Chapter 4: A Categorisation of Legislative Remedies

The first part of this book examined legislative remedies from a conceptual perspective, situating this concept in the context of the judicial practice of both general international law and human rights law. It was shown that although legislative remedies do not exclusively belong to the field of human rights from a doctrinal perspective, they do so in practice. Even though the ICJ has, in principle, the competence to order such measures, this would prove to be more problematic than in the case of human rights courts, mainly due to the different functions of international adjudication in these two fields. Most likely due to this reason, as well as due to its legal culture as the most 'traditional' international court and the type of disputes it deals with, the ICJ seems rather hesitant to engage in such law-making tasks. On the contrary, all three regional human rights courts have over time adopted and consolidated a remedial practice that includes orders to reform domestic laws. It was therefore concluded that legislative remedies form part of a remedial *lex specialis* in human rights law, which also comprises other particular remedial features. The second part of this book will thus focus on the use of legislative remedies by human rights courts, examining when and how they are applied as well as the consequences of their use.

This chapter will establish a typology of legislative measures issued by human rights courts, categorising them and analysing the differences and commonalities among the three regional courts in this respect. It will thereby inquire into the question of what types of issues these measures intend to tackle. With this aim, the legislative remedies that have been ordered by the three regional human rights courts until the end of 2022 will be examined and divided into ten different categories, whereby several of these categories in turn contain more concrete subcategories. Each of them will be put into context and the remedial practice of each human rights court with respect to them will be explored. Most of these categories include remedial measures issued by the three regional courts, or at least two of them. This already shows that these courts have a rather common understanding regarding the purpose of legislative remedies and the type of contexts in which to apply them. However, the differences are also very important, and throughout this categorisation, it is possible to not only observe the preferences of each court when it comes to issuing legislative

remedies but also to see why they have favoured some types of cases over others in this regard.

The first caveat regarding this case law analysis is that the unit of measure is not the judgments as such but the remedial measures. This is because both the IACtHR and the ACtHPR often issue judgments that include several legislative remedies relating to different topics. For example, the judgment of the ACtHPR in the case of *Ajavon vs. Benin* (2020) contains no less than five legislative measures, dealing respectively with electoral rights, fair trial rights, constitutional issues, amnesty laws, and the right to strike. This is different in the case of the ECtHR, where no judgments can be found with more than one legislative measure, due to the highly exceptional nature of these remedies in its case law. In this respect, this case law analysis will examine 193 remedial measures included in 161 judgments. In addition, it is important to note the enormous difference between the number of legislative remedies issued by the IACtHR and that of the other two regional human rights courts. While the IACtHR has issued 129 of these measures until the end of 2022, the ECtHR issued 34 and the ACtHPR only 30 until that date. It, therefore, makes sense to also have an individualised look at the practice of each regional court concerning these remedies in order to see their respective focus. Thus, the first section will categorise the legislative remedies of the three regional courts commonly. The second section will subsequently examine the intensity of the use of these particular categories separately for each court.

I. Common Categories of Legislative Remedies

There are a total of ten categories in which almost all legislative remedies issued by the three regional human rights courts can be included.[748] These are related to the protection of vulnerable groups (1), the right to a fair trial (2), the right to property (3), electoral rights (4), nationality rights (5), amnesty laws (6), death penalty (7), freedom of expression (8), constitutional issues (9) and the codification of criminal offences (10). In the following, each of them will be explored and put into context individually. The analysis of these categories of legislative remedies issued by human rights courts will start with the most transversal ones and will end with those that are more exclusive to only one or two courts.

748 Six of these remedies do not fit in any of the categories and were included at the end in a separate section, on 'Others'.

It is thereby worth highlighting that some measures could have been included in more than one of the categories below. For example, the cases related to the application of the death penalty are usually also related to the codification of certain criminal offences that establish capital punishment as a consequence. Also, the subcategory of measures about indigenous collective property rights could be included more broadly into the category of the protection of vulnerable people. The same goes for the measures on prisoners' voting rights, which are included in the category of electoral rights. In this respect, the more specific categories were favoured (e.g. property rights of indigenous communities) over the general ones (e.g. protection of vulnerable groups).

1. The Protection of Vulnerable Groups

The protection of groups in situation of vulnerability is one of the main purposes of the legislative measures ordered by human rights courts. This is due to the fact that vulnerability is arguably one of the foundations of human rights.[749] It is therefore a concept that has received a lot of scholarly attention in the context of regional human rights adjudication,[750] especially before the ECtHR.[751] It has been argued that vulnerability "has become more than a legal concept to the extent that it has evolved into a discourse within the broader human rights movement".[752] Although vulnerability is

749 See in this regard Peters, *ZaöRV* 2020, p. 11, pointing at the feminist origin of this explanation. See also Mikaela Heikkilä and Maija Mustaniemi-Laakso, "Vulnerability as a human rights variable: African and European developments", *African Human Rights Law Journal* 20, 2020, p. 778.

750 See for an early example, Alexander H. E. Morawa, "Vulnerability as a Concept of International Human Rights Law", *Journal of International Relations and Development* 6, 2003, pp. 139-155. See also generally Ingrid Nifosi Sutton, *The Protection of Vulnerable Groups under International Human Rights Law*, Routledge, 2017. For a more recent analysis, see Alexandra Timmer, Moritz Baumgärtel, Louis Kotzé and Lieneke Slingenberg "The potential and pitfalls of the vulnerability concept for human rights", *NQHR* 39(3), 2021, pp. 189-261.

751 Corina Heri, *Responsive Human Rights: Vulnerability, Ill-treatment and the ECtHR*, Oxford: Hart, 2021. On the Inter-American side, see Sergio García Ramírez, "Los sujetos vulnerables en la jurisprudencia 'transformadora' de la Corte Interamericana de Derechos Humanos", *Revista Mexicana de Derecho Constitucional* 41, 2019, pp. 4-34.

752 Lourdes Peroni and Alexandra Timmer "Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law", *I•CON* 11(4), 2013, pp. 1056–1085, p. 190.

universal and inherent to the human condition, some groups are more vulnerable than others, due to biological, historical, or contextual reasons.[753] There are specific human rights instruments at the UN level aiming at the protection and non-discrimination of several vulnerable groups included in this category, such as children,[754] women,[755] persons with disabilities,[756] prisoners,[757] and indigenous communities.[758] Thus, it is not surprising that an important number of legislative remedies issued by regional human rights concern the protection of such groups.

As will be explained in more detail in the next chapter, the countermajoritarian character of human rights is clearly reflected in legislative remedies, which intend to modify laws adopted by a domestic majority or otherwise put certain limits to majoritarian decision-making with the aim of protecting minorities – or as in this case, vulnerable groups.[759] This is made evident when analysing remedies directed at the protection of prisoners – one of the groups whose interests are most often neglected by majority decisions. As will be shown, most measures for the protection of vulnerable groups prescribe legislative enactments. This reflects the link

753 Vulnerability for biological reasons affects for example children and persons with disabilities, while vulnerability for historical reasons concern groups that have been historically discriminated, such as indigenous people, women or LGBTI people, and contextual reasons are for example related to persons in detention, who are controlled by and dependent on state authorities. For a more nuanced categorisation of grounds for vulnerability, see Heri, *Responsive Human Rights* 2021, pp. 31-120.

754 UN Convention on the Rights of the Child, adopted on 20 November 1989 by General Assembly resolution 44/25.

755 UN Convention on the Elimination of All Forms of Discrimination against Women, adopted on 18 December 1979 by the UN General Assembly, entered into force on 3 September 1981.

756 UN Convention on the Rights of Persons with Disabilities, adopted on 13 December 2006, entered into force on 3 May 2008.

757 United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted in 1955.

758 UN Declaration on the Rights of Indigenous Peoples, adopted on 13 September 2007.

759 The main difference between these two concepts is that certain groups are not a minority from a purely numerical perspective, but still deserve special protection on account of their vulnerability. The clearest example in this regard are women.

between vulnerability and positive human rights obligations of the state,[760] whereby "legislating for the vulnerable" is a very relevant duty.[761]

Moreover, several authors have noted that human rights courts approach the issue of vulnerability not so much from an individual but from a collective perspective (i.e. focusing on vulnerable groups rather than on vulnerable individuals).[762] This is probably also why human rights courts have often issued collective measures (such as legislative ones) instead of individual measures for the protection of these groups.[763] Both the ECtHR and the IACtHR have paid a great deal of attention to vulnerable groups when issuing legislative remedies. The remedial provisions included in this category amount to 21% of the ECtHR's legislative remedies, and 20% of those of the IACtHR. On the other hand, the ACtHPR has issued only two legislative measures (i.e., 8%) that can be included in this category. In addition, the main difference among the three courts in this context lies in the concrete vulnerable groups they have focused on.

In this regard, the ECtHR's legislative remedies concerning vulnerable groups have mostly affected individuals in detention, and more particularly the absence of a domestic remedy for inhuman conditions of detention. Besides the six legislative measures related to this group,[764] the ECtHR has also issued this type of measure for the protection of persons with disabilities.[765] In all of these cases, the ECtHR found a violation of Arts. 3 and 13 of the Convention. Moreover, it found that in most cases the

760 In one of the early analyses of vulnerability and human rights adjudication, the author finds that "vulnerability, the gravity of past human rights violations, and the scope of positive protective or restorative duties of states closely interact" (Morawa, *JIRD* 2003, p. 150). On vulnerability and positive obligations, see also Dimitris Xenos, "The human rights of the vulnerable", *The International Journal of Human Rights* 13(4), 2009, pp. 591-614.

761 See Nesa Zimmermann, "Legislating for the Vulnerable? Special Duties under the European Convention on Human Rights", *Schweizerische Zeitschrift für internationales und europäisches Recht* 4/2015, pp. 539-532.

762 Heikkilä and Mustaniemi-Laakso, *AHRLJ* 2020, p. 782 ("Characteristic for both the European and African human rights bodies is that they often approach vulnerability in a primarily group-based – or identity-based – manner"). See also Xenos, *IJHR* 2009, p. 610. See however Nesa Zimmermann, 2015, p. 541, differentiating between dependency-based vulnerability, relating more to an individual, and discrimination-based vulnerability, relating rather to a group.

763 Heri, *Responsive Human Rights,* 2021, p. 142.

764 ECtHR, *Ananyev vs. Russia* (2009); *Torreggiani vs. Italy* (2013); *Varga vs. Hugary* (2015); *Neshkov vs. Bulgaria* (2015); *Sukachov vs. Ukraine* (2020), *Tomov vs. Russia* (2019).

765 ECtHR, *W.D. vs Belgium* (2016).

vulnerable group in question suffered structural human rights violations in a particular state and that there was no effective domestic remedy available for them to obtain redress before a domestic court.

Legislative remedial measures for the protection of vulnerable groups are also of particular importance in the Latin American region, due to its social context, with large segments of the population in a situation of exclusion and discrimination.[766] Human rights protection in this region is therefore often conceived as having a collective rather than an individual nature.[767] The measures of the IACtHR included in this category are predominantly related to indigenous communities, that are – particularly in this region – extremely vulnerable and have been historically disregarded. Further legislative remedies by the IACtHR concern children, detainees and women. The IACtHR usually needs to step in and order legislative reforms in these cases due to a lack of sufficient protection of vulnerable groups in the respective national legal order. Thus, like those of the ECtHR, these measures typically consist of the adoption of legal provisions that regulate concrete aspects related to these vulnerable groups and aim at their protection.

Finally, the ACtHPR has so far delivered only two judgments with legislative measures for the protection of vulnerable groups, despite the considerable amount of people in a situation of vulnerability in the African continent. As will be seen below, the legislative measures ordered by the ACtHPR have focused mostly on other issues, such as electoral rights or due process rights. Numerous cases were brought by detainees, but they primarily dealt with issues affecting the right to a fair trial, and they generally do not include structural remedies.[768] The two cases of the ACtHPR included in this section are related to the protection of women and girls in Mali; and to indigenous communities in Kenya.[769] In the following, the

766 See in this regard Soley in von Bogdandy et al. (eds.), 2017, pp. 344-346.

767 See Armin von Bogdandy, "*Ius Constitutionale Commune* en America Latina: Observations on Transformative Constitutionalism", in Armin von Bogdandy *et al.* (eds.), *Transformative Constitutionalism in Latin America: Emergence of a New Ius Commune*, Oxford: OUP, 2017, p. 34 ("A further distinctive characteristic of human rights in Latin America is the emphasis on the collective dimension of their protection. The rights protection often concerns entire groups, and judgments are drafted so that they immediately address such groups.").

768 An exception thereto are the judgments with legislative measures related to the death penalty, which also affect detainees but are examined in a separate category due to its particularities.

769 ACtHPR, *APDF and IHRDA vs. Mali* (2018); *ACmHPR vs. Kenya* (2022).

legislative remedies of the three courts aiming at the protection of each of these vulnerable groups will be examined.

a) Indigenous communities

The protection of indigenous communities has been a priority for the IACtHR for many years. This is an issue that does not significantly affect the ECtHR, as there is a comparatively low amount of indigenous peoples in the European continent.[770] This is different in the African context, with the presence of an important number of indigenous communities, but with only one judgment by the ACtHPR with legislative remedies related to this issue.[771] Thus, the most relevant remedial practice in this context comes from the IACtHR, which also served as an inspiration to the ACtHPR in its recent judgment on this issue.

Indigenous peoples are possibly the group that has been historically most discriminated in the Americas and they are, still to this day, in a situation of extreme vulnerability and exclusion.[772] It is therefore not surprising that the IACtHR, since its first judgments, has taken the task of protecting indigenous communities very seriously in its remedial practice.[773] The

770 The ECtHR has however dealt with several cases brought by the Saami community, although this jurisprudence has been criticised because the Court dismissed virtually all of these cases in the admissibility stage. See on this Peter Kovacs, "Indigenous Issues under the European Convention of Human Rights, Reflected in an Inter-American Mirror", *George Washington International Law Review* 48, 2016, pp. 781-806. See also Timo Koivurova, "Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects", *International Journal on Minority and Group Rights* 18, 2011, pp. 1–37.

771 ACtHPR, *ACmHPR vs. Kenya* (2022). See on that case Ricarda Rösch, "Indigenousness and peoples' rights in the African human rights system: situating the Ogiek judgement of the African Court on Human and Peoples' Rights", *Verfassung und Recht in Übersee* 50(3), 2017, pp. 242-258.

772 See Germán Freire et al., *Indigenous Latin America in the Twenty-First Century*, Washington D.C.: World Bank, 2015, especially at pp. 57-72 with concrete data and statistics on the topic.

773 For an in-depth analysis of the case law of the IACtHR on indigenous rights, see James Anaya, *International Human Rights and Indigenous Peoples*, Austin: Kluwer, 2009, pp. 264-319. See also Tom Antkowiak, "A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples", 25 *Duke Journal of International Law,* 2015, pp. 1-80 (with a critical approach regarding the monetary remedies awarded by the Court, although not dealing with the remedies examined in this section).

Court has ordered states to legislate on a number of issues affecting these communities, whereby their right to previous and informed consent for activities that affect their territory figures prominently among them.[774] In addition, legislative measures of the IACtHR have also concerned the right of indigenous peoples to political participation,[775] as well as the recognition of their collective legal personality and their right to collective access to justice.[776] It can thus be observed that most of these cases have been related to the collective rights of indigenous communities, an issue that has been developed to a great extent by the IACtHR. In this regard, there is also an important number of legislative measures relating to the right to communal property of indigenous communities, which are however included under the category of property rights.[777]

b) Children

The other vulnerable groups included in this section have a more universal character and are spread across the three regional systems, as is the case of children.[778] However, most of the judgments with legislative measures concerning children have also been issued by the IACtHR. In seven cases against four states, this Court has ordered a reform of domestic laws to improve the protection of children. An illustrative example in this regard is the case of *'Street Children' vs. Guatemala* (2001). The victims of this

774 The IACtHR ordered in this respect both Ecuador and Suriname to adopt the necessary legislative measures to guarantee the right of indigenous communities to be previously and effectively consulted in case of activities that affect their territory (IACtHR, *Saramaka vs. Surinam* (2007), operative para. 8; *Sarayaku vs. Ecuador* (2012), operative para. 4). The same was done by the ACtHPR with respect to Kenya (ACtHPR, *ACmHPR vs. Kenya* (2022), operative para. ix).

775 In the judgment of IACtHR, *Yatama vs. Nicaragua* (2005), a remedial measure ordered to reform a specific law that impeded members of indigenous peoples to participate in electoral procedures (operative para. 11).

776 In the case of IACtHR, *Kaliña and Lokono vs. Surinam* (2015), the Court ordered to adopt legislative reforms in order to recognise the collective legal personality of indigenous communities (operative para. 13) and their collective access to justice (operative para. 15).

777 See below section I.3 of this chapter.

778 See Aoife Nolan and Ursula Kilkelly, "Children's Rights under Regional Human Rights Law - A Tale of Harmonisation?", in Carla M. Buckley *et al.* (eds.), *Towards Convergence in International Human Rights Law*, Leiden: Brill Nijhoff, 2016, pp. 296-322.

case were five homeless children who lived in an area known for having a high crime rate. At the time of the events, there was a common pattern in Guatemala of lawless actions perpetrated by state security agents against 'street children', which included threats, detentions and even homicides as a means of countering juvenile delinquency. These five children were kidnapped and murdered, and although several state agents were prosecuted for these crimes, they ended up acquitted of all charges. The IACtHR found for the first time a violation of Art. 19 ACHR, which contains the obligation of protecting children, and ordered the State to "adapt Guatemalan legislation" to this provision.[779] The other legislative remedies of the IACtHR in this respect are also mostly related to violations of Art. 19 ACHR, covering issues such as juvenile criminal justice,[780] the criminalisation of the sale of children,[781] the military recruitment of children,[782] the identification of disappeared children,[783] or the crime of statutory rape.[784]

The ACtHPR also issued a judgment with legislative remedies for the protection of girls, prescribing the amendment of Mali's Family Code due to incompatibilities related, *inter alia,* to the minimum age of marriage for girls or the obligation to eliminate traditional practices and conducts

779 IACtHR, *"Street Children" vs. Guatemala* (2001), operative para. 5. For an in-depth analysis of this case, see Mónica Feria Tina, *The Landmark Rulings of the Inter-American Court of Human Rights on the Rights of the Child*, Leiden: Martinus Nijhoff, 2008, pp. 13-32.

780 In the case of *Mendoza vs. Argentina* (2013), the IACtHR determined that "[t]he State must adapt its legal framework to the international standards for juvenile criminal justice" (operative para. 20), due to the fact that the Argentinian Criminal Code established the same sanctions for children and for adults (para. 295). See also *Vera Rojas vs. Chile* (2021), including an order to reform the laws for allowing the Children Protection Office to participate in legal proceedings on health-related issues of children.

781 This was ordered in *Fornerón and daughter vs. Argentina* (2012), operative para. 4.

782 In the case of *Vargas Areco vs. Paraguay* (2006), the Court ordered the State to "adapt its domestic legislation regarding the recruitment of minors under the age of 18 into the Paraguayan Armed Forces to applicable international standards" (operative para. 14). See also Feria Tinta, 2008, pp. 373-397.

783 IACtHR, *Molina Theissen vs. Guatemala* (2004), operative para. 8.

784 In the case of *Angulo Losada vs. Bolivia* (2022), operative para. 14, the Court ordered to amend the provision of the Bolivian Criminal Code dealing with statutory rape, as it "is based on gender traditions and stereotypes; it does not identify the particular conditions of vulnerability of the victim; it conceals power relations; and it creates a hierarchy between sexual crimes that diminishes, invisibilises and naturalises the gravity of sexual violence against children and adolescents" (para. 199).

harmful to the rights of women and children.[785] This was a very important case for the ACtHPR, as it is the first one that tackled customary practices that are present in several African societies but are clearly in violation of international women's and children's rights.[786] Finally, the ECtHR, despite having dealt extensively with children's rights,[787] focusing particularly on positive state obligations in this respect,[788] has not yet issued legislative remedies directed specifically at their protection.

c) Prisoners

As mentioned before, legislative measures for the protection of individuals in detention have played a very important role in the case law of the ECtHR.[789] Almost one-third of all the ECtHR's legislative measures are related to the protection of prisoners, whereby these cases concern generally the same systemic problem faced by states, namely the poor conditions of detention in its prisons. The ECtHR has ordered general measures aimed at solving this problem in cases against Russia, Italy, Bulgaria, Ukraine and Hungary. It can thus be observed that, with the exception of Italy, it is a problem mostly affecting states of the former Eastern Bloc.[790]

These are remedies that usually concern applicants who have been imprisoned for several years in overcrowded cells with limited personal

785 ACtHPR, *APDF and IHRDA vs. Mali* (2018), respectively at paras. 78 and 125.

786 See Tetevi Davi, "African Court on Human and Peoples' Rights Delivers Landmark Ruling on Women's Rights and the Rights of the Child in Mali", *EJIL: talk*, 27 July 2018, available at: https://www.ejiltalk.org/african-courton-human-and-peoples-rights-delivers-landmark-ruling-on-womens-rights-and-the-rights-of-the-child-in-mali/.

787 For an analysis on the ECtHR' jurisprudence on that topic, see Claire Fenton-Glynn, *Children and the European Court of Human Rights*, Oxford: OUP, 2020.

788 See on these obligations Conor O'Mahony, "Child Protection and the ECHR: Making Sense of Positive and Procedural Obligations", *International Journal of Children's Rights* 27, 2019, pp. 660-693, at pp. 664-666.

789 With respect to individual remedies, the measure that has been ordered more often by the ECtHR is the release of individuals in detention. Moreover, the only two instances in which the CoM has activated the 'infringement procedure' concern the failure of Azerbaijan and Turkey to implement these orders and release respectively Mr. Mammadov and Mr. Kavala.

790 It is however also possible to find 'Article 46 judgments' recommending of legislative reforms for the protection of prisoners against further Western states. See for example ECtHR, *J.M.B. vs. France* (2020); *Vasilescu vs. Belgium* (2014); *Bamouhammad vs. Belgium* (2015).

space,[791] but also with other deficiencies such as a lack of hot water in showers,[792] lack of access to toilets, or insalubrity in general.[793] In all cases pertaining to this category, the ECtHR decided to apply the pilot judgment procedure, justifying it on the basis of the number of previous and pending cases against the same state on the same substantive issue.[794]

In all of these cases, the Court found that the situation amounted to inhuman or degrading treatment contrary to Art. 3 ECHR.[795] However, the aspect that the legislative measures aimed to tackle was the lack of an effective domestic remedy for these violations, constituting in turn an infringement of Art. 13 ECHR.[796] The ECtHR thus usually distinguishes between two structural problems in these cases. On the one hand, the problem of the conditions of detention, which according to the Court is rather complex in nature and does not depend on a specific domestic law or the lack of it.[797] On the other hand, the problem of the absence of a

791 See for example ECtHR, *Ananyev vs. Russia* (2009), paras. 8-24, *Sukachov vs. Ukraine* (2020), para. 3.

792 As in ECtHR, *Torreggiani vs. Italy* (2013), paras. 8-11.

793 ECtHR, *Neshkov vs. Bulgaria* (2015), paras. 248, 253, 256. In addition, one of these judgments does not relate so much to the conditions inside prisons but to the conditions of prisoner transport in Russia, i.e. the transfers from one prison to another in trains with overcrowded carriages and unsuitable facilities for such long journeys (*Tomov vs. Russia* (2019), paras. 19-56). The Court highlighted also the exposure to extremely low temperatures as one of the main problems in this respect.

794 For example, in ECtHR, *Ananyev vs. Russia* (2009), the Court noted that since *Kalashnikov vs. Russia* (2002) it had decided more than eighty cases concerning inhuman detention conditions in Russian pre-trial remand detention centres. In *Varga vs. Hugary* (2015), para. 98, it referred only to four previous judgments decided against Hungary on that issue, but indicated that around 450 applications were still pending in this respect.

795 ECtHR, *Ananyev vs. Russia* (2009), para. 166; *Torreggiani vs. Italy* (2013), para. 79; *Varga vs. Hugary* (2015), para. 91; *Sukachov vs. Ukraine* (2020), para. 100; *Tomov vs. Russia* (2019), paras. 136, 140-142.

796 See for example ECtHR, *Ananyev vs. Russia* (2009), para. 119; *Tomov vs. Russia* (2019), paras. 155-156; *Sukachov vs. Ukraine* (2020), para. 125. Contrary to the remedies for the excessive length of proceedings or non-enforcement of domestic judgments (see section 2(b) of this chapter), where a compensatory remedy could suffice, in these cases the ECtHR qualified the existence of a preventive remedy capable of rapidly bringing the ongoing violation to an end as "indispensable" (ECtHR, *Ananyev vs. Russia* (2009), paras. 97-98).

797 For example, in *Neshkov vs. Bulgaria* (2015) the ECtHR stated that "that the problem of detention conditions did "not stem from a particular legal provision or single other cause but from a plethora of factors" (at para. 272). Similarly, in *Ananyev vs. Russia* (2009) it argued that structural problem was not "the product of a defective legal provision or regulation or a particular lacuna in Russian law" but "a

domestic remedy that can tackle the first problem is more closely related to the domestic legal framework in the concerned state.[798]

The ECtHR makes that distinction also with respect to the remedial measures. Regarding the primary problem (the conditions of detention) the Court limits itself to making some suggestions,[799] arguing that ordering specific measures in this respect would not be "appropriate to its function as an international court".[800] However, it takes a different approach regarding the secondary problem, specifying for example that this problem would "require clear and specific changes in the domestic legal system that would allow all people in the applicants' position to complain about alleged violations".[801] The ECtHR has also suggested a set of features for both preventive and compensatory remedies,[802] and highlighted in several cases the legislative nature that these domestic remedies should possess.[803] For example, in *Sukachov vs. Ukraine* (2020) the ECtHR stated that "findings under this provision [Art. 13 ECHR] require specific changes in Ukrainian legislation that will enable any person in the applicant's position to complain of a breach of Article 3 resulting from poor detention conditions and obtain adequate relief for any such breach at domestic level".[804]

Prisoners have also been regarded as deserving special protection by the IACtHR, with legislative measures directed at the improvement of deten-

multifaceted problem owing its existence to a large number of negative factors" (at para. 191).

798 Again, in *Neshkov vs. Bulgaria* (2015), the ECtHR argued that "the systemic problem underlying the breach of Article 13 of the Convention appears to be due chiefly to the statutory law and its interpretation by the courts" (at para. 273).

799 Legislative reforms are however included prominently among these suggestions. For example, in *Ananyev vs. Russia* (2009) the ECtHR "strongly doubt[ed] that the existing trend to use deprivation of liberty as the preventive measure of predilection can be reversed unless the relevant provisions of the Russian Code of Criminal Procedure have been amended" (at para. 202).

800 See ECtHR, *Ananyev vs. Russia* (2009), para. 194. Similarly, in *Sukachov vs. Ukraine* (2020), paras. 145-152.

801 E.g. ECtHR, *Ananyev vs. Russia* (2009), para. 212.

802 See for example ECtHR, *Ananyev vs. Russia* (2009), para. 234; *Neshkov vs. Bulgaria* (2015), paras. 281-289.

803 See for example *Neshkov vs. Bulgaria* (2015), para. 279 ("findings under this Article [13] require specific changes in the Bulgarian legal system"). In *Ananyev vs. Russia* (2009), the ECtHR did not specify any time limit for the introduction of such remedies, as it involved "the preparation of draft laws, amendments and regulations, then their enactment and implementation, together with the provision of appropriate training for the State officials concerned" (at para. 234).

804 ECtHR, *Sukachov vs. Ukraine* (2020), para. 153.

tion conditions in two states.[805] Legislative measures of the IACtHR have furthermore related to the transfer of prisoners,[806] the registration of detainees,[807] the regulation of the use of force by law enforcement officials,[808] and the imposition of corporal punishments on detainees.[809] Finally, the ACtHPR, despite having dealt extensively with complaints submitted by prisoners, has primarily focused on the fair trial aspects of their convictions and has not yet included legislative remedies related to conditions of detention or other issues concerning imprisonment in itself.

d) Women

Although women have historically suffered discrimination on a global scale, they have not figured as prominently as other vulnerable groups in the remedial practice of human rights courts.[810] There are only four cases in

805 This was ordered in the cases of IACtHR, *Pacheco Teruel vs. Honduras* (2012), operative para 3; and *Yvon Neptune vs. Haiti* (2008), operative para. 9.

806 IACtHR, *Lopez vs. Argentina* (2019), operative para. 9.

807 In the case of IACtHR, *"White Van" vs. Guatemala* (2001), in which the State was found to be responsible of the acts of arbitrary detention, torture and murder committed by state agents against eleven persons, the IACtHR ordered the adoption of legislative measures in order to "set up [a] register of detainees (...) guarantee its reliability and publicize it" (operative para. 4).

808 The Court ordered in IACtHR, *Montero Aranguren vs. Venezuela* (2006) to create a legal framework for the regulation of the use of force by Law Enforcement Officials (operative para. 9), after state agents entered the prison "Retén de Catia" and shot indiscriminately against the prisoners, killing sixty-three of them. Fourteen years later, in 2020, the Court issued another legislative order against Venezuela concerning the entry into prisons of military authorities carrying firearms, as the domestic provision regulating this issue "[did] not define, with the required specificity, the reasons for authorising such an action, or explain its exceptional nature or guarantee that such an intervention would be adequately regulated and supervised by civilian authorities". See IACtHR, *Olivares Muñoz vs. Venezuela* (2020), para. 173 and operative para. 8.

809 In IACtHR, *Caesar vs. Trinidad and Tobago* (2005), the Court ordered the derogation of the State's "Corporal Punishment Act", which allowed judges to order corporal punishments – carried out by the prison authorities – in addition to the deprivation of liberty (operative para. 3).

810 This is especially the case before the ECtHR, whereby its jurisprudence in this area has been criticised for adopting "a comparative approach concerned primarily with the prohibition of direct discrimination in the form of intentional distinctions in the public sphere (...) rather than a substantive approach concerned with challenging the disadvantage of traditionally disadvantaged groups" (Ivana Radacic, "Gender

which human rights courts included legislative measures for the protection and non-discrimination of women. The first legislative measure ordered by the IACtHR in this respect was related to the search for missing women. Although other judgments of the IACtHR dealt with this issue,[811] only one of them ordered a state to implement legislative reforms in this area. In the case of *Velasquez Paiz vs. Guatemala* (2015), the police did not act upon the complaint that a woman was missing, in accordance with a law which established that it could only intervene twenty-four hours after the disappearance. Hence, the IACtHR ordered Guatemala to reform this law in order to allow for an effective and immediate search for missing women.[812] The other judgment of the IACtHR included in this sub-section concerns the criminalisation of abortion in El Salvador. The victim of this case, after suffering an obstetric emergency, was reported by her doctor for the possible "perpetration of a crime", consisting of "the unlawful act of abortion".[813] She was convicted to thirty years of prison. The IACtHR found this to be disproportionate and ordered the State to amend its criminal laws in this respect.[814]

The case of *APDF and IHRDA vs. Mali* (2018) was also included in the sub-section on the protection of children, as there were specific remedies for each of these groups. Making use of the ACtHPR's expansive scope of review,[815] two NGOs submitted a complaint about the compatibility of the Malian Family Code with several provisions of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women and the African Charter on the Rights and Welfare of the Child. The Court found that this law not only infringed several articles of the two aforementioned instruments but also of CEDAW. These incompatibilities concerned a number of issues, related to the consent for marriage, inheritance rights, and

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Equality Jurisprudence of the European Court of Human Rights", *EJIL* 19(4), 2008, pp. 841-857, at p. 856).

811 For example, in the case of IACtHR, *'Cotton Field' vs. Mexico* (2009), the Court ordered a wide array of executive measures for the protection of women, such as the standardisation of investigation protocols or the establishment of a database with genetic information of disappeared women. However, no legislative measures were ordered in this regard.

812 IACtHR, *Velasquez Paiz vs. Guatemala* (2015), operative para. 17.

813 IACtHR, *Manuela vs. El Salvador* (2021), para. 286.

814 IACtHR, *Manuela vs. El Salvador* (2021), operative para. 16. It moreover requested two additional legislative amendments, concerning the regulation of medical secrecy in such instances and the issue of pre-trial detention (operative paras. 12 and 14).

815 See Chapter 1 of this book.

the obligation to eliminate traditional practices and conduct harmful to the rights of women.[816] The ACtHPR therefore ordered Mali to "amend the impugned law", as well as more generally to "harmonise its laws with the international instruments".[817]

Finally, the ECtHR ordered Russia to adopt legislative measures for the protection of women from domestic violence.[818] The Court explicitly noted that the authorities' failure to address reports of domestic violence stems from *lacunae* in its substantive and procedural laws and that in order to address these shortcomings, "the authorities must promptly revise or amend legislation to bring it into compliance with the Convention".[819] It moreover specified several substantive requirements of this legislative reform, such as the criminalisation of domestic violence, the aspects that should be covered in the definition, or issues related to the burden of proof and the protection of victims of domestic violence.[820]

e) Persons with disabilities

Although persons with disabilities probably constitute one of the most paradigmatic groups in a situation of biological vulnerability, there are only two judgments of regional human rights courts including legislative measures for their protection, in this case by the ECtHR and the IACtHR.[821] The latter case relates to the consent of persons with disabilities with respect to medical treatment. As this issue was not foreseen in the Ecuadorian laws, the State was prescribed to regulate in its legislation "the international obligation to provide support to persons with disabilities so that they are able to give their informed consent to medical treatments".[822]

In the case before the ECtHR, the judgment is also in some way related to individuals placed in detention, but deserving special treatment and protection on account of their condition as persons with disabilities. The

816 ACtHPR, *APDF and IHRDA vs. Mali* (2018), respectively at paras. 78, 95, 115, and 125.
817 ACtHPR, *APDF and IHRDA vs. Mali* (2018), para. 135 (x).
818 ECtHR, *Tunikova vs. Russia* (2021), operative para. 8.
819 ECtHR, *Tunikova vs. Russia* (2021), para. 153.
820 ECtHR, *Tunikova vs. Russia* (2021), paras. 154-157.
821 For an overview of the IACtHR' jurisprudence on that topic, see Diana Guarnizo-Peralta, "Disability rights in the Inter-American System of Human Rights: An expansive and evolving protection", *NQHR* 36(1), 2018, pp. 43-63.
822 IACtHR, *Guachalá Chimbo vs. Ecuador* (2021), operative para. 11.

facts of the case concern an individual with mental disabilities who was arrested and placed in a Belgian prison for an indeterminate period, under a law that allowed to intern persons with disabilities that were considered to represent a danger for society.[823] Arguing that the applicant had been placed for over nine years in a prison environment with no therapy adapted to his mental health condition and no prospect of reintegration, the Court found this to be in violation of Arts. 3 and 13 ECHR, as the available remedy for these types of cases was not considered effective.[824] The ECtHR, however, limited the statement of the operative part to ordering "appropriate measures to ensure that the system of internment of offenders is in conformity" with the Convention.[825] This is different to other cases related to the conditions of detention, where the introduction of an effective domestic remedy was expressly ordered. Here, the wording leaves much more discretion to the legislator in order to decide how to implement the measures; but in any case, the aforementioned law could not remain as it stood.

2. The Right to a Fair Trial

Besides the protection of vulnerable groups, the other main category in which an important number of legislative remedies can be included is that of fair trial rights. The legislative measures included in this category aim at the protection of specific procedural guarantees, and they usually consist of the amendment of specific laws that regulate judicial proceedings in order to incorporate such guarantees.[826] In addition, these remedies have not only

823 ECtHR, *W.D. vs Belgium* (2016), paras. 5-19.

824 ECtHR, *W.D. vs Belgium* (2016), paras. 116 and 155. In particular, the Court argued that the lack of suitable places in the external circuit and the lack of qualified staff in prison psychiatric wings, more than the remedy itself, were at the origin of its ineffectiveness (at para. 151).

825 ECtHR, *W.D. vs Belgium* (2016), operative para. 6.

826 Most of the fair trial-related remedies included here concern domestic laws regulating judicial proceedings, although there are also some exceptions in this regard. For example, there are cases related to due process rights in the pre-trial phase, such as in the context of criminal investigations (see IACtHR, *Favela Nova vs. Brazil* (2017)), or to the post-trial phase, such as those dealing with the implementation of judgments. See also ECtHR, *Ali Riza vs. Turkey* (2020), concerning arbitral proceedings.

affected the fair trial rights of defendants but also of victims.[827] In the case of the ECtHR, 39% of its legislative measures affect fair trial rights, while they represent 33% of those of the IACtHR and 19% in the case of the ACtHPR. There are, however, some important differences concerning the concrete elements of the right to a fair trial that each court has focused on. The legislative remedies of the ECtHR in this area are primarily concerned with the excessive length of judicial proceedings and the non-enforcement of domestic judgments, while those issued by the ACtHPR concern only judicial independence and the right to appeal. The IACtHR has focused on a wider array of fair trial-related issues in its legislative remedies, whereby the right to an independent court established by law has played a paramount role.

It is also important to highlight that certain core elements of the right to a fair trial are completely absent from the legislative remedies of human rights courts, even if these elements are often the object of disputes before them. This is for example the case with the right to counsel, the right to be present, the right to a public trial or the right to equality of arms. In particular, the legislative remedies issued by the three regional human rights courts have focused mainly on four components of the right to a fair trial. These are the right to an independent and impartial tribunal established by law (a), the excessive length of judicial proceedings (b), the right to appeal (c) and the enforcement of judgments (d). Other more exceptional legislative remedies related to the right to a fair trial have concerned means of evidence, arbitrary detentions or criminal investigations (e).

a) The right to an independent and impartial tribunal established by law

The right to an independent and impartial tribunal established by law is considered as "the essence of the rule of law and crucial to the fairness of any trial".[828] All three regional courts have issued legislative remedies in

827 For example, the IACtHR ordered several states to reform its laws on military jurisdiction in order to establish that perpetrators of human rights abuses are always prosecuted under the ordinary jurisdiction. These remedies aim mostly at protecting the rights of victims to have their human rights violations examined and judged by an independent tribunal established by law. See in this respect Clooney and Webb, 2020, p. 34 ("The right to a fair trial cannot be understood solely from the viewpoint of the defendant, even though he is the primary beneficiary of the various guarantees in international law").

828 Clooney and Webb, 2020, p. 67.

this respect. A number of them have dealt with the legislative conditions for the independence of the judiciary, affecting issues such as the stability and arbitrary dismissal of judges and prosecutors and the composition of judicial councils or constitutional courts. In addition, the IACtHR has a line of legislative remedies that focuses specifically on the extended use of the military jurisdiction and its incompatibility with the right to an ordinary judge established by law.

i) The independence of judges and prosecutors

Judicial independence is an area that has gained enormous weight in regional human rights litigation. In this context, the IACtHR has for example issued several judgments against Venezuela with legislative measures aiming to prevent the arbitrary removal of judges in this state.[829] Similarly, in recent cases, this Court has included legislative remedies related to the dismissal of provisional prosecutors and magistrates in Colombia and Peru,[830] an issue that goes hand in hand with judicial independence.[831] The IACtHR has even ordered Mexico to reform its constitution in order to guarantee the independence of another body intervening in judicial proceedings, the state's forensic services.[832]

In addition, remedies aiming to put an end to unlawful restrictions on the freedom of expression of judges are also included in this category, as these are sanctions affecting their independence. The case of *Urrutia Laubreaux vs. Chile* (2020) dealt with the sanctioning of a judge after he published an academic paper, in accordance with a domestic law that prevented judicial officials from "publishing (…) documents defending their official conduct or attacking, in any way, that of other judges".[833]

829 IACtHR, *Apitz Barbera vs. Venezuela* (2008), operative para. 19; *Reverón Trujillo vs. Venezuela* (2009), operative para. 10; *Chocrón Chocrón vs. Venezuela* (2011), operative para. 8. These judgments triggered a strong reaction by the State, as will be seen in Chapter 6 of this book.

830 IACtHR, *Martínez Esquivia vs. Colombia* (2020), operative para. 9 ("The State shall adjust its regulations to guarantee stability of provisional prosecutors, pursuant to paragraphs 162 and 163 of this judgment"). See also IACtHR, *Casa Nina vs. Peru* (2020), operative para. 7; *Cuya Lavi vs. Peru* (2021), operative para. 10.

831 See International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, 2007, pp. 71-77.

832 IACtHR, *Digna Ochoa vs. Mexico* (2021).

833 IACtHR, *Urrutia Laubreaux vs. Chile* (2020), para. 133.

The IACtHR found this restriction of the freedom of expression to be too broad, noting that "regulations such as this violate not only the principle of legality but also judicial independence", and ordered Chile to "eliminate paragraph 4 of article 323 of the Organic Code of the Courts".[834] Moreover, the IACtHR has also ordered legislative reforms in order to allow for the review and overturn of judgments issued by non-independent judges, such as those issued during the Chilean military dictatorship.[835]

On the other hand, the ACtHPR's legislative remedies aiming to uphold judicial independence have been included in three judgments against Benin. These are very important cases, affecting constitutional provisions that regulate the composition of the State's Constitutional Court and Higher Judicial Council. In two of these cases, the Court found Article 115 of the Beninese Constitution, governing the composition and appointment of judges to the Constitutional Court, incompatible with the ACHPR. It specifically determined that the renewable nature of the constitutional judges' mandate would compromise its independence, in violation of Art. 26 of the ACHPR.[836] Notably, in these two cases, the remedial measures were worded quite differently. In the case of *XYZ vs. Benin (II)* (2020), the Court ordered Benin "to take all legislative and regulatory measures to guarantee the independence of the Constitutional Court, in particular with regard to the process for the renewal of their term of office".[837] In *Ajavon vs. Benin* (2020), however, the Court made a broader request for Benin "to take all necessary measures to ensure that the mandate of the judges of the Constitutional Court is marked by guarantees of independence".[838] Thus, the legislative nature and specificity of the remedial measure were diluted in this second case. But in this case, the ACtHPR found as well the law regulating the composition of the Beninese Higher Judicial Council to be contrary to the independence of the judiciary, for several reasons related to the appointment rules, the functions of this Council and the presence of members of the government in it. Thereby, it expressly ordered Benin to

834 IACtHR, *Urrutia Laubreaux vs. Chile* (2020), para. 136 and operative para. 8.
835 This was ordered in IACtHR, *Maldonado Vargas vs. Chile* (2015), operative para. 9.
836 ACtHPR, *XYZ vs. Benin (II)* (2020), paras. 68-72. ACtHPR, *Ajavon vs. Benin* (2020), para. 289. It is relevant to note that this is a different position to that held by the ECtHR, who has considered renewable terms in judicial bodies as Convention-compliant. See ECtHR, *Maktouf vs. Bosnia and Herzegovina* (2013), paras. 50–52.
837 ACtHPR, *XYZ vs. Benin (II)* (2020), operative para. xiii).
838 ACtHPR, *Ajavon vs. Benin* (2020), para. 361.

reform this law.[839] The ACtHPR ordered again the reform of the latter law in the case of *Houngue Éric Noudehouenou vs. Benin* (2022), specifying the provisions that would need to be repealed.[840]

Finally, one judgment of the ECtHR included legislative measures affecting the independence of arbitral proceedings for the settlement of football disputes in Turkey. The case concerned several disputes affecting football players and referees, which were decided before the Arbitration Committee of the Turkish Football Federation (TFF). The ECtHR found that this arbitral body did not satisfy the requirements of independence and impartiality under Art. 6 of the Convention, mainly due to its internal organisation and to the fact that "the TFF Law does not provide appropriate safeguards to protect members of the Arbitration Committee from any outside pressure".[841] It therefore prescribed the adoption of general measures to address this systemic problem, whereby a reform of the TFF Law appears to be implicitly required.[842]

ii) Restrictions to the military jurisdiction

Besides the legislative remedies dealing with judicial independence *stricto senso*, the IACtHR also has a very important line of legislative remedies aiming to secure the right to a 'competent' court. In these cases, the remedies' purpose is the limitation of the use of military courts in domestic judicial systems. This is highly relevant because the use of military jurisdiction has been traditionally very extended in the Latin American region, especially in the context of its authoritarian regimes.[843] The IACtHR has

839 ACtHPR, *Ajavon vs. Benin* (2020), paras. 309-325; operative para. xxiv (2), ordering Benin "to repeal (…) Articles 1 and 2 of Organic Law No. 2018-02 of 4 January 2018 (…) relating to the Higher Judicial Council".

840 ACtHPR, *Houngue Éric Noudehouenou vs. Benin* (2022), operative para. xvi. These specific provisions are "those that make the President of the Republic a member of the HJC and Chair of the HJC, those that entitle the President of the Republic to appoint members of the HJC, and those that make other members of the executive members of the HJC".

841 ECtHR, *Ali Riza vs. Turkey* (2020), para. 241.

842 ECtHR, *Ali Riza vs. Turkey* (2020), operative para. 5.

843 See on this issue Ivette Castañeda García, "Military justice in Latin America: a comparative analysis", in Alison Duxbury and Matthew Groves (eds.), *Military Justice in the Modern Age*, Cambridge: CUP, 2016, pp. 196-217 ("military justice has more recently been used for political and corporate ends during the years of military intervention in the political life of many Latin American countries").

taken a very firm position on that issue, ordering five states in nine cases to reform their domestic laws in order to introduce certain limitations to the use of military judicial fora.[844] In this respect, it has established that in order for a military court to exercise jurisdiction, two conditions must be met. First, the individual appearing before the court must be an active member of the military, and second, the alleged crime must be of a militaristic nature.

Some of the early cases in which the IACtHR ordered the reform of domestic laws concerned the first condition. It consisted of a series of cases against Peru, dealing with two laws that allowed civilians accused of the crimes of treason and terrorism to be judged by military courts, without the possibility of appealing to ordinary courts. The IACtHR determined that "[w]hen a military court takes jurisdiction over a matter that regular courts should hear, the individual's right to a hearing by a competent, independent and impartial tribunal previously established by law" is violated.[845] Thus, it ordered the State "to adopt the appropriate measures to amend those laws (...)".[846] The same occurred with respect to laws that allowed for retired military personnel to be judged by military courts.[847]

With regard to the second condition, an enlightening example is the four cases against Mexico concerning Art. 57 of the Mexican Code of Military Justice, which allowed military courts to judge every member of the army whenever the alleged crime was committed during service. In the case of *Radilla Pacheco vs. Mexico* (2009), the members of the military had been accused of enforced disappearance, while in the other cases they were accused of sexual assault and torture, respectively.[848] In all of these cases, military courts had exercised competence over these crimes. The Court affirmed that "military criminal jurisdiction shall have a restrictive

844 For an analysis of these cases, see Christina M. Cerna, "The Inter-American System and Military Justice", in Alison Duxbury and Matthew Groves (eds.), *Military Justice in the Modern Age*, Cambridge: CUP, 2016, pp. 325-346.

845 IACtHR, *Castillo Petruzzi vs. Peru* (1999), para. 128.

846 IACtHR, *Castillo Petruzzi vs. Peru* (1999), operative para. 14). This was later repeated in another judgment of 2004 (IACtHR, *Lori Berenson vs. Peru*, operative para. 1), and in further judgments the State was considered to be responsible of a violation of Art. 2 ACHR because of these laws, although no remedies were issued because Peru had already declared them unconstitutional (IACtHR, *Cantoral Benavides vs. Peru* (2001); *Durand and Ugarte vs. Peru* (2001); *Cesti Hurtado vs. Peru* (2001)).

847 IACtHR, *Palamara Iribarne vs. Chile* (2005), *Usón Ramirez vs. Venezuela* (2009).

848 These were the cases of IACtHR, *Rosendo Cantú vs. Mexico* (2010) and *Cabrera García and Montiel Flores vs. Mexico* (2010).

and exceptional scope and be directed toward the protection of special juridical interests, related to the tasks characteristic of the military forces" and that this jurisdiction is not the competent one "to investigate and, in its case, prosecute and punish the authors of violations of human rights".[849] The Court thus ordered Mexico in all of these cases to make this specific provision compatible with the ACHR, among other remedies.[850]

b) The right to be judged within a reasonable time

The excessive length of judicial proceedings is one of the main issues litigated before the ECtHR. The CoM stated in 2010 that it is "by far the most common issue raised in applications to the Court", thereby constituting "an immediate threat to [its] effectiveness".[851] Moreover, both the CoM and the Venice Commission have recommended states to set up domestic remedies for such undue delays.[852] It is therefore not surprising that most legislative remedies of the ECtHR relate to this issue. It is, in fact, the only human rights court that has issued legislative remedies in that respect, incorporating them in eleven judgments against seven states.[853]

849 IACtHR, *Radilla Pacheco vs. Mexico* (2009), paras. 272-273.

850 IACtHR, *Radilla Pacheco vs. Mexico* (2009), operative para. 10; *Fernandez Ortega vs. Mexico* (2010), operative para. 13; *Rosendo Cantú vs. Mexico* (2010), operative para. 12; *Cabrera Gacía and Montiel Flores vs. Mexico* (2010), operative para. 15. Similarly to the ECtHR's usual practice with respect to legislative remedies, the IACtHR also ordered to introduce a domestic remedy allowing to challenge the competence of these courts. See on these cases Eduardo Ferrer MacGregor and Fernando Silva, *Jurisdicción Militar y Derechos Humanos: El caso Radilla ante la Corte Interamericana de Derechos Humanos*, Mexico: Editorial Porrúa, 2011.

851 Recommendation CM/Rec(2010)3 of the Committee of Ministers to Member States on effective remedies for excessive length of proceedings. See also more recently Clooney and Webb, 2020, p. 390, stating that "more than half the fair trial violations confirmed by the European Court of Human Rights concerned unduly lengthy proceedings".

852 Recommendation CM/Rec(2010)3; Venice Commission, Compilation of Venice Commission Opinions and Reports Concerning Courts and Justice (2015) CDL-PI(2015)001, p. 66.

853 However, both the IACtHR and the ACtHPR have also dealt with such delays in their case law. The IACtHR found violations of Art. 8 ACHR on account of the excessive length of proceedings already in some of its first contentious cases. See for example IACtHR, *Genie Lacayo vs Nicaragua* (1997), para. 81; *Suarez Rosero vs. Ecuador* (1997), para. 73. With respect to the ACtHPR, see *Wilfred Onyango Nganya vs. Tanzania* (2016), as well as the analysis of this and similar cases included in

The facts of all cases are very similar, as they all concern one or several applicants who suffered an excessive delay in judicial proceedings, often with final judgments issued between ten and twenty years after initiating the proceedings,[854] or with final domestic judgments still pending after that time.[855] In all of these cases, the ECtHR found not only that these proceedings had been unreasonably long, constituting a violation of Art. 6 ECHR, but also that the absence of an effective domestic remedy implied a violation of Art. 13 ECHR.[856] In this context, it considered these delays a structural problem, usually concerning a specific jurisdiction.[857] For example, between 2010 and 2012 the ECtHR issued three judgments with legislative measures against Greece, concerning the excessive delays before its administrative, civil, and criminal courts, respectively.[858]

With respect to the remedial measures, the ECtHR's approach has been again to suggest possible measures in order to solve the main structural problem, i.e. the excessive delays in judicial proceedings, but at the same time to avoid specifying any binding orders in that regard.[859] However,

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Jamil Ddamulira Mujuzi, "The African Court on Human and Peoples' Rights and its Protection of the Right to a Fair Trial", *LPICT* 16, 2017, pp. 187–223, at pp. 216-220.

854 For example, *Vassilios Athanasiou vs. Greece* (2010) concerned ten applicants that had started administrative judicial proceedings in 1994 and did not obtain a final judgment until fourteen years later (paras. 5-12). See also *Rumpf vs. Germany* (2010), where the final judgment was issued after thirteeb years (paras. 11-29).

855 See for example *Glykantzi vs. Greece* (2012).

856 ECtHR, *Lukenda vs. Slovenia* (2005), paras. 79, 86-88; *Vassilios Athanasiou vs. Greece* (2010), paras. 29, 35; *Glykantzi vs. Greece* (2012), paras. 50, 57; *Michelioudakis vs. Greece* (2012), paras. 45, 54; *Ümmühan Kaplan vs. Turkey* (2012), paras. 43, 58; *Gazsó vs Hungary* (2015), paras. 17, 21.

857 See for example *Dimitrov and Hamanov vs. Bulgaria* (2011), paras. 7-32 (on the criminal jurisdiction); *Finger vs. Bulgaria* (2011), paras. 6-34 and *Ümmühan Kaplan vs. Turkey* (2012), paras. 6-17 (on the civil jurisdiction); *Rumpf vs. Germany* (2010), paras. 11-29 (on the administrative jurisdiction); or *Gazsó vs Hungary* (2015), para. 510 (on the labour jurisdiction). In some cases, the structural problem has even concerned a narrower field of law, such as judicial proceedings related to the payment of disability benefits (ECtHR, *Lukenda vs. Slovenia* (2005)). On the other hand, sometimes the Court has also found that the excessive delays were cutting across several jurisdictions (*Vlad vs. Romania* (2013) and *Rutkowski vs. Poland* (2015)) or even across all of them (*Ümmühan Kaplan vs. Turkey* (2012)).

858 See ECtHR, *Vassilios Athanasiou vs. Greece* (2010) (on the administrative jusridiction); *Glykantzi vs. Greece* (2012) (on the civil jurisdiction) and *Michelioudakis vs. Greece* (2012) (on the criminal jurisdiction).

859 The ECtHR has stated that this structural problem "may be due to a large number of factors, of both a legal and logistical character" (ECtHR, *Dimitrov and Hamanov vs. Bulgaria* (2011), para. 115; Finger vs. Bulgaria (2011), para. 120). Thus, its suggestions

the situation is different with respect to the 'secondary' structural problem found in these cases, i.e. the lack of an effective domestic remedy to prevent and obtain redress for these delays. The ECtHR ordered in almost all of these cases to introduce such a domestic remedy in order to provide adequate relief for this situation.[860] It also stated that these remedies, in order to be considered effective, should possess certain features, such as an acceleratory and a compensatory nature.

c) The right to appeal before a higher court

The right to appeal is another aspect that has triggered several legislative measures, both by the IACtHR and the ACtHPR.[861] It was an especially important issue before the IACtHR, ordering the reform of domestic laws

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have been rather broad, indicating that "comprehensive, large-scale actions of a legislative and administrative character" should be adopted (ECtHR, *Rutkowski vs. Poland* (2015), para 207).

860 ECtHR, *Vassilios Athanasiou vs. Greece* (2010), operative para. 5; *Rumpf vs. Germany* (2010), operative para. 5; *Dimitrov and Hamanov vs. Bulgaria* (2011), operative para. 6; *Finger vs. Bulgaria* (2011), operative para. 5, *Glykantzi vs. Greece* (2012), operative para. 5; *Ümmühan Kaplan vs. Turkey* (2012), operative para. 5; *Gazsó vs Hungary* (2015), operative para. 5. There are however also cases in which the ECtHR was not that straight-forward with respect to the obligations of setting up a domestic remedy. For example, in *Rutkowski vs. Poland* (2015), the State had already introduced a domestic remedy that according to the Court "at least in law, had all the features of an effective remedy" (para. 215) but had several shortcomings with respect to its interpretation and application by the judiciary (paras. 216-221). The ECtHR's remedial measure in this case stated that "the respondent State must, through appropriate legal or other measures, secure the national courts' compliance with the relevant principles under Article 6 § 1 and Article 13 of the Convention" (operative para. 6). As it can be observed, this judgment is different from other pilot judgments concerning the excessive length of judicial proceedings, as the legislative measures ordered therein affect not as much the absence of a domestic remedy (Art. 13) as the main problem of unreasonable delays (Art. 6). This is similar in the cases of *Lukenda vs. Slovenia* (2005) and *Vlad vs. Romania* (2013). In both of them, the ECtHR seemed to focus its remedial measure on the main structural problem, ordering the states to guarantee the right to be judged in a reasonable time "through appropriate legal and administrative measures" (ECtHR, *Lukenda vs. Slovenia* (2005), operative para. 5; *Vlad vs. Romania* (2013), operative para. 6).

861 The ECtHR has taken a different approach that the other two human rights courts when dealing with the right to appeal. It has interpreted this right rather narrowly, affording a wide margin of appreciation to states in the regulation of its system of appeals. See Clooney and Webb, 2020, p. 656. Notably, in the ECHR the right to appeal is not included under the fair trial provision (Art. 6 ECHR) but instead under

to allow for the appeal of judgments before higher courts in twelve cases against six different states. The first case and a prominent example in this regard is *Herrera Ulloa vs. Costa Rica* (2004). Here, the IACtHR noted that, according to the right to appeal included in Art. 8.2(h) of the ACHR, the remedies in this regard "must be effective", "accessible", and guarantee "a full review of the decision being challenged".[862] As the latter was not foreseen in the Costa Rican law, the Court ordered the State to "adjust its legal system to conform to the provisions of Article 8(2)(h)".[863] In addition, the IACtHR issued legislative remedies in three cases against Argentina because the provisions in force would not allow for the review of factual and/or evidentiary issues before a higher court.[864] Legislative remedies of the IACtHR included in this sub-category have extended beyond the appeal of judicial decisions, by ordering to regulate the possibility of appealing administrative decisions that declare a strike illegal,[865] as well as decisions of public educational institutions.[866] Despite not constituting an appeal in the formal sense, this sub-section includes also legislative measures found in two cases against Guatemala related to the right of every person sentenced to death to request an executive pardon or a commutation of the sentence.[867]

The ACtHPR has also one case in which it ordered a legislative reform related to the right to appeal. *Ajavon vs. Benin* (2019) concerned a politician and businessman from Benin who had been convicted of drug trafficking by the then newly established Anti-Economic Crimes and Terrorism Court (CRIET). The law creating CRIET was challenged mainly because it established that the proceedings before this Court would not allow for an ordinary appeal before a higher court but for a cassation appeal which does

a specific provision in Protocol 7, which includes however a specific obligation to legislate in order to protect this right (see Chapter 1 of this book).

862 IACtHR, *Herrera Ulloa v Costa Rica* (2004), paras. 161-165.

863 IACtHR, *Herrera Ulloa v Costa Rica* (2004), operative para. 5.

864 See IACtHR, *Mendoza vs. Argentina* (2013); *Gorigoitía vs. Argentina* (2019) and *Valle Ambrosio vs. Argentina* (2020).

865 IACtHR, *Former Employees of the Judiciary vs. Guatemala* (2021), operative para. 7.

866 IACtHR, *Pavez Pavez vs. Chile* (2022), operative para. 9.

867 See IACtHR, *Fermin Ramirez vs. Guatemala* (2005), operative para. 10; *Raxcacó Reyes vs. Gautemala* (2005), operative para. 7. As mentioned, this would not be an appeal in the legal sense because it is not taking place before a higher court but before the executive authorities. See on legislative remedies and death penalty, section I(7) of this chapter.

not consider the facts but only the formal aspects of a judgment.[868] The ACtHPR thus held that Article 19(2) of this law constituted a violation of the applicant's right to appeal,[869] and ordered in the reparations judgment Benin "to amend Sections 12 and 19(2) of Law No. 2018-13 of 2 July 2018, establishing CRIET in order to make them compliant with the provisions of Articles 3(2) of the Charter and 14(5) of the ICCPR".[870]

d) The enforcement of domestic judgments

Another sub-category of legislative measures concerning fair trial rights before the ECtHR is the one dealing with the non-enforcement of domestic judgments. The ECtHR has included legislative measures for this purpose in four judgments, against Russia, Ukraine and Moldova. They all concern cases in which the states' administrative authorities failed to implement a domestic judicial decision affording social housing or other benefits to the applicants in a reasonable time. Notably, neither the IACtHR nor the ACtHPR have dealt with this issue in their remedial case law.

The first of these cases before the ECtHR was *Burdov vs. Russia (No. 2)* (2009), concerning the non-enforcement of judgments that prescribed the payment of benefits for the Chernobyl victims.[871] The Court found that this constituted a violation of the rights to access to court and property, and – contrary to the first *Burdov* case – [872] it went on *mutu proprio* to examine

868 ACtHPR, *Ajavon vs. Benin,* (Merits, 2019), paras. 211-213.

869 ACtHPR, *Ajavon vs. Benin* (Merits, 2019), para. 215. In addition, the same law was also found to violate the right to equality before the law, because it established that the Public Prosecutor could lodge an ordinary appeal against the discharge decisions in favour of those prosecuted (para. 225).

870 ACtHPR, *Ajavon vs. Benin* (Reparations, 2019), para. 144 (vii).

871 See on this case Philip Leach, Helen Hardman and Svetlana Stephenson, "Can the European Court's Pilot Judgment Procedure Help Resolve Systemic Human Rights Violations? Burdov and the Failure to Implement Domestic Court Decisions in Russia", *HRLR* 10(2), 2010, pp. 346-359.

872 In ECtHR, *Burdov vs. Russia* (2002), the applicant claimed that despite several domestic judgments in his favour, the Russian authorities refused to pay him the benefits he was entitled to after being exposed to radioactive emission when he participated in the emergency operations in the aftermath of the Chernobyl nuclear plant disaster. The Court found that this constituted a violation of Art. 6 ECHR and Art. 1 Protocol 1 ECHR, but ordered only the payment of a monetary compensation. The State paid this sum to the applicant and argued that it had also enforced further judgments related to the payment of benefits for the Chernobyl victims (*Burdov vs. Russia (No. 2)* (2009), para. 10). This was accepted by the CoM and the case

the right to a domestic remedy under Art. 13 ECHR, finding that the remedies available in Russia for the non-enforcement of domestic judgments could not be considered effective.[873] With respect to the remedial measures, the ECtHR took a similar approach to that in most other judgments included in this analysis. It abstained from indicating specific measures to solve the structural problems but ordered states to set up a remedy "which secures adequate and sufficient redress for non-enforcement or delayed enforcement of domestic judgments".[874] The ECtHR explicitly stated in this respect that it would be "highly unlikely (…) that such an effective remedy can be set up without changing the domestic legislation on certain specific points".[875]

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was closed. Later, Russian courts issued several additional judgments ordering the payment of default interests and compensation to Mr. Burdov for the State's failure to implement the previous decisions in a reasonable time (*Burdov vs. Russia (No. 2)* (2009), paras. 12-21). Mr. Burdov then submitted a second application before the ECtHR claiming that Russia had again failed to implement these additional judgments in due time.

873 This was because the available remedies did not have both a preventive and a compensatory nature. See *Burdov vs. Russia* (No. 2) (2009), paras. 96-117. The same violations (i.e. Arts. 6, 13 and 1 Protocol 1 ECHR) were also found in the cases of *Yuriy Nikolayevich Ivanov vs. Ukraine* (2009) and *Gerasimov vs. Russia* (2014), paras. 174 and 183. In *Olaru vs. Moldova* (2009), the introduction of a domestic remedy was ordered without previously finding a violation of Art. 13. Instead, it recalled that it had determined the Art. 13 violation in three previous cases against Moldova and it was not aware of any change in this respect (para. 58).

874 *Burdov vs. Russia* (No. 2) (2009), operative para. 6; *Olaru vs. Moldova* (2009), operative para. 4; *Yuriy Nikolayevich Ivanov vs. Ukraine* (2009), operative para. 5; *Gerasimov vs. Russia* (2014), operative para. 12.

875 *Burdov vs. Russia* (No. 2) (2009), para. 138. Here it can be seen that the ECtHR in some cases leaves a very small room of manoeuvre to states with regard to the legislative character that the domestic remedies should possess. Indeed, after this judgment Russia introduced such a remedy by reforming its domestic legislation. However, the applicants of *Gerasimov vs. Russia* (2014) were unsuccessful while attempting to make use of, as it only applied for the State's failure to enforce judgments ordering monetary payments, but not other obligations in kind (paras. 157-166). Therefore, the Court noted in this second pilot judgment against Russia concerning the same issue that "while part of the problem was successfully resolved by the first pilot judgment and the ensuing adoption of the Compensation Act (…), numerous cases which do not fall within the latter's scope" (para. 206). This led the Court to consider that the structural problem in Russia "lends itself to be resolved through an amendment of domestic legislation, as demonstrated by the positive experience of the Burdov pilot judgment" (para. 221).

The other remedies of the ECtHR included in this subcategory are also related to judgments ordering the payment of social benefits,[876] or the provision of housing and other services in kind.[877] As to the legislative origin of the structural problem, a clear difference can be observed between the two cases against Russia, in which the ECtHR stated that these problems "do not stem from a specific legal or regulatory provision or a particular lacuna in Russian law",[878] and the cases against Ukraine and Moldova, where domestic laws were identified as the source of the problem.[879]

e) Other due process rights

Finally, there are also several legislative remedies ordered by the IACtHR and the ACtHPR that aim at tackling other fair trial-related issues, not only in the strictly judicial context but also in criminal procedures more generally. For example, in the case of *Favela Nova Brasilia vs. Brazil* (2017), the IACtHR ordered Brazil to adopt legislative measures allowing victims and their families to participate in criminal investigations carried out by the police and the prosecution authorities.[880] In the case of *Oumar Mariko vs. Mali* (2022), the ACtHPR's measures prescribed the reform of the "laws governing the constitutional court", in order to allow for adversarial proceedings and the recusal of judges.[881] Further remedies included here relate

876 As in ECtHR, *Yuriy Nikolayevich Ivanov vs. Ukraine* (2009), dealing with the application of a former member of the military who had obtained a favourable domestic judgment concerning the payment of his pension.

877 See respectively ECtHR, *Olaru vs. Moldova* (2009), paras. 5-23; *Gerasimov vs. Russia* (2014), paras. 8-75.

878 ECtHR, *Burdov vs. Russia* (No. 2) (2009), para. 136; *Gerasimov vs. Russia* (2014), para. 219.

879 This is reflected most clearly in *Olaru vs. Moldova* (2009), with the Court stating that the structural problem "appears to have its origin in socially-oriented legislation (…) which bestows social housing privileges on a very wide category of persons at the expense of the local governments" (para. 54). In *Yuriy Nikolayevich Ivanov vs. Ukraine* (2009) the Court's terms were vaguer, mentioning as the source of the problem "a combination of factors, including (…) shortcomings in the national legislation" (para. 84).

880 IACtHR, *Favela Nova Brasilia vs. Brazil* (2017), operative para. 19.

881 ACtHPR, *Oumar Mariko vs. Mali* (2022), operative paras. xv and xvi.

to arbitrary detentions,[882] the use of confidential witnesses,[883] and habeas corpus rights.[884]

3. Property Rights

Property rights represent an area of debate in international human rights law. It is perhaps the only right which is included in the regional human rights instruments but neither in the ICCPR nor in the ICESCR.[885] This is due to the diverging approaches towards property rights that the Western states and those of the Eastern Bloc had at the moment of drafting these Covenants. For communist governments at that time, these rights were equated to "bourgeois trappings".[886] At the same time, Western liberal governments gave property rights a special priority precisely in order to use them as a 'weapon' against communism. The importance traditionally given to property rights in the European human rights protection system can thereby be traced to that conflict, as the ECHR was drafted in the midst of the Cold War. The drafters of the Convention embraced a rather liberal-conservative human rights perspective, avoiding the redistributionist vision of certain political forces.[887] However, the right to property was

882 A Honduran law allowed for the detention of people that were suspected to be part of the street gangs known as 'maras'. This law was challenged and its amendment was ordered by the IACtHR in the case of *Pacheco Teruel vs. Honduras* (2012), operative para. 5. See similarly IACtHR, *Tzompaxtle Tecpile vs. México* (2022), operative paras. 7 and 8.

883 In the case of IACtHR, *Norín Catrimán vs. Chile* (2014), operative para. 20, the Court ordered to reform procedural criminal laws for the means of evidence consisting in confidential witnesses to be restricted and subject to judicial control.

884 In the case of IACtHR, *Blanco Romero vs. Venezuela* (2005), the IACtHR ordered the adoption of the necessary legislative measures "in order for writs of habeas corpus to be effectively processed in cases of [en]forced disappearance" (operative para. 9).

885 See on that William Schabas, "The Omission of the Right to Property in the International Covenants", *Hague Yearbook of International Law* 4, 1991, pp. 158–159.

886 See Rosemary Foot, "The Cold War and Human Rights", in Melvyn P. Leffler and Odd Arne Westad (eds.), *The Cambridge History of the Cold War*, Cambridge: CUP, 2010, pp. 445-465.

887 See generally Marco Duranti, *The Conservative Human Rights Revolution*, Oxford: OUP, 2017.

not included in the Convention itself but was added two years later with the adoption of the first Protocol to the ECHR.[888]

Since then, this right has become a cornerstone in the case law of the ECtHR, both from an interpretative and a remedial perspective. Concerning the former, the ECtHR has interpreted the right to property rather broadly, extending its protection to all economic interests of natural and legal persons.[889] On the latter, as it will be observed, property rights are of utmost importance in the remedial jurisprudence of the ECtHR. Its first cases with legislative remedies concerned the issue of property rights in the context of transitions to democracy of former communist states.[890]

Between 2004 and 2022, the ECtHR issued eight judgments with legislative measures related to property rights against seven different states, mostly in the contexts of transitions to democracy and state succession.[891] Several of these cases are related to compensations for the confiscation of property that took place before the ECHR entered into force in these states. In this regard, the Court has affirmed repeatedly that the right to property does not imply a general obligation for states to return properties that were confiscated before the entry into force of the Convention, but when states adopt a domestic law regulating the restitution of such properties, this can be regarded as a new property right.[892] In general, three distinct sub-categories can be identified with respect to ECtHR's judgments with legislative remedies related to property rights. These are property rights in the context of transitions to democracy, usually from former communist regimes (a); property rights in the context of state succession, mainly in the Balkan region (b); and property rights in the aftermath of armed conflicts, such as the one between Turkey and Cyprus (c). Property rights have not played such an important role in the remedial practice of the other two regional courts, except for the legislative remedies concerning the collective property of indigenous peoples over their territory (d).

888 According to Schabas, the non-inclusion of the right to property in the ECHR was because "the deputies were divided on political lines, with the socialists contending that to recognize the right to property but not any other economic and social rights, such as the right to work, would send the wrong message about the substance of human rights" (Schabas, *Commentary to the ECHR*, 2015, p. 961).

889 Sabrina Praduroux, "Property and Expropriation: Two Concepts Revisited in the Light of the Case Law of the European Court of Human Rights and the European Court of Justice", *European Property Law Journal* 8(2), 2019, pp. 172–191.

890 See ECtHR, *Broniowski vs. Poland* (2004) and *Hutten-Czapska vs. Poland* (2006).

891 This represents 26% of all ECtHR's cases with legislative measures.

892 ECtHR, *Maria Atanasiu vs. Romania* (2010), paras. 135-136.

a) Property rights in the context of transitions to democracy

Most cases in which the ECtHR has dealt with transitional justice issues concern the restitution or compensation for property that was nationalised or otherwise confiscated by communist regimes.[893] As was mentioned before, this is the sub-category in which the origin of legislative remedies and also pilot judgments before the ECtHR can be found, as it was an issue that brought an enormous amount of complaints before this Court.[894] The first two cases in which the pilot judgment procedure was applied are *Broniowski vs. Poland* (2004) and *Hutten-Czapska vs. Poland* (2006). The former dealt with the State's obligation to redress or compensate individuals who, after the Soviet invasion, had been "repatriated from the 'territories beyond the Bug River' [i.e., the eastern provinces of pre-war Poland] and had to abandon their property there".[895] Poland introduced a compensation scheme, but then adopted a law in 2003 extinguishing the State's obligations towards those who had received some type of compensatory property, even though it did not correspond to the property they had abandoned.[896] The ECtHR found this to constitute a violation of Art. 1 of Protocol 1 to the ECHR, and went on to consider the effects of the Polish legislative scheme upon other potential victims.[897] It found in this respect that "the facts of the case disclose the existence, within the Polish legal order, of a shortcoming as a consequence of which a whole class of individuals have been or are still denied the peaceful enjoyment of their possessions".[898] Thus, after introducing the pilot judgment procedure, the ECtHR included a paragraph in the operative part of the judgment stating that Poland "must, through appropriate legal measures and administrative practices, secure the implementation of the property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress in lieu".[899]

893 See generally Tom Allen and Benedict Douglas, "Closing the Door on Restitution", in Antoine Buyse and Michael Hamilton (eds.), *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights*, Cambridge: CUP, 2011, pp. 208-238.

894 See Chapter 3 of this book.

895 ECtHR, *Broniowski vs. Poland* (2004), para. 11.

896 ECtHR, *Broniowski vs. Poland* (2004), para. 137.

897 ECtHR, *Broniowski vs. Poland* (2004), para. 187. The ECtHR found that this prevented the applicants' access to compensation for their properties (para. 176), and that an unjustified difference of treatment between 'Bug River claimants' was introduced with this law (para. 186).

898 ECtHR, *Broniowski vs. Poland* (2004), para. 189.

899 ECtHR, *Broniowski vs. Poland* (2004), operative para. 4.

Contrary to that judgment, where the structural problem stemmed not only from domestic laws but also from the State's administrative practice in the application of these laws, in *Hutten Czapska vs. Poland* (2006) the issue turned exclusively around the housing legislation, which left no margin for a Convention-friendly application. The system of rent control introduced by the former communist authorities in Poland resulted in legislative restrictions for landlords regarding rent increases for their dwellings.[900] After reviewing the relevant laws, the ECtHR found that the rent control scheme constituted a violation of the right to property, as in practice it was "forcing landlords to accept a level of rent which bore no relation whatsoever to the costs of maintenance of property".[901] Thus, after identifying the underlying systemic problem in this case as "the malfunctioning of Polish housing legislation",[902] the ECtHR stated in the operative part that Poland "must (…) through appropriate legal and/or other measures, secure in its domestic legal order a mechanism maintaining a fair balance between the interests of landlords and the general interest of the community".[903] Thus, although it still refrained from giving a very specific order to the legislator, the fact that such mechanism or procedure had to be "secure[d] in [the State's] domestic legal order" strongly indicates that this needed to be done through a legislative amendment.[904] In fact, the legislative nature of this remedy was criticised by some judges in separate opinions.[905]

The cases of *Maria Atanasiu vs. Romania (2010)* and *Manushaqe Puto vs. Albania* (2012) also dealt with compensations for property loss during communist regimes.[906] In both cases, the ECtHR included rather broad

900 ECtHR, *Hutten-Czapska vs. Poland* (2006), paras. 3-6, 13.

901 ECtHR, *Hutten-Czapska vs. Poland* (2006), paras. 210, 225.

902 ECtHR, *Hutten-Czapska vs. Poland* (2006), operative para. 3.

903 ECtHR, *Hutten-Czapska vs. Poland* (2006), operative para. 4. However, when commenting on the general measures, it stated that "[i]t is not for the Court to specify what would be the most appropriate way of setting up such remedial procedures or how landlords' interests in deriving profit should be balanced against the other interests at stake" (para. 239).

904 By contrast, in ECtHR, *Broniowski vs. Poland* (2004) the remedial measure was much broader, mentioning only the State's obligation to "secure the implementation of the property right" with respect to the affected individuals.

905 See ECtHR, *Hutten-Czapska vs. Poland* (2006), separate opinions of judges Zagrebelsky and Zupančič. The latter stated for example that "the Court clearly does not have, with the usual paraphernalia of constitutional law, an interest in meddling in what national legislation should or should not do".

906 The factual context of ECtHR, *Maria Atanasiu vs. Romania* (2010) is related to the nationalisation by Romania of an important number of buildings and "virtually all

remedial measures, establishing only Romania's and Albania's obligation to adopt "measures to ensure effective protection of the rights guaranteed by Article 6 §1 of the Convention and Article 1 of Protocol No. 1, in the context of all the cases similar to the present case".[907] However, the legislative nature of these remedies can be seen in the argumentative part of the judgment, where the Court mentioned that legislative reforms were probably needed, including even "an overhaul of the legislation in order to create clear and simplified rules of procedure".[908]

b) Property rights in the context of state succession

Another important sub-category of cases with legislative measures is the one affecting property rights in the context of state succession. This is mainly related to the dissolution of the former Soviet Federal Republic of Yugoslavia (SFRY).[909] The first of these cases is *Grudić vs. Serbia* (2012), a rather particular one in this analysis, as the legislative measures were not

agricultural land" between 1949 and 1962. After the end of the communist regime, the State adopted several laws in order to redress the victims of property rights violations, through the restitution of nationalised properties or compensation when this was no longer possible. The applicants of this case claimed that they had suffered an unlawful deprivation of property and that afterwards the State had failed to restitute or compensate this loss, despite multiple domestic claims and even favourable judicial decisions in this respect (paras. 14-43). *Manushaqe Puto vs. Albania* (2012) concerned several applicants who had inherited a title over plots of land that had been however confiscated by the State or otherwise expropriated during the communist regime or even before that. Albania set up several administrative commissions in charge of determining a financial compensation for the cases in which the restoration of property was no longer possible, and these commissions had issued binding decisions requesting the payment of a financial compensation to the applicants. However, the State had failed to enforce these decisions and pay the requested sums for over ten years (ECtHR, *Manushaqe Puto vs. Albania* (2012), paras. 4-22).

907 ECtHR, *Manushaqe Puto vs. Albania* (2012), operative para. 6.

908 ECtHR, *Maria Atanasiu vs. Romania* (2010), para. 235. Similarly in *Manushaqe Puto vs. Albania* (2012), para. 110. However, as usual these concrete measures were "suggested (…) on a purely indicative basis", as "the national authorities retain full discretion in choosing (…) the general measures to be laid down in the domestic legal system" (ECtHR, *Maria Atanasiu vs. Romania* (2010), para. 236).

909 See generally on the ECtHR and state succession, Menno T. Kamminga, "Impact on State Succession in Respect of Treaties", in Menno T. Kamminga and Martin Scheinin (eds.), *The Impact of Human Rights Law on General International Law*, Oxford: OUP, 2009, pp. 99-109.

included in the context of a pilot judgment procedure and were directed towards securing restitution for the specific applicants, instead of non-repetition for further potential victims.[910]

Two further legislative measures were included in the judgment of ECtHR, *Ališić vs. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* (2014). This application was directed against five successor states of the SFRY and relates to the applicants' inability to withdraw 'old' currency savings from their accounts after the dissolution of this state. In the early 1990s, during an economic crisis, the SFRY restricted the withdrawal of foreign currency funds from its banks. After the State's dissolution in 1992, these funds remained frozen in some of the successor states, as they could not reach an agreement regarding the distribution of the SFRY's guarantees for those savings. In this regard, the Court observed in its Chamber judgment that both Croatia and Macedonia had repaid most or even all the 'old' foreign-currency savings, but that this was not the case for Slovenia and Serbia.[911] The ECtHR thus decided in its Chamber judgment to apply the pilot judgment procedure and included two separate measures against Serbia and Slovenia ordering each of them to "undertake all necessary measures (…) in order to allow [the applicants] and all others in their position to be paid back their 'old' foreign-currency

910 This case dealt with the Serbian Government's failure to pay the disability pensions to which the applicants were entitled. The applicants were residents of Kosovo and had been receiving disability pensions by Serbia until 2000, when Kosovo was placed under international administration. From there on the State suspended these payments, even after the applicants relocated to Serbia in 2005. In the operative paragraphs, the ECtHR stated that "the respondent Government must (…) take all appropriate measures to ensure that the competent Serbian authorities implement the relevant laws in order to secure payment of the pensions and arrears in question" (*Grudić vs. Serbia* (2012), operative para. 3). As the judgment did not talk about other pensions besides those of the applicants, it is understood that these "arrears and pensions" are only those of the applicants. Thus, in this case the legislative remedy clearly serves a function of restitution instead of non-repetition.

911 Therefore, the Court found a violation of the right to property by these two states (ECtHR, *Ališić vs. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* (2012), para. 74). In addition, it found that no effective remedy for claiming and potentially obtaining the repayment of the savings was available in these two states, thus constituting a violation of Art. 13 ECHR (para. 90) The Grand Chamber agreed and upheld these findings (ECtHR, *Ališić vs. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* (2014), paras. 125, 136).

savings".[912] In the Grand Chamber judgment, the required measures were indicated with more detail as to their legislative nature, by determining that both states "must make all necessary arrangements, *including legislative amendments* in order to allow [the applicants] and all others in their position to recover their 'old' foreign-currency savings".[913]

c) Property rights in post-conflict situations

The last sub-category of ECtHR remedies included here concerns property rights in post-conflict situations. The ECtHR has dealt with this issue in the context of several conflicts, such as the conflict in Bosnia and Herzegovina,[914] the Nagorno-Karabakh conflict,[915] as well as the Turkey-Cyprus conflict.[916] It has, however, only included legislative measures with respect to the latter one. This was done in the case of *Xenides-Arestis vs. Turkey* (2005), where the applicant alleged that Turkish military forces prevented her from accessing her property in Northern Cyprus.[917] The ECtHR found that this constituted a violation of the right to property, and noted that the violation originated in "a widespread problem affecting large numbers of people, namely the unjustified hindrance of her 'respect for her home' and 'peaceful enjoyment of her possessions' as a matter of 'TRNC' policy or practice".[918] Thus, it indicated in the operative paragraphs that the State "must introduce a remedy which

912 ECtHR, *Ališić vs. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* (2012), operative para. 11.

913 ECtHR, *Ališić vs. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* (2014), operative paras. 10 and 11 (emphasis added).

914 See generally Antoine Christian Buyse, *Post-conflict Housing Restitution: The European Human Rights Perspective with a Case Study on Bosnia and Herzegovina*, Cambridge: Intersentia, 2008.

915 See especially the two 'mirror judgments' of the ECtHR in *Chiragov vs. Armenia* (2015) and *Sargsyan vs. Azerbaijan* (2015).

916 In the case examined in this sub-section, the Court relied extensively on the reasoning applied in *Loidizou vs Turkey* (1996) and the inter-state case of *Cyprus vs. Turkey* (2001). However, in these previous judgments the Court had abstained from ordering structural remedies. See on this issue Kudret Özersay and Ayla Gürel, "Property and Human Rights in Cyprus: The European Court of Human Rights as a Platform of Political Struggle", *Middle Eastern Studies* 44(2), 2008, pp. 291-321, showing how the proceedings before the ECHR concerning property rights in the context of the Cyprus conflict were used by both parties as another arena for their political struggles.

917 ECtHR, *Xenides-Arestis vs. Turkey* (2005), para. 3.

918 ECtHR, *Xenides-Arestis vs. Turkey* (2005), para. 38.

secures genuinely effective redress for the Convention violations identified in the instant judgment in relation to the present applicant as well as in respect of all similar applications pending before it".[919]

d) Property rights of indigenous communities

With respect to the IACtHR, its only judgments with legislative measures concerning property rights are those related to the right to collective property of indigenous peoples with respect to their ancestral territories.[920] In this respect, the IACtHR has developed a specific approach towards indigenous property rights, giving them a collective dimension, as opposed to the ECtHR which deals with this issue as standard property cases.[921] The first case where this adaptation of property rights to indigenous contexts took place is *Awas Tingni vs. Nicaragua* (2001). This was considered a landmark case in international law, being "the first legally binding decision by an international tribunal to uphold the collective land and resource rights of indigenous peoples".[922] Among other issues, the IACtHR pointed in this case to "the lack of specific and effective legislation for indigenous communities to exercise their rights", and ordered Nicaragua to "adopt in its domestic law (...) an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores".[923] The same type of measures, ordering the adoption of legal mechanisms for indigenous communities to claim a title over their ancestral lands, have become a rather commonly utilised remedy in the IACtHR's case law related to indigenous property rights.

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919 ECtHR, *Xenides-Arestis vs. Turkey* (2005), operative para. 5.

920 See generally on this issue Alejandro Fuentes, "Protection of Indigenous Peoples' Traditional Lands and Exploitation of Natural Resources: The Inter-American Court of Human Rights' Safeguards", *International Journal on Minority and Group Rights* 24(3), 2017, pp. 229-253.

921 See Elena Abrusci, "Judicial Fragmentation on Indigenous Property Rights: Causes, Consequences and Solutions", *IJHR* 21(5), 2017, pp. 550-564.

922 See James Anaya and Claudio Grossman, "The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples", *Arizona Journal of International and Comparative Law* 19(1), 2002, pp. 1-16, at p. 2.

923 IACtHR, *Awas Tingni Community vs. Nicaragua* (2001), para. 128 and operative para. 3.

It was included, *inter alia,* in three judgments against Paraguay and two against Suriname.[924] Moreover, in the remedial provisions of *Lhaka Nonhat vs. Argentina* (2020), the IACtHR added procedural requirements for the adoption of such laws. It specifically "order[ed] the State, prior to adopting the legislative and/or any other measures ordered (…), to establish actions that permit the participation of the country's indigenous peoples and/or communities (not only the victims in this case) in consultation processes in relation to such measures".[925] It should be noted, however, that in a separate opinion one of the judges criticised the use of legislative remedies in this case, arguing that these rights "do not require laws to give them effect".[926]

The ACtHPR took inspiration from this remedial case law of its Inter-American counterpart, and in 2022 ordered Kenya to adopt the necessary measures "to delimit, demarcate and title Ogiek ancestral land and to grant collective title to such land in order to ensure, with legal certainty, the Ogiek's use and enjoyment of the same".[927] However, as explained in the Introduction to this book, the main difference in this respect is that here the ACtHPR is prescribing these measures only in the benefit of one indigenous community and not for all the others inhabiting the country. This is therefore not qualified as a legislative remedy, as demarcating and titling in favour of a single community can be done through administrative measures, and it was argued that there was already a law in force that could allow for it.[928]

4. Electoral Rights

Another important category of legislative remedies is that related to electoral rights. Although the three regional courts have issued legislative remedies dealing with these rights, they have played an especially important role in the case law of the ACtHPR, with 23% of its legislative remedies

924 IACtHR, *Yakye Axa vs. Paraguay* (2005), *Sahoyamaxa vs. Paraguay* (2006), *Xákmok Kásek vs. Parguay* (2010)*, Saramaka vs. Suriname* (2007), *Kaliña and Lokono vs. Surinam* (2015).

925 IACtHR, *Lhaka Nonhat vs. Argentina* (2020), para. 355.

926 See IACtHR, *Lhaka Nonhat vs. Argentina* (2020), Dissenting Opinion of Judge Sierra Porto, para. 23, stating in this respect that "rights of indigenous and tribal peoples to property demarcation, delimitation and titling – as the other rights of the indigenous population in general – are rights with direct and immediate legal effect".

927 ACtHPR, *ACmHPR vs. Kenya* (2022), operative para. iv.

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

pertaining to this field.[929] These remedies affect a number of electoral laws that were found to be incompatible with states' human rights obligations. In the case law of the other two regional courts, legislative measures concerning electoral rights are much scarcer, with only two of them issued by the IACtHR and one by the ECtHR. The two judgments of the IACtHR concern political participation and the rights of elected public officials, while the legislative remedy on electoral rights issued by the ECtHR forms part of the (in)famous UK prisoners' voting rights saga.

a) The incompatibility of electoral laws before the ACtHPR

Despite being the youngest of the three regional courts, the ACtHPR is the one that has dealt more often with electoral rights in its remedial practice, ordering several states to reform electoral laws and even constitutional provisions related to electoral issues. In accordance with its broad scope of review, the Court has not only assessed the compatibility of electoral norms with the ACHPR but also with the African Charter on Democracy and the ECOWAS Protocol on Democracy and Good Governance. Especially relevant in this respect are two cases where the Court ordered Tanzania to reform its Constitution in order to increase democratic pluralism and to allow for the judicial investigation of cases of electoral fraud.

The first of them dealt with a provision of the Constitution of Tanzania prohibiting independent candidates from running for office at all levels. This constitutional provision was found to constitute a violation of several rights under the ACHPR, including the right to political participation, the freedom of association, the right not to be discriminated against and the right to equality before the law.[930] The ACtHPR indicated in the operative provisions that "[t]he Respondent is directed to take constitutional, legislative and all other necessary measures within a reasonable time to remedy

929 In contrast, legislative remedies related to electoral rights represent a 3% of both those of the ECtHR and the IACtHR. This focus of the ACtHPR on electoral issues can be observed not only in the judgments discussed below, but also in its advisory opinions. See for example ACtHPR, *Advisory Opinion issued at the Request of the PanAfrican Lawyers Union (PALU)*, Request No. 001/2020, 16 July 2021, on the right to participate in the government of one's country in the context of an election held during a public health emergency or a pandemic.

930 ACtHPR, *Tanganyika Law Society and Legal and Human Rights Centre* vs. *Tanzania* (2013), operative paras. 1 and 2.

the violations (...)".[931] This case is presented by Gathii and Mwangi as an example of the fact that the ACtHPR "serves as a forum where opposition politicians can advance their causes", due to the structural advantages enjoyed domestically by incumbent governments, which make the task of those in the opposition extremely difficult at that level.[932]

The other case concerning electoral provisions of the Tanzanian Constitution affected its Article 41(7), establishing that "where a candidate is declared duly elected by the electoral Commission in accordance with this Article, no court shall have jurisdiction to investigate his election".[933] The ACtHPR found that this provision introduced an unjustified differentiation between litigants, thus constituting discrimination, while also violating the "right to have its case heard" (i.e., to a domestic remedy).[934] Here, it was even more specific as to the constitutional character of the remedial provision, by ordering Tanzania to "ensure that article 47(1) of the Constitution is amended and aligned with the provisions of the Charter".[935]

Another relevant judgment on this topic dealt with Ivorian Law no. 2014-335, governing the composition, organisation, duties and functioning of the State's Independent Electoral Commission. The ACtHPR found that this law (which had been challenged by an NGO) provided for an imbalance in the composition of the Electoral Commission in favour of the incumbent government, thus failing to guarantee the independence and impartiality of electoral bodies.[936] Lastly, the ACtHPR determined that Article 27 of the Charter on Political Parties of Benin infringed the freedom of association under the ACHPR because according to this provision, political parties would lose their legal status if they failed to present candidates for two parliamentary elections.[937] In the same case, the ACtHPR also found that the Electoral Code of Benin infringed the rights to freedom of association and non-discrimination by prohibiting independent candidates

931 ACtHPR, *Tanganyika Law Society and Legal and Human Rights Centre* vs. *Tanzania* (2013), operative para. 3.
932 Gathii and Mwangi, in Gathii (ed.), 2020, pp. 242-243 and 253.
933 ACtHPR, *Jebra Kambole vs. Tanzania* (2020), para. 34.
934 ACtHPR, *Jebra Kambole vs. Tanzania* (2020), operative para. vi.
935 ACtHPR, *Jebra Kambole vs. Tanzania* (2020), operative para. viii.
936 As provided by Art. 17 of the African Charter on Democracy and Art. 3 of the ECOWAS Democracy Protocol (ACtHPR, *APDH vs. Côte d'Ivoire* (2016), para. 132-135). This constituted in turn a violation of Art. 13 of the ACHPR (para. 136) as well as of the right to equal protection before the law under Art. 3(2) ACHPR (para. 151).
937 ACtHPR, *Ajavon vs. Benin* (2020), paras. 240-247, 358.

and electoral alliances, as well as the right to participate in the government of one's country because of the residency requirement for candidates, ordering its amendment.[938] Similarly, the reform of the Electoral Code of Mali was also requested in a more recent judgment.[939]

b) Prisoners' voting rights before the ECtHR

Despite the ECtHR's constant focus on conditions of detention in its case law,[940] the first case with legislative remedies affecting individuals in detention did not deal with this issue but with their voting rights.[941] This case in question, *Greens and MT vs. UK* (2010), formed part of the saga on prisoners' voting rights in this State.[942] In this case, the two applicants had attempted to register to vote but they were rejected by the authorities due to their status as convicted persons, in accordance with the British Representation of the People Act of 1983. In a succinct analysis, after finding that the 1983 Act had not been amended and the blanket voting prohibition for prisoners was still in place in the aftermath of *Hirst vs. UK* (2001), the ECtHR found a violation of Art. 3 Protocol 1 ECHR. The Court

938 ACtHPR, *Ajavon vs. Benin* (2020), paras. 198-220, 358. The same legislative remedy was also included in *XYZ vs. Benin (I)* (2020), operative para. xiv), as well as in *Houngue Eric Noudehouenou vs. Benin* (2020), operative para. xi). In these cases, it was because the Electoral Code had been adopted after a constitutional reform that been declared to be in violation of the State's human rights obligations. See below section I. 8 ("Constitutional Issues").

939 ACtHPR, *Oumar Mariko vs. Mali* (2022), operative para. xvii.

940 See above section I. 1 c).

941 There is only one judgment in which the ECtHR has included a legislative remedy dealing with electoral rights. However, it has dealt with this issue on a number of further judgments. In this respect, a notorious case is ECtHR, *Sejdić and Finci vs. Bosnia and Herzegovina* (2009), where the ECtHR found for the first time that a constitutional provision was incompatible with the Convention, although it did not order any specific remedies in this regard.

942 This issue had been dealt first with by the ECtHR in the case of *Hirst vs. UK* (2001), which received a lot of attention both in- and outside this State. See for example Sophie Briant, "Dialogue, Diplomacy and Defiance: Prisoners' Voting Rights at Home and in Strasbourg", *EHRLR* 16(3), 2011, pp. 243-252; Ed Bates, "Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg", *HRLR* 14(3), 2014, pp. 503–540. See on this conflict between the ECtHR and the UK, Chapter 6 of this book.

made the legislative nature of this problem very explicit,[943] and stated that a "legislative amendment is required in order to render the electoral law compatible with the requirements of the Convention".[944] Therefore, the ECtHR included in the operative part a measure ordering the UK to "bring forward, (…) legislative proposals intended to amend the 1983 Act and, if appropriate, the 2002 Act in a manner which is Convention-compliant" as well as to "enact the required legislation".[945] This was, notably, one of the cases in which the legislative nature of the requested remedies was made more explicit by the Strasbourg Court.

c) Political participation and the rights of elected officials before the IACtHR

The IACtHR has also issued legislative remedies related to electoral rights, but it has only done so in two cases.[946] The first case, *Yatama vs Nicaragua* (2005), was also included in the section on the protection of indigenous communities, as the IACtHR included a legislative measure in order to ensure their political participation.[947] The IACtHR went nevertheless even further and, in a separate measure, ordered the reform of the State's Electoral Act, as well as the regulation of certain procedural aspects related to electoral participation that extended to the rest of the population.[948] The second case concerned Gustavo Petro, a then well-known opposition leader in Colombia who at the time of writing is the President of this State. There, the Court found that the domestic law allowing for the "disqualification

943 The ECtHR argued that the UK's failure "to introduce legislative proposals to put an end to the current incompatibility of the electoral law with Article 3 of Protocol No. 1 is not only an aggravating factor as regards the State's responsibility under the Convention for an existing or past state of affairs, but also represents a threat to the future effectiveness of the Convention machinery" (ECtHR, *Greens and MT vs. UK* (2010), para. 111).

944 ECtHR, *Greens and MT vs. UK* (2010), para. 112. It refrained however from indicating what the amended law should look like, as "in matters of general policy (…) opinions within a democratic society may reasonably differ" (para. 113).

945 ECtHR, *Greens and MT vs. UK* (2010), operative para. 6.

946 Nevertheless, electoral rights have also been dealt with in the IACtHR's advisory jurisprudence, such as in its advisory opinion on presidential re-elections. See IACtHR, *Indefinite Presidential Re-election in Presidential Systems in the context of the Inter-American System of Human Rights,* Advisory Opinion OC-28/21 (2021).

947 See above section I. 1 a) of this chapter.

948 IACtHR, *Yatama vs. Nicaragua* (2005), operative para. 10.

or dismissal of a democratically elected public official by an administrative authority and not by 'a conviction by a competent judge in criminal proceedings' is contrary to Article 23(2) of the Convention", and therefore ordered its reform.[949]

5. Nationality Rights

Nationality rights is also a field in which all three regional human rights courts have issued legislative remedies, although rather exceptionally.[950] Both the ECtHR and the ACtHPR have done so in one judgment, and the IACtHR in two. The American Convention is the only regional human rights treaty that includes the right to a nationality, which can be found in its Article 20. In the African system, a protocol to the ACHPR 'on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa' was adopted by the ACmHPR in 2015, while the ECtHR has usually dealt with these issues through Article 8 ECHR. The four legislative remedies included in this section affect the issue of statelessness.[951] The main difference among them is that in the case of the ECtHR, the remedy was related to statelessness in the context of state succession, while those of the IACtHR and the ACtHPR concerned the deprivation of citizenship and statelessness in the context of migration.

949 IACtHR, *Petro Urrego vs. Colombia* (2020), para. 113, operative para. 8 ("The State shall, within a reasonable time, update its domestic legal code in accordance with the parameters established in this judgment").

950 Nationality rights encompass "the right to a nationality, the right not to be arbitrarily deprived of one's nationality, the right to change one's nationality and (…) 'the right to naturalisation'". See David Owen, "On the Right to Have Nationality Rights: Statelessness, Citizenship and Human Rights", *NILR* 65, 2018, pp. 299–317, at p. 300. See also Alice Edwards, "The meaning of nationality in international law in an era of human rights", in Alice Edwards and Laura van Waas (eds.), *Nationality and Statelessness under International Law*, Cambridge: CUP, 2014, pp. 11-43.

951 See in this respect Michelle Foster and Hélène Lambert, "Statelessness as a Human Rights Issue: A Concept Whose Time Has Come", *International Journal of Refugee Law* 28(4), 2016, pp. 564–584, arguing that the landmark decisions issued by regional human rights courts reflect the current importance of statelessness as a human rights issue.

a) Statelessness in the context of state succession

Statelessness became an important issue in Europe during the 1990s, especially due to the "wave of disappearances or dissolutions of states" that took place during that time.[952] This led to the adoption of the European Convention on Nationality in 1997 and the ILC Articles on Nationality in relation to the Succession of States in 1999.[953] The ECtHR had to deal with this issue as well, for example in the case of *Kurić vs. Slovenia* (2010), which concerns the issue of nationality laws that are discriminatory in the context of state succession. This case relates to citizens of other successor states to the SFRY that were residing in Slovenia at the moment of its independence. In accordance with several laws adopted at that time, they had three months to apply for Slovenian nationality. In case they failed to do so, their names were 'erased' from the register. In consequence, a number of them became stateless. The Slovenian Constitutional Court found this to be unconstitutional, and the ECtHR ruled in its Chamber judgment that it constituted a violation of Art. 8 ECHR. It therefore included an operative provision ordering the State to adopt "appropriate general and individual measures to secure the applicants' right to a private and/or family life and effective remedies in this respect".[954] Moreover, the ECtHR stated with respect to the legislative nature of these measures that "the failure by the Slovenian legislative and administrative authorities to comply with the Constitutional Court's decisions clearly indicates the appropriate general and individual measures to be adopted in the Slovenian domestic legal order so that the violations found may be remedied: *enactment of appropriate legislation* and regulation of the situation of the individual applicants by issuing retroactive permanent residence permits".[955]

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952 See Ineta Ziemele, "State Succession and Issues of Nationality and Statelessness", in Alice Edwards and Laura van Waas (eds.), *Nationality and Statelessness under International Law*, Cambridge: CUP, 2014, pp. 217-246, at p. 217.

953 See ILC, "Articles on Nationality of Natural Persons in relation to the Succession of States with commentaries", *Yearbook of the International Law Commission*, 1999, vol. II, Part Two, pp. 23–24; European Convention on Nationality, especially Art. 18, dealing with nationality in the context of state succession. See also Ziemele, 2014, p. 222 ("it was only after the last major wave of state successions in the 1990s that international law really made strides in elaborating standards for the regulation of nationality in this context").

954 ECtHR, *Kurić vs. Slovenia* (2010), operative para. 6.

955 ECtHR, *Kurić vs. Slovenia* (2010), para. 407 (emphasis added). Indeed, the legislative measures were implemented by Slovenia, adopting a new law on nationality

b) Deprivation of citizenship in the context of migration

The other cases included in this section have to do with the deprivation of citizenship and statelessness in the context of migration.[956] The issue of migration and human rights has been mostly discussed with respect to the ECHR,[957] as it was until recently an issue affecting more the European than the inter-American or African contexts.[958] However, a country in which this has been an issue for a long time is the Dominican Republic (DR), due to the migration flows coming from Haiti.[959] Indeed, the two cases in which the IACtHR has ordered to reform domestic laws in this area concern the

and issuing residence permits. Thereafter, the ECtHR issued its Grand Chamber judgment on this case. There, it pointed to a number of shortcomings of the enacted legislation, highlighting that under the Slovenian legal order "the whole category of the 'erased' [were] still denied compensation for the infringement of their fundamental rights" (*Kurić vs. Slovenia* (2012), para. 412). Therefore, it decided to apply the pilot judgment procedure, putting the focus on the compensatory aspect and requesting the State to set up an ad hoc compensation scheme for those 'erased' (*Kurić vs. Slovenia* (2012), operative para. 9). The question remains here whether this remedy issued by the GC can be qualified as a legislative one, as contrary to the introduction of a domestic remedy (which usually requires a legislative act) an *ad hoc* compensation scheme can be set up through administrative action. However, Slovenia introduced this compensation scheme through another legislative enactment, and in its subsequent just satisfaction judgment, the GC considered this "appropriate" and avoided including any general measures (*Kurić vs. Slovenia* (2014), paras. 138-139). In any case, the chamber judgment in *Kurić vs. Slovenia* (2010) is clearly including a legislative measure, which was indeed effective.

956 On the close links between migration and statelessness, see Sophie Nonnenmacher and Ryszard Cholewinski, "The nexus between statelessness and migration", in Alice Edwards and Laura van Waas (eds.), *Nationality and Statelessness under International Law*, Cambridge: CUP, 2014, pp. 247-263.

957 See generally Başak Çalı, Ledi Bianku and Iulia Motoc (eds.), *Migration and the European Convention on Human Rights*, Oxford: OUP, 2021. Although the ECtHR has produced important jurisprudence in this field, it has not yet included migration-related legislative remedies in its judgments. See also on the ECtHR's case law in this area David Moya and Georgios Milios (eds.), *Aliens before the European Court of Human Rights*, Leiden: Brill Nijhoff, 2021.

958 This has changed recently due to the political and social situation of Venezuela. More than 7 million people have left the country during the last years according to the UNCHR, and many Latin American states are nowadays increasingly faced with the management of migration (https://www.unhcr.org/emergencies/venezuela-situation).

959 See Eugenio Matibag and Teresa Downing-Matibag, "Sovereignty and Social Justice: The 'Haitian Problem' in the Dominican Republic", *Caribbean Quarterly* 57(2), 2011, pp. 92-117.

denial of Dominican authorities to register children born in the DR with parents in an irregular situation, thus depriving them of their access to nationality and rendering them *de facto* stateless.[960] As will be explained in Chapter 6, these remedies were the origin of a conflict between the DR and the inter-American human rights bodies.

The case of the ACtHPR included in this section is *Anudo Ochieng Anudo vs. Tanzania* (2018), dealing with the expulsion and withdrawal of the citizenship of a Tanzanian individual. When Mr. Anudo, born in Tanzania, applied for a marriage license, he was accused of misrepresenting his identity, and in consequence, his passport was confiscated and he was expelled to Kenya, a state that did not recognise him as a citizen. The ACtHPR found this to be an arbitrary deprivation of citizenship in violation of Article 15(2) UDHR, as well as an arbitrary expulsion contrary to Article 13 ICCPR.[961] When dealing with the victim's right to an effective remedy, the Court noted that in accordance with Article 10(f) of the Tanzanian Immigration Law, the decision of the Minister of Home Affairs declaring a person an "illegal immigrant" is final. After finding that this constitutes a violation of the right to be heard by a judge under Art. 7 ACHPR, the Court concluded that the aforementioned law "contains gaps in as much as it does not allow citizens by birth to exercise judicial remedy where their nationality is challenged".[962] Thus, it ordered Tanzania to "amend its legislation to provide individuals with judicial remedies in the event of dispute over their citizenship".[963]

6. Freedom of Expression

Freedom of expression is also an issue that affects the three regional courts to a similar extent.[964] In this regard, all of them have included legislative

960 These are the cases of IACtHR, *Yean and Bosco vs. Dominican Republic* (2005), operative para. 8; and *Expelled Dominicans and Haitians vs. Dominican Republic* (2014), operative paras. 19 and 20.

961 ACtHPR, *Anudo Ochieng Anudo vs. Tanzania* (2018), paras. 88 and 106.

962 ACtHPR, *Anudo Ochieng Anudo vs. Tanzania* (2018), para. 117.

963 ACtHPR, *Anudo Ochieng Anudo vs. Tanzania* (2018), operative para. viii. This was re-stated in the judgment on reparations (ACtHPR, *Anudo Ochieng Anudo vs. Tanzania* (2021), operative para. xii).

964 See for example Eduardo Andrés Bertoni, "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 (examining the impact of the

remedies related to this right in some of their judgments. A number of remedies included here concern the reform of laws that somehow impede the effective exercise of this right, such as criminal law provisions regulating the offences of libel, slander or defamation that are either too broad or disproportionate in terms of their consequences.[965] Thus, most legislative measures in this context demand negative reforms. However, a minority of legislative measures affect the right to public access to information, requesting states to enact laws that regulate this issue. Finally, a third sub-category consists of IACtHR legislative remedies relating to the freedom of expression which do not fall under the two primary sub-categories.

a) The offences of libel, slander and defamation

The IACtHR has ordered the reform of laws regulating the offences of libel, slander and defamation in four cases against Argentina, Chile and Ecuador.[966] For example, *Kimel vs. Argentina* (2008) relates to the publication of a book that expressed criticism towards the judicial authorities and a particular judge. The author was condemned for the offences of libel and slander, which were established very broadly in the Argentinian Criminal Code. Therefore, the IACtHR ordered Argentina to amend the domestic criminal laws that contain these offences, in order to "comply with the requirements of legal certainty so that, consequently, they do not to affect the exercise of the right to freedom of thought and expression".[967] The Court issued similar remedial orders in *Palamara Iribarne vs. Chile* (2005), *Palacio Urrutia vs. Ecuador* (2021) and *Baraona Bray vs. Chile* (2022).[968]

This issue was also taken up by the ACtHPR in the case of *Lohe Issa Konate vs. Burkina Faso* (2014), concerning a journalist who had been

freedom of expression case law of the ECtHR on the IACtHR's case law dealing with this topic).

965 See in this respect Jo M. Pasqualucci, "Criminal Defamation and the Evolution of the Doctrine of Freedom of Expression in International Law: Comparative Jurisprudence of the Inter-American Court of Human Rights", *Vanderbilt Journal of Transnational Law* 39, 2006, pp. 379-433.

966 See generally on the IACtHR's jurisprudence in this area Johannes Seidl, *Meinungsfreiheit in der Rechtssprechungspraxis des Interamerikanischen Gerichtshof für Menschenrechte*, Tübingen: Mohr Siebeck, 2014, especially at pp. 208-216.

967 IACtHR, *Kimel vs. Argentina* (2008), operative para. 11.

968 See IACtHR, *Palamara Iribarne vs. Chile* (2005), operative para. 13; *Palacio Urrutia vs. Ecuador* (2021); *Baraona Bray vs. Chile* (2022), operative para. 9.

convicted of defamation. Notably, in this case, the ACtHPR considered separately the violation of the freedom of expression by domestic laws *per se* and by domestic courts applying those laws.[969] With respect to the law, the ACtHPR considered that the provisions on defamation failed to meet the requirement of proportionality because they established that defamation was an offence punishable by imprisonment. The Court found that, apart from very serious and exceptional circumstances such as incitement to hatred, discrimination or violence, as well as threats or incitement to international crimes, the restriction of the freedom of expression cannot have imprisonment as a consequence.[970] Thus, it found two separate violations due to the existence of the provisions and due to the application of them by courts, and it ordered Burkina Faso to amend these provisions.[971] In a more recent case, this Court also imposed the reform of a specific provision of the Criminal Code of Benin, in order to protect the freedom of expression in the context of criticism towards judicial decisions.[972]

b) The regulation of public access to information

Access to information is also an important aspect of the freedom of expression, and it has been dealt with through legislative remedies by both the IACtHR and the ECtHR. The judgment of the IACtHR in the case of *Claude Reyes vs. Chile* (2006) concerned restrictions on public access to state-owned information. The IACtHR stated that these restrictions need to comply with certain conditions, such as being proportionate and based on a concrete law.[973] At that time there was no law in Chile regulating access to information, and therefore the Court ordered the adoption of such a law in order "to guarantee the protection of the right of access to State-held information".[974] Another relevant case in this context is *Flores Bedregal vs. Bolivia* (2022), where the IACtHR ordered the reform of Bolivia's Organic

969 ACtHPR, *Lohe Issa Konate vs. Burkina Faso* (2014), para. 124.
970 ACtHPR, *Lohe Issa Konate vs. Burkina Faso* (2014), paras. 163-165.
971 It specifically stated in the remedial order that the amendment shall repeal custodial sentences for acts of defamation and make sure that other sanctions for these acts should meet the requirements of necessity and proportionality (ACtHPR, *Lohe Issa Konate vs. Burkina Faso* (2014), operative para. 8).
972 ACtHPR, *Houngue Éric Noudehouenou vs. Benin* (2022), operative para. xvi.
973 IACtHR, *Claude Reyes vs. Chile* (2006), paras. 89-92.
974 IACtHR, *Claude Reyes vs. Chile* (2006), operative para. 7.

Law of the Armed Forces, as it established the withholding of information even when the clarification of enforced disappearances was at stake.[975]

The ECtHR has issued legislative remedies related to the freedom of expression only once, in a case related to access to information and family rights. The case concerns Serbia's failure to give information about the alleged death of the applicant's son.[976] The ECtHR noted that there were "hundreds of parents in the same situation as that of the applicant, namely, whose newborn babies had 'gone missing' following their alleged deaths in hospital wards".[977] Taking into account "the significant number of potential applicants", the Court requested Serbia to "take all appropriate measures, preferably by means of a *lex specialis* (…), to secure the establishment of a mechanism aimed at providing individual redress to all parents in a situation such as, or sufficiently similar to, the applicant's".[978]

c) Other freedom of expression-related issues

Further legislative remedies of the IACtHR related to the freedom of expression also concern the protection of journalists,[979] freedom of expression in the military,[980] and censorship. The issue of censorship was dealt with in the case of *The Last Temptation of Christ vs. Chile* (2001), related to

975 IACtHR, *Flores Bedregal vs. Bolivia* (2022), operative para. 14.

976 ECtHR, *Zorica Jovanovic vs. Serbia* (2013). A few days after he was born, while still in the hospital, the medical staff told the applicant that her son had died. However, the body was never released, the cause of death was not established through an autopsy, the applicant was not informed of when and where her son was buried, and the son's death was not officially recorded (para. 71). The applicant indeed suspected that her son was still alive and had been unlawfully given up for adoption (para. 42). The ECtHR found that these facts disclosed a violation of Art. 8 ECHR (para. 75).

977 ECtHR, *Zorica Jovanovic vs. Serbia* (2013), para. 26.

978 ECtHR, *Zorica Jovanovic vs. Serbia* (2013), para. 92 and operative para. 6 (although without expressly mentioning the preference for a *lex specialis* in the operative provision).

979 IACtHR, *Leguizamón Zaván vs. Paraguay* (2022), operative para. 12, prescribing the adoption of a law for the protection of journalists and human rights defenders from violence after exercising their right freedom of information.

980 In the case of IACtHR, *Usón Ramirez vs. Venezuela* (2009), which is also included in the category on the right to a fair trial, the State was ordered to amend a specific article of its Organic Code of Military Justice (operative para. 9). When specifying the content of the legal reform, the Court mentioned that "the State must allow for the people to exercise the democratic control over all state institutions and their

film productions and a system of previous censorship that was established in Chile's Political Constitution of 1980. In this case, named after the movie 'The Last Temptation of Christ' (as its exhibition was prohibited on the basis of this norm), the IACtHR ordered Chile to "amend its domestic law (...) in order to eliminate previous censorship".[981] Chile ended up amending its Constitution in order to comply with this judgment, which rendered it a very notorious one.

7. Amnesty Laws

Amnesty laws have gained notable importance in the field of human rights law and transitional justice.[982] This category is one of the flagships of the IACtHR, which has consistently declared the incompatibility of these laws with the Convention. Despite representing only 4% of the IACtHR's legislative remedies, those consisting in the invalidation of amnesty laws have become some of the most notorious of this Court, receiving a lot of attention in scholarship.[983] The ACtHPR took inspiration from this practice and also ordered the repeal of an amnesty law in one case due to its incompatibility with human rights obligations. On the other hand, although the ECtHR has never directly decided on the validity of an amnesty law,[984] it has generally taken a more flexible approach in cases related to this

civil servants by means of freely expressing their ideas and opinions about their performance, fearing no further repression" (para. 173).

981 IACtHR, *The Last Temptation of Christ vs. Chile* (2001), operative para. 4. In the reasoning, the Court mentioned expressly Chile's Constitution when stating that the State was failing to adapt its domestic laws to the Convention by maintaining cinematographic censorship in it (at para. 88).

982 See for example Louise Mallinder, "Can Amnesties and International Justice be Reconciled?", *International Journal of Transitional Justice* 1, 2007, pp. 208–230.

983 See Annelen Micus, *The Inter-American human rights system as a safeguard for justice in national transitions: from amnesty laws to accountability in Argentina, Chile and Peru*, Brill Nijhoff, 2015. See also Christina Binder, "The Prohibition of Amnesties by the Inter American Court of Human Rights", *GLJ* 12(5), 2011, pp. 1203-1230; Juan Pablo Perez-Leon Acevedo, "The control of the Inter-American Court of Human Rights over amnesty laws and other exemption measures: Legitimacy assessment", *LJIL* 33, 2020, pp. 667–687.

984 See however Miles Jackson, "Amnesties in Strasbourg", *Oxford Journal of Legal Studies* 38(3), 2018, p. 456, arguing that "there is a good chance that the Court will be seized of an amnesty case in the near future".

issue.[985] It has specified in this respect certain circumstances under which an amnesty law might be lawfully adopted, such as "a reconciliation process and/or a form of compensation to the victims".[986] As it will be observed, the IACtHR has also nuanced its position towards amnesty laws in its most recent cases.[987]

In general, the Latin American amnesty laws were enacted during the 1980s and 1990s, in the context of military dictatorships present at that time in the region. They were either adopted by the regime itself (the so-called 'self-amnesties') or during transitions to democracy and prevented the states from prosecuting human rights violations that were committed in a specific period. In addition, these amnesty laws were an impediment to the victims' relatives discovering the truth, as well as the victims themselves obtaining reparations. The IACtHR ordered for the first time the annulment of amnesty laws in the case of *Barrios Altos vs. Peru* (2001). It concerned two 'self-amnesty' laws, adopted in 1995 by the regime of Fujimori, which impeded holding responsible anyone who had participated in human rights violations between 1980 and 1995. The facts of the case are related to the extrajudicial execution of fifteen people by members of the Peruvian Army in 1991. When the amnesty laws entered into force, the investigation of these facts was closed by the Peruvian High Court of Justice. The IACtHR held in this case that "[s]elf-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention", establishing thus the invalidity of

985 In *Tarbuk vs. Croatia* (2012), para. 50, the ECtHR argued that "[t]he state is justified in adopting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the provision, however, that a balance is maintained between the legitimate interests of the State and the interests of individual members of the public in having the right to life protected by law". Nevertheless, in a number of cases against Turkey, the ECtHR found that the existence of amnesty provisions constituted a violation of the State's obligation to investigate acts of torture, arguing that "when an agent of the State is accused of crimes that violate Article 3 of the Convention, (…) the granting of an amnesty or pardon should not be permissible" (see ECtHR, *Yerli vs. Turkey* (2014), para. 61; *Okkali vs. Turkey* (2006), para. 78; *Terzi and Erkmen vs. Turkey* (2007), para. 34).

986 ECtHR, *Marguš vs. Croatia* (2014), para. 139.

987 See for example Perez-Leon Acevedo, *LJIL* 2020, p. 668 ("To some extent, the IACtHR has arguably 'moderated' its approach by considering and balancing competing interests in subsequent cases that involved amnesty laws").

the specific laws.[988] *Barrios Altos* soon became a leading case for the human rights jurisprudence dealing with this topic.[989]

Since then, the IACtHR has ordered this remedy in four other judgments. The case of *Almonacid Arellano vs. Chile* (2006) also dealt with 'self-amnesty',[990] while the issue in *Gomes Lund vs. Brazil* (2010) and *Gelman vs. Uruguay* (2011) were amnesty laws adopted in the context of a transition to democracy.[991] Especially in the latter case, the IACtHR's decision was criticised by a number of commentators for failing to properly consider the domestic democratic procedures, as the Uruguayan amnesty law had been validated twice through democratic referenda.[992] Finally, the case of *Mozote Massacres vs. El Salvador* (2012) dealt with an amnesty law adopted in the context of negotiations aimed at ending a non-international armed conflict. The IACtHR nuanced here its position, stating that in such a context an amnesty may be permitted, although it cannot be applied for war crimes or crimes against humanity.[993] In this case, it is also worth looking at the separate opinion of Judge Garcia-Sayán, subscribed by five of the seven judges of the IACtHR. The subscribing judges left a door open for amnesties, stating that in certain transitional situations, States may weigh "the degree of justice that can be achieved" against the aim of "tolerance

988 IACtHR, *Barrios Altos vs. Peru* (2001), para. 43, operative para. 4, finding that "Amnesty Laws No. 26479 and No. 26492 are incompatible with the [ACHR] and, consequently, lack legal effect".

989 See Pablo González Domínguez and Edward J. Pérez, "Desafíos de la Jurisprudencia de la corte interamericana de derechos Humanos sobre leyes de Amnistía en contextos de Justicia transicional", *Persona y Derecho* 80, 2019, pp. 81-106, examining the influence of *Barrios Altos* on subsequent IACtHR case law in pp. 83-88.

990 Here, the IACtHR expanded on the impossibility of granting amnesty for crimes against humanity, highlighting the irrelevance of "[t]he fact that such provisions have been adopted pursuant to domestic legislation or against it" (IACtHR, *Almonacid Arellano vs. Chile* (2006), para. 120).

991 The Court stated in this regard that the incompatibility of amnesty laws with the ACHR "does not stem from a formal question, such as its origin, but rather from the material aspect as they breach the rights enshrined in Articles 8 and 25 of the Convention" (IACtHR, *Gomes Lund vs. Brazil* (2010), para. 175).

992 See for example Roberto Gargarella, "Democracy and Rights in Gelman v. Uruguay", *AJIL Unbound*, 2015, pp. 115-119. See also Perez-Leon Acevedo, *LJIL* 2020, p. 683 ("The IACtHR should distinguish between normative provisions that lack democratic legitimacy and those that possess an important quota of democratic legitimacy").

993 IACtHR, *Mozote Massacres vs. El Salvador* (2012), paras. 285-286.

and peace".[994] These arguments were not applicable to the case at hand, but rather reflected a trend within international legal practice and scholarship to accept limited amnesties under certain conditions.[995]

Although the IACtHR has been the pioneer and the most active court in regard to amnesty laws, this issue has also been taken up by the ACtHPR, which ordered the repeal of a Beninese amnesty law. It concerned a law adopted "to grant amnesty for crimes, misdemeanors and felonies committed in the context of the legislative elections of April 2019".[996] The ACtHPR followed as well the more flexible approach and concluded that "an amnesty law is compatible with human rights only if it is accompanied by restorative measures for the benefit of the victims".[997] As this was not the case with this law, it found that Benin had violated the right to an effective remedy under Art. 7(1) of the African Charter and prescribed the repeal of this law.[998] It is interesting to compare in this respect the wording of the legislative remedies concerning amnesty laws before these two courts. While the ACtHPR ordered the State to "repeal (…) Law No. 2019 - 39 of 31 July 2019 on amnesty for criminal, tort and offences committed during the legislative elections of 28 April 2019", the IACtHR used a different formula in all its cases related to amnesty laws, by stating in the remedy that the respective laws "lack legal effect".[999] This formulation is rather surprising for an international court, and it will be examined in more detail in Chapter 5 of this book.[1000]

994 IACtHR, *Mozote Massacres vs. El Salvador* (2012), Separate Opinion of Judge García Sayan, paras. 37-38.

995 See in this regard Louise Mallinder, "The end of amnesty or regional overreach? Interpreting the erosion of South America's amnesty laws", *ICLQ* 65(3), 2016, pp. 645-680 ("the regional trend appears to be evolving towards a more nuanced position in which limited amnesties and alternative punishments may continue to be permissible"). See also Perez-Leon Acevedo, *LJIL* 2020, p. 683 ("The one-size-fits-all approach of the IACtHR to Latin American amnesty laws/exemption measures should be replaced with more nuanced and case-by-case approaches").

996 ACtHPR, *Ajavon vs. Benin* (2020), paras. 223 and 232.

997 ACtHPR, *Ajavon vs. Benin* (2020), paras. 234-238.

998 ACtHPR, *Ajavon vs. Benin* (2020), para. 239.

999 IACtHR, *Barrios Altos vs. Peru* (2001), operative para. 4 ("lack legal effects"); *Almonacid Arellano vs. Chile* (2006), operative para. 3 ("have no legal effects"); *Gomes Lund vs. Brazil* (2010), operative para. 3 ("lack legal effect"); *Gelman vs. Uruguay* (2011), operative para. 11 ("lacking effects"); *El Mozote Massacres vs. El Salvador* (2012), para. 296 ("lack legal effect").

1000 See in this regard Micus, 2015, pp. 158-160.

8. Mandatory Death Penalty

Unlike the European system, where the death penalty was formally abolished through Protocols 6 and 13 to the ECHR, this punishment is not *per se* incompatible with or prohibited by its American and African counterparts.[1001] The American Convention establishes several limitations regarding the application of this punishment,[1002] while the African Charter is the regional human rights treaty most permissive with the death penalty, not including any restrictions in this regard. Moreover, the ACtHPR has established that this punishment can be compatible with the right to life as long as it is provided by law and imposed after a fair trial with due process.

Thus, it is not surprising that the legislative remedies included in this section have been issued only by the IACtHR and the ACtHPR, and that the death penalty has played a less important role in the case law of the ECtHR.[1003] Indeed, the IACtHR and the ACtHPR have each included legislative remedies concerning the death penalty in four judgments. While the judgments of the former court are directed against three states (Trinidad and Tobago, Barbados and Guatemala), in the case of the latter court the

1001 Although Article 2(1) ECHR includes death penalty as an exception to the right to life, this was first abolished during peacetime through the adoption of Protocol 6 in 1983 and then in all circumstances through Protocol 13, adopted in 2002. See in this respect Schabas, *Commentary to the ECHR*, 2015, p. 1200, describing Protocol 13 as "the final step in full abolition". See generally also Jon Yorke, "Inhuman Punishment and Abolition of the Death Penalty in the Council of Europe", 16(1) *European Public Law*, 2010, pp. 77-103, analysing how the interpretation of Art. 3 ECHR has contributed to the dismantling of death penalty in the CoE.

1002 The ACHR (Article 4, paras. 2-6) contains some specifications in this regard. *Inter alia*, it states that capital punishment "shall not be extended to crimes to which it does not presently apply", nor "re-established in states that have abolished it", and that "every person condemned to death shall have the right to apply for amnesty, pardon or commutation of sentence". The IACtHR moreover established in an advisory opinion of 1983 that death penalty should be applied only in the "most serious common crimes" and that "certain considerations involving the person of the defendant (...) must be taken into account" (IACtHR, *Restrictions to the Death Penalty*, Advisory Opinion OC-3/83 (1983), para. 55). In addition, twelve state parties to the ACHR have ratified the 1990 Optional Protocol to abolish the death penalty. See in this respect Hennebel and Tigroudja, *Commentary to the ACHR*, 2022, pp. 182-183.

1003 The death penalty-related case law of the ECtHR concerns mostly cases of extradition to countries where death penalty is still in place. A seminal case in this regard is ECtHR, *Soering vs. UK* (1989). See also William A. Schabas, *The Abolition of the Death Penalty in International Law*, 3rd ed., Cambridge: CUP, 2003, at pp. 259-299.

four of them concern Tanzania.[1004] All of these measures are related to domestic provisions establishing the mandatory death penalty for certain crimes, such as murder or treason. This implies that the death penalty is the automatic consequence of being convicted for these crimes, without any "graduated assessment of the seriousness of the offence, so that it will bear an appropriate relation to the graduated levels of gravity of the applicable punishment".[1005]

In its first case on this topic, the IACtHR determined that the mandatory death penalty in Trinidad and Tobago treated the accused "not as individual, unique human beings, but as undifferentiated and faceless members of a mass who will be subjected to the blind application of the death penalty".[1006] The same argumentation was repeated some years later with regard to the provision of the Guatemalan Criminal Code that stipulated a mandatory death penalty for the crimes of kidnapping and abduction.[1007] In the case of Barbados, section 2 of the State's Offences Against the Person Act read: "[a]ny person convicted of murder shall be sentenced to, and suffer, death".[1008] The Court declared this provision to be "*per se* contrary to the Convention" and ordered the State, as in the other cases, to adopt "such legislative or other measures as may be necessary to ensure that the imposition of the death penalty (...) is not imposed through mandatory sentencing".[1009]

The ACtHPR used the same arguments in the case of *Ally Rajabu vs. Tanzania* (2019).[1010] The two applicants had been found guilty of murder

1004 As it can be observed, most of the IACtHR's judgments on this topic concern Caribbean common law states, a region which "remains a holdout in the steady march toward a customary international human rights norm rejecting capital punishment". See Margaret A. Burnham, "Caribbean Constitutions and the Death Penalty", in Richard Albert et al. (eds.), *The Oxford Handbook of Caribbean Constitutions*, Oxford: OUP, 2020, pp. 421-454, at p. 421.

1005 IACtHR, *Hilaire, Constantin and Benjamin vs. Trinidad and Tobago* (2002), para. 102.

1006 IACtHR, *Hilaire, Constantin and Benjamin vs. Trinidad and Tobago* (2002), para. 101.

1007 IACtHR, *Raxcacó Reyes vs. Guatemala* (2005), paras. 73-82. In addition, Guatemala had expanded death penalty to cases for which it was not foreseen when it ratified the Convention (paras. 57-66).

1008 Cited in IACtHR, *Boyce vs. Barbados* (2007), para. 49.

1009 IACtHR, *Boyce vs. Barbados* (2007), para. 72 and operative para. 7, respectively. The same was ordered in *Dacosta Cardogan vs. Barbados* (2009), operative para. 9.

1010 The aforementioned decisions of the IACtHR have not only influenced its African counterpart, but also constitutional courts, who have annulled provisions estab-

and were sentenced in accordance with section 197 of the Tanzanian Penal Code, which established the mandatory death penalty for this crime.[1011] The ACtHPR found that in the case of Tanzania death penalty was provided by law and the trial had been fair, thus in principle complying with the death penalty requirements established by this court. However, the Court determined that this provision was contrary to the Charter, due to the judges' inability to take into account the individual circumstances of those convicted.[1012] Similar to its American counterpart, the ACtHPR considered mandatory sentencing to the death penalty as arbitrary deprivations of the right to life,[1013] and ordered Tanzania "to remove the mandatory imposition of the death penalty from its penal Code as it takes away the discretion of the judicial officer".[1014] The ACtHPR then included almost identical remedies in three further judgments against Tanzania.[1015]

9. Constitutional Issues

This category is a particular one, as it deals with legislative remedies aiming not at the reform of ordinary laws but of domestic constitutions. Certainly, some remedies prescribe constitutional amendments in further cases, related to issues such as the constitutional regulation of electoral rights or fair trial rights, which are included in the corresponding sections of this chapter.[1016] However, the remedies included in this section affect issues that are of an essentially constitutional nature. It contains in this respect three cases of the IACtHR that relate to the constitutional regulations on the

lishing mandatory death penalty in a number of jurisdictions. See Andrew Novak, "The 'Judicial Dialogue' in Transnational Human Rights Litigation: Muruatetu & Anor v. Republic and the Abolition of the Mandatory Death Penalty in Kenya", *HRLR* 18, 2018, pp. 771–790.

1011 ACtHPR, *Ally Rajabu vs. Tanzania* (2019), para. 97.

1012 ACtHPR, *Ally Rajabu vs. Tanzania* (2019), operative para. viii.

1013 ACtHPR, *Ally Rajabu vs. Tanzania* (2019), para. 114. The ACtHPR found a violation not only of article 4 of the ACHPR (i.e. the right to life), but also of Article 1, concerning the general implementation of rights, because Tanzania had not removed this provision from its penal code after the entry into force of the Charter (para. 125).

1014 ACtHPR, *Ally Rajabu vs. Tanzania* (2019), operative para. xv (1).

1015 See ACtHPR, *Amini Juma vs. Tanzania* (2021), *Gozbert Henerico vs. Tanzania* (2022) and *Marthine Christian Msuguri vs. Tanzania* (2022).

1016 See for example ACtHPR, *Jebra Kambole vs. Tanzania* (2020), operative para. viii; ACtHPR, *XYZ vs. Benin (II)* (2020), operative para. xiii; IACtHR, *Digna Ochoa vs. Mexico* (2021).

reform of ordinary laws and another three by the ACtHPR that concern constitutional reforms.

With respect to the IACtHR, the three cases included here concern the constitutions of Trinidad and Tobago and Barbados, which contained provisions that impeded certain laws to be amended under any circumstance, making it impossible for these states to implement other legislative remedies issued by the IACtHR.[1017] Specifically, the Constitution of Trinidad and Tobago, in its section 6, precluded "individuals from challenging (...) all laws or acts carried out pursuant to any law in force in Trinidad and Tobago before 1976, the year the Constitution entered into force".[1018] The case of Barbados is very similar, as section 26 of its Constitution "prevents courts from declaring the unconstitutionality of current laws that were enacted or made before the Constitution came into force".[1019] In other judgments against these two states, the IACtHR had ordered the repeal of ordinary laws that provided respectively for corporal punishments against detainees,[1020] and for the mandatory death penalty as the consequence of certain crimes.[1021] These laws were however protected by the aforementioned constitutional clauses. The Court determined in the former case that "any provision that establishes that [Corporal Punishment] Act's immunity from challenge is likewise incompatible".[1022] In the Barbadian case, this was even more explicit, mentioning that "section 26 of the Constitution of Barbados effectively denies its citizens in general, and the alleged victims in particular, the right to seek judicial protection against violations of their right to life".[1023] The IACtHR thus ordered both states to reform their constitutions in order to allow for the amendment of ordinary laws.[1024]

1017 See generally Natalia Torres Zuñiga, "Control de Normas Constitucionales por la Corte Interamericana de Derechos Humanos", in Pablo Santolaya and Isabel Wences (eds.), *La America de los Derechos*, Madrid: CEPC, 2016, pp. 483-507, especially pp. 496-498.

1018 Cited in IACtHR, *Caesar vs. Trinidad and Tobago* (2005), para. 49(11).

1019 IACtHR, *Boyce vs. Barbados* (2007), para. 75.

1020 IACtHR, *Caesar vs. Trinidad and Tobago* (2005) operative para. 3.

1021 IACtHR, *Boyce vs. Barbados* (2007), operative para. 9.

1022 IACtHR, *Caesar vs. Trinidad and Tobago* (2005), para. 133.

1023 IACtHR, *Boyce vs. Barbados* (2007), para. 79.

1024 IACtHR, *Caesar vs. Trinidad and Tobago* (2005), operative para. 4 ("[t]he State shall amend (...) Section 6 of Trinidad and Tobago's Constitution"); *Boyce vs. Barbados* (2007), operative para. 8, ordering to "remove [the constitutional provision's] immunizing effect". The same argumentation was then repeated in the case of *Dacosta Cardogan vs. Barbados* (2009), which was also related to the

In the case of the ACtHPR, the three 'constitutional' remedies included here concern a reform of the Beninese Constitution that took place in 2019. According to the applicants of these cases, this reform was "adopted in secret, without the involvement of all sections of the Beninese society", in contravention to the principle of national consensus laid down in the African Charter on Democracy, Elections and Governance (ACDEG).[1025] In the first of these cases, the Court determined that in order to be compatible with the ACDEG, constitutional reforms need to be "preceded by a consultation of all actors and different opinions with a view to reaching national consensus or followed, if need be, by a referendum".[1026] As this was not the case with the Beninese constitutional reform, the Court found it to be in violation of Article 10(2) of the ACDEG.[1027] The ACtHPR did not stop there, but considered as well that adopting a constitutional reform without national consensus violates the right to economic, social and cultural development, included in Article 22(1) of the ACHPR, as well as the right to peace and security under Article 23(1) of the Charter.[1028] The Court repeated these arguments in two further cases against Benin.[1029] Moreover, in these three cases, the ACtHPR not only prescribed the repeal of the unconventional constitutional reform but also "all subsequent laws related to the election".[1030]

Offences against the Person Act (establishing the mandatory death penalty) and its preclusion from reform.

1025 Article 10(2) of the ACDEG establishes that "State Parties shall ensure that the process of amendment or revision of their constitution reposes on national consensus, obtained if need be, through referendum". See ACtHPR, *XYZ vs. Benin (II)* (2020), para. 5.

1026 ACtHPR, *XYZ vs. Benin (II)* (2020), para. 102.

1027 ACtHPR, *XYZ vs. Benin (II)* (2020), para. 105. In addition, the ACtHPR established that Benin had infringed the right to information under Article 9 ACHPR because the draft constitutional revision and the debates leading thereto were not publicly available to the population (paras. 119-125).

1028 ACtHPR, *XYZ vs. Benin (II)* (2020), paras. 125-128, 135-137.

1029 ACtHPR, *Ajavon vs. Benin* (2020), paras. 342-343; *Houngue Eric Noudehouenou vs. Benin* (2020), para. 66. However, contrary to the case of *XYZ vs. Benin (II)* (2020), here the Court did not find that the constitutional reform violated the rights to information, to economic, social and cultural development, nor the right to peace.

1030 ACtHPR, *Houngue Eric Noudehouenou vs. Benin* (2020), operative para. xi. In *Ajavon vs. Benin* (2020), para. 358, the ACtHPR even specified that this should be done "in any case before an election", while in *XYZ vs. Benin (II)* (2020), operative para. Xiv, it specifically ordered the repeal of "Law 2019-43 of 15 November 2019 on the Electoral Code". See Chapter 5 for a closer analysis of these orders.

10. Codification of Criminal Offences

The last category comprises remedial measures that order states to criminalise certain acts or to adapt the definition of criminal offences in their national laws. The IACtHR is the only regional human rights court that has issued legislative remedies for this purpose, but it has done so in an important number of cases. In some of them, the IACtHR ordered to legally define acts that were not contemplated by the domestic criminal codes, while in others it ordered to adapt the legal definition to international standards. The enforced disappearance of persons plays a paramount role in this regard. This crime was infamously common during the internal conflicts and authoritarian regimes that were present in Latin America in the early years of the system. In fifteen of the twenty cases included in this category, the IACtHR ordered either to codify the crime of enforced disappearance of persons or to adapt the definition of this crime to international standards.[1031] Besides enforced disappearances, the Court has also ordered states to criminalise acts of torture,[1032] as well as extrajudicial executions.[1033]

These are usually cases in which the IACtHR considers the state responsible for acts constituting *inter alia* enforced disappearance or torture and subsequently finds that these crimes are not codified or properly defined in the domestic legal order, in contravention of treaty obligations to legislate.[1034] For example, in *Trujillo Oroza vs. Bolivia* (2002), the IACtHR considered that the State stood in violation of Art. 3 of the Inter-American Convention on the Enforced Disappearance of Persons, which requires that all state parties define this conduct as a criminal offence.[1035] In addition, it stated that the lack of a legal definition hindered the criminal procedure, allowing for the

1031 The Court specified some aspects that the definition should contain. For example, it mentioned that the law should allow for a declaration of absence and presumption of death in cases of enforced disappearance (IACtHR, *Molina Theissen vs. Guatemala* (2004), operative para. 7), or that no temporal limitations should affect the prosecution of this crime (IACtHR, *Osorio Rivera vs. Peru* (2013), para. 271). This adaptation to international standards has been ordered especially against Peru, in three judgments issued between 2009 and 2016 (IACtHR, *Gomez Palomino vs. Peru* (2009), paras. 102-108; *Osorio Rivera vs. Peru* (2013), para. 206, *Tenorio Roca vs. Peru* (2016), paras. 303 and 304).

1032 IACtHR, *Heliodoro Portugal vs. Panamá* (2008), operative para. 16; *Goiburú vs. Paraguay* (2006), operative para. 14; *Deras García vs. Honduras* (2022), operative para. 13.

1033 IACtHR, *Barrios Altos vs. Peru* (2001), operative para. 5(b).

1034 On the treaty obligations to legislate, see Chapter 1 of this book.

1035 IACtHR, *Trujillo Oroza vs. Bolivia* (2002), para. 95.

impunity of perpetrators, and thus ordered the adoption of this criminal provision.[1036] With respect to the adaptation of legal definitions to international standards, the issue of prescription has also played an important role, for example in two judgments against Brazil dealing with the definition of slavery and crimes against humanity.[1037] In both of these cases, the Court ordered Brazil to amend its criminal code in order to guarantee the non-applicability of statutory limitations on these crimes. Another recent example concerns the definition of rape in the Bolivian Criminal Code. The IACtHR ordered the amendment of this provision in order to make consent the central element of the definition, instead of the requirement of violence or intimidation.[1038]

ll. Others

There are finally five further legislative measures included in judgments of the IACtHR and the ACtHPR that do not fit in any of the categories examined above. Some of them are too specific, such as the ones that deal with the prohibition of in-vitro fertilisation in Costa Rica,[1039] or with impermissible restrictions to the right to strike in Benin.[1040] In other cases, they are the only ones of their nature, such as the one related to the right to

1036 IACtHR, *Trujillo Oroza vs. Bolivia* (2002), para. 97 and operative para. 2. The criminalisation of enforced disappearances as such has only been ordered again in *Gomes Lund vs. Brazil* (2010), operative para. 3.

1037 See respectively IACtHR, *Hacienda Brasil Verde vs. Brazil* (2016), operative para. 11 and *Herzog vs. Brazil* (2018), operative para. 8.

1038 IACtHR, *Angulo Losada vs. Bolivia* (2022), operative para. 13. In addition, another legislative measure in this judgment requested the codification of the crime of incest (operative para. 15).

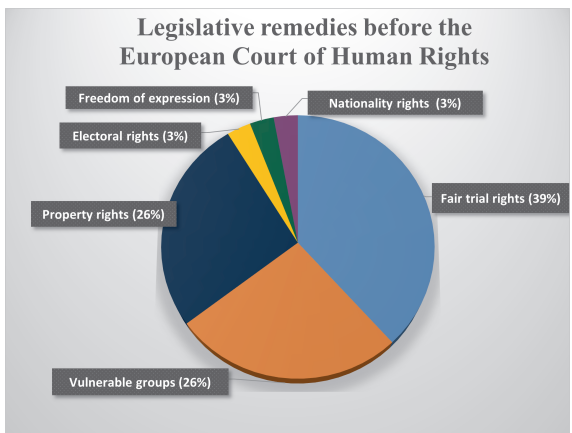
1039 In Costa Rica, the prohibition of practicing in-vitro fertilisation (IVF) techniques was established in its domestic law. In the case of IACtHR, *Artavia Murillo vs. Costa Rica* (2012) the Court ordered the State to adopt "appropriate measures to annul the prohibition to practice IVF" (operative para. 2) and to "regulate (...) the aspects that it considers necessary for the implementation of IVF" (operative para. 3).

1040 ACtHPR, *Ajavon vs. Benin* (2020), para. 358. In this case, the applicant alleged that three articles of the Beninese Law No. 2018-34 violated the right to strike (para. 129). The Court found that not only the contested law, but also two further domestic laws of Benin prohibited the right to strike in violation of the principle of non-regression under the ICESCR (paras. 140-142).

privacy in Argentina,[1041] or the ones concerning the use of force by public officials in Ecuador and the DR.[1042]

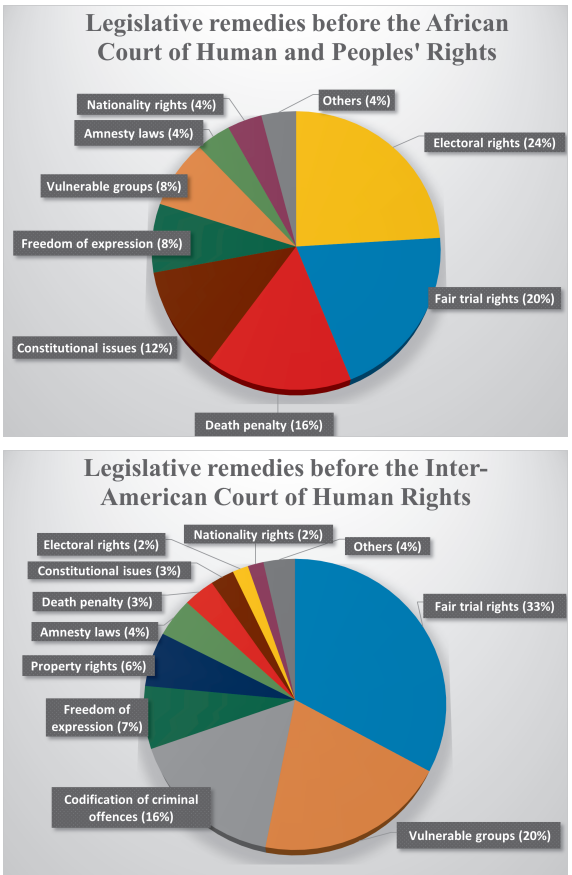
II. Different Intensities in the Use of Legislative Remedies

The case law analysis included in this chapter has shown that there is a notoriously similar understanding among regional human rights courts with respect to the issues that should be tackled through legislative remedies. Indeed, all three regional courts have used legislative remedies with regard to six of the ten categories established in this chapter, while two of them (the IACtHR and the ACtHPR) have done so in another three categories, and there is only one category in which the legislative measures come exclusively from one court. However, notable differences among the courts can be observed when looking at the intensity with which each of them has applied legislative remedies to each category. This is reflected in the following charts:



1041 See IACtHR *Fernández Prieto and Tumbeiro vs. Argentina* (2020), operative 7 ("[t]he State shall adapt its domestic law concerning the regulations that permit stopping and searching vehicles or individuals without a court order".).

1042 See respectively, IACtHR, *Casierra Quiñonez vs. Ecuador* (2022), operative para. 10; *Nadege Dorzema vs. Dominican Republic* (2012), operative para. 9. The facts of this latter case relate to the shooting of Dominican Border Patrol Officers against a truck that did not stop at a checkpoint, killing several people that were in it. The Court ordered in this regard the DR to "adapt its domestic laws on the use of force by law enforcement officials".



Here it becomes clear that the three courts have different priorities when it comes to the use of legislative measures. It can be observed in this respect that each regional court has favoured three categories, that comprise around two-thirds of all its respective legislative measures. Thereby, it is notable that the only category in which these remedies are frequently used by all of them is that of legislative remedies related to the right to a fair trial. It comprises 39% of the ECtHR's legislative remedies, 33% of those of the IACtHR and 20% of the ones issued by the ACtHPR. This important number of remedial measures is most probably related to the fact that fair

trial is the right that is litigated more often before regional human rights courts.[1043]

Then, one can see that the ACtHPR, in its young jurisprudence, has put its main emphasis on the issue of electoral rights, comprising 24% of its legislative remedies. This is probably due to the democratic challenges affecting many states in the African region, with electoral provisions that favour incumbent governments at the expense of democratic pluralism. In addition, this issue is very rarely tackled by domestic courts, which tend to side with those in power.[1044] This has often resulted in accusations of electoral fraud, which have in turn triggered protests by the population and violent repression of protesters by the states' security forces.[1045] Electoral violence among the supporters of different political factions, military *coups d'état*, or even internal armed conflicts as a result of political struggles are also still relatively prevalent issues in the African continent.[1046] Thus, it is not surprising that the African Court devotes a great deal of attention to electoral rights issues in its remedial jurisprudence.

Issues related to the mandatory death penalty have also been important before this court, comprising 16% of its legislative measures. This is due to the fact that people who have been condemned to death in Tanzania are often applying to the ACtHPR in this respect, as this State still foresees in its criminal code the mandatory death penalty as a consequence of being found guilty of the crime of murder. Other categories have played

1043 With respect to the IACtHR, see for example Hennebel and Tigroudja, *Commentary to the ACHR*, 2022, p. 311, mentioning that "almost each of the four hundred judgments dealing with substantive rights contain claims of violation of Article 8 [i.e. the right to a fair trial]". However, the remedies afforded more often for fair trial violations are not legislative reforms (a rather exceptional type of remedy) but compensation and declaratory relief. See also Clooney and Webb, *The Right to a Fair Trial in International Law*, 2020, p. 832.

1044 See on this point O'Brien Kaaba, "The Challenges of Adjudicating Presidential Election Disputes in Domestic Courts in Africa", *AHRLJ* 15(2), 2015, pp. 329-354, especially at pp. 335 et seq.

1045 For example, after the elections of Benin in April 2019, allegations of fraud were raised against the State's incumbent president, due to the amendment of electoral laws in his favour shortly before the election. This caused massive protests, to which the military responded with violence against the protestors and arbitrary detentions. See Sarah Maslin Nir, "It Was a Robust Democracy. Then the New President Took Power", *The New York Times*, 4 July 2019, available at: https://www.nytimes.com/2019/07/04/world/africa/benin-protests-talon-yayi.html.

1046 On this issue, see generally Liisa Laakso, "Electoral Violence and Political Competition in Africa", in Nic Cheeseman (ed.), *The Oxford Encyclopedia of African Politics*, Oxford: OUP, 2019, pp. 552-563.

a less important role, but there is still a wide array of them. Legislative remedies related to constitutional issues comprise 12% of the total, while the remaining categories amount to 28% of the measures. However, this rest includes another five categories, making a total of eight of them. This shows that in its young jurisprudence, the ACtHPR has already opened up to use legislative remedies for a considerable variety of issues.

This is different in the case of the ECtHR, where the variety of remedial categories is more limited. Here, legislative measures have been only used with respect to six categories. This includes the aforementioned one on the right to a fair trial (39%), which is the leading one by far, followed by the legislative remedies for the protection of vulnerable people (26%) and legislative remedies for property rights (26%). The final category is especially noteworthy, as it is an area that the other regional courts have not given much weight to. As mentioned before, this importance given to the right to property by the ECtHR is probably due to its understanding of human rights, where economic liberalism can be considered an important component of its interpretation.[1047] Property rights are a good reflection of this liberal human rights tradition, especially because they often take precedence over the states' socio-economic policies. The ECtHR has also included legislative remedies related to electoral rights, nationality rights and the right of freedom of expression, but to a much lesser extent than the other three categories (3% each). In sum, the ECtHR is a court that not only limits considerably the use of legislative remedies in general but, moreover, circumscribes it mostly to very particular issues and generally avoids extending its use beyond that.

The IACtHR, on the other hand, is not only the regional court using legislative remedies more often by far, but also for a wider variety of topics. The ten categories included in this chapter all contain judgments of the IACtHR. Thereby, as is the case with the ECtHR, the IACtHR's most common category of legislative remedies is that of fair trial rights (33%), followed by the protection of vulnerable groups (20%). Unlike the ECtHR, however, the third most common category of legislative remedies before the IACtHR is the codification of criminal offences (16%). The IACtHR is alone in including legislative measures related to this issue, ordering states to codify certain crimes or adapt its definition to international standards.

1047 See Tom Allen, "Liberalism, Social Democracy and the Value of Property under the European Convention on Human Rights", *ICLQ* 59 (4), 2010, pp. 1055-1078.

This is most probably related to the importance given by the IACtHR to the issue of enforced disappearances, which were a sadly common method of repression against dissidents during Latin American military dictatorships.[1048] Most of these orders to codify criminal offences are related precisely to this crime. Therefore, in accordance with its '*nunca más*' mission, the Court puts a great focus on the adequate codification of enforced disappearances at the domestic level.[1049] This is done both with the practical purpose of ensuring that history does not repeat itself in the region and with the symbolic purpose of highlighting the relationship between this crime and the recent history of Latin America. The other remedial categories are also of considerably less weight before this Court, comprising between 2% and 7% of the total number of legislative measures issued by the IACtHR.

Interim Conclusion: A Common Understanding with Different Priorities

To conclude, the case law analysis included in this chapter has first shown the generally common understanding that human rights courts possess regarding when to make use of legislative remedies. Although the ECtHR has been more cautious than its counterparts, limiting the use of such measures to a rather narrow scope of human rights issues, this is understandable due to this court's general hesitation to innovate, especially in the remedial sphere. Thus, when the ECtHR exceptionally includes legislative remedies in a judgment, it does so mostly in fields where it has already prescribed such measures or has at least repeatedly recommended them. This contrasts with the practice of the IACtHR, where remedial innovations have traditionally been a notable feature. It is therefore not surprising that this is the court that has tackled the greatest variety of issues through its legislative measures. Nevertheless, the ACtHPR is not far behind, having included legislative measures concerning eight of the ten categories established in this chapter, despite its much more recent and limited jurisprudence. It can thus be observed that this young court is developing its remedial practice under

1048 See generally Gabriella Citroni, "The Contribution of the Inter-American Court of Human Rights and Other International Human Rights Bodies to the Struggle Against Enforced Disappearance", in Yves Haeck et al. (eds.), *The Inter-American Court of Human Rights*, Cambridge: Intersentia, 2015, pp. 379-402, especially pp. 395-398.

1049 On this 'nunca más' leitmotiv of the IACtHR, see Chapter 3 of this book.

the shadow of the IACtHR, which has been for many years a notorious example of a human rights court aiming to achieve structural transformations through its remedial measures. The ACtHPR probably wants to live up to the expectations in this regard, taking the remedial practice of its inter-American counterpart as its main source of inspiration.

In order to see this common understanding more clearly, it is also worth having a look at fields in which legislative measures have not been used by human rights courts. As it was shown, almost every legislative remedy issued by regional human rights courts fits into the ten categories outlined in this chapter.[1050] This is noteworthy because there are many other types of human rights issues dealt with frequently by the three courts, where they nevertheless avoid including legislative remedies. For example, when examining the case law guides produced by the ECtHR on the most relevant topics it deals with, one can find issues such as data protection, environment, immigration, rights of LGBTI persons, mass protests or terrorism. In none of these categories has the Strasbourg Court ever included a legislative remedy.[1051] Similarly, in the 'Journals of Jurisprudence' of the IACtHR there are also important topics not included in this chapter, and thus without legislative remedies, such as personal integrity; rights of LGBTI people; economic, social, cultural and environmental rights; or corruption and human rights.[1052]

This shows that legislative remedies are favoured by human rights courts only for specific types of human rights issues. These are probably issues that are more closely related to specific laws or legislative omissions, while

1050 There are five exceptions in this regard: four legislative remedies of the IACtHR and one of the ACtHPR that do not fit in these categories, which are included in section II ('Others').

1051 See ECtHR, *Case-law Guides by theme*, available at: https://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/guides&c. The only category included both in the ECtHR's case law guides by theme and in this chapter is that of prisoners' rights. Besides that, the ECtHR produces also case law guides on specific articles. In this context, the only provisions to which the ECtHR attaches legislative remedies are that of the right to a fair trial (Art. 6), the right to property (Art. 1 Prot. 1), the right to free elections (Art. 3 Prot. 1), the freedom of expression (Art. 10), the prohibition of torture (Art. 3) and the right to an effective domestic remedy (Art. 13).

1052 See IACtHR, *Journals of Jurisprudence*, available at: https://www.corteidh.or.cr/publicaciones.cfm?lang=en. In this case, there are several topics which coincide with those listed in this chapter, such as judicial independence, political rights, freedom of expression, transitional justice, indigenous peoples, persons deprived of their liberty, women's human rights or children's rights.

other issues affect mostly administrative practices. On the other hand, it might also be that these are fields in which the courts consider that a stronger homogenisation among the domestic legal frameworks is necessary, while in other areas they are willing to allow for national preferences and particularities. In any case, it is shown that human rights courts have a rather common understanding of the issues that should be tackled through legislative measures.

However, despite this common understanding, the chapter has also shown that each court has different priorities concerning the use of legislative measures. This is reflected in the different intensities in the use of such measures pertaining to the respective categories. The only one where legislative remedies are employed rather intensively by the three courts is that of fair trial rights, a fundamental area of human rights litigation and a rather broad category. Another broad field is the protection of vulnerable groups, where an important number of legislative measures by the ECtHR and the IACtHR can also be found, but curiously not so much by the ACtHPR. Besides that, each court has prioritised a particular issue in this respect. This is the case of property rights before the ECtHR, electoral rights before the ACtHPR and the codification of criminal offences before the IACtHR. As it was explained above, this is probably due to the context in which these courts operate and the self-understanding they have about their respective missions and roles in their region. In this respect, electoral issues are particularly worrying in the African region, while the focus on the codification of criminal offences by the IACtHR has probably to do with its 'nunca más' mission, and the importance given to property rights by the ECtHR might be related to its more liberal self-understanding.

In sum, the systemic human rights problems with respect to which courts are willing to intervene with a high degree of intrusiveness are rather limited and common to the three regional systems, although the priorities of the courts differ to some extent. It is implied in this respect that issues which need to be tackled through legislation are systemic by nature, as they affect a large number of persons and are intrinsic to the domestic legal systems. It is mainly for this reason that courts need to act more intrusively in order to tackle such problems. The next chapter will look precisely at how intrusive regional human rights are when applying legislative remedies, by looking at the way in which such remedial measures are spelled out and how much discretion is left to the domestic legislator in order to implement them.