Introduction

One of the main developments in the area of international adjudication during the late 20th century was the establishment of international courts and proceedings allowing individuals to lodge complaints against states for the violation of human rights norms. The traditional understanding about the consequences of judgments finding such human rights violations was that the victims were entitled to adequate reparation, usually in the form of monetary compensation. However, as the different human rights systems and the jurisprudence of the respective courts developed, it started to become clear that some infringements were of such a systemic nature that individual forms of reparation did not suffice. This gave rise to different forms of collective reparation, conceptualised as structural remedies or guarantees of non-repetition. Among those, a group of remedies that stands out due to their high degree of intrusiveness in states' sovereignty are the measures that order the reform of the domestic legal order, labelled here as legislative remedies. These remedies are the main object of analysis of this book.

One of the cornerstones of international law is the rule establishing that the infringement of treaty obligations cannot be justified on the basis of domestic laws.[1] Nevertheless, in practice, the picture looks different. In 2012, when writing about the future of international law, the late Antonio Cassesse highlighted the inconsistency between domestic legislative frameworks and international rules as one of the main problems in this regard.[2] In order to change this, he advocated in favour of an international court being in charge of determining the incompatibility of states' domestic laws with their international obligations and in that case "enjoining the state to modify its legislation forthwith".[3] Moreover, he argued that any natural or legal person with an interest in the matter should be able to trigger such proceedings and a monitoring body should supervise the implementation

1 In accordance with Art. 27 of the Vienna Convention on the Law of Treaties (VCLT).

2 Antonio Cassesse, "Towards a Moderate Monism: Could International Rules Eventually Acquire the Force to Invalidate Inconsistent National Laws?", in Antonio Cassesse (ed.), *Realizing Utopia: The Future of International Law*, Oxford: OUP, 2012, pp. 187–199, at p. 188.

3 Cassesse, "Towards Moderate Monism", 2012, p. 191.

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of such reforms. This is, to some extent, a development that is already taking place before regional human rights courts, which have, over the last few decades, been slowly and rather quietly moving in that direction.[4]

Human rights violations stemming from domestic legislation (or lack thereof) are rather common before the three regional courts – the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR) and the African Court on Human and Peoples' Rights (ACtHPR). These infringements represent a particular challenge because if legislative issues are not adequately tackled, they are likely to give rise to numerous additional violations. For that reason, although it was not foreseen at the moment of their respective inceptions, each of these human rights courts developed their remedial practice to a point in which they began to include measures prescribing legislative reforms. These remedies have been rather common in the jurisprudence of the IACtHR since the early 2000s, while in the case law of the ECtHR, they were introduced in 2004 with the 'pilot judgment procedure' but remain highly exceptional. The ACtHPR, despite being a comparatively young court, has also increasingly adopted this remedial practice, especially during recent years when this Court's case law considerably expanded. Even though some of the most widely discussed judgments of human rights courts involve these remedial measures,[5] it is a practice that has not received much scholarly attention as a whole.

This practice is related to the expanding powers of international adjudication in general,[6] as well as to the increasing international judicialisation

4 This was also recognised by Cassesse, mentioning in this respect that the ECtHR would in principle be able to meet these conditions but failed due to do so due to its narrow interpretation of Art. 41 ECHR, while the IACtHR was doing better on that front. See Cassesse, "Towards Moderate Monism", 2012, pp. 194-198.

5 This is the case, for example, of the 'prisoners voting rights saga' before the ECtHR or the prohibition of amnesty laws by the IACtHR. On the former, see ECtHR, *Greens and M.T. vs. UK* (2010), operative para. 6 ("the respondent State must (a) bring forward (…) legislative proposals intended to amend the 1983 Act and, if appropriate, the 2002 Act in a manner which is Convention-compliant; and (b) enact the required legislation (…)"). Concerning the latter see for example IACtHR, *Gelman vs. Uruguay* (2011). The decisions on amnesty laws have on the one hand been able to end with the impunity of some perpetrators of human rights violations, but on the other hand they have also been criticised in other instances for interfering with the democratic will of the people.

6 It relates thus to the rise of 'newstyle' international courts, which follow a model of compulsory jurisdiction that has effects going far beyond the parties in dispute. See generally Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights*, Princeton, NJ: Princeton University Press, 2014.

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of national politics.[7] The rise of 'newstyle' international courts can be detected primarily at the regional level, where the tribunals in several instances reach deeply into the societies under their supervision.[8] Although it is quite common to see national laws and policies challenged on the basis of international rules and principles – not only in the field of human rights but also in other fields such as international trade or environmental law – regional human rights courts play a special role in this regard, as they are the only international courts that include binding orders to reform legislation on a consistent basis. Such remedial measures are indeed exceptional at the international level, being instead usually circumscribed to the field of constitutional adjudication, due to their high degree of intrusiveness. Thus, by issuing legislative remedies human rights courts are stretching their mandate beyond their traditional role of providing individual justice, thereby adopting a constitutional role.

It is, however, arguably still unclear in which specific type of cases the respective human rights courts order the amendment of domestic laws, as well as the concrete way in which they do so. In this regard, some authors have criticised these courts for not being sufficiently consistent and for lacking clear criteria in terms of deciding under which circumstances to order such far-reaching measures.[9] Thus, in view of the established practice of regional human rights courts ordering states under certain circumstances to amend their domestic laws, as well as the arguable inconsistency and lack of clear criteria in this regard, it is worth taking a closer look at this practice, comparatively analysing and assessing the human rights courts' approach to this issue. This is even more relevant when considering the backlash suffered by the three regional human rights courts in recent times. Some of the main points of criticism have concerned the alleged judicial activism of these bodies, going beyond what is established in the mandates of the respective Conventions, and their interference with the sovereignty of states, especially with their democratic institutions. Both of these issues

7 See for example on this point Michael C. Tolley, "Judicialization of Politics in Europe: Keeping Pace with Strasbourg", *Journal of Human Rights* 11(1), 2012, pp. 66-84.

8 Karen Alter and Lisbeth Hooghe, "Regional Dispute Settlement", in Tanja Börzel and Thomas Risse (eds.), *The Oxford Handbook of Comparative Regionalism*, Oxford: OUP, 2016, at p. 551.

9 With regard to the IACtHR, see for example Tom Antkowiak, "Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond", *CJTL* 46(2), 2008, pp. 351-419, at p. 383 ("While the Court's current approach in this area is uneven, it does order legislative reforms in a handful of circumstances").

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are especially present in the cases in which the amendment of domestic laws is ordered by these courts.

On the other hand, two further important challenges currently faced by regional human rights protection systems relate to their effectiveness and efficiency.[10] The former challenge refers mainly to the lack of adequate protection of international rights domestically, which is one of the main goals of the human rights conventions.[11] Arguably, one way of improving effectiveness is to adopt a 'constitutional' approach in human rights adjudication, ordering states to improve the domestic implementation of rights.[12] The efficiency challenge relates to the so-called 'docket crisis', especially affecting the ECtHR, which is unable to deal in an adequate time with the high number of complaints it receives.[13] One of the reasons for the backlog is the number of 'repetitive' applications submitted to this court.[14] In this regard, ordering states to reform their domestic legislation in order to solve structural problems of incompatibility with the respective treaty can be a good way of diminishing the number of repetitive applications, improving the efficiency of the respective system by focusing on the improvement of domestic human rights protection.

Therefore, legislative measures can be considered a particularly ambivalent remedial practice. They can be very helpful in order to render the systems more efficient, tackling structural problems that can trigger many applications, and improving the internal protection of human rights, but at the same time, they can be a source of criticism for undue interference with the democratic decision-making of domestic parliaments. This book, therefore, aims to establish when and how these remedies should be included in

10 See generally, regarding these two concepts and its differences, Iain Cameron, "The Court and the member states: procedural aspects", in Andreas Follesdal *et al.* (eds.), *Constituting Europe*, Cambridge: CUP, 2013, pp. 25-61.

11 See Art. 1 of the ECHR, Art. 1 of the ACHR and Art. 1 of the ACHPR.

12 See on this issue Steven Greer, "Constitutionalizing Adjudication under the European Convention on Human Rights", *Oxford Journal of Legal Studies* 23(3), 2003, pp. 405-433.

13 See for example the Copenhagen Declaration (2018), in which the caseload challenge is pointed to as "a reason for serious concern". It also notes that "that further steps will need to be taken over the coming years in order to further enhance the ability of the Court to manage its caseload".

14 See Antkowiak, *CJTL* 2008, at p. 354, arguing that "flaws in [the ECtHR's] remedial framework are partially responsible for the Strasbourg Court's current crisis". The concept of 'repetitive applications' means applications directed against the same state and related to the same substantive issue (e.g., human rights violations against different persons caused by the same law).

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judgments and to assess if the current approach used by the three regional human rights courts is appropriate in this regard.

I. Conceptual Clarifications

This book will mainly revolve around a concept – that of legislative remedies before human rights courts. In this regard, it is first necessary to delimit and clarify this concept. In a nutshell, the concept implies binding judicial orders to legislate following the finding of a human rights violation. The concept of legislative remedies might, however, be confusing at first glance, as one might understand that these are remedies established in legislation. Instead, these are remedies imposed by the judiciary, whereby the legislative element is to be found in their content and not in their origin. In this respect, it is useful to briefly clarify what is meant by each of the elements of "Legislative Remedies before Human Rights Courts".

1. "*Legislative …*"

The legislative element is very important for this study, implying an obligation for the state to legislate in some way. This can take place through the amendment of a specific domestic law, but also through its repeal or the adoption of a new law. The differences between these types of legislative actions will be examined, but the term is meant to encompass all three situations. The remedial case law of regional human rights courts includes a wide array of measures, though most of them require executive action, which can consist, for example, of the payment of compensation, the restitution of property, or the publication of judgments. Some of them also require actions by the judiciary, such as the retrial of victims or the investigation into human rights violations and the prosecution and punishment of those responsible. However, human rights judgments prescribing legislative action are much rarer and carry particular problems, as will be shown later in this book.

The legislative element usually emerges very clearly from the wording of the remedial measure, but these measures can sometimes be rather vague and must be read in conjunction with the rest of the judgment in order to find that they require legislative action. This is generally the case with the remedial measures of the ECtHR, as will be explained in more detail

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in Chapter 3. But also some measures of the other two courts can be confusing in this regard. For example, in a case related to the territorial rights of indigenous communities, the ACtHPR prescribed the adoption of "all necessary measures, legislative, administrative or otherwise" in order to delimit and title the ancestral lands of the Ogiek people.[15] A difference with the IACtHR's remedial measures in similar cases is that here the ACtHPR refers exclusively to one indigenous community (the Ogiek), while the IACtHR usually extends such a remedy to all indigenous peoples residing in the territory of the respondent state.[16] In the latter case, this would likely need to be done through legislation. In the former case, however, the legislative nature of these measures is less clear, as demarcating and titling the territory of one particular community can in principle be done through administrative measures. In fact, the Court argued that, in this case, "the legal framework in the Respondent State already possesses legislation that can be used to effect restitution of Ogiek ancestral land".[17] Therefore, this is a measure that cannot be considered a legislative remedy *stricto senso*.

Despite this caveat, it will be shown that there are some remedial measures in which the legislative nature can be very clearly observed, while in others it is more an issue of interpretation. Thereby, this study adopts a contextual interpretation that assumes a legislative remedy when this can be inferred from the particular circumstances of the case and there is no specific indication to the contrary. In any case, it is also necessary to clarify that not every finding of a human rights court concerning the incompatibility of legislation will be examined, nor the recommendations to reform it, but only the binding judicial orders in this regard. This is where the concept of remedies comes into play.

2. "… *Remedies* …"

In the adjudicatory context, the concept of remedies is generally understood as "the judicial relief which legal systems provide for the enforcement

15 ACtHPR, *ACmHPR vs. Kenya* (2022), operative paras. vi) and vii).

16 See for example IACtHR, *Kaliña and Lokono Peoples vs. Suriname* (2015), operative para. 14 ("the State shall take the necessary measures to establish an effective mechanism for delimiting, demarcating and titling the territories of indigenous and tribal peoples in Suriname"). See also IACtHR, *Yakye Axa vs. Paraguay* (2005), operative para. 10.

17 ACtHPR, *ACmHPR vs. Kenya* (2022), para. 96.

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or defence of substantive rights".[18] This concept, however, comprises two distinct aspects: a procedural and a substantive one. The former encompasses the procedures and institutions that allow for the enforcement of rights. A remedy in this regard would consist of granting access to a judicial procedure, irrespective of the outcome. On the other hand, the substantive understanding of remedies refers precisely to the outcome of these proceedings, i.e. the specific measures ordered for redressing an infringement or preventing its recurrence. In this understanding, remedies adopt the form of secondary obligations for states, i.e. obligations that arise from the breach of a primary obligation.

In scholarship, this is sometimes also referred to as reparation, and in some instances, both terms are used interchangeably.[19] However, 'remedy' in a substantive understanding has a broader meaning than 'reparation'. According to the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), reparation takes the form of restitution, compensation or satisfaction. This concept thus usually comprises only the measures aimed at redressing those injured by the wrongful act. There are, however, additional secondary obligations arising from an internationally wrongful act which aim at the protection of community interests.[20] The term 'remedy', as utilised throughout this book, thus includes every secondary obligation that arises with the breach of an international norm, including – but not limited to – the obligation to provide full reparation.

This term, however, excludes the recommendations that judicial bodies make in the argumentative part of their judgments, as well as those contained in advisory opinions, as they lack the binding nature of remedial measures. Thus, only the measures included in the operative part of judgments will be taken into account, as they constitute the *res judicata* – as opposed to the statements included in the argumentative part, constituting

18 Chester Brown, *A Common Law of International Adjudication*, Oxford: OUP, 2007, p. 185.

19 See for example Dinah Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility", *AJIL* 96(4), 2002, pp. 833-856.

20 According to ARSIWA, cessation and guarantees of non-repetition are consequences of internationally wrongful acts separate from reparation. See André Nollkaemper, "Constitutionalization and the Unity of the Law of International Responsibility", *Indiana Journal of Global Legal Studies* 16(2), 2009, pp. 12-13 ("Indeed, the obligation of cessation, and the obligation to provide guarantees of non-repetition, have more to do with a return to legality than with reparation for injury."). He considers this shift from injury to legality as a "step toward a more public law, and indeed, constitutionally oriented, law of responsibility".

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the *res interpretata*. In this respect, the status that primary obligations possess in domestic constitutional contexts is also mostly irrelevant for this study, as states are obliged to implement the remedial measures issued by an international court that has jurisdiction over them independently of this status. This is clearly the case in international human rights adjudication, as states have a concrete treaty obligation to abide by the *res judicata* of these courts' judgments against them.[21]

3. "…*before Human Rights Courts*"

Furthermore, a terminological distinction needs to be drawn between extrajudicial remedies in international law and those pertaining to the field of international adjudication. Extrajudicial remedies can be imposed "by act of the party injured, by operation of law [or] by agreements between parties".[22] They are therefore remedies that are imposed without a judicial decision expressly ordering them. A typical form of extrajudicial remedies consists in sanctioning states for their breach of international norms.[23] On the contrary, the remedies examined here are those awarded by courts, with binding character for the respondent party. This also excludes the measures contained in the decisions of quasi-judicial institutions – such as the Inter-American Commission of Human Rights (IACmHR), the African Commission on Human and Peoples' Rights (ACmHPR) or the UN human rights treaty bodies – as they lack the formal binding force of remedies.

Extrajudicial and judicial remedies are closely interlinked. The ARSIWA, for example, consists mainly of a codification of extrajudicial remedies, serving to "shape the expectations of parties to a dispute, becoming a basis for negotiations when international obligations are breached".[24] This does not, however, prevent international courts from invoking the ARSIWA in

21 Whether they have also an obligation to abide by the *res interpretata* is a more contentious issue in human rights adjudication, whereby the constitutional context would arguably come into play. See for example Davide Paris, "Allies and Counterbalances – Constitutional Courts and the European Court of Human Rights: A Comparative Perspective", *ZaöRV* 77, 2017, pp. 623-649, at p. 648, arguing that domestic constitutional courts can deviate from the *res interpretata* in the context of implementing ECtHR judgments (but not from the *res judicata*).

22 Capone, "Remedies", in *MPEPIL*, para. 1.

23 For a general overview on this topic, see Matthew Happold and Paul Eden (eds.), *Economic Sanctions and International Law*, Oxford: Hart, 2016.

24 Shelton, *AJIL* 2002, p. 833.

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order to support their own decisions regarding remedies.[25] This was also the aim of the ILC, when it decided the ARSIWA "should be allowed to stand as Articles to be taken up by courts and tribunals as deemed appropriate".[26]

Moreover, the origin of extrajudicial remedies in international law can be traced back to antiquity,[27] while judicial remedies are more recent. Most authors situate their origin at the beginning of modern arbitral practice, particularly in the context of the Jay Treaty of 1794.[28] This treaty, concluded between the United States and Great Britain, provided the basis for the creation of three mixed commissions whose function was to settle issues among these states that could not be solved through negotiation. In this context, it was assumed for the first time that the remedies allowed for in international law are analogous to those of domestic law.[29] This was the approach of arbitral tribunals in the subsequent decades.[30] As the relevant treaties of that time tended not to include aspects related to the availability of specific remedies, this was left to arbitral discretion. Judicial remedies thus evolved through this arbitral jurisprudence during the 19th and early 20th centuries. Nevertheless, that practice was far from consistent, having been described as "a chaos of conflicting decisions".[31] In addition, throughout that period remedies were almost exclusively confined to the payment of damages for the violation of international agreements.[32]

This changed with the establishment of the Permanent Court of International Justice (PCIJ) in 1922. In front of this court, remedies evolved from monetary compensations to more sophisticated forms of redress. The

25 See generally UN Secretary General, *Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies*, Report of the Secretary-General, UN Doc. A/74/83, 2019.

26 James Crawford, "The International Court of Justice and the Law of State Responsibility", in Christian Tams and James Sloan (eds.), *The Development of International Law by the International Court of Justice*, Oxford: OUP, 2013, pp. 70–86, at p. 81.

27 Extrajudicial remedies in antiquity took the form of war indemnities. An example in this regard are the reparations imposed by Rome over Carthage after the First Punic War. See generally Kim Oosterlink, "Reparations", in Steven N. Durlauf and Lawrence E. Blume (eds.), *The New Palgrave Dictionary of Economics*, 2nd edition, London: Palgrave Macmillan, 2008.

28 Christine Gray, *Judicial Remedies in International Law*, Oxford: OUP, 1990, p. 5.

29 Capone, "Remedies", in *MPEPIL*, para. 6.

30 Gray, *Judicial Remedies in International Law*, 1990, p. 6 ("the borrowing of remedies from municipal law was carried out unquestioningly by tribunals").

31 Gray, *Judicial Remedies in International Law*, 1990, p. 10.

32 Gray, *Judicial Remedies in International Law*, 1990, p. 12 ("the award of remedies other than damages by international arbitral tribunals is extremely unusual").

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judgment of the *Factory at Chorzów* case (1927) is especially relevant in this regard, as will be observed in Chapter 2. When the International Court of Justice (ICJ) succeeded the PCIJ in 1945, it continued with the task of developing an international law of remedies, shaping and applying further measures. Thereafter, more specialised international tribunals began to emerge, such as the regional human rights courts, which will be the main object of study in this book. Each of these tribunals progressively developed its own remedial practice from the point of departure of general international law. Eventually, the three regional human rights courts began, for different reasons, to order states to reform their domestic laws, as will be seen in Chapter 3. This study will thus primarily focus on the field of international human rights adjudication, whilst also briefly analysing the issue of remedies in general international adjudication. The latter analysis will allow for an examination of the main differences between these two fields and whether legislative measures form part of a sort of 'remedial *lex specialis*'.

II. Methodological Clarifications

As previously mentioned, this book intends to offer a systematic analysis of legislative remedies before human rights courts, comparing the remedial practice of the three aforementioned human rights courts in this respect and looking at all relevant features of this remedy from different perspectives, thereby analysing both doctrinal discourses and empirical data. In order to do so, the main research questions will be: Is the reform of domestic laws a consistent remedy in international human rights adjudication? When and how is this remedy applied? What are its main features and problems? Is the approach employed by human rights courts in this respect normatively adequate?

These general questions can be divided into more specific questions that will be addressed in the respective chapters of the book. In this regard, the first part of the book will contend with the following questions: To what extent do human rights treaties affect domestic laws? How do human rights courts perform the review of legislation? Are legislative remedies part of a 'remedial *lex specialis*' of human rights courts? What was the historical process and the reasons that led the respective human rights courts to issue these types of remedies? How do they fit in the overall remedial landscape before each regional human rights court?

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In turn, the second part will try to answer the following questions with the help of a case law analysis: Which type of human rights issues are being tackled through legislative remedies? Is there a common understanding among human rights courts in this regard? What degree of discretion should be afforded to the legislator in order to implement these remedial measures? What are the courts' respective approaches towards the issue of remedial deference? What are the main consequences of legislative remedies? Are legislative remedies more likely to generate non-compliance and backlash? Finally, the conclusion will briefly assess whether the previously examined remedial practice of each human rights court is adequate in light of several normative considerations.

In order to answer this array of questions, the first part of the book will build on a rather doctrinal and analytical method, while the second part will be based on an analysis of case law with a comparative approach regarding the results. With regard to the consequences of legislative remedies, the last chapter will also make use of case studies in order to focus on more concrete aspects. In this respect, the first part does not present major methodological issues; the second part, however, necessitates the clarification of some aspects. As it consists of an analysis of case law that includes all judgments containing legislative measures, a very relevant aspect is the identification of these measures. They are relatively easy to identify in the cases of the IACtHR and the ACtHPR, but with the ECtHR this looks different, as will be explained in the next section. Concerning the comparative element of the analysis, it is argued that, despite several differences in the historical development, context and practice of the three regional human rights courts, comparing their remedies seems appropriate in light of the equivalency of these remedial measures. However, some of the main differences among them should be highlighted.

1. *Identifying Legislative Measures: the Special Case of Legislative Remedies before the ECtHR*

Before both the IACtHR and the ACtHPR, the obligation to carry out a legislative reform after an infringement is a rather straightforward issue. When this is prescribed in the operative provisions of a judgment, states are obliged to legislate, and when this is not the case they are not required to do so. There are certainly cases in which states reform their legislation after a judgment of these courts without it being expressly ordered. This is

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however exceptional, and the link between the judgment and the reform is rather tenuous. Other potential aspects come into play, especially domestic political preferences that use international judgments as a justification that can lower the political costs of a perhaps unpopular reform.[33]

In the case of the ECtHR, the emergence of such a secondary obligation is arguably less clear. This is primarily due to the institutional architecture of the European human rights system and the role of the Committee of Ministers (CoM) in supervising the execution of judgments, as this body is able to request additional measures besides those expressly ordered in the operative part of a judgment.[34] Once the ECtHR delivers a judgment, it is transferred to the CoM (an intergovernmental body of the Council of Europe), which is in charge of supervising its execution.[35] The Department for the Execution of Judgments of the ECtHR (usually called the 'Secretariat') plays a very important role in this regard, acting as an intermediary between the respondent state and the CoM.[36] In this context, the respondent state has to deliver an Action Plan to the Secretariat specifying the measures it will take in order to comply with the judgment.[37]

Ideally, when presenting an Action Plan, states should already envisage the adoption of appropriate individual and general measures. This should include legislative reforms whenever the violation stems from a legal provision or when its legal order prevents the state from providing an effective remedy at the domestic level. In practice, however, states often depict the

33 The reform can thereby be defended internally as an external imposition, even if only indirect.

34 See Octavian Ichim, *Just Satisfaction under the European Convention on Human Rights*, Cambridge: CUP, 2014, p. 38 ("The Committee of Ministers has the authority to impose certain actions or even legislative adjustments"). See also Linos-Alexander Sicilianos, "The Involvement of the European Court of Human Rights in the Implementation of its Judgments: Recent Developments under Article 46 ECHR", *NQHR* 32(3), 2014, pp. 235–262, at p. 254 ("To put it otherwise, by supervising the execution of the Court's judgment, the Committee of Ministers frequently specifies (some of) the legal consequences of the violation of the Convention").

35 See generally Raffaela Kunz, "Securing the survival of the system: the legal and institutional architecture to supervise compliance with the ECtHR's judgments", in Rainer Grote, Mariela Morales and Davide Paris (eds.), *Research Handbook on Compliance in International Human Rights Law*, Edward Elgar, 2021, pp. 12-41.

36 See Basak Çalı and Anne Koch, "Foxes Guarding the Foxes? Peer Review of Human Rights Judgments by the Committee of Ministers of the Council of Europe", *HRLR* 14(2), 2014, pp. 301-325.

37 Or an Action Report in case it considers that all necessary measures have already been taken. See Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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violation as resulting from a wrong application of the law and affecting only the victims of the case at hand. Thus, they usually limit their action plan to the payment of just satisfaction ordered by the Court.[38] This is what Hillebrecht termed "the low-hanging fruit" in compliance with human rights judgments.[39]

In such cases, the role of the Secretariat and the CoM becomes more relevant. These bodies will examine whether states – besides paying the compensation ordered by the Court – adopt the necessary individual and general measures,[40] assessing the action plans and reports and carrying out dialogue with the concerned state.[41] In practice, this means that the Secretariat, before issuing a recommendation to the CoM regarding the compliance status and whether to close the supervision proceeding, can ask for individual and general measures.[42] In order to assess the need for such measures, the Secretariat will evaluate the facts of the case and the violation established, as well as the Court's review in this regard. If the CoM then considers that general measures (such as legislative reforms) are necessary to comply with the judgment and those are not envisaged by the states, it can oblige them to modify the action plans to include such measures. However, this will ultimately depend on the political negotiations

38 See for example Alice Donald and Anne-Katrin Speck, "The European Court of Human Rights' Remedial Practice and its Impact on the Execution of Judgments", *HRLR* 19, 2019, pp. 1-35, at p. 22 ("Governments may use the absence of specific remedies as an excuse to propose the narrowest possible solution to the dysfunctions identified by the Court").

39 Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance*, Cambridge: CUP, 2014, pp. 61-65.

40 See Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, Rule 6 (2) (b), establishing that the CoM will examine among others whether "general measures have been adopted, preventing new violations similar to that or those found or putting an end to continuing violations". See generally also Helen Keller and Cedric Marti, "Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights Judgments", *EJIL* 26(4), 2016, pp. 829-850.

41 It has been argued in this regard that "the Court examines and decides whether the personal interest has been affected, while the Committee of Ministers basically defends the general interest" (Ichim, *Just Satisfaction,* 2014, p. 34).

42 See Krzysztof Wojtyczek, "Judicial and Non-Judicial Elements in the Enforcement Mechanism of the European Convention on Human Rights", in Paulo Pinto de Albuquerque and Krzysztof Wojtyczek (eds.), *Judicial Power in a Globalized World*, Springer, 2019, pp. 653-672, at p. 669, noting that "[t]he determination of legal consequences is made in the form of the decision to close or not the supervision proceedings, accepting or not the measures presented by the respondent Government".

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held before the CoM at an intergovernmental level, which often lead to the acceptance of such minimal compliance.[43]

Thus, it can be seen that legislative reforms as a consequence of ECtHR judgments are nothing rare, even if the Court usually abstains from prescribing them.[44] Nevertheless, whether legislative reforms are implemented or not in these types of cases will largely depend on the willingness of the respondent state's legislative or judicial authorities, or – if they lack such willingness – on the intergovernmental negotiations taking place in the execution phase before the CoM. This is different when legislative measures are included in the operative paragraphs of ECtHR's judgments, as these are the only cases in which there is no room for negotiation.[45] This is the only situation in which they can be conceptualised as legislative remedies, as here the requirement to reform domestic laws is legally binding.[46] These are, therefore, the cases that will be examined in more detail in the following chapters.

43 See Dia Anagnostou and Alina Mungiu-Pippidi, "Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter", *EJIL* 35(1), 2014, pp. 205-227, at p. 212, mentioning the criticism to the CoM "for accepting minimal government action (…) as sufficient to acknowledge compliance". See also Laurence Helfer, "Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime", *EJIL* 19(1), 2008, pp. 125-159, at p. 147, highlighting that "the Court's unwillingness to identify specific remedies (…) generated disputes within the Committee of Ministers concerning the scope of a respondent state's legal obligations".

44 Actually, after quantitatively examining the implementation of all leading judgments of the ECtHR until 2016, Stiansen finds that "approximately 25 per cent of cases require legislative changes for compliance". See Øyvind Stiansen, "Delayed but not Derailed: Legislative Compliance with European Court of Human Rights Judgments", *IJHR* 23(8), 2019, p. 1224. Sadurski even argued that "the fiction according to which, before its pilot judgments, the Strasbourg rulings dealt with specific cases, and not with the law, was just that: a fiction" (Wojciech Sadurski, "Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments", *HRLR* 9(3), 2009, pp. 397- 453, at p. 421).

45 See for a more detailed explanation Chapter 3 of this book.

46 See for example Lech Garlicki, "Broniowski and After: On the Dual Nature of 'Pilot Judgments'", in Lucius Caflisch *et al.* (eds.), 2007, p. 185, explaining that one of the main features of pilot judgments is that it "constitutes not a mere recommendation but a command, at least in respect of those of its components included in the operative part of the judgment".

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2. *Comparing the Three Regional Human Rights Courts*

After identifying these judgments, the remedial practices of the three regional courts will be analysed and compared. This study will thus be situated in the field of comparative international law, as it compares the approaches adopted by different regional actors with respect to international adjudication. It carries out what Roberts *et al.* term 'thick comparativism', as it compares the actual practice of courts instead of only the legal norms.[47] More concretely, it will focus on what has been labelled 'comparative regionalism' by comparing specific regional human rights systems and actors.[48]

The three regional human rights courts present notable differences in their structure and jurisdiction. This is to some extent a result of their context and historical evolution. The ECtHR was already established by 1959, followed by the IACtHR in 1979 and by the ACtHPR only in 2004. In this regard, the latter courts are part of an adjudicatory system composed of two levels, with a human rights commission accompanying the court, while in the case of the European system, the Commission was dismantled in 1998 with the entry into force of Protocol 11. This has some important implications for the jurisdiction exercised by these courts. In the case of the ECtHR, individuals can submit a complaint directly to the Court if the admissibility requirements are met. On the contrary, in the Inter-American system, individuals can only submit a complaint to the IACmHR, which will then examine the complaint and issue recommendations if it finds an infringement. Only if the state fails to comply with these recommendations will the case be transmitted to the IACtHR. This is similar to the case of the ACtHPR, with the difference being that—through an optional declaration—states can also allow individuals and NGOs to access the African Court directly.

Another important difference between these systems concerns the number of judgments issued annually by each court, which amounts to over 1000 in the case of the ECtHR, while they comprise only around twenty by both the IACtHR and the ACtHPR. Moreover, supervising compliance with the judgments is a judicial task in the case of the IACtHR, while in the European and African systems, this task is carried out by intergovernmental

47 See Anthea Roberts *et al.*, "Comparative International Law: Framing the Field", *AJIL* 109, 2015, at p. 471.

48 See generally Tanja Börzel and Thomas Risse (eds.), *The Oxford Handbook of Comparative Regionalism*, Oxford: OUP, 2016.

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political bodies. All of these differences have notable effects on the remedial practice of the courts and will therefore be taken into account when analysing and comparing this practice along the rest of this book. Further differences that will be examined in this context concern the personal competence to submit an application to these courts, their advisory function, their self-understanding and their geopolitical context.

In any case, it is a fact that all three courts prescribe in some instances the reform of domestic laws, thus clearly constituting a practice that allows for comparison. In addition, the comparison of regional human rights courts has been gaining traction in scholarship during the last decade.[49] One can find general comparisons of the human rights courts in their context,[50] but also more specific ones concerning their historical evolution,[51] their approach towards specific types of cases,[52] or even their remedial intrusiveness.[53] Thus, the comparative approach seems to be adequate in this context, while taking into account the intrinsic differences among the regional human rights systems.

III. Structure and Overview

This book will be divided into two main parts, each consisting of three chapters. The first part of the book will deal with the concept of legislative remedies more generally, asking whether it constitutes a particularity of

49 Comparisons between the ECtHR and the IACtHR are the most usual in this respect, while the ACtHPR has only figured in more recent comparative analyses, due to the fact that the latter court has only started to develop its jurisprudence rather recently. See in this respect Başak Çalı, Mikael Rask Madsen and Frans Viljoen, "Comparative regional human rights regimes: Defining a research agenda", *I•CON* 16(1), 2018, pp. 128–135.

50 Laurence Burgorgue-Larsen, *Les 3 cours régionales des droits de l'homme in context*: *La justice qui n'allait pas de soi,* Paris: Éditions Pedone, 2020.

51 See Alexandra Huneeus and Mikael Rask Madsen, "Between universalism and regional law and politics: A comparative history of the American, European, and African human rights systems", *I•CON* 16(1), 2018, pp. 136– 160.

52 Francesco Seatzu and Simona Fanni, "A Comparative Approach to Prisoners' Rights in the European Court of Human Rights and Inter-American Court of Human Rights Jurisprudence", *Denver Journal of International Law and Policy* 44(1), 2015, pp. 21-40; Bertoni, Eduardo Andrés, "The Inter American Court of Human Rights and the European Court of Human Rights: A Dialogue on Freedom of Expression Standards", *EHRLR* 3, 2009, pp. 332-352.

53 Başak Çalı, "Explaining variation in the intrusiveness of regional human rights remedies in domestic orders", *I•CON* 16(1), 2018, pp. 214-234.

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international human rights law and examining how it fits within the overall landscape of remedies, both in general international adjudication and human rights adjudication. The second part of the book will then analyse in detail the legislative remedies awarded by the three regional human rights courts, comparatively examining what type of human rights issues they are intended to tackle and if their wording allows for enough legislative room of manoeuvre, as well as the consequences of these remedies.

Chapter 1 will provide a first overview of the concept of legislative remedies, linking it to the obligations to legislate included in human rights treaties as well as to the review of legislation carried out by human rights courts. This concept will also be examined through the lens of the global constitutionalism approaches, arguing that these remedies provide for an increased constitutionalisation of human rights adjudication. In this respect, despite legislative measures being more intrusive than other remedies, it will be concluded that human rights courts are legitimated to issue them under certain circumstances.

Chapter 2 will then deal with legislative remedies in the area of general international adjudication. This is useful in order to answer the question of whether these remedies are a particularity of human rights adjudication and if they would fulfil the same function if applied by general international courts, particularly by the ICJ. In this context, the chapter explores the landscape of remedies in general international law, and how the ICJ has approached this issue. In addition, it inquires more concretely on whether legislative measures could be ordered by the ICJ, and what their remedial function would be in the context of general international law. It will conclude that although the ICJ would have the competence to order the reform of domestic laws, it should be cautious to employ it due to this court's particular function in the ecosystem of international adjudication.

Chapter 3 will then return to international human rights adjudication, situating legislative remedies in the remedial landscape of regional human rights courts. The chapter will inquire about the special nature of remedies in this field and explore whether legislative remedies are an intrinsic part of it. In addition, the evolution and the current remedial practice of human rights courts will be analysed and legislative remedies will be situated therein, before moving to the second part of the book in which the case law analysis concerning these remedial measures is carried out.

This case law analysis will start in Chapter 4 by establishing a typology of legislative remedies, dividing them into ten categories of specific human rights issues. Thereby, the chapter will examine whether legislative

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measures are a consistent remedy before human rights courts with respect to *when* they are employed. It will be concluded that the regional human rights courts have a common understanding of these measures, shown by the fact that most of them are awarded in order to tackle similar human rights issues, whereby the protection of vulnerable groups and fair trial rights play a paramount role. However, it will also be argued that the three courts have different priorities in this respect, as each of them has favoured the use of legislative remedies for a particular issue that the other two have not considered to be as relevant. This does moreover reflect the self-understanding of human rights courts concerning their role in their respective region.

Chapter 5 – continuing with the analysis of case law – focuses on the common nature of legislative measures with regard to *how* they are applied. The chapter will thereby analyse the wording of these measures and the issue of remedial deference towards domestic legislatures. A concept developed in this context is that of the 'margin of deliberation', implying that legislative remedies should not prevent legislatures from deliberating in order to implement them. They should be therefore sufficiently vague as to the expected outcome of the legislative reform, an issue that should be preferably decided through democratic deliberation. An exception concerns however states with authoritarian tendencies, in which the democratic conditions for this deliberation to take place are not fully present. Then, the chapter will analyse the mechanisms developed by human rights courts that relate to deference *vis-a-vis* legislatures, as well as the diverging specificity in the courts' legislative remedies, taking into account the approach developed by each human rights court in this regard.

Chapter 6 will then finally focus on the post-judgment phase, exploring the consequences of legislative remedies. First, the chapter will inquire to what extent the instances of backlash against regional human rights courts are related to their legislative measures. Then it will turn to the issue of compliance, examining if and why legislative measures are less likely to be timely implemented by states, an issue that is mainly related to domestic execution procedures. It will also be argued that, despite difficulties in its implementation, legislative remedies are able to have an impact that extends beyond the case at hand, *inter alia* by providing an opportunity structure for civil society actors to engage in strategic litigation. Finally, the question of whether and how human rights courts have reacted to the issues of backlash and non-compliance in relation to legislative remedies will also be explored in this last chapter.

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