Concluding Remarks

As has been shown throughout this book, legislative remedies are a relatively common instrument before human rights courts, especially if one leaves the usual Eurocentric perspective aside. Arguably, it is also a type of remedy that deserves more attention. In this regard, the book has made a number of relevant findings concerning this remedy, which will be summarised below. In addition, this concluding part will offer a brief normative assessment of the human rights courts' approach to this remedial practice, which consists of ordering states to reform their domestic laws. It will be argued that an increased constitutionalisation of human rights adjudication might be necessary in this context, not in the sense of admitting only a small number of applications that raise structural issues, but in that of intervening at a structural level whenever this is necessary. On the other hand, such structural interventions (*inter alia* in the form of legislative remedies) should not be too specific, as domestic legislatures must retain a margin of deliberation. In this context, the ECtHR is probably falling short on the former issues, while the IACtHR is going too far on the latter one and the ACtHPR is probably achieving the best balance in this regard.

I. Main Findings

Chapter 1 of this book provided a first overview of the concept of legislative remedies. It explored the relationship between human rights courts and domestic laws around three different stages, taking into account the primary obligations to legislate under human rights treaties, the review of legislation carried out by human rights courts and their remedial orders in this respect. It found that legislative remedies can be to some extent considered a concretisation of these primary obligations to legislate. These obligations are both customary (in particular the general obligations to legislate) and treaty-based (especially the specific obligations to legislate). In addition, the first chapter highlighted some important developments in the international human rights review of legislation, concerning in particular the competence to exercise this review *in abstracto*. A notable innovation in this context can be observed before the ACtHPR, which has consistently accepted to review the compatibility of laws without the need to identify a victim to whom

the law was applied. On the contrary, both the ECtHR and the IACtHR generally review only laws that were actually applied and thereby caused an alleged human rights violation, despite some exceptions in this respect. Another potential way of reviewing laws *in abstracto* relates to the advisory competence of human rights courts, but it was shown that it is a potential that has remained largely unused. Finally, the chapter argued that legislative remedies make an important contribution to the constitutionalisation of human rights adjudication, assuming a role that is usually reserved for constitutional courts, and that human rights courts are legitimised to order such sovereignty-intrusive measures under certain circumstances. The latter is due to the increased interconnectedness between sovereignty and human rights protection and to the (at least implicit) consent of states to this practice.

The first part of this book made also a comparison between remedies in general international adjudication and human rights adjudication, in order to show that those pertaining to the latter field possess a special nature and that legislative remedies form an intrinsic part of this specialty. In this respect, although the regulation and codification of remedies are not fundamentally different in both areas of international law, in practice human rights courts have progressively departed from the approach taken by the PCIJ and by the ICJ, which was examined in Chapter 2. Notably, the increasing focus of human rights courts – especially the IACtHR and the ACtHPR – on satisfaction and guarantees of non-repetition is not mirrored in the jurisprudence of the ICJ, where measures of cessation and restitution prevail. The use of legislative measures is also part of this particularity of human rights adjudication. Although the ICJ has never ordered a legislative reform, it was argued in light of the cases in which this Court has dealt with domestic laws that if it would do so this would probably adopt a different function than guaranteeing non-repetition. Thus, it can be concluded that there is a 'remedial *lex specialis*' in human rights law and, therefore, remedies before human rights courts should not be assessed under the logic of the general law of state responsibility.

In addition to comparing remedies in these two fields of international law, it was also useful to compare in Chapter 3 the remedial landscape before each regional human rights court, and the evolution of their respective practice in this regard. The most notable differences are related to the remedial self-restraint of the ECtHR on the one hand and the remedial activism of the IACtHR on the other, whereby the ACtHPR has also tended towards the approach of its American counterpart. These differences

between courts can be attributed to the remedial legal basis included in the respective instruments, as well as the historical and political context in which the three courts were created and evolved.

An observation concerning these contextual explanations is that international courts situated in the Global South, such as the IACtHR and the ACtHPR, are generally less worried about stepping outside the traditional boundaries of international adjudication and intruding on the sovereignty of states with their remedies. On the contrary, those situated in the Global North, such as the ECtHR, are considerably more restrained in this respect. In the case of the ICJ, the different geographical origin of its judges can lead to some sort of compromise on this issue, whereby remedies end up being not as intrusive as that of the Global South courts (such as the IACtHR) but more than those of the Global North (such as the ECtHR). This is also mirrored at the domestic adjudicatory level.[1430] For example, a number of constitutional courts in the Global South have adopted a transformative approach that aims at changing social structures through individual cases, thereby issuing remedies that step well into the political realm.[1431] This has not taken place to the same extent before constitutional courts of the Global North.

This difference might be due to the fact that these regions of the Global South have had more recent experiences of authoritarianism, and perhaps these regional courts have an increased mistrust towards domestic politicians and institutions. In any case, regional courts in the Global South have developed a particular understanding of international adjudication, and this is reflected in their remedial practice. However, this is not without problems, as states in the Global South, due to the history of intrusions in their sovereign sphere by foreign states and international institutions (especially those of a financial nature) are more zealous to protect their sovereignty against such outside interventions. Therefore, the remedial practice of human rights courts has also been the cause of resistance and even backlash on behalf of states, an issue that was examined in chapter 6 of this book.

1430 Being therefore related to what Çalı termed as the 'legal culture explanation' for the variation in the intrusiveness of remedies. See Çalı, *I•CON* 2018, pp. 214-234.

1431 See generally Philipp Dann, Michael Riegner and Maxim Bönnemann (eds.), *The Global South and Comparative Constitutional Law*, Oxford: OUP, 2023; Daniel Bonilla Maldonado (ed.), *Constitutionalism of the Global South,* Cambridge: CUP, 2013.

In general, the second part of the book turned around the actual practice of regional human rights courts with respect to legislative remedies. This was done through an analysis of case law in which all legislative measures issued by human rights courts were identified, grouped, and analysed. First, Chapter 4 divided these remedies into ten categories, related to the specific human rights issues they deal with. This showed that the three courts have a common understanding of such measures, as most of them were issued to tackle the same problems in different regions, especially those related to fair trial rights and to some extent also to the protection of vulnerable groups. However, the three courts have also different priorities in this regard, as shown by the fact that each of them has afforded increased attention to a particular issue in the context of its legislative remedies. This is the case of property rights before the ECtHR, electoral rights before the ACtHPR, and the codification of criminal offences (especially enforced disappearances) before the IACtHR. Arguably, these priorities are also a good reflection of the self-understanding of each regional court with respect to its particular mission, with the strong 'nunca más' element at the IACtHR, the role of the ACtHPR as a democracy defender and the liberal human rights approach of the ECtHR.

Then, Chapter 5 focused on the wording of these measures. This chapter also examined the question of the amount of deference that should be afforded by human rights courts to domestic legislatures, concluding that a 'margin of deliberation' is necessary in this respect. This implies that legislative bodies should be able to deliberate before implementing such remedies, which is in turn mainly related to the specificity of the remedial measures and the room of manoeuvre available for its implementation. If legislative remedies are too specific as to the outcome of the required reform, there is not much room for deliberation before the domestic legislature. In this regard, it was shown that in general, the IACtHR has employed a high degree of remedial specificity in these cases, while the legislative measures of the ECtHR are considerably vague and those of the ACtHPR lay in between.

Finally, Chapter 6 dealt with the consequences of legislative measures. These consequences are mainly related to the issues of (non-)compliance and backlash. It was shown that concrete legislative remedies contributed to or were even the main cause of backlash by some individual states in the three regional systems. In addition, these measures take the longest to be implemented, although this is mostly related to a lack of effective domestic coordination mechanisms for the implementation judgments that involve

the legislature. However, these remedies are also able to produce a notable impact, not only by catalysing reforms but also by triggering social debates around certain issues or empowering specific actors, such as specialised NGOs that have engaged in strategic litigation before regional human rights courts aiming precisely at the reform of legislation on concrete issues.

In sum, it can be concluded that legislative remedies have a high degree of consistency and commonality in international human rights adjudication, especially with respect to the issue of when they are employed and the type of consequences they trigger. The three courts have consolidated their remedial practice, and legislative measures clearly form part of it. However, the answer to this question becomes more nuanced if one does not focus on when, but on how legislative measures are applied. In that context, each court has developed a distinct approach regarding the wording and specificity of such measures, as well as the frequency of their use. It is thus also necessary to briefly assess the practice of the three regional courts in this respect.

II. Nomative Assessment

The first element of this assessment concerns the general competence of these courts to order legislative reforms. Nowadays there should be no doubts about the existence of this competence. This remedial practice has been consolidated separately in each regional system, and even if it was not part of the original cession of state sovereignty to these courts, it can be considered that in view of this consolidated jurisprudence states have acquiesced to it. Despite the aforementioned instances of resistance and non-compliance with such orders, governments of state parties have not collectively attempted to modify this practice.[1432] Thus, it can be concluded that despite some individual objections to it, the majority of states have consented to the competence of human rights courts to order legislative reforms.

Moreover, from an international law perspective, it has been clear since the *Factory at Chorzów* judgment of 1927 that the competence of a court to

1432 As shown in Chapter 5, the arguably only instance of collective backlash against the IACtHR was the 'Five Presidents Declaration', and this affected only five of the twenty states subject to the jurisdiction of this Court, while in the case of the ECtHR, the state parties actually supported this remedial practice in the context of the 'Interlaken Process'.

decide the outcome of a case implies a competence to establish the appropriate remedies in this regard. As shown in Chapter 2, even a traditional international court such as the ICJ, whose role is generally to solve disputes among states and not to examine more broadly the compatibility of a domestic legal order with a treaty, would be competent to order legislative reforms. In the case of human rights courts, which were precisely set up to ensure that states live up to their international human rights commitments *inter alia* through legislation, their competence in that respect becomes more evident.

This is shown in the fact that every human rights treaty includes not only specific obligations to legislate in order to protect concrete rights or groups or to prevent or punish certain acts, but also general obligations to legislate in order to ensure that the state parties' domestic legal order conforms to the treaty and ensures the protection of the rights contained therein, as shown in Chapter 1. Even if there are human rights treaties that do not expressly include such a general obligation to legislate – such as the ECHR – this is considered to constitute a customary obligation under international law. Thus, if domestic laws are incompatible with the states' human rights obligations, or if states are failing to provide adequate protection of such rights due to the absence of laws, they are obliged to reform their legal order. What courts are doing in this respect can be regarded as a reiteration and concretisation of a primary human rights obligation of states.

One could therefore even ask if in such cases a human rights violation against a concrete victim needs to take place for a court to intervene and order a legislative reform. Despite some exceptions, this is the position taken both by the ECtHR and the IACtHR, due to the rules concerning its personal and material jurisdiction, which include a 'victim requirement' in order to submit cases before them. However, as examined in Chapter 1, the ACtHPR has adopted a different view on what constitutes a notable development in human rights adjudication. This court does not require the existence of a concrete victim and has admitted a number of complaints that concerned exclusively a domestic law or a legislative provision, without identifying any individual affected by it, often including legislative remedies in the context of such cases.

Although this may seem surprising for a human rights court, it does make sense due to the aforementioned conceptualisation of legislative remedies. If they are not viewed as secondary obligations that arise from the infringement of a primary obligation, being therefore inextricably linked to this infringement, but rather as a reiteration or concretisation of the

primary obligation, their link to a violation and a concrete victim is not a *conditio sine qua non* but can be dispensed with. In sum, the African Court is taking a novel approach to the issue of domestic laws' conformity with human rights obligations that can arguably be useful to prevent violations from occurring in the first place, providing this court with an undoubtedly stronger constitutional character.

The other two regional courts are more constrained in this respect through their strict procedural rules on jurisdiction, but loosening them and adopting a similar approach could be a promising option in order to follow the path of constitutionalisation. Nevertheless, this would not be without problems. If any individual could claim that laws are contrary to the respective convention without being affected by them, the most obvious risk is that courts would be flooded with such complaints, especially because the rule on the exhaustion of domestic remedies would be difficult to apply. In this regard, for an individual or an NGO to be empowered to bring a claim against the constitutionality of a legislative provision *in abstracto* at the domestic level is very rare. Usually, this competence is reserved to specific institutional bodies, such as parliamentary groups or ombudsmen. Thus, human rights courts would find themselves in a situation where the exhaustion of domestic remedies could not be required, as no such remedies are available. This is to some extent also occurring in the cases concerning an abstract review of legislation before the ACtHPR. When states objected to the admissibility of such cases claiming that the applicant had not exhausted domestic remedies, the ACtHPR dismissed the objections arguing that no remedies were available for an individual to challenge a domestic law.[1433]

Another aspect of this assessment concerns the use that each regional human rights court has made of its competence to issue legislative remedies. It is argued in this respect that whenever the courts find that the domestic legal order of states is incompatible with the corresponding treaty, they should order a reform of the concerned laws to make it compatible. However, despite constituting binding orders that prescribe these reforms, legislative remedies should be broad enough to leave the domestic legislature a margin of deliberation. This concept was developed in Chapter 5 of this book, and it implies that the legislature should have a certain amount of discretion to implement the legislative measures imposed by human rights courts. This is mainly due to the democratic legitimacy of the procedure

1433 See ACtHPR, *Lohé Issa Konaté vs. Burkina Faso* (2014), paras. 108-114.

and decisions adopted by legislative bodies, which is higher than that of the domestic executive or judiciary. In this respect, democratic deliberation is arguably a cornerstone of modern democracies, and it takes place to a considerable extent before legislative bodies. Thus, legislative remedies before human rights courts should afford a margin for legislatures to deliberate and democratically decide the concrete outcome of the requested reform. This can be done through remedial vagueness, by prescribing a legislative reform but avoiding to specify in detail how the new provision should be drafted, as explained in Chapter 5.

Of course, it is also possible that states could abuse the vagueness of legislative remedies, carrying out a reform that is not in line with the jurisprudence of the human rights court in question. This is to some extent related to the democratic decline witnessed in some states recently, as these are arguably more likely to abuse the lack of specificity. Therefore, it is argued that remedial specificity should be dependent on the respondent state in question, also because democratic deliberation is less likely to take place in states with authoritarian tendencies, as examined also in Chapter 5. In the case of other states, good faith in the implementation of judgments should arguably be presumed, and democratic deliberation should not be curtailed due to the potential of abuse regarding vague legislative remedies.

In this respect, it can be argued that the IACtHR has often been too specific in its legislative remedies. There are a number of judgments in which this court prescribed the concrete elements to be included in a legislative amendment, detailing as well how such elements should be regulated. The domestic implementation of such orders then turns into a sort of automatic task. No deliberation can take place because the judgment is to a great extent already drafting the new law, and implementing such judgments then simply consists in transposing these prescriptions into domestic norms. This has arguably been a source of backlash, as shown in Chapter 6.[1434] A higher degree of remedial deference would thus be probably convenient in this context. The IACtHR has even attempted to completely bypass the domestic legislature by determining that some laws "lack legal effect".[1435] Deciding on the domestic validity of laws is however clearly outside its

1434 As stated by Cavallaro and Brewer, the fact that the IACtHR is "instructing states not only to undertake general tasks, but also to carry them out in a specific way (…) can provoke hostile reactions by both states and the general public". See Cavallaro and Brewer, *AJIL* 2008, p. 824.

1435 See for example IACtHR, *Barrios Altos vs. Peru* (2001), operative para. 4.

sphere of competences. In general, only constitutional courts are empowered to deprive a legislative provision of legal effects domestically.

In addition, precisely because legislative remedies before constitutional courts are generally negative – prescribing the repeal of legislation – the deliberative element is not that relevant. If a law or a provision simply needs to be repealed, there is not much to be debated. The deliberation will take place at a later stage, when the legislature adopts a new law to replace the one that was declared unconstitutional. However, legislative remedies before the ECtHR and the IACtHR are usually of a positive nature, prescribing the adoption of new laws or the inclusion of specific elements into existing laws. Thus, the margin of deliberation becomes much more relevant for such positive legislative measures.

In the case of the ACtHPR this is different, being the only court that orders mostly legislative reforms of a negative nature. In addition, when this court included legislative reforms of a positive nature, it generally worded them broadly enough to allow for domestic deliberation. Thus, it can be concluded that in principle the ACtHPR's practice in this respect conforms to the normative considerations outlined above. While it prescribes legislative reforms in all cases in which it finds an incompatibility, it generally allows for a margin of deliberation for its implementation. It is nevertheless a jurisprudence that arguably lacks the consolidation and consistency of the other two regional courts' case law. Despite having issued a similar number of legislative measures than that of the ECtHR, this has been done in a much shorter period of time. Moreover, as shown in Chapter 3, the remedial practice of the ACtHPR has been changing in recent years, when it has been dealing with a higher number of cases. One can in sum consider that this court, though still in the process of consolidating its remedial jurisprudence, is going in the right direction.

The ECtHR can also be considered to have acted in a sufficiently deferent way when issuing legislative remedies. It has worded such remedies very vaguely, usually limiting itself to prescribing the introduction of an effective remedy in the domestic legal order for a particular issue. Nevertheless, it can also be argued that this court is not making use of legislative remedies in enough cases. Despite finding relatively often that domestic norms are incompatible with the ECHR, legislative reforms are ordered extremely rarely. Upon reaching such findings, it usually orders the payment of monetary compensation and leaves the decision on whether to take additional measures in the hands of the concerned state. States then generally limit themselves to paying compensation and perhaps taking an individual mea-

sure concerning the victim – such as a retrial or release from prison – but avoid taking any structural measures in this regard. This, in turn, provokes that numerous repetitive cases concerning the same law are submitted to the ECtHR by additional victims, eventually leading to the serious backlog crisis that has been taking place in the European system for a number of years now. The ECtHR will only after several judgments concerning the same law recommend its reform in the reasoning of the judgment. But even then, the reform still depends on the negotiations taking place before the CoM, as such recommendations included in the reasoning are not formally binding. An actual order in this respect – included in the operative paragraphs of the judgments – will be introduced only after a number of attempts to solve the issue through these softer ways, in conjunction with a lack of cooperation on behalf of the state.

The mechanism which was intended to solve this problem – the pilot judgment procedure – has arguably failed to live up to the expectations. This is mainly due to its highly exceptional character and the scarcity of instances in which it has been applied. Its use has even decreased in recent years, with only four pilot judgments issued between 2017 and 2022. Moreover, there has been a lack of engagement and cooperation by states to solve their structural deficits.[1436] If the ECtHR aims to be more sustainable and efficient in the long term with respect to its management of cases, it would have to increase the use of legislative remedies, thereby potentially reducing the number of repetitive cases and being able to deliver judgments in a timely manner.[1437]

In sum, the argument in this respect is that the ECtHR is being overly cautious about states' concerns, even when dealing with authoritarian laws or institutions.[1438] While it is true that the preservation of the CoE system "may at times and on certain matters require the integration of their laws and policies, [and] at other times necessitating the recognition of their difference and autonomy",[1439] the ECtHR is arguably paying much more

1436 See generally Leach *et al.*, 2010.

1437 This was also one of the recommendations made by Antonio Cassesse, arguing that "the Court should, after finding that a breach of the Convention has occurred on account of an inconsistent national law, enjoin the responsible state to change that law", which could be done with a different interpretation of Art. 41 ECHR. Cassesse, "Towards Moderate Monism", in Cassesse (ed.), 2012, p. 197.

1438 See in this respect Demir-Gürsel in Aust and Demir-Gürsel (eds.), 2021, p. 257.

1439 Esra Demir-Gürsel, "For the sake of unity: the drafting history of the European Convention on Human Rights and its current relevance", in Aust and Demir-Gürsel (eds.), 2021, pp. 109-132.

attention to the second aspect than the first one. Nevertheless, when it includes such remedies, it generally provides the domestic legislatures with enough margin to deliberate with regard to its implementation. In the case law of the IACtHR one can find the opposite scenario, where it includes legislative measures in an adequate number of cases but is too specific in the wording of such measures, curtailing the discretion that legislative bodies should possess. The ACtHPR is arguably maintaining the best balance in this respect, issuing legislative remedies when they are necessary but without being overly intrusive in its remedial specificity. Although its case law is still being consolidated in this regard, it seems that the older courts could learn something from the newer court.

Going back to the beginning of this book, when Cassesse advocated for international courts with the power to prescribe reforms of domestic legislation in cases of incompatibility with international obligations, he wrote that putting such measures into effect "could only be predicated on a dramatic change in the domestic and international ethos—a process which is likely to occur only over many decades", and that "any progress may only occur within regional groupings".[1440] Indeed, a decade later there has been some progress in that direction within regional human rights protection systems, where courts have developed a consistent practice of prescribing legislative reforms. This is certainly a practice that needs to be refined, and additional measures should be put into place (especially at the domestic level) to ensure the compatibility of domestic laws and human rights treaties. In any case, however, international courts are progressing in the direction envisaged back then – this progress is not likely to stop any time soon.

1440 Cassesse, "Towards Moderate Monism", in Cassesse (ed.), 2012, pp. 192, 199.