damages to the victims, but rarely afforded the amount requested[91]. The Court also did not engage in analysis or deep reasoning on the amount afforded. In the process of determining the quantum, ECtHR was guided by the "seriousness of the violation of the Convention suffered by the applicant... and the enduring

[88] Ibid.
[89] Mikheyev v. Russia, 77617/01 EUR.CT.H.R., at para. 162,(2006).
[90] Gurgurov v. Moldova 7045/08, EUR.CT.H.R., at para. 74, E.g., Ipate v, Moldova, at para. 68, E.g., Chitayev and Chitayev v. Russia, at para. 210, Khadisov and Tsechoyev v. Russia, at para. 181.
[91] Adyin v Turkey, *supra note 9*, at para 131,E.g., Khadisov and Tsechoyev v. Russia, at para.183.

psychological harm,[92]" the "exceptionally serious consequences of the incident[93]" or the "suffered anguish and distress" which arose from the violations found [94].

While the Court afforded compensation in all the cases where it was requested and where a violation was established, the ECtHR has taken hesitant approach in the modalities of satisfaction[95]. In the case of *Ireland v. UK*, the Court unanimously held that "it cannot direct the respondent State to institute criminal or disciplinary proceedings against those members of the security forces who have committed the breaches of Article 3 found by the Court and against those who condoned or tolerated such breaches[96]". The Court in its judgments has not ordered a state to publicly apologize to victim nor to institute domestic proceedings against those responsible for the breach.

Notwithstanding that the ECtHR has taken restrictive approach on the issue of reparation it is interesting to note one reaction of the Committee of Ministers. In particular, the backlog of cases in the European jurisdiction compelled the Committee of Ministers[97] to invite the Court alter some of its practices and take a proactive approach. In that light, the Committee of Ministers adopted a resolution[98]which invited the Court:

> ". ..to identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem…. to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments";

The resolution of the Committee of Minister acknowledges that the judgments of the Court have not produced deterrent impact on the adamant governments. Although, the resolution does not

[92] Aksoy v Turkey, *supra note 13,* at para. 131.
[93] Mikheyev v. Russia, *supra note 89,*at para. 163.
[94] Chitayev and Chitayev v. Russia, 59334/00 EUR.CT.H.R., at para. 212, (2007).
[95] See generally, Shelton, *supra note 41,* at 295.
[96] See Ireland v. the United Kingdom, *supra note 3,* at point I(10).
[97] Committee of Ministers is organ of the Council of Europe. It is in charge for execution of the judgments.
[98] Committee of Ministers, Res (2004) 3, on judgments revealing an underlying systematic problem.

create legal change of the remedial powers of the Court, it aims to encourage the Court to consider other alternatives to influence the domestic systems and hence, get rid of the gross problems[99].

In the statistic of the European Court of Human Rights in the period 1959-2010, there was total of 69 violations on the prohibition on torture,[100] this number does not include the violation of inhuman and degrading treatment or lack of effective investigation which are also covered in the prohibition stipulated in Article 3. Out of the 69 violations, 27 were against Turkey, 25 were against Russia, 8 against Moldova and the rest were isolated incidents with single or couple of violations by country[101]. The fact that three States have inflicted more than 80% of the acts of torture, urges a need for closer examination of the States in question. Although, the judges of the Court have stated that the Court is bringing justice in individual case and its judgment does not aim to punish the State; bearing in mind that some states are appearing as repeating offenders, the Court should reconsider the scope of the reparations it provides. In that regards, the European Court should draw an example forms its Inter-American counterpart, which provides the victims with the widest range of modalities of satisfaction and non recidivism.

With regards to the costs and fees ECtHR lacks clear standards. In some instances the applicant was granted the full amount requested,[102] close to the amount requested,[103] or

[99] See generally Hall Keith, *The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad*, 18, (5). EUR.J.INT'L., 921 at 926-7, (2008).
[100] Violations by article and by country. European Court of Human Rights, http://www.echr.coe.int/NR/rdonlyres/2B783BFF-39C9-455C-B7C7-F821056BF32A/0/Tableau_de_violations_19592010_ENG.pdf (last visited November 21st, 2011)
[101] *Ibid.*
[102] Aksoy v Turkey, *supra note 13*, at para.114, E.g., Chitayev and Chitayev v. Russia, at para. 218.
[103] Aydin v Turkey, *supra note 9*, at para. 135.

extremely small portion of the costs and expenses requested,[104] in other cases the applicant was only granted cost and expenses for the procedures before ECtHR but not the domestic proceedings[105]. Regardless of the sum awarded to the victims the Court has stated:"an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been "actually and necessarily incurred and are reasonable as to quantum [106]". The Court does not have practice to award the costs and expense if full, but the prospective applicants should bear in mind that when ECtHR decides to grant sum for costs and expenses it bases its decision on whether the cost was necessary and reasonable incurred.

3.3 The Inter-American Human Rights System

The peculiar organization of the Inter-American system creates possibility for a case to be completed either in the proceedings before the Commission or the Court. The difference where the case will be finalized makes an impact of the scope of the reparations provided; the better remedial support being provided by the I/A Court.

The I/A Commission issues recommendations to the State responsible for the breach and they include both compensation and modalities of satisfaction. However, it has to be underscored that recommendations of the I/A Commission almost never specify the quantum. In the case *Jaliton Neri Da Foneseca v. Brazil,* the I/A Commission has requested the government to: "pay the next of kin of (the victim-Jailton Neri da Fonseca) compensation computed in

[104] See Korobov v. Ukraine, *supra note 21,* at para.02. E.g., Ipate v. Moldova, at para.74.
[105] Selmouni v. France, *supra note 15,* at para. 130.
[106] Korobov v. Ukraine, *supra note 21,* at para. 102, accord Aydin v. Turkey, at para. 135, accord Akkoc v. Tureky, at para.139, accord Selmouni v. France, at para. 130, accord Aksoy v. Turkey, at para. 114, accord Khadisov and Tsechoyev v. Russia, at para. 187.

accordance with international standards, in an amount sufficient to make up for both the material damages and the moral damages suffered[107]". In a similar manner, in the case of *Ana, Beatriz and Celia González Pérez v. Mexico,* the Commission has recommended the government to "adequately compensate" the victims[108] without suggesting the quantum. Further, it also deserves to be noted that although the recommendations of the I/A Commission include recommendations for non-repetition of the violation and modalities of satisfaction, the number of measures suggested and their scope is lower than the one ordered by the of I/A Court[109].

The Inter-American Court has expansive approach on the issue of reparations and its judgments include compensation for both pecuniary and non pecuniary damages as well as other non monetary forms for just satisfaction. The legal basis of the remedial powers of the I/A Court's are drawn from Article 63(1) of the American Convention which provides:

> "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 I/A Court provided the victims of torture with the widest range of reparations ever afforded by a regional body. The case of *Tibi* reflects the broad understanding of the Court on its remedial powers where the Court stated in instances when reparation is impossible:

> "this international Court must order that measures be adopted to ensure respect for the rights that were abridged, to avoid new violations, to remedy the consequences of the violations, and to ensure payment of compensation for damage caused.[110]"

[107] Jaliton Neri Da Foneseca v. Brazil, *supra note 27*, at para.VII (3).
[108] Ana, Beatriz and Celia González Pérez v. Mexico, *supra note 28*, at para. (2).
[109] E.g., Jaliton Neri Da Foneseca v. Brazil, *supra note 27*, at para.VII (2) (4) (5), E.g., Ana, Beatriz and Celia González Pérez v. Mexico, at para. VI (1).
[110] Tibi v. Ecuador, *supra note 24,* at para. 244.

The above understanding is widely reflected in the case law of the Court, which provided the victims of torture with extensive and deep range of reparations.

The first important point which deserves to be noted, is Court 's broad interpretation of the victim status, in that sense, the Court often identified as victim not only the person who personally suffered the torturous act but also his/her immediate relatives[111].

The I/A Court has awarded the victims with both pecuniary and non pecuniary compensation. With regards to pecuniary damage the Court has accepted the view that compensation has to be in broad terms and capable to repair the damage "in so far as possible[112]". In that light, the Court has been affording compensation for lost earnings,[113] as well as consequential damages that included trip expenses of the family members[114], costs for psychotherapy sessions, expenses for special food and physical treatments, purchase of dental prosthetics, goods that were seized by the police at the time of detention[115]"etc.

Notwithstanding the awards for pecuniary damages the I/A Court also took proactive role on the issue of non-pecuinary compensation. The I/A Court was generous in affording victims a sum which aims to compensate for the non-pecuniary damage they have suffered. The Court bases its assessment of the quantum on the principle of fairness, and the relative nature of the case. In that process the Court considered:

> "the circumstances of the instant case, the intensity of the suffering caused by the facts to the victims, changes in the conditions of their existence, and the other non-pecuniary or nonmaterial consequences they suffered..[116]".

[111] Juan Humberto Sánchez v.Honduras, I/A Court. H.R., Series No.99, at para. 101, (2003).
E.g., Cantú, at para. 207, E.g.,Tibi v. Ecuador, at para. 230, E.g., Urrutia at para. 170,E.g., Fernández Ortega et al. v. Mexico, at para.224.
[112] Tibi v. Ecuador, *supra note 24,* at para.231.
[113] E.g., Urrutia, *supra note 23,* at para.158, Loor v Panama, at para.304, Cf. Bulacio Case, at para. 84.
[114] E.g. Urrutia, *supra note 23,* at para.159.
[115] Tibi v. Ecuador, *supra note 24,* at para. 237.
[116] Tibi v. Ecuador, *supra note 24,* at para. 243. E.g., Loor v Panama, para. 311.

Moreover, the Court has also taken proactive approach towards the forms of satisfaction and non repetition and has ordered states to "investigate the facts that gave rise to the violations, to identify, try, and punish those responsible[117], to publish the pertinent parts of the Judgment of the Court in a official gazette[118], to make written statement of acknowledgment of international responsibility and apology to the victims published in daily newspaper [119], to adapt the domestic law to the relevant international standards of justice[120], to award scholarships to the victims[121] etc. These modalities of satisfaction are not exhaustive, the I/A Court has used many other modalities of satisfaction whose form was influenced by the circumstances of the particular case.

With regards the costs and expenses the I/A Court did not develop constant practice and in some instances has awarded the applicant sum for proceeding before the national courts as well as I/A Court[122] , while in other has only awarded costs and expenses for the proceedings before I/A Court[123]. In a similar manner as the ECtHR, the I/A Court when determining the amount to be granted for cost and expenses is engaging in evaluation of the expenses indicated by the parties and grants sum for expenses if it finds them reasonable[124]".

[117] Velez Loor v.Panama, I/A Court H.R., Series C No.218, at para. 268, (2010).E.g.,Cantú, at para. 211, E.g., Tibi v. Ecuador, at para. 256, E.g., Urrutia at para.177, E.g., Fernández Ortega et al. v. Mexico,at para. 226, Cf. Gutiérrez-Soler v. Colombi, at para. 54, Cf. Cf. Bulacio Case, at para. 84.
[118] Tibi v. Ecuador, *supra note 24*, at para 260,E.g., Cantú, at para. 229, E.g., Fernández Ortega et al. v. Mexico, at para.245.
[119] Tibi v. Ecuador, *supra note 24*, at para. 261, E.g., Cantú, at para. 226, E.g., Fernández Ortega et al. v. Mexico,at para. 244.
[120] Rosendo Cantú et al. v. Mexico, I/A Court.H.R., Series C No 216, at para. 223. (2010).
[121] Cantú, *supra note 120*, at para. 257, E.g. Fernández Ortega et al. v. Mexico, at para. 264.
[122] Velez Loor v.Panama, *supra note 117*, at para.319, Tibi v. Ecuador, at para. 270, Cantú, at para. 286.
[123] Urrutia, *supra note 23*, at para.184, Fernández Ortega et al. v. Mexico, at para. 299.
[124] Urrutia *supra note 23*, at para.182, Tibi v. Ecuador, at para. 268.

3.4 The African Human Rights System

In the words of Mutua, the findings of the African Commission are "too remote if not virtually meaningless[125]". This criticism is be proven and justified when one looks at the decisions of the Commission. However, before getting into deeper criticism of this institution, and its remedial modesty, it is useful to examine the legal grounds for its operation.

Article 30 from the African Charter on Human and People's Rights established the Commission and defined its mandate as to promotion and protection of human and peoples' rights in Africa. One of the shortcomings of the Charter is the lack of specification of the nature of the Commission's findings as a result of which many scholars criticize the Commission for lacking of an" effective protection mandate[126]". However, the Commission derived its powers to provide remedies from the "implied powers doctrine,[127]" and has stated that its findings are "authoritative interpretation of the Charter and thus binding on states[128]". Even though there is clear absence of provision which empowers the Commission to provide remedies, and even though some governments dispute the binding nature of the decisions of the Commission; still the Commission pronounces findings and the issues recommendations[129].

The African Commission offers the lowest remedial protection to victims and in many instances has not produced any effects. In the case *Commission,World Organisation against Torture, Lawyers', Committee for Human Rights, Jehovah Witnesses, Inter-African Union for Human Rights v. Zaire*, the Commission stated that the main aim of the communication

[125] Makau Mutua, *supra note 73*, at 20.
[126] *Ibid*, at 3.
[127] Frans Viljoen & Lirette Louw, *supra note 34*, at 11.
[128] *Ibid*. at 8.
[129] *Ibid.* at 2.

procedure is to: "initiate positive dialogue"[130]. However, the government of Zaire has not replied to the allegations and ignored the notifications and remainders of the Commission. As a result the Commission found violation of Article 5 which amounted to torture but besides mere proclamation of violation it did not specify any kind of reparation, recommendation and request. In the case of *Amnesty International vs/Sudan, Comité Loosli Bachelard vs/Sudan, Lawyers Committee for Human Rights vs/Sudan, Association of Members of the Episcopal Conference of East Africa also against Sudan*, the African Commission went a step further and besides the declaration of the violation of Article 5 it has also 'strongly' recommended to "the Government of Sudan to put an end to (these) violations in order to abide by its obligations under the African Charter on Humanand Peoples' Rights[131]".

The passive role on the African Commission on the issue of reparations can be also observed in case of *Law Office of Ghazi Suleiman / Sudan*, where the African Commission mentioned that: "torture is prohibited by the criminal code of Sudan and the perpetrators are liable to imprisonment for three months or a fine,[132]" but did not express concern on the light measure, and did not request or recommend to the government to change the law in question. It is imperative for the African Commission to acknowledge the universally accepted standards; in that above context "the Committee against Torture has on numerous occasions ruled that sentence of a short duration, from several days to two or three years"[133] is insufficient.

The African Commission was a bit progressive in the case *Curtis Francis Doebbler/Sudan* , where the Commission requested the government of Sudan to amend the

[130] World Organisation Against Torture, Lawyers'Committee for Human Rights, Jehovah Witnesses, Inter-African Union for HumanRights /Zaire 25/89, 47/90, 56/91, 100/93, ACHPR, at para.193, (1996).
[131] Amnesty International / Sudan, Comite' Bachelard / Sudan, Lawyers Committee for Human Rights / Sudan, Association of Members of the Episcopal Conference of East Africa / Sudan; 48/90, 50/91, 52/91, 89/93. ACHPR, at para. 84.
[132] See Law Office of Ghazi Suleiman v. Sudan, 222/98 and 229 /99, ACHPR, at para. 45. (2003).
[133] Rodley Nigel & Pollard Matt, *Criminalisation of Torture: state obligations under the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 2. EHRLR, 115, at 123, (2006).

Criminal law, abolish the lash penalty and provide the victims with compensation[134]. Further, in the case *Civil Liberties Organisation/Nigeria*, the African Commission recommended the Government of Nigeria to "improve the conditions of detention[135]" but failed to instruct the government to pay compensation.

The African Commission has taken inconsistent approach towards the recommendations it provides. Although, part of the blame can be transferred to the founding Charter, still the Commission needs to take active role and provide up-to date recommendations which follow the internationally accepted standards.

In contrast to the African Commission, the African Court has a legal base to issue reparations. Article 27 (1) from the protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights states that:

> "If the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation"

The explicit granting of the African Court, to issue remedies deserves to be welcomed. However, due to the recent establishment of the Court, and dearth on torture case law in the jurisprudence of the Court, the approach of the African Court towards the issue of reparations cannot be analyzed at the time of writing of this dissertation.

[134] Curtis Francis Doebbler/Sudan, 236/00, ACHPR, at last para. (2003).
[135] See Civil Liberties Organisation/ Nigeria, *supra note 35*, at para. 27.

CONCLUSIONS AND RECOMMENDATIONS

1. European Human Rights System

The definition on torture in the European Human Rights system is: wide, varied and constantly changing[136]". Although, at the beginning of its establishment the Court took narrow approach towards the definition on torture and set very high threshold of minimum level of severity required for a ill-treatment to be classified as torture; later on the Court alter its interpretation. In particular, the Court has stated that the definition on torture should be interpreted in the light of present day conditions, which takes into consideration the accepted common standards. In has to be underscored that this moving definition takes into consideration the threats of the day and the sophisticated mechanisms for inflicting harm.

Although, the European Court on Human Rights is the oldest human rights system, the European public is still unfamiliar with the procedures available before the Court, as a result 95% of the applications are declared inadmissible. That small portion of applications which the Court declares admissible, are forced to wait up to 8 years for the judgment to be delivered. The long-processing time of application is a frustrating process which may further aggravate the health being of victims. Bearing in mind, that in most of the cases the victims of torture need medical or psychological help in order to heel the injuries inflicted, the importance of rendering a judgment in a timely manner is cannot be overstated. With regards to the above stated and with a hope for effective implementation the priority policy of the Court should be welcomed.

[136] Yavuz Aydin, *The European Court of Human Rights approaches to the prohibition of Torture, inhuman and degrading treatment or punishment*, at 4, http://www.justice.gov.tr/e-journal/pdf/Prohibition_Torture.pdf (last visited on November 20th, 2011).

The European Court on Human Rights provides the torture victims with basic protection. The reparations provided by the ECtHR aim to compensate the victim for the harm inflicted, however they are insufficient. The European Court is reluctant to afford compensation for pecuniary damages and although it affords compensation for non-pecuniary damages it tends to provide them in a significantly lower amount than the one requested. The ECtHR does not provide the victims with modalities of satisfaction and that creates one of the most serious pitfalls of the remedial powers of the Court. The Court has not order a state to publicly apologize to victim, nor to prosecute the individuals responsible for the torturous act. The European Court of Human Rights needs to be restructured in order to be able to provide greater protection to the victims; in that sense many lesson can be learned from the remedial powers of the Inter-American Court.

2. Inter-American Human Rights System

The Inter-American Torture Convention, provided the Inter-American system with broad definition of torture, upon which the Court effectively relied. The understanding of the I/A Court for the scope of an act of torture takes into considerations the sophisticated inventions for inflicting harm. The Court has pointed out that act of torture may be inflicted into the physical, psychological and metal sphere, has taken activist approach in the interpretation of torture and as such it takes into account the universal standards.

Having unfettered access to justice is a crucial component on effective justice mechanism. However, the Inter-American Court in its current organization does not provide access for individuals. If an individual wants to obtain a reparation, he/she has to petition the I/A

Commission first. Later on after the Commission issue recommendation and if the state does not comply with them, the Commission or the state can transfer the case to the Court which can deliver legally binding judgments. The victim in the Inter-American system on average spend 6 years in proceedings before the Commission with a hope that the State violator will take responsibility and follow the recommendations of the Commission and only when it becomes more than obvious that the government is reluctant to do so, the individual is left to wait for the Commission to transfer the case to the Court. The two-tier system can be effective only if the procedures before the Commission are conducted in timely fashion. Transforming the I/A Court and I/A Commission to permanent organs may be valid solution for speeding up the process.

The Inter-American Court provided the victims of torture with broadest protection. The Inter-American Court identifies as victims not only the person who personally was subjected to the torturous act but also his/her immediate family members. The Court awards compensation for pecuniary and non-pecuniary damages but also other form of satisfaction and guarantees of non-recidivism. The reparations provided by the Inter-American Court should serve as examples for the others regional human rights systems.

Some argue that the operation of the Inter-American system exceeded the imagination of its founders[137], and if one takes into account the reparations afforded by the I/A Court, sure it did. However, the task of the Court is not completed; it has to persistently work hard in order to satisfy the heightened expectations of the victims.

[137] Santiago Canton, *The Inter-American Commission on Human Rights: 50 years of Advances and New Challenges*, http://www.americasquarterly.org/Inter-American-Commission-Human-Rights (last visited November 21, 2011).

3. African Human Rights System

The African Commission on Human Rights has taken modest approach towards the definition on torture; in particular the Commission did not engage in analysis of the various forms of ill-treatments. In the very few instances where the Commission reasoned its decision for the calcification of ill-treatment it invoked the case law on the European Court of human rights. Although the African Commission has not diminished the framework of the definition of torture, it proved to be reluctant to act as developer of the law. The African Commission has to provide deeper reasoning of its findings and take leading role as developer of the law on the Continent.

The African Charter lacks explicit provision which allows individuals to submit a petition to the Commission. In addition to this, the African Court does not provide for mandatory right of individual petition. Therefore, it is from enormous significance the position of the individual within the system to be enhanced. Taking in consideration the problematic base on the organization of the African system it seems that reorganization of the system is more than needed. In order to avoid overlapping of competences between the Commission and the Court, and lower the processing time, the opinion of Obisienunwo and Nmehielle for giving promotional role to the African Commission and making the Court the " only judicial body which will adjudicate on the matters[138], sound as good and valid solution of the problem.

The African human Rights system offers the worst remedial support. Besides the lack of clarity for the binding force of the findings of the Commission, there are additional malfunctions in the operation of this institution. In a number of instances where Commission has found a violation, it has not provided a recommendation; or in the instances where it provided

[138] VINCENT OBISIENUNWO & ORLU NMEHIELLE, THE AFRICAN HUMAN RIGHTS SYSTEM: ITS LAWS, PRACTICE AND INSTITUTIONS, at 54, (2001).

recommendation, it only asked the states to respect the provisions of the Charter, or to dully compensate the victims without specifying the quantum. However, there are few notable exceptions where the Commission has asked the governments to amend their domestic law and bring in it compliance with the Convention. The African Court has a power to deliver legally binding decision but it has not developed a case law on the issue of torture and as such it cannot be analyzed at the time of the writing of this dissertation. Taking into consideration the erogenous nature of the violation on the African Continent, the African Human Rights institutions need to take proactive role in the issue of remedies. Only by providing the victims with effective and timely forms of reparation, the system will indulge victims' appetite for justice.

BIBLIOGRAPHY

Documents

Universal Jurisdiction

Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights law and Serious Violations of International Humanitarian Law, GA Res 60/147 2005, http://www2.ohchr.org/english/law/remedy.htm (last visited November 22, 2011).

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, GA. Res. 39/46 (1984), http://www2.ohchr.org/english/law/cat.htm (last visited on February 14, 2011).

Responsibility of States for Internationally wrongful acts, 2001, http://www.ilsa.org/jessup/jessup06/basicmats2/DASR.pdf (last visited on November 21, 2011).

African Human Rights System

African (Banjul) Charter on Human and People's Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), http://www.africa-union.org/official_documents/treaties_%20conventions_%20protocols/banjul%20charter.pdf (last visited on February 8, 2011).

African Court on Human and Peoples' Rights, Rules of the Court, 2010, accessed online http://www.african-court.org/fileadmin/documents/Court/Interim%20Rules%20of%20Court/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf (last visited on November 13, 2011).

Protocol of the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and People's Rights, http://www.african-court.org/fileadmin/documents/Court/Court%20Establishment/africancourt-humanrights.pdf (last visited on November 13, 2011).

Rules of Procedures of the African Commission on Human and Peoples' Rights, 1995, http://www.achpr.org/english/_info/rules_en.html (last visited on November 13, 2011).

European Human Rights System

Committee of Ministers, Res (2004) 3, on judgments revealing an underlying systematic problem, https://wcd.coe.int/ViewDoc.jsp?id=743257&Lang=fr (last visited on November 22, 2011).

Convention for the Protection of Human Rights and Fundamental Freedoms, (European Convention on Human Rights), 1950, as amended by Protocols Nos 11 and 14, CETS, NO 194, 2010, http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf (last visited on November 10, 2011).

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987, ETS NO 151. and ETS NO. 152, 2002, http://conventions.coe.int/Treaty/en/Treaties/Html/126.htm (last visited on November 10, 2011).

Rules of Court, (European Court of Human Rights), April 2011, http://www.echr.coe.int/NR/rdonlyres/6AC1A02E-9A3C-4E06-94EF-E0BD377731DA/0/REGLEMENT_EN_Avril2011.pdf (last visited on November 10, 2011).

Inter-American Human Rights System

American Convention on Human Rights "Pact of San Jose, Costa Rica", OAS, TREATY SERIES, No. 36, 1969, http://www.oas.org/juridico/english/treaties/b-32.html (last visited on November, 2011).

American Declaration of the Rights and Duties of Man, 1948, http://www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm (last visited on November 15, 2011).

Inter-American Convention to Prevent and Punish Torture, 15 GA 1985, http://www.cidh.oas.org/Basicos/English/Basic9.Torture.htm on November 14th 2011(last visited on November 15, 2011).

Rules of Procedure of the Inter-American Commission on Human Rights, Reg. Ses. 137, 2009, http://www.cidh.oas.org/Basicos/English/Basic18.RulesOfProcedureIACHR.htm (last visited on November 12, 2011).

Rules of Procedure of the Inter-American Court of Human Rights, 2009, http://www.cidh.oas.org/Basicos/English/Basic20.Rules%20of%20Procedure%20of%20the%20Court.htm (last visited on November 12, 2011).

Statute of the Inter-American Commission on Human Rights, GA OAS Res.447, 1979, http://www.cidh.oas.org/Basicos/English/Basic17.Statute%20of%20the%20Commission.htm (last visited on November 12, 2011).

Statute of the Inter-American Court of Human Rights, GA OAS 1979, Res. 448, http://www.cidh.oas.org/Basicos/English/Basic19.Statute%20of%20the%20IA%20Court.htm (last visited on November 12, 2011).

Books

CLEMENTS L. HOLE & SIMMONS A., EUROPEAN HUMAN RIGHTS: TAKING A CASE UNDER THE CONVENTION, (1999).

DAVID JOHN HARRIS &STEPHEN LIVINGSTONE, THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS, (Oxford University Press), (1998).

DIEGO RODRIGEZ-PINZON &CLAUDIA MARTIN, THE PROHIBITION OF TORTURE AND ILL-TREATMENT IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM, (World Organization against Torture), (2006).

DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW, (Oxford University Press), (2006).

FATSAH OUGERGOUZ, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS, A COMPREHENSIVE AGENDA FOR HUMAN DIGNITY AND SUITABLE DEMOCRACY IN AFRICA, (Martinus Nijhoff), (2003).

FRANS VILJOEN & ANSELM CHIDI ODINKALU, THE PROHIBITION OF TORTURE AND ILL TREATMENT IN THE AFRICAN HUMAN RIGHTS SYSTEM, (World Organization against Torture), (2006).

JO. M. PASQUALUCCI , THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS, (Cambridge University Press), (2003).

OBIORA CHINEDU OKAFOR, THE AFRICAN HUMAN RIGHTS SYSTEM, ACTIVIST FORCES AND INTERNATIONAL INSTITUTIONS, (Cambridge University Press), (2007).

MARK W. JANIS, RICHARD S. KAY & ANTHONY WILFRED BRADLEY, EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS, (Oxford University Press), (2008).

NAOMI ROTH- ARRIAZA, IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE. (Oxford University Press), (1995).

PIETER DIJK, GODEFRIDUS J.H. HOOF, G.J.H. VAN HOOF & A.W. HERINGA, THE THEORY AND PRACTICE OF THE EUROPEAN CONVENTION FOR HUMAN RIGHTS, (Martinus Nijhoff)(1998).

VINCENT O. ORLU NMENHIELLE, THE AFRICAN HUMAN RIGHTS SYSTEM, ITS LAWS, PRACTICE AND INSITITUTIONS, (Martinus Nijhoff), (2001).

YEARBOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, THE GREEK CASE, (MARTINUS NIJHOFF), (1972).

Articles

Center for Reproductive Rights, *Reproductive Rights in the Inter-American System for the Promotion and Protection of Human Rights*, http://reproductiverights.org/sites/default/files/documents/pub_bp_rr_interamerican.pdf (last visited on October 20, 2011).

Conor Mc Carthy, *Reparations and Victim Support under the Rome Statute of the International Criminal Court*, Phd Thesis, University of Cambridge, (2010).

Decker, J. A , *Is the United States Bound by the Customary International Law of Torture? A Proposal for ATS Litigation in the War on Terror*, 6 Chi. J. Int'l L., 803, (2006).

Djajic Sanja, *Victims and Promise of Remedies: International Law Fairytale Gone Bad*, 329, 9,SAN DIEGO INTL'L L.J., (2008).

Foot Rosemary, *Torture: The Struggle over a Peremptory Norm in a Counter-Terrorist Era*, 20 (2), Int. Rel.,131-151, (2006).

Frans Viljoen & Lirette Louw, *The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation*, 48 (1) JAL., (2004).

Hall Keith, *The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad*, 18, (5). EUR.J.INT'L., 921-937 (2008).

Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*. 19,1. EUR.J.INT'L., 125, (2008).

Makau Mutua, *The African Human Rights System, A critical evaluation,* http://hdr.undp.org/en/reports/global/hdr2000/papers/MUTUA.pdf (last visited on November 7, 2011).

Rachel Murray, *Decisions by the African Commission on Individual Communications under the African Charter on Human and People's Rights*, 46(2) INT'L & COMP.L.Q., 412.,(1997).

Rodley Nigel & Pollard Matt, *Criminalisation of Torture: State obligations under the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 2. EHRLR, 115, (2006).

Viljoen Frans & Louw Lirette, *The status of the findings of the African Commission: From moral persuasion to legal obligation.* 48. 1.Journal of African Law., 1, (2004).

African cases

Amnesty International / Sudan, Comite' Bachelard / Sudan, Lawyers Committee for Human Rights / Sudan, Association of Members of the Episcopal Conference of East Africa / Sudan; 48/90, 50/91, 52/91, 89/93. ACHPR, (1993).

Civil Liberties Organisation / Nigeria, 151/96, ACHPR, (1999).

Commission Nationale des Droits de l'Homme et des Libertés / Chad, 74/92 ACHPR, (1995).

Constitutional Rights Project and Civil Liberties Organisation / Nigeria, 143/95, 150/96 ACHPR, (1999).

Curtis Francis Doebbler / Sudan, 236/00, ACHPR, (2003).

Huri-Laws / Nigeria, 225/98, ACHPR, (2000).

John D. Ouko / Kenya 232/99, ACHPR (2000).

Kazeem Aminu / Nigeria 205/97, ACHPR, (2000).

Krishna Achuthan (on behalf of Aleke Banda),Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) / Malawi, 64/92-68/92-78/92 (1992).

Law Office of Ghazi Suleiman / Sudan 222/98 and 229 /99, ACHPR, (2003).

World Organisation Against Torture, Lawyers'Committee for Human Rights, Jehovah Witnesses, Inter-African Union for HumanRights / Zaire 25/89, 47/90, 56/91, 100/93, ACHPR, (1996).

European Cases

Aksoy v. Turkey, 21987/93 EUR.CT.H.R., (1996).

Akkoc v. Turkey, 22947/93 and 22948/93 EUR.CT.H.R.,(2000).

Aydin v. Turkey, 23178/94 EUR.CT.H.R., (1997).

Chitayev and Chitayev v. Russia, 59334/00 EUR.CT.H.R.,(2007).

Dikme v. Turkey, 20869/92 EUR.CT.H.R., (2000).

Egmez v. Cyprus, 30873/96 EUR.CT.H.R., (2000).

Gurgurov v. Moldova 7045/08 EUR.CT.H.R., (2009).

Ireland v. the United Kingdom, 5310/71 EUR.CT.H.R., (1978).

Ipate v, Moldova, 23750/07 EUR.CT.H.R., (2011).

Khadisov and Tsechoyev v. Russia, 2519/02 EUR.CT.H.R., (2009).

Korobov v. Ukraine 39598/03 EUR.CT.H.R.,(2011).

Ribitisch v. Austria, 18896/91 EUR.CT.H.R., (1995).

Saadi v. Italy 37201/06 EUR.CT.H.R., (2008)

Selmouni v. France, 25803/94 EUR.CT.H.R.,(1999).

Slyusarev v. Russia 60333/00 EUR.CT.H.R., (2010).

Soering v. The United Kingdom 14038/88 EUR.CT.H.R.,(1989).

Tomasi v. France, 12850/87 EUR.CT.H.R., (1992).

Mikheyev v. Russia, 77617/01 EUR.CT.H.R.,(2006).

The *Greek case* YEARBOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, THE GREEK CASE, (MARTINUS NIJHOFF) (1972).

Tomasi v. France, 12850/87 EUR.CT.H.R, (1992).

Tyrer v. the United Kingdom, 5856/72 EUR.CT.H.R ,(1978)

Inter-American Cases

Ana, Beatriz and Celia González Pérez v. Mexico, Case 11.565, Report No. 53/01, OEA/Ser.L/V/II.111 Doc. 20 rev. (2000).

Bulacio v. Republic of Argentina, I/A Court. H.R., Series C No. 100, (2003).

Caesar v. Trinidad and Tobago, I/A Court. H. R., Series C No. 123, (2005).

Cantoral-Benavides v. Peru, I/A Court H.R., Series C No.69, (2000).

Fernández Ortega et al. v. Mexico, I/A Court.H.R., Series C No. 215, (2010).

Gutiérrez-Soler v. Colombia, I/A Court. H. R., Series C No 132, (2005).

Jaliton Neri Da Foneseca v. Brazil, Case11.634, Report No. 33/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 (2004).

Juan Humberto Sánchez v.Honduras, I/A Court. H.R., Series No.99, (2003)

Luis Lizardo Cabrera v. Dominican Republic, Case 10.832, Report Nº 35/96, Inter-Am. C. H. R., OEA/Ser.L/V/II.95 Doc. 7 rev. (1997).

Maritza Urrutia v. Guatemala, I/A Court H.R., Series C No. 103, (2003).

Rosendo Cantú et al. v. Mexico, I/A Court.H.R., Series C No 216, (2010).

Tibi v. Ecuador, I/A Court.H.R., Series C No 114, (2004).

Velez Loor v. Panama, I/A Court H.R., Series C No.218, (2010).

Webpages

Aisling Reidy, The Prohibition of torture, a guide to the implementation of Article 3 of the European Convention on Human Rights. Human rights, handbooks, No6.http://echr.coe.int/NR/rdonlyres/0B190136-F756-4679-93EC-42EEBEAD50C3/0/DG2ENHRHAND062003.pdf (last visited November 22, 2011).

David Padilla, The Future of the Inter-American Human Rights System, http://www.wcl.american.edu/hrbrief/v3i1/iahr31.htm (last visited November 21, 2011).

IRCT, Inter-American Court of Human Rights, http://www.irct.org/legal-instruments---mechanisms/complaint-mechanisms-and-legal-proceedings/regional-mechanisms/american-mechanisms/inter-american-court-of-human-rights.aspx (last visited on November 23, 2011).

Michal Davala, *Position of individuals in the Inter-American Human Rights system*, 1 Days of Law: Masaryk University, http://www.law.muni.cz/sborniky/dny_prava_2010/files/prispevky/11_evropa/Davala_Michal_(4663).pdf (last visited on November, 2011).

Practical Guide on admissibility criteria, Council of Europe, (2010) http://www.gddc.pt/direitos-humanos/portugal-dh/acordaos/docs/Practical_Guide_on_Admissibility_Criteria.pdf (last visited November 20, 2011).

Preparatory Contributions, High Level Conference on the Future of the European Court of Human Rights, http://www.gddc.pt/direitos-humanos/portugal-dh/acordaos/docs/Brochure_contributions_preparatoires_en.pdf (last visited November 22, 2011).

Santiago Canton, The Inter-American Commission on Human Rights: 50 years of Advances and New Challenges, http://www.americasquarterly.org/Inter-American-Commission-Human-Rights (last visited November, 2011).

Support for torture victims, facts and figures. http://www.torturevictims.ch/index.php?id=24&L=2 (last visited on November 15, 2011).

The Court's priority Policy. European Court of Human Rights, http://www.echr.coe.int/NR/rdonlyres/DB6EDF5E-6661-4EF6-992E-F8C4ACC62F31/0/Priority_policyPublic_communication_EN.pdf (last visited November 21t, 2011).

Torture (Damage) Bill: Justice for torture survivors. http://www.redress.org/news-and-events/watch-our-video on November 16th 2011 (last visited on November 16, 2011).

Violations by article and by country. European Court of Human Rights, http://www.echr.coe.int/NR/rdonlyres/2B783BFF-39C9-455C-B7C7-F821056BF32A/0/Tableau_de_violations_19592010_ENG.pdf (last visited November 21, 2011).

Yavuz Aydin, The European Court of Human Rights approaches to the prohibition of Torture, inhuman and degrading treatment or punishment, http://www.justice.gov.tr/e-journal/pdf/Prohibition_Torture.pdf (last visited on November 20, 2011).