Chapter 6: The Consequences of Legislative Remedies

After having examined the judicial practice of human rights courts with respect to their legislative remedies throughout the last chapters, including the typology of issues they relate to and the way they are spelled out by each court, a final aspect to consider is the post-judgment phase. What are the consequences of these remedial measures? Several judgments included in the previous analysis have been extensively commented on precisely due to their consequences, in particular because some have caused a negative reaction by states, in the form of backlash and delayed or non-compliance. It is therefore assumed that highly intrusive remedies, such as those of a legislative nature, are more likely to trigger negative consequences. Conversely, however, legislative measures can also trigger an impact that goes beyond their implementation by the state concerned, being therefore related to some forms of strategic litigation before human rights courts. These issues will be examined in the final chapter.

First, this chapter will examine the issue of whether instances of backlash against regional human rights courts are related to their legislative measures. In some of these instances, the direct link between the courts' legislative measures and the negative reaction by states can be clearly observed, as in the case of the UK and the 'prisoner voting rights saga'. In others, this relation is rather indirect, as in the restriction of access to the ACtHPR by several states. This chapter, then, will turn to the issue of compliance, examining whether and why legislative measures are less likely to be timely implemented by states. This mostly affects deficiencies in the domestic capacity to enforce international judgments, especially when the legislature must intervene.

This chapter will also argue that despite such difficulties, legislative remedies are not ready to be dismissed, as they are able to produce positive outcomes by having an impact that extends beyond the case at hand. This has in turn created an opportunity structure for civil society actors to engage in so-called strategic litigation before human rights courts, using individual cases to achieve broader transformations, such as legislative reforms. Finally, the question of how human rights courts have reacted to the issues of backlash and non-compliance in relation to legislative remedies will be explored. In this regard, such reactions can be observed in the evolving use of legislative measures on the one hand and the lowering of

compliance requirements on the other. Moreover, a different situation can be observed before each of the three regional human rights courts in this respect. This is, to some extent, also related to the issues examined in the previous chapters, as the consequences of legislative remedies depend also on the specific topic to which they relate and the degree of discretion left to the legislator to implement them.

I. Legislative Remedies and Backlash Against Human Rights Courts

It is nowadays common knowledge that we live in an age of backlash against human rights on the one hand,[1201] and against international courts on the other.[1202] Thus, regional human rights courts have been particularly affected by it. Although specific instances of criticism and pushback against these courts have taken place for some time,[1203] this has gained momentum and notably increased during the last decade.[1204] Throughout this chapter, 'backlash' is used as a generic term that encompasses different forms of criticism, resistance and pushback against human rights courts. This is despite the fact that some authors have differentiated between pushback and backlash, depending on the intensity and the actors involved.[1205] However, there is no settled terminology in this regard, and the general tendency

1201 See for example Sanja Dragić, *Post-Backlash Human Rights Law*, Brill, 2022.

1202 See generally Courtney Hillebrecht, *Saving the International Justice Regime: Beyond Backlash against International Courts*, Cambridge: CUP, 2021. With respect to international criminal courts, see for example Joseph Powderly, "International criminal justice in an age of perpetual crisis", *LJIL* 32(1), 2019, pp. 1-11.

1203 See Mikael Rask Madsen, "The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to The Brighton Declaration and Backlash", *LCP* 79, 2016, pp. 141-178, at p. 143, mentioning the first negative reactions to the ECtHR's "expanding jurisprudence and power" in the 1980s and 1990s.

1204 See for example, Patricia Popelier, Sarah Lambrecht and Koen Lemmens (eds.), *Criticism of the European Court of Human Rights*, Cambridge: Intersentia, 2016; Marten Breuer (ed.), *Principled Resistance to ECtHR Judgments – A New Paradigm?*, Berlin: Springer, 2019; Laurence Helfer and Erik Voeten, "Walking Back Human Rights in Europe?", *EJIL* 31(3), 2020, pp. 797–827.

1205 In accordance with these authors, for example in the case of the ECtHR the resistance by states has not reached the level of backlash (or at least it had not by 2018, today they might reach a different conclusion in light of the conflict with Russia). See Mikael Rask Madsen, Pola Cebulak and Micha Wiebusch, "Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts", *IJLC* 14(2), 2018, pp. 197-220, especially at pp. 207-211,

nowadays is to employ 'backlash' as a catch-all concept including these various forms of resistance.[1206] This chapter will, therefore, employ this broader conception of the term 'backlash'.

Among the various current strands of critique against human rights,[1207] the one emphasising the role of democratic procedures is particularly related to legislative remedies, as it considers rights protection contrary to the will of the people. As explored in the previous chapter, this relates to the criticism against the review of legislation by courts in general, a debate held especially in the context of constitutional adjudication.[1208] The points made in this regard primarily concern the courts' lack of democratic credentials and accountability to challenge decisions taken by democratic parliaments. This is also related to the critiques pointing at an increased judicialisation of politics (the so-called *'gouvernement des juges'*), whereby a transfer of power from states' political branches (such as the legislature) to the judicial branches (notably constitutional courts and international courts) can be observed.[1209] It has been argued in this respect that "judgments involving legislative changes are likely to be particularly controversial because they challenge democratic ideals concerning majority rule and parliamentary supremacy".[1210]

Such critiques are not only made by states but also commonly found in scholarship. Waldron for example warns about the "danger that judicial

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referring both to the Brighton Declaration and to the UK voting rights saga as examples of pushback not reaching the level of backlash.

1206 See for example Øyvind Stiansen and Erik Voeten, "Backlash and Judicial Restraint: Evidence from the European Court of Human Rights", *ISQ* 64(4), 2020, pp. 770-784; Mikael Rask Madsen, "From boom to backlash? The European Court of Human Rights and the transformation of Europe", in Aust and Demir-Gürsel (eds.), *The European Court of Human Rights: Current Challenges in Historical Perspective*, Cheltenham: Edward Elgar, 2021, pp. 21-42.

1207 See Anne Peters, "The Importance of Having Rights", *ZaöRV* 81(1), 2021, pp. 7-22, at pp. 16-17.

1208 See for example, with respect to the ECtHR, Koen Lemmens, "Criticising the European Court of Human Rights or Misunderstanding the Dynamics of Human Rights Protection?", in Popelier et al. (eds.), 2016, p. 37 ("Much of the critique on the Court can be seen as a disapproval of the idea that judges – be them ordinary judges, constitutional or international judges – are entitled to intervene in the legislature's affairs").

1209 On this debate, see Chapter 5 of this book.

1210 See Stiansen, *IJHR* 2019, p. 1222. See also similarly Fiona de Londras and Kanstantin Dzehtsiarou, "Mission Impossible? Addressing non-execution Through Infringement Proceedings in the European Court of Human Rights", *ICLQ* 66(2), 2017, at pp. 474 et seq.

review will tilt towards judicial sovereignty if courts begin to present themselves as pursuing a coherent program or policy, rather than just responding to particular abuses identified as such by a bill of rights – one by one, as they crop up".[1211] Especially the IACtHR has been criticised for being too activist in its remedial practice.[1212] Contesse highlights in this regard that "the Inter-American Court embraces a maximalist model of adjudication – one that leaves very little, if any, room for states to reach their own decisions".[1213] With respect to the ECtHR, Sadurski warned already in the early years of the pilot judgments procedure about the fact that "such a constitutional-style intervention of the European Court may be ineffective or, worse, counter-productive (that is, by provoking a backlash against such interference from Strasbourg)".[1214] Others have more recently advocated for an increased self-restraint on behalf of this court, stating that "Strasbourg should be cautious about enlarging its jurisdiction too far, to avoid provoking a 'damaging reaction' from the States, who might reasonably protest that the Court has (illegitimately) absorbed too much power, in relation to matters not properly within its scope".[1215]

Moreover, such intrusive remedial measures were generally not foreseen in the time in which states consented to be bound by human rights judgments but have instead been developed through the subsequent judicial practice. In an early analysis of backlash against the IACtHR, Helfer argued that when international judgments impose new or more costly obligations than those foreseen when states ratified the corresponding treaty, backlash is more likely.[1216] He labels such situations as 'overlegalization of human rights', stating that this occurs when "a treaty's augmented legalization levels require more extensive changes to national laws and practices than

1211 Waldron, *Global Constitutionalism* 2021, p. 101.

1212 See for example Ezequiel Malarino, "Judicial Activism Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights," *International Criminal Law Review* 12, 2012, pp. 665-695.

1213 Jorge Contesse, "Contestation and Deference in the Inter-American Human Rights System," *LCP* 79(2), 2016, p. 124.

1214 Sadurski, *HRLR* 2009, p. 428.

1215 Ed Bates, "Strasbourg's Integrationist Role, or the Need for Self-restraint?", *ECHRLR* 1, 2020, pp. 14-21.

1216 See Laurence R. Helfer, "Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes", *Columbia Law Review* 102, 2002, pp. 1832-1911, at p. 1871.

was the case when the state first ratified the treaty".[1217] Legislative measures can clearly embody such 'overlegalization'.

The issue of sovereignty costs and human rights treaty ratification has been extensively explored, especially by political scientists.[1218] When such costs increase after ratification, they can trigger backlash. Hillebrecht has highlighted in this regard that measures such as legislative reforms "impose the highest cost on states".[1219] Thus, from a doctrinal perspective, there is arguably enough evidence concerning the relation between intrusive remedies such as the ones examined here and backlash against the courts issuing them. The question that remains open is whether the concrete instances of backlash experienced by regional human rights courts can be traced back to this specific remedial practice.

In this context, the backlash against human rights courts has primarily taken two forms. The first such form concerns cases of open criticism and pushback by individual states. This takes place not only in states with authoritarian or populist tendencies,[1220] but also in others with fully democratic credentials.[1221] The second form of backlash is related to collective attempts to limit the authority and competences of human rights courts. In the European system, this has taken place in the context of the institutional reform process that started at Interlaken in 2009 and later turned into a mechanism intending to limit the ECtHR's authority. At the Inter-American system, a collective form of backlash can be observed in the open letter of 2019 by five presidents of some of the most important states in the region, asking for a similar reform that would limit the IACtHR's competences and the intensity of its review. The question in this respect is whether and to which extent these forms of backlash are related to the remedial practice of the respective courts, and especially to its legislative measures, as it aligns in time with the development of this practice.

1217 Helfer, *CLR* 2002, p. 1854.

1218 See for example Emilie M. Hafner-Burton, Edward D. Mansfield and Jon C.W. Pevehouse, "Human Rights Institutions, Sovereignty Costs and Democratization", *British Journal of Political Science* 45, 2013, pp. 1-27; Oona Hathaway, "The Cost of Commitment", *Stanford Law Review* 55(5), 2003, pp. 1821-1862.

1219 Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance*, Cambridge: CUP, 2014, p. 54.

1220 Such as Russia, Venezuela, or Tanzania. See, with respect to the ECtHR, Jan Petrov, "The populist challenge to the European Court of Human Rights", *I•CON* 18(2), 2020, pp. 476–508.

1221 This is for example the case of the UK. See Ed Bates, "Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg", *HRLR* 14, 2014, p. 503.

1. Legislative Remedies and Individual Instances of Backlash

In recent years, there have been a number of instances of backlash by individual states against the three regional human rights courts. These will be examined with regard to its possible relation with legislative measures. It is however important to note that the intensity of such backlash is different in front of each court. In the case of the ECtHR, these have been mostly instances of resistance and criticism, whereby the position of the UK towards specific judgments of this court is especially relevant. Concerning the ACtHPR, the backlash has been probably more intense, as it has adopted the form of limiting the access of individuals and NGOs to the Court through the withdrawal of optional declarations that were issued by states in this respect. Finally, the most intensive form of backlash has arguably taken place in the Inter-American system, with several states exiting the Convention system as a whole.

a) Resisting the ECtHR

Due to the prudent application of legislative remedies by the ECtHR, this practice should not, at first glance, constitute a reason for backlash. In fact, the remedial practice of the Court is usually not listed among the main reasons that have triggered such a reaction by states.[1222] The (arguably) most contentious conflict inside the Strasbourg system, which has led to a member state's expulsion from this system, is mainly related to Russia's invasion of another CoE member state (Ukraine) in 2022. However, the disagreements and progressive distancing of the ECtHR and Russia can be traced back over a long period.[1223] This is actually the state against which the ECtHR has directed most of its legislative remedies, and some judgments concerning Russia's domestic laws have also generated resistance and

1222 See among others Mikael Rask Madsen, "Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?", *JIDS* 9, 2018, pp. 199-222.

1223 Already after the illegal annexation of Crimea in 2014, Russia's voting rights at the PACE were suspended, among other sanctions by the CoE. Russia reacted by withholding its contribution to the CoE's budget in the following years, which in turn caused a financial crisis in this organisation, and the sanctions were eventually lifted in 2019. See generally Lauri Mälksoo and Wolfgang Benedek (eds.), *Russia and the European Court of Human Rights: The Strasbourg Effect*, Cambridge: CUP, 2017.

probably contributed to the State's discontent with the Court.[1224] Former Russian President Medvedev is quoted as stating that "we will never surrender that part of our sovereignty which would allow any international court or foreign court to render a decision changing our national legislation".[1225]

Studies on criticism towards the ECtHR in further states have also highlighted its connection to the Court's impact on domestic legislation.[1226] For example, the ECtHR has been criticised in the Netherlands for "disrespecting (…) the democratic legitimacy of national legislation".[1227] Madsen has observed in this regard that backlash may occur "when there is a clear preference for national political outcomes that clashes with developments at international institutions".[1228] There are specific instances in which this has occurred, and legislative remedies have played an important role in the negative reaction of states, despite its exceptionality. The main example in this respect concerns the 'prisoner voting rights saga', which generated strong resistance from the British government, even threatening to leave the system.[1229]

This saga has its origin in the judgment of *Hirst vs. UK (No. 2)* (2005), where the Court found that a general and indiscriminate prohibition for prisoners to vote "irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances", fell outside the State's margin of appreciation and constituted a violation of Article 3 Protocol 1 ECHR.[1230] With respect to remedies, it pointed out that it was for the State "to implement such measures as it considers appropriate to fulfil its obligations to secure the right to vote in

1224 In this respect, research has shown that the position of a given state towards the ECtHR depends not so much on the number of decisions against it, but rather on "a few incidental judgments" (Patricia Popelier, Sarah Lambrecht and Koen Lemmens, "Introduction", in Popelier et al. (eds.), 2016, p. 16).

1225 Cited in Aaron Matta and Armen Mazmanyan, "Russia: In Quest for a European Identity", in Popelier et al. (eds.), 2016, p. 497.

1226 See for example Michael Reiertsen, "Norway: New Constitutionalism, New Counter-Dynamics?", in Popelier et al. (eds.), 2016, p. 361.

1227 Janneke Gerards, "The Netherlands: Political Dynamics, Institutional Robustness", in Popelier et al. (eds.), 2016, p. 328.

1228 Mikael Rask Madsen, "Two-level politics and the backlash against international courts: Evidence from the politicisation of the European court of human rights", *British Journal of Politics and International Relations* 22(4), 2020, pp. 728–738.

1229 Ed Bates, "Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg", *HRLR* 14(3), 2014, pp. 503-540.

1230 ECtHR, *Hirst vs. UK* (No. 2) (2005), para. 82.

compliance with this judgment".[1231] It however implicitly recommended a legislative reform, stating that it would be "leaving it *to the legislature* to decide on the choice of means for securing the rights guaranteed by Article 3 of Protocol No. 1".[1232] Five judges dissented, arguing that the Court "is not a legislator and should be careful not to assume legislative functions".[1233]

The UK refused to implement this judgment and defied the ECtHR instead.[1234] In view of this, the ECtHR subsequently introduced a very explicit order to reform the relevant domestic laws in the pilot judgment *Greens and MT vs. UK* (2010).[1235] In response, the British Parliament adopted a harsh resolution in 2011 where it expressed its refusal to implement the judgment, stating "that legislative decisions of this nature should be a matter for democratically-elected lawmakers".[1236] After a long period of tension, with the UK even threatening to leave the ECHR system, the case was closed rather problematically, with the CoM lowering its compliance requirements – as will be elucidated below.[1237]

This case of resistance is closely related to the particularities of British constitutionalism, where even the highest domestic courts have only very limited powers to challenge legislation. In fact, under the Human Rights Act of the UK, when domestic courts find legislation to be clearly incompatible with ECHR rights, Parliament remains free to decide on the consequences of such a finding. Thus, under this approach, the ECtHR displayed greater powers concerning domestic legislation than those of UK courts, and its judgment "was seen as an attack on parliamentary sovereignty".[1238] In sum, the core of this controversy was precisely the legislative nature of the measure being ordered by the ECtHR.[1239] This is therefore one of the instances in which the relation between legislative measures and backlash can be more clearly observed.

1231 ECtHR, *Hirst vs. UK* (No. 2) (2005), para. 93.
1232 See ECtHR, *Hirst vs. UK* (No. 2) (2005), para. 84 (emphasis added).
1233 ECtHR, *Hirst vs. UK* (No. 2) (2005), Joint Dissenting Opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens, para. 6.
1234 See in this regard Steve Foster, "Reluctantly Restoring Rights: Responding to the Prisoner's Right to Vote", *HRLR* 9(3), 2009, pp. 489–507.
1235 ECtHR, *Greens and MT vs. UK* (2010), operative para. 6. See also, examining this judgment, Chapter 4 of this book.
1236 Cited in Bates, *HRLR* 2014, p. 513.
1237 See below section III(2) of this chapter.
1238 Angelika Nußberger, "From High Hopes to Scepticism? Human Rights Protection and Rule of Law in Europe in an Ever More Hostile Environment", in Krieger, Nolte and Zimmermann (eds.), 2019, pp. 150-171, p. 163.
1239 Bates, *HRLR* 2014, p. 530.

b) Limiting access to the ACtHPR

The remedial practice of the ACtHPR, and in particular its legislative remedies, has also been a source of conflict. Here, the recent backlash has taken the form of states limiting access to the ACtHPR by withdrawing their declarations made under Article 34(6) of the African Court's Protocol.[1240] As previously mentioned, applications to the ACtHPR can be brought only by the ACmHPR, states and African intergovernmental organisations. But as a particularity of the African system, individuals and NGOs are also allowed to apply directly before the Court if the corresponding state has consented to it through an optional declaration. At the time of writing, only ten of the thirty states under the jurisdiction of the Court submitted such a declaration, but four of them withdrew it afterwards. Rwanda withdrew its optional declaration in 2016, while Tanzania, Benin and Côte d'Ivoire did so between 2019 and 2020.[1241]

It must be noted that currently, almost all cases decided by the ACtHPR stem from these direct applications, especially by individuals.[1242] The ACmHPR has not been transmitting cases to the Court in a systematic way, as it is done by the IACmHR (or by the European Commission on Human Rights (ECmHR), before it was dismantled in 1998). Thus, authors have identified the "Commission's lack of initiative in presenting cases to the Court" as one of the main impediments that prevent the ACtHPR from dealing with more cases.[1243] Viljoen points to several reasons for this lack of initiative, including "a lack of referral criteria, deficiencies in accurately establishing (non-) implementation, and uncertainty about the

1240 See Madsen *et al.*, *IJLC* 2018, p. 210, explaining the restriction of access to an international court as a form of expressing resistance by states. See also, with respect to the African Court, Tom Daly and Micha Wiebusch, "The African Court on Human and Peoples' Rights: mapping resistance against a young court", *IJLC* 14, 2018, pp. 294– 313.

1241 For a more detailed analysis of these four withdrawals, see Sègnonna Horace Adjolohoun, "A crisis of design and judicial practice? Curbing state disengagement from the African Court on Human and Peoples' Rights", *AHRLJ* 20, 2020, pp. 1-40.

1242 See Tarisai Mutangi, "Enforcing Compliance with the Judgments of the African Court on Human and Peoples' Rights", in Aderomola Adeola (ed.), *Compliance with International Human Rights Law in Africa: Essays in Honour of Frans Viljoen*, Oxford: OUP, 2022, p. 184, explaining that by 2019 the ACtHPR had received 238 applications, twelve of which were filed by civil society organisations, and only three by the ACmHPR. The other 223 applications were filed by individuals.

1243 Allwell Uwazuruike, *Human Rights under the African Charter*, Cham: Palgrave Macmillan, 2020, at p. 171.

Commission's role, know-how and experience in presenting such cases before the Court".[1244] Thus, by withdrawing the aforementioned declarations and impeding individuals and NGOs from submitting applications, states are substantially curtailing the capacity of the ACtHPR to hear cases of alleged human rights violations.

The first state to withdraw its Article 34(6) declaration was Rwanda in March 2016. The context of this withdrawal was the procedure leading to the hearings of the case *Ingabire Victoire Umuhoza vs. Rwanda* (2017).[1245] This case dealt with the application of a Rwandan politician who had been convicted for the crime of downplaying the genocide. Notably, one of the remedies sought by the applicant in this case was the annulment of several specific sections of the Rwandan criminal code "relating to the punishment of the crime of ideology of the Genocide".[1246] As it is known, the issues concerning the Rwandan genocide remain very sensitive in this state. Thus, already in the preliminary stages of the proceedings before the ACtHPR, the Rwandan government sent a *note verbale* arguing that the State had "never envisaged that the kind of person described above [i.e., a person that denies or downplays the genocide] would ever seek and be granted a platform on the basis of the said Declaration", and that therefore it would withdraw this declaration.[1247]

However, the Rwandan government still participated in the judicial proceedings and thereby focused on the possibility of the ACtHPR including legislative measures. In fact, Rwanda objected to the Court's jurisdiction arguing that the ACtHPR is not "a legislative body which can (…) make national legislation in lieu of national legislative Assemblies".[1248] This objection was dismissed by the ACtHPR, although in the decision on the merits, it considered the law criminalising the minimisation of genocide to be compatible with the Charter, however finding its application in the con-

1244 Frans Viljoen, "Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights", *ICLQ* 67, 2018, pp. 63-98, at p. 97.

1245 See in this respect Solomon Ayele Dersso, "The Future of Human Rights and the African Human Rights System", *NJHR* 40(1), 2022, pp. 28-43, at p. 41.

1246 ACtHPR, *Ingabire Victoire Umuhoza vs. Rwanda* (2017), para. 48.

1247 Oliver Windridge, "Assessing Rwexit: the impact and implications of Rwanda's withdrawal of its article 34(6) declaration before the African Court on Human and Peoples' Rights", *African Human Rights Yearbook* 2, 2018, p. 249.

1248 ACtHPR, *Ingabire Victoire Umuhoza vs Rwanda* (2017), para. 52.

crete case disproportionate.[1249] Although Rwanda's withdrawal is probably more closely linked to the political sensitivity of the cases submitted to the ACtHPR and the nature of the victims than to remedial questions *per se*,[1250] it can be observed that the possibility of including legislative remedies also played a part in it.

Another major blow came with the decision of Tanzania (the state that hosts the ACtHPR) to withdraw its optional declaration in November 2019. The State did not offer any explanation for its withdrawal, but due to its timing, some commentators have suggested that it might be related to the case of *Ally Rajabu vs. Tanzania* (2019).[1251] In this case, the ACtHPR found that the mandatory death penalty for a sentence of murder violates the right to life, and therefore ordered a reform of the State's Criminal Code.[1252] Tanzania had also unsuccessfully objected to the ACtHPR's competence in this case, by claiming that "the Applicant does not plead violation of his rights by any of the laws of which he seeks annulment or suspension".[1253] Moreover, the Court had rendered numerous legislative remedies against Tanzania during the previous years, requesting *inter alia* the amendment of its laws on citizenship and even of the electoral rules contained in its Constitution.[1254] All of these cases had been brought to the ACtHPR directly by individuals and NGOs on the basis of the Article 34(6) Declaration. Thus, legislative remedies arguably played a more important role in this particular instance of backlash.

Then, both Benin and Côte d'Ivoire decided to withdraw their optional declarations in April 2020. In the latter case, the Ivorian notice of withdrawal mentioned that the ACtHPR's actions "not only violate the states'

1249 See ACtHPR, *Ingabire Victoire Umuhoza vs Rwanda* (2017), paras. 147 *et seq*. See also on this case Harrisson Mbori, "Ingabire Victoire Umuhoza vs Rwanda", *AJIL* 112(4), 2018, pp. 713-719.

1250 See Viljoen, *ICLQ* 2018, p. 66 ("A contributing factor to Rwanda's withdrawal may (rather) have been that the government did not foresee the submission of six cases against it, within a relatively short period, all dealing with politically sensitive matters, submitted by political opponents of the current government").

1251 Nicole Da Silva, "Individual and NGO Access to the African Court on Human and Peoples' Rights: The Latest Blow from Tanzania", *EJIL: talk!*, 16 December 2019, available at: https://www.ejiltalk.org/individual-and-ngoaccess-to-the-african-court-on-human-and-peoples-rights-the-latest-blow-from-tanzania/. See also Faix and Jamali, *NQHR* 2022, p. 66.

1252 ACtHPR, *Ally Rajabu vs. Tanzania* (2019), operative para. xv (1).

1253 ACtHPR, *Ally Rajabu vs. Tanzania* (2019), para. 62.

1254 ACtHPR, *Tanganyika Law Society and Legal and Human Rights Centre vs. Tanzania* (2013); *Anudo Ochieng Anudo* vs. Tanzania (2018).

sovereignty, but were likely to cause a disruption of its domestic legal order".[1255] In this respect, commentators have mentioned the connection to a specific order of provisional measures in which the Court ordered to suspend an arrest warrant against the former Ivorian Prime Minister.[1256] This withdrawal is therefore less related to legislative measures than those of the other states.

On the other hand, Benin's withdrawal is also closely related to an order of provisional measures, but in this case with legislative – and even constitutional – implications. This is the case of *Ajavon vs. Benin* (2020), in which the applicant (an opposition politician in exile who had already been before the ACtHPR, where he successfully challenged a Beninese law)[1257] claimed that several unrelated domestic laws, including the Constitution of Benin, would be incompatible with the State's human rights obligations.[1258] As several of these laws concerned electoral procedures, the ACtHPR issued an order of provisional measures ordering Benin to suspend the municipal elections scheduled for May 2020.[1259] This is probably what triggered the reaction of Benin.[1260] In its notice of withdrawal, the Beninese government stated that "the errors of the African Court have become a source of real

1255 Presse Côte d'Ivoire, "La Côte d'Ivoire retire sa déclaration de la Charte africaine des droits de l'Homme et des Peuples (Communiqué)", 29 April 2020, available at : https://www.pressecotedivoire.ci/article/5879-la-cote-divoireretire-sa-declaration-de-la-charte-africaine-des-droits-de-lhomme-et-des-peuples-communique (non-official translation).

1256 Oliver Windridge, "Under Attack? Under the Radar? Under-Appreciated? All of the Above? A Time of Reckoning for the African Court on Human and Peoples' Rights", *Opinio Iuris*, 07 Mai 2020, available at: https://opiniojuris.org/2020/05/07/under-attack-under-the-radar-under-appreciated-all-of-the-above-a-time-ofreckoning-for-the-african-court-on-human-and-peoples-rights/. ACtHPR, *Guillaume Kigbafori Soro vs. Côte d'Ivoire* (Provisional Measures), App. 012/2020, 22 April 2020, para. 42 (i).

1257 ACtHPR, *Sébastien Germain Marie Aikoué Ajavon vs. Benin* (2019).

1258 ACtHPR, *Sébastien Germain Marie Aikoué Ajavon vs. Benin* (2020).

1259 ACtHPR, *Sébastien Germain Marie Aikoué Ajavon vs. Benin,* Provisional Measures (2020).

1260 Nicole da Silva and Misha Plagis, "A Court in Crisis: African States' Increasing Resistance to Africa's Human Rights Court", *Opinio Iuris*, 19 May 2020, available at: http://opiniojuris.org/2020/05/19/a-court-in-crisis-african-states-increasing-resistance-to-africas-human-rights-court/, citing the words of the Government's spokesperson according to whom the withdrawal was necessary "in order not to jeopardize the interests of an entire nation and the duty of a government which is responsible for holding elections on time".

legal and judicial insecurity which it is the responsibility of governments to remedy".[1261]

Thus, it can be observed that the legislative measures issued by the ACtHPR played a notable role in the withdrawal of Tanzania's and Benin's optional declarations, and to a lesser extent also in that of Rwanda. In this context, it is also worth noticing that among the categories of legislative measures examined in the previous chapter, the one related to electoral rights is particularly prone to cause resistance and backlash. This is due to the sensitivity that domestic governments attach to this issue, especially when electoral laws permitting rulers to remain in power or favouring them in some other ways are ordered to be amended. This particular remedial practice of the ACtHPR is thus rather often connected to instances of backlash.[1262]

However, it is not only the concrete remedies that are important in this context but also the manner in which the ACtHPR has adopted rather flexible rules on legal standing, which allows it to review domestic legislation *in abstracto* by permitting individuals and NGOs to bring applications against laws without having been affected by them.[1263] Despite various states' objections, this type of 'abstract' applications have been accepted by the ACtHPR in numerous cases, arguing that it constitutes a particularity of the African system due to the difficulties that individuals encounter in accessing the Court.[1264] Therefore, the objective of states when withdrawing the optional declarations is probably also to avoid instances of strategic

1261 Gouvernement de la République du Benin, *Retrait du Bénin de la CADHP - Déclaration du ministre de la Justice et de la Législation*, 28 April 2020, available at : https://www.gouv.bj/actualite/635/retrait-benin-cadhp--declaration-ministre-justice-legislation/ ("les égarements de la Cour africaine sont devenus source d'une véritable insécurité juridique et judiciaire à laquelle il est de la responsabilité des gouvernants de porter remède").

1262 Some authors have also expressed criticism at the remedial practice of the ACtHPR when commenting on the withdrawals. Apollin Koagne Zouapet for example speaks of "a Court so concerned with the protection of human rights that it does not hesitate to bypass possible procedural obstacles to provide a remedy to all citizens of a country". See Apollin Koagne Zouapet, "'Victim of its commitment … You, passerby, a tear to the proclaimed virtue': Should the epitaph of the African Court on Human and Peoples' Rights be prepared?", *EJIL: Talk*!, 05 May 2020, available at: https://www.ejiltalk.org/victim-of-its-commitment-you-passerby-a-tear-to-the-proclaimed-virtueshould-the-epitaph-of-the-african-court-on-human-and-peoples-rights-be-prepared/.

1263 See Chapter 1 of this book, examining this jurisdictional approach of the ACtHPR.

1264 See for example ACtHPR, *Ajavon vs. Benin* (2020), para. 59; ACtHPR, *XYZ vs. Benin (II)* (2020), para. 48.

litigation by NGOs aiming to challenge domestic laws even in the absence of victims.

c) Exiting the ACHR

Much like its counterparts, the IACtHR has also witnessed resistance by several states almost since its conception,[1265] and this has even reached the point in which two states have already exited the ACHR.[1266] The remedial practice of the Court has contributed to a considerable extent to this resistance and backlash. Although it had no influence on the first withdrawal from the Convention (that of Trinidad and Tobago in 1998), this was different in the second one (that of Venezuela in 2012), where several orders to reform laws affecting the domestic judiciary played an important role. Moreover, legislative measures had also a considerable influence on other conflicts between specific states and the IACtHR, such as that with the Dominican Republic in 2014 or that with Fujimori's Peru in the late 1990s.

Peru was the first state to have a major problem related to the IACtHR's remedial practice.[1267] Some of this Court's first legislative measures were directed precisely against Peru, in two cases dealing with due process rights and restrictions to the military jurisdiction.[1268] The IACtHR ordered the reform of two domestic laws which foresaw that all those accused of treason and terrorism were to be judged under the military jurisdiction.[1269] These remedies were considered "simply unacceptable" by the Peruvian government,[1270] and it withdrew the recognition of the contentious jurisdiction of

1265 See Neuman, *EJIL* 2008, p. 105. With regard to backlash and other forms of resistance towards the IACtHR, see Ximena Soley and Silvia Steininger, "Parting ways or lashing back? Withdrawals, backlash and the Inter-American Court of Human Rights", *IJLC* 14(2), 2018, pp. 237-257.

1266 Trinidad and Tobago exited the American Convention in 1998 and Venezuela in 2012.

1267 Trinidad and Tobago had already withdrawn by that time, but this was not linked to the remedies of the Court, as the first judgments on reparations against this state were issued after its withdrawal. In this case, the backlash had to do, among other issues, with provisional measures ordered by the IACtHR in cases related to the application of the death penalty.

1268 See Chapter 4 of this book. See also Cavallaro and Brewer, *AJIL* 2008, p. 789.

1269 See IACtHR, *Loayza Tamayo vs. Peru* (1998), operative para. 5; *Castillo Petruzzi vs. Peru* (1999), operative para. 14.

1270 Cited Jorge Contesse, "Resisting the Inter-American Court", *YJIL* 44(2), 2019, pp. 179-237, at p. 197.

the IACtHR in July 1999.[1271] Among its reasons for withdrawing this recognition, Peru explicitly mentioned the lack of authority of the IACtHR to order the modification of domestic laws.[1272] This withdrawal was however not accepted by the Court, arguing that the only possibility for a state is to denounce the ACHR in its entirety, which needs to be done in accordance with the established procedure.[1273] The situation could only be solved one year later with the change of government in Peru, when the authoritarian regime was substituted by a democratic one which was committed to the inter-American system. This first instance of backlash, even if it was related to the IACtHR's legislative remedies, did not prevent the Court from maintaining and even expanding this remedial practice during the following decade.

This led to the next case of major backlash towards the inter-American system, the withdrawal of Venezuela in 2012.[1274] Venezuela's backlash and eventual withdrawal from the ACHR can be attributed to several factors, among them the remedies ordered by the IACtHR against this state. Regarding legislative reforms, the IACtHR issued between 2008 and 2011 five judgments against Venezuela which included this remedy. Especially sensitive in this regard were three judgments related to the arbitrary dismissal of judges. The Court specifically ordered Venezuela to amend certain norms that considered provisional judges as "freely removable", as well as to reinstate the judges that had been ceased.[1275] This was one of the main issues that provoked Venezuela's withdrawal in 2012.[1276] Indeed, already

1271 The IACtHR can only initiate judicial proceedings against states that have expressly recognised its contentious jurisdiction through an optional declaration, in accordance with Art. 62 ACHR.

1272 Douglass Cassel, "Peru Withdraws from the Court: Will the Inter-American Human Rights System Meet the Challenge?", *Human Rights Law Journal* 20, 1999, at p. 170.

1273 See IACtHR, *Constitutional Court vs. Peru* (1999), para. 39; *Ivcher Bronstein vs. Peru* (2001), para. 40.

1274 See Alexandra Huneeus, "Venzuela's Withdrawal from the Inter-American Court", *ICONnect Blog*, 15 October 2012, available at http://www.iconnectblog.com/2012/10/venezuelas-exit-from-the-inter-american-court/. See also Soley and Steininger, *IJLC* 2018, pp. 250-252.

1275 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.

1276 Another main issue concerned remedies affecting domestic judgments. In the judgment of *Lopez Mendoza vs. Venezuela* (2011), the Court ordered Venezuela to overturn the conviction of the opposition leader, Leopoldo Lopez Mendoza, who

in December 2008, some months after the notification of the first of the aforementioned judgments, the Supreme Court of Venezuela responded declaring this judgment of the IACtHR to be "non-executable", arguing *inter alia* that the IACtHR had issued "orders for the Legislative Branch (...) violating the sovereignty of the Venezuelan State in the organization of public powers (...) which is inadmissible".[1277] When Venezuela eventually decided to withdraw from the Convention, it expressly mentioned among other reasons the IACtHR's interference in the State's legislative practice.[1278] Venezuela's withdrawal was probably a stronger blow to the inter-American system than Trinidad and Tobago's withdrawal in 1998, due to the respective weight of these two countries in the region.[1279]

Shortly thereafter, another conflict affected the IACtHR, this time with the Constitutional Court of the Dominican Republic (DR).[1280] The origin of this conflict can be traced to legislative remedies issued by the IACtHR, in this case relating to the conformity of the Dominican nationality laws with the ACHR.[1281] Already by 2005, the IACtHR had declared these laws to be discriminatory, as they prevented children of Haitian descent from

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had been imprisoned in violation of his due process rights, as well as to allow him to run as a candidate in the subsequent national elections. This judgment caused a major outrage in the Venezuelan Government and the State's Supreme Court declared the judgment to be "non-executable". See Judgment No. 1547 of the Supreme Court of Justice of Venezuela, 17 October 2011, operative para. 1.

1277 Supreme Court of Justice of Venezuela (Constitutional Chamber), *Judgment No. 1939*, 18 December 2008, section V (non-official translation). In this judgment, Venezuela's Supreme Court already recommended the Executive to withdraw from the Convention.

1278 See Ministry of Foreign Affairs of Venezuela, "Notificación de Denuncia" and "Fundamentación que sustenta la denuncia de la República Bolivariana de Venezuela de la Convención Americana sobre Derechos Humanos presentada a la Secretaría General de la OEA", 10 September 2012 ("la Corte Interamericana (…) violenta y malinterpreta el principio de complementariedad del sistema (…) al pretender juzgar, como lo haría un tribunal nacional, respecto a disposiciones de derecho interno").

1279 In addition, Trinidad and Tobago is part of the English-speaking countries of the Caribbean region, which have a different legal and constitutional tradition than most Latin American states and have therefore been rather separated from the inter-American system. Nowadays, Barbados is the sole English-speaking country of the Caribbean region which is subject to the jurisdiction of the IACtHR. See Helfer, *CLR* 2002.

1280 See generally Alexandra Huneeus and René Urueña, "Treaty Exit and Latin America's Constitutional Courts", *AJIL Unbound*, vol. 111, 2017, pp. 456-460.

1281 See Dinah Shelton and Alexandra Huneeus, "In re Direct Action of Unconstitutionality Initiated Against the Declaration of Acceptance of the Jurisdiction of the

obtaining nationality, and ordered their reform.[1282] This triggered a strong reaction inside the DR, where Haitian immigration is a very sensitive issue. The fact that Haiti and the DR share the same island and that Haiti is one of the world's poorest countries makes many Haitians cross the border and move to the DR in search of a better future. This, in turn, is met with strong resistance in some sectors of the Dominican society. The judgment was therefore criticised by the State's secretary of foreign relations, and the DR failed to comply with the legislative measures, despite paying the monetary compensation.[1283]

In fact, the Dominican government moved in the opposite direction of the IACtHR's orders and reformed its Constitution by expressly providing that children of "illegal migrants" would not obtain Dominican nationality, taking exception to the applicable *ius soli* principle.[1284] Then, in 2014, the IACtHR issued another judgment dealing with the DR's discriminatory practice in nationality issues, ordering again the reform of several laws, including the Dominican Constitution.[1285] This judgment was again received with strong opposition by the national media and even the government.[1286] Only two months after the IACtHR had issued this judgment, the Constitutional Court of the DR declared that the instrument by which the State had

Inter-American Court of Human Rights", *AJIL*, vol. 109(4), 2015, pp. 866-872. See also Contesse, *YJIL* 2019, pp. 199-204.

1282 IACtHR, *Yean and Bosco vs. Dominican Republic* (2005). See also Chapter 4 of this book.

1283 See Cavallaro and Brewer, *AJIL* 2008, p. 790.

1284 Contesse, *YJIL* 2019, p. 200.

1285 In the case of *Dominican and Haitian Persons Expelled from the Dominican Republic vs. Dominican Republic* (2014), the IACtHR ordered, among other remedies, the "necessary measures in order to avoid that (...) the statements of articles 6, 8 and 11 of Law No 169-14 continue producing legal effects" (operative para. 18). Besides this concrete law, it also ordered the State to annul any other norm which prevented the persons born in the DR to obtain the Dominican nationality on the grounds of their parents' illegal residence, as well as to adopt the legislative ("even if necessary constitutional") measures in order to regulate an accessible inscription procedure for children born in the State's territory (operative paras. 19 and 20, respectively).

1286 See Presidency of the Dominican Republic, "El Gobierno rechaza la sentencia de la Corte Interamericana de Derechos Humanos", 23 October 2014, available at https://presidencia.gob.do/noticias/el-gobierno-dominicanorechaza-la-sentencia-de-la-corte-interamericana-de-derechos-humanos. See also further references in Soley and Steininger, *IJLC* 2018, p. 249.

accessed the ACHR was unconstitutional on procedural grounds.[1287] Nowadays the situation of the DR regarding the IACtHR is still not completely clear. The DR officially remains part of the inter-American system, as the government has not formally activated the withdrawal mechanism, but this has been the last judgment of the IACtHR against the Dominican State to date.[1288]

In sum, one can also see that legislative remedies were extremely influential in several individual instances of backlash against the IACtHR. It is thus a remedial practice that can trigger strong reactions inside the states affected by them, especially when they affect issues that are particularly sensitive and affect core aspects of the states' sovereign sphere, such as the latter issue concerning migration and nationality,[1289] or those concerning the independence of the judiciary in Venezuela.[1290] However, another question is whether these reactions are also present at a collective level, where instances of backlash have also occurred.

2. Legislative Remedies and Collective Instances of Backlash

Besides these instances of backlash by individual states against the three regional human rights courts, there is another form of backlash affecting them – called here 'collective backlash'.[1291] This takes place when several states jointly attempt to reform the respective human rights protection system in order to lessen the authority or limit the competences of courts. A typical feature of this form of backlash is the reliance on concepts such as state discretion, subsidiarity or margin of appreciation, in order to restrict

1287 Constitutional Court of the Dominican Republic, *Judgment TC/0256/14*, 04 November 2014.

1288 However, provisional measures have been issued against this state after 2014. See for example *Juan Almonte Herrera vs. Dominican Republic*, Provisional Measures (2015).

1289 Hannah Arendt mentioned already in *The Origins of Totalitarianism* that "in the sphere of international law, it had always been true that sovereignty is nowhere more absolute than in matters of 'emigration, naturalization, nationality, and expulsion'" (Hannah Arendt, *The Origins of Totalitarianism*, New York: Harvest Book 1976, p. 278.).

1290 This is because the judiciary has played a very important role in Venezuela during the last years, restricting the rights of opposition leaders to the point of imprisoning several of them, and confirming electoral results in favour of the regime after elections arguably held in contravention of international standards.

1291 See, on collective forms of backlash, Madsen et al., *IJLC* 2018, p. 198.

the intensity of the judicial review carried out by human rights courts.[1292] This can be observed in the recently concluded 'Interlaken process' at the European human rights protection system, but also in the declaration signed by five Latin American presidents in 2019, concerning the IACtHR.

a) The 'Interlaken Process' in Europe

Between 2009 and 2018, a series of inter-governmental conferences took place with the purpose of reflecting on the long-term effectiveness of the European human rights protection system.[1293] This process and the resulting institutional reforms have been known as the 'Interlaken process', due to the location of the first of these conferences in 2009.[1294] The subsequent conferences took place in Izmir (2010), Brighton (2012), Brussels (2015) and Copenhagen (2018). Each of them produced a formal declaration containing recommendations for the Court, the CoM and the member states.

The main source of concern at the background of the Interlaken process was the caseload crisis before the ECtHR, which had "reached its peak of 160,000 pending applications" some months after Interlaken.[1295] However, there was also a subjacent reason for this process, which was the growing discontent of some states with the Court's jurisprudence.[1296] In this respect, one issue put on the agenda of these conferences by "those seeking to force or persuade the Court to soften review and to grant more deference to

1292 See Hillebrecht, 2021, p. 133 ("By expanding the degree of deference that courts afford states, international justice opponents try to limit the impact that international courts have on domestic politics").

1293 See Alastair Mowbray, "The Interlaken Declaration – The Beginning of a New Era for the European Court of Human Rights?", *HRLR* 10(3), 2010, pp. 519-528; Jon Petter Rui, "The Interlaken, Izmir and Brighton Declarations: Towards a Paradigm Shift in the Strasbourg Court's Interpretation of the European Convention of Human Rights?", *NJHR* 31(1), 2013, pp. 28-54.

1294 See for example ECtHR, *The Interlaken Process and the Court*, 2016 Report to the CoM, 01 September 2016, available at: https://www.echr.coe.int/Documents/2016_Interlaken_Process_ENG.pdf.

1295 Lize Glas, "From Interlaken to Copenhagen: What Has Become of the Proposals Aiming to Reform the Functioning of the European Court of Human Rights?", *HRLR* 20, 2020, pp. 121-151, at p. 125. The main aim of the Interlaken Declaration was therefore to "to find a solution for the chronic [case] over-load". See Declaration adopted at the Interlaken Conference on the Reform of the European Court of Human Rights, 19 February 2010, available at: https://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf.

1296 Glas, *HRLR* 2020, p. 125.

the policy preferences of governments" was the question of "whether to dismantle the components of judicial supremacy that had been established through the ECtHR's precedents".[1297]

Many authors have thus seen this process as a form of curtailing the ECtHR's authority and competences.[1298] Madsen describes it as, especially since the Brighton Conference (2012), an "institutionalized process that aimed to limit the ECtHR's power".[1299] In fact, the Brighton Declaration is often seen as a 'turning point' in this reform process, shifting from rather technical measures to improve the Court's efficiency to "a full-blown challenge to the very legitimacy and role of the ECtHR".[1300] This Declaration has even been described as aiming at "a new dawn in which the Court would play a different and more limited role",[1301] with provisions intending "to restrict the Court's scrutiny of the States' law and practice".[1302] In response to it, the ECtHR itself expressed discomfort at the idea of states dictating "how it should carry out the judicial functions conferred on it".[1303]

One of the main ways for states to limit the Court's intrusiveness and "persuade [it] to take a more state friendly position in its case law" was to focus on the principle of subsidiarity and the margin of appreciation.[1304] In almost all of these declarations, states encouraged the ECtHR to give increased prominence to these two principles,[1305] which led to their incor-

1297 Alec Stone Sweet, Wayne Sandholtz and Mads Andenas, "The Failure to Destroy the Authority of the European Court of Human Rights: 2010–2018", *LPICT* 21, 2022, pp. 244–277, at p. 246. See also Hillebrecht, 2021, p. 151 ("These reform processes questioned, at their core, the degree to which the central role of the ECtHR was to provide individual recourse or to serve as a forum for regional constitutional review").

1298 See Stone Sweet, Sandholtz and Andenas, *LPICT* 2022, p. 253 ("Through the High Level Conferences, the Court's detractors sought to revive rights minimalism"). See also Sarah Lambrecht, "Reforms to Lessen the Influence of the European Court of Human Rights: A Successful Strategy?", *European Public Law* 21(2), 2015, pp. 257-284.

1299 Madsen, *LCP* 2016, at p. 144.

1300 Oddný Mjöll Arnardóttir, "The Brighton Aftermath and the Changing Role of the European Court of Human Rights", *JIDS* 9, 2018, pp. 223–239, at p. 224.

1301 Madsen, *JIDS* 2018, p. 202.

1302 Glas, *HRLR* 2020, p. 127.

1303 High Level Conference Brighton, Speech by Sir Nicolas Bratza, President of the European Court of Human Rights (18–20 April 2012), cited in Arnardóttir, *JIDS* 2018, p. 225.

1304 Arnardóttir, *JIDS* 2018, p. 225.

1305 High Level Conference on the Future of the European Court of Human Rights, *Brighton Declaration*, 2012, paras. 11 and 12(a), available at: https://www.echr.co

poration in the Preamble of the ECHR through Protocol No. 15.[1306] The Preamble now affirms "that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation". This can be seen as a mandate for the ECtHR to show an increased deference to national authorities, particularly to the domestic legislatures.[1307] Actually, according to the former ECtHR President, the message being sent with the introduction of the new Preamble is that "governments (or some of them) wish to compel the Court to exercise increased self-restraint in its scrutiny, especially when (…) national Parliaments are involved".[1308] In the words of Hillebrecht, "arguments about the degree of deference courts should afford to national authorities only thinly veil concerted efforts to attenuate the courts' impact".[1309] Thus, it can be observed that one of the aims of this reform process has been to limit to some extent the ECtHR's review of domestic laws.

Nevertheless, in these declarations states generally abstained from criticising the ECtHR's remedial approach. To the contrary, the Brighton Declaration actually "welcome[d] the continued use by the Court of proactive measures, particularly pilot judgments, to dispose of repetitive violations in an efficient manner".[1310] Moreover, this declaration seemed to favour a more constitutional approach by the ECtHR,[1311] stressing that "the Court

e.int/documents/2012_brighton_finaldeclaration_eng.pdf. See also *Interlaken Declaration*, Action Plan, para. 9(b), *Izmir Declaration*, Preamble, 2011, para. 5, available at: https://www.echr.coe.int/documents/2011_izmir_finaldeclaration_eng.pdf; *Brussels Declaration*, 2015, para. 7, available at: https://www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf; *Copenhagen Declaration*, 2018, para. 30, available at: https://www.echr.coe.int/Documents/Copenhagen_Declaration_ENG.pdf.

1306 See, critical with this development, Ian Cram, "Protocol 15 and Articles 10 and 11 ECHR—The Partial Triumph of Political Incumbency Post-Brighton?", *ICLQ* 67, 2018, pp. 477–503.

1307 See Lambrecht, *European Public Law* 2015, p. 273.

1308 Jean-Paul Costa, "The relationship between the European Court of Human Rights and the National Courts", *EHRLR* 3, 2013, pp. 264-274, at p. 265.

1309 Hillebrecht, 2021, p. 135.

1310 Brighton Declaration (2012), para 20 (c).

1311 See in this respect Luzius Wildhaber, "A Constitutional Future for the European Court of Human Rights", 23 *Human Rights Law Journal* 23, 2002, pp. 161-165; Luzius Wildhaber and Steven Greer, "Revisiting the Debate about 'Constitutionalising' the European Court of Human Rights", *HRLR* 12(4), 2012, pp. 655-687. See also Chapter 5 of this book.

should be in a position to focus its efforts on serious or widespread violations, systemic and structural problems (…) and hence would need to remedy fewer violations itself and consequently deliver fewer judgments".[1312] The Copenhagen Declaration (2018) mentions as well the "ineffective national implementation of the Convention that remains the principal challenge".[1313] These statements can be seen as supporting to some extent legislative remedies, which are a convenient tool for addressing systemic problems and widespread violations and can allow for a more effective implementation of the ECHR at the national level.[1314]

In sum, although on a collective level states have intended to limit the intensity of the ECtHR's review of domestic laws, they seem more supportive with respect to the Court's remedial practice in general and legislative measures in particular, as can be seen in the high-level declarations adopted between 2009 and 2018. Thus, even though the majority of the CoE member states seem to be in favour of limiting the ECtHR's scrutiny of their laws, if the Court were to find exceptionally that a specific law or the absence of it violates the Convention, they appear to support the inclusion of legislative remedies in this regard.

b) The 'Five Presidents Declaration' in the Americas

Although the IACtHR has not been subject to a process of reform similar to that concerning the ECtHR in the Interlaken process,[1315] it has also suffered a form of collective backlash from several of its most relevant member states. This occurred in 2019, when the governments of Argentina, Brazil, Colombia, Paraguay and Chile adopted a joint declaration concerning the role of the IACtHR.[1316] The attempt of these presidents sought to curtail the IACtHR's authority and to urge it to be more cautious, by expressing

1312 *Brighton Declaration* (2012), para. 33.
1313 *Copenhagen Declaration* (2018), para. 12.
1314 See generally Chapter 1 of this book.
1315 A similar reform process was however carried out with respect to the IACmHR in 2011. While it was called a process of "strengthening" the Commission, it was rather aiming at limiting several of its powers, such as that of issuing provisional measures, and the expansion of its jurisdiction more generally. See in this respect Contesse, *YJIL* 2019, pp. 209-217.
1316 See Government of Chile, *Comunicado de prensa Ministerio de Relaciones Exteriores - Ministerio de Justicia y Derechos Humanos sobre Sistema Interamericano de Derechos Humanos*, 23 April 2019, available at: https://minrel.gob.cl/comunicado

their discontent with its current practice. In this regard, the declaration used similar arguments to those employed in the European context, by underlining the principle of subsidiarity, and stating that the IACtHR should award states a "margin of appreciation for deciding about the most suitable ways for respecting rights and guarantees, in order to give weight to its own democratic procedures".[1317] This joint declaration was seen by civil society as a challenge to the Court and an attempt to undermine its authority.[1318] Some authors however argued that it could simply be regarded "as a legitimate attempt of the five signatories to clarify the limits of their consent".[1319]

Contrary to the high-level declarations of the Interlaken process, the 'Five Presidents Declaration' emphasised the issue of remedies, thereby aiming to change the IACtHR's remedial practice. The declaration highlighted in this respect the need for the IACtHR's remedies to be proportionate and to "respect the State's constitutional and legal orders".[1320] This seems to be a reference to the use of legislative remedies, being the ones that affect the domestic legal and constitutional order more directly. It is worth recalling in this context that the IACtHR's orders to reform domestic laws are much more common than those of the ECtHR. Thus, it is likely that the five presidents' attempt to undermine the IACtHR and exert its influence upon it was triggered at least partly by the remedial practice of this Court, including especially its legislative remedies. Nevertheless, this connection between legislative remedies and instances of collective backlash is still weaker than in the aforementioned individual instances of backlash.

To conclude, this section has shown that legislative remedies have been a source of negative reactions and even backlash, but there is a difference

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-de-prensa-ministerio-de-relaciones-exteriores-ministerio-de/minrel/2019-0423/105105.html.

1317 Government of Chile, *Comunicado de prensa Ministerio de Relaciones Exteriores* 2019 (non-official translation).

1318 See for example Amnesty International, "Americas: The Inter-American System is Crucial for Guaranteeing Human Rights in the Region", 24 April 2019, available at: https://www.amnesty.org/en/latest/news/2019/04/americas-sistema-interamericano-fundamental-para-derechoshumanos/.

1319 Paula Baldini Miranda da Cruz, "Trackers and Trailblazers: Dynamic Interactions and Institutional Design in the Inter-American Court of Human Rights", *JIDS* 11, 2020, pp. 69-90, at p. 87.

1320 Government of Chile, *Comunicado de prensa Ministerio de Relaciones Exteriores* 2019 (non-official translation).

between states acting individually and collectively. At an individual level, legislative remedies are more likely to trigger resistance, especially when they affect sensitive issues such as electoral rights, nationality rights or the rights of prisoners. This can be seen in individual instances of backlash against all three regional courts. However, this is not the case with collective instances of backlash, that are connected to legislative remedies rather loosely. Especially when states act collectively in the framework of the international organisation to which the courts belong (as in the aforementioned example of the 'Interlaken Process' of the CoE) the remedial practice has not been among the main sources of discontent. However, the 'Interlaken Process' is the only instance of collective backlash against a human rights court from within its international organisation. Thus, it might also be that these observations stem from the particularities of the ECtHR, its rather scarce use of intrusive remedies and the wide degree of discretion left to domestic legislatures in these cases.[1321] The collective instance of backlash against the IACtHR in the form of a joint declaration by five states was more closely linked to this Court's remedial practice, but its impact was more limited, as it was not part of an institutional reform process and it was carried out by a minority of states, despite their importance in the region.

II. Legislative Remedies and Compliance

Besides the issue of backlash, the other main consequence of legislative remedies concerns the lack of timely compliance with these measures. This is to some extent also related to the previous section, as "discrete non-compliance" is sometimes also an expression of pushback by states.[1322] However, this is not always the case, especially with complex remedies such as legislative reforms.[1323] Research into backlash and compliance with the ECtHR's judgments shows that there is generally no correlation between

1321 Stiansen actually observed with respect to the ECtHR that "although the need to enact legislative changes makes for a more difficult implementation process, states are not more likely to blatantly defy such judgments" (Stiansen, *IJHR* 2019, p. 1223).

1322 Madsen et al, *IJLC* 2018, p. 209.

1323 See for example Martin Faix and Ayyoub Jamali, "Is the African Court on Human and Peoples' Rights in an Existential Crisis?", *NQHR* 40(1), 2022, pp. 56–74, at p. 60 ("However, non-compliance does not always amount to backlash (…) This is particularly evident in cases where a government pays monetary compensation to the applicant but is unwilling or unable to bring changes to the legislation").

these two issues.[1324] This section will thus explore the issue of compliance with legislative remedies. It will not examine the current state of compliance with all 193 legislative measures that were identified in this study. Instead, it will give an overview of the empirical studies on compliance with human rights judgments that differentiate the types of measures ordered by the three regional courts, focusing on legislative measures. Subsequently, possible reasons for the low rates of compliance with these measures will be explored.

1. Empirical Studies on Compliance with Legislative Remedies

Several authors have examined the issue of compliance with human rights judgments from an empirical perspective, analysing the implementation of particular remedial measures. Thereby, a difference can be observed when comparing the ECtHR and the other two human rights courts. Legislative remedies before the ECtHR have been generally considered to have positive effects on compliance, perhaps because they put the focus on a legislative gap that the state in question has failed to fill despite previous warnings by the Court.[1325] In this regard, the exceptionality of these measures comes with increased visibility and thereby makes non-compliance more costly in terms of reputation. On the contrary, in the cases of the IACtHR and the ACtHPR, legislative remedies have been found to make compliance slower and more difficult.

In this regard, Stiansen conducted a study on "legislative compliance" with ECtHR judgments, quantitatively examining the leading cases in which states carried out legislative reforms in order to execute a judgment. This study is not, however, limited to the cases in which the ECtHR explicitly ordered a legislative reform, but it includes all of the cases where the concerned state and/or the CoM considered it necessary to legislate after a judgment.[1326] The results of this statistical analysis show that "judgments

1324 Sarah Lambrecht, "Assessing the Existence of Criticism of the European Court of Human Rights", in Popelier et al. (eds.), 2016, p. 513.

1325 With respect to the practice by the ECtHR of issuing several 'warnings' before introducing a binding legislative measure, see Chapter 3 of this book.

1326 See Stiansen, *IJHR* 2019, p. 1232, explaining that in order to measure the need for legislative reforms, he included the judgments in which the state had already carried out such a reform and those in which it still needed to do so in order to comply with a judgment.

that generate a need for legislative changes are implemented at a slower rate than other judgments".[1327] Moreover, the author finds that this delayed compliance "contributes to the backlog of repetitive cases that is burdening the ECtHR".[1328] However, the picture looks different if one examines not every case where the concerned state and/or the CoM consider legislative measures to be necessary for compliance, but only those in which the ECtHR explicitly orders such legislative measures by including them in the operative paragraphs.[1329]

In a study about non-financial remedies – which comprises those of a legislative nature – Mowbray finds that those included in the operative part of judgments are executed "more swiftly than where the Article 46 indication is contained in the text of the judgment".[1330] Other authors have arrived at the same conclusion when examining compliance with pilot judgments.[1331] For example, with respect to the judgment of *Torreggiani vs. Italy* (2013), where the ECtHR included legislative measures ordering the introduction of a domestic remedy for inhuman conditions of detention, such legislative reforms were adopted only one year later.[1332] This is despite the fact that implementing legislative reforms in Italy following ECtHR judgments where this was not expressly ordered has been described as following "a slow and tortuous path".[1333] Thus, it seems that including the need for legislative reforms as a remedy in the operative part of judgments can make a difference and have a 'catalysing effect' on domestic legislative procedures.[1334]

This is probably due to the notable exceptionality of such measures, which makes them gain importance and visibility when used, thereby

1327 Stiansen, *IJHR* 2019, p. 1239.

1328 Stiansen, *IJHR* 2019, p. 1242. Similar findings were also made in 2013 by Larsen with respect to the cases in which the ECtHR calls for legislative reforms, whether in the reasoning or in the operative part of judgments. He arrived at the conclusion that those judgments were particularly apt for the application of the infringement proceedings under Art. 46(4) ECHR, due to their delayed compliance. See Larsen, *NJHR* 2013, pp. 496-512.

1329 See on this difference Chapter 3 of this book.

1330 Mowbray, *HRLR* 2010, p. 474.

1331 See generally Philip Leach et al., *Responding to Systemic Human Rights Violations: An Analysis of 'Pilot Judgments' of the European Court of Human Rights and their Impact at National Level*, Cambridge: Intersentia, 2010.

1332 See Federica Favuzza, "Torreggiani and Prison Overcrowding in Italy", *HRLR* 17, 2017, pp. 153–173.

1333 Leach et al, *Responding to Systemic Human Rights Violations,* 2010, p. 109.

1334 See Fyrnys, *GLJ* 2011, p. 1259.

putting more pressure on the concerned state in order to comply. In addition, the system of supervising compliance with judgments is also relevant in this respect. The CoM applies different supervision procedures depending on the seriousness of the case. Judgments containing legislative measures are always supervised under the 'enhanced procedure', where non-compliance is debated in the CoM meetings and the concerned state representative has to defend its position before the other forty-five representatives. This implies a sort of diplomatic pressure upon the state by its counterparts and can have positive effects on compliance.[1335] However, this increased pressure in the form of reputational costs applies only with respect to states that give weight to their international reputation, as can be observed in the aforementioned case of Italy, or in the process of compliance with the legislative measure included in *Rumpf vs. Germany* (2010), which was not only implemented swiftly but even welcomed by the German authorities.[1336]

With other states such as Russia, where reputational considerations do not appear to affect its action, compliance with such measures is less likely. For example, in 2019, the ECtHR highlighted that many years after the pilot judgment in *Ananyev vs. Russia* (2009), where the ECtHR ordered the introduction of a remedy for the issue of inhuman conditions of detention, no such remedies had been set up.[1337] This can also be observed in the case of Turkey and its non-compliance with the Kavala judgment even after the launch of infringement proceedings against the State and the concomitant international pressure triggered by these proceedings. Thus, the positive effects of exceptional measures in terms of reputational costs appear to affect only certain states, but not all of them.

In the case of the IACtHR, the general rate of compliance with judgments is rather low. Out of the 320 judgments on reparations issued by the IACtHR until 2022, only forty-four have been closed at the time of writ-

1335 See Lucas Sánchez de Miquel, "Supervisión de la Ejecución de Sentencias: Un Análisis Comparado de los Sistemas Europeo e Interamericano de Derechos Humanos", *Anuario de Derecho Constitucional Latinoamericano* 24, 2018, pp. 285, 297.

1336 See Andreas von Staden, *Strategies of Compliance with the European Court of Human Rights*, University of Pennsylvania Press, 2018, at pp. 175-178.

1337 See ECtHR, *Tomov vs. Russia* (2019), para. 181. The Court therefore included in this judgment another legislative measure requesting domestic remedies for the protection of detainees. See in this respect Chapter 4 of this book.

ing.[1338] One reason for this is that the IACtHR orders a wide and complex array of measures in most of its judgments. It is therefore more difficult to fully implement these judgments than for example those of the ECtHR, as most of them only require the payment of monetary compensation, which can be complied with more easily.[1339] Indeed, in the inter-American system, there are also measures that are implemented more quickly than others, without necessarily meaning that the latter ones are rejected by states.[1340] It is therefore rather common to find a situation of 'partial compliance' with the judgments of this court.[1341]

Several authors have focused on the issue, conducting empirical studies regarding compliance with the IACtHR's specific remedial measures. When analysing these studies, it becomes evident that legislative reforms are among the most difficult remedies to comply with and take the longest time to be implemented.[1342] In this regard, through a nuanced statistical analysis, Hawkins and Jacoby arrive at the conclusion that "[c]ompliance rates are lowest with court orders to amend, repeal or adopt domestic laws or judgments (7%)".[1343] Using a similar set of cases, Huneeus finds that "in over eighty cases in which it has ordered structural remedies (...) the Inter-American Court has deemed that states have fully complied in five

1338 http://www.corteidh.or.cr/cf/jurisprudencia2/casos_en_etapa_de_supervision_archivados_cumplimiento.cfm?lang=es. See von Bogdandy and Urueña, *AJIL* 2020, p. 425 with further references concerning this issue.

1339 See Neuman, *EJIL* 2008, p. 104.

1340 See Cecilia Bailliet, "Measuring Compliance with the Inter-American Court of Human Rights: The Ongoing Challenge of Judicial Independence in Latin America", *NJHR* 31, 2013, pp. 477-495.

1341 See Hawkins and Jacoby, "Partial Compliance. A Comparison of the European and the Inter-American Court of Human Rights", *Journal of International Law and International Relations* 6(1), 2010.

1342 Hillebrecht, 2014, pp. 49-50 ("For example, states are much more likely to comply with obligations around financial obligations than they are to comply with mandates requiring changes in legislation"); Damián González Salzberg, "Do States comply with the compulsory judgments of the Inter-American Court of Human Rights?", *Revista do Instituto Brasileiro de Direitos Humanos* 13, 2013, p. 108 ("Conversely, the measures ordering criminal prosecution and the amendment of domestic legislation show a much lower level of compliance"); Cavallaro and Brewer, *AJIL* 2008, p. 785 ("However, when it comes to more far-reaching measures (…) (such as (…) changing laws and practices), compliance is considerably less likely"); Huneeus, *YJIL* 2015, p. 37 ("On the other hand, the Court can order structural remedies. However, this strategy risks a lower compliance rate").

1343 Hawkins and Jacoby, *Journal of International Law and International Relations* 2010, at p. 57.

cases".[1344] Also Basch *et al*., in their quantitative analysis of compliance, find that "remedies with the least degree of compliance are those requiring (...) legal reforms (14%)".[1345]

This also shows that when legislative measures are rather frequent, as in the case of the IACtHR, the rate of compliance with them is lower, as the increased visibility factor and the added pressure caused by the exceptional nature of such measures are not present. Reputational factors are also less likely to come into play for a concrete state when most other states of the region are in a similar situation. Moreover, supervision of compliance is carried out by the IACtHR itself, without the involvement of the OAS' political bodies. It is therefore also difficult to exercise the sort of diplomatic pressure mentioned before. Thus, among the many remedial measures included in the IACtHR's judgments, states probably tend to reach first for the 'low hanging fruit' in terms of compliance, such as the compensation measures or even the symbolic satisfaction measures.[1346]

Studies on compliance with judgments of the ACtHPR are much scarcer than in the case of the two other regional human rights courts.[1347] This is mainly due to the difficulty of obtaining up-to-date data on the implementation of the ACtHPR's judgments.[1348] In the few studies of this sort, the general state of compliance has been found to be rather poor.[1349] With

1344 Huneeus, *YJIL* 2015, at p. 36.

1345 Fernando Basch *et al*., "The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions", *Sur: International Journal on Human Rights* 7, 2010, p. 18.

1346 See Hillebrecht 2014, pp. 61-65.

1347 See however the recent volume Aderomola Adeola (ed.), *Compliance with International Human Rights Law in Africa: Essays in Honour of Frans Viljoen*, Oxford: OUP, 2022.

1348 See Japhet Biegon, "Compliance Studies and the African Human Rights System", in Aderomola Adeola (ed.), 2022, p. 23 ("As a general trend across the [African] continent, recorded or official information and data on what governments are doing or have done to implement decisions of regional human rights bodies are unavailable or inaccessible"). See also Faix and Jamali, *NQHR* 2022, p. 64 ("in the vast majority of cases, it is not possible to determine the extent to which the respondent States have executed the judgments of the Court"). Similarly, Ben Kioko, "Perspective from the African Court on Human and Peoples' Rights", *JHRP* 12, 2020, pp. 163–170, at p. 168, argues that "there are challenges with providing a precise figure given the complexities involved in measuring implementation rates".

1349 See for example Victor Oluwasina Ayeni, "Implementation of the Decisions and Judgments of African Regional Human Rights Tribunals: Reflections on the Barriers to State Compliance and the Lessons Learnt", *African Journal of International and Comparative Law* 30(4), 2022, pp. 560-581.

respect to the legislative measures ordered by the ACtHPR, Kioko reported that almost none of them had been implemented by 2020.[1350] Other authors have also argued with respect to this Court that "the more politically contentious, structural and far-reaching the required measures are, the more difficult enforcement is likely to be".[1351]

In sum, it can be observed that legislative measures, when being relatively common, take more time in their implementation and are generally more difficult to comply with. On the other hand, when these measures are exceptional, as in the case of the ECtHR, they might be able to send a message of seriousness and urgency that can make compliance with them easier and swifter. However, this does not mean that all legislative measures included in ECtHR judgments are implemented without problems. Actually, these judgements are still complied with at a lower rate than most measures of economic compensation. There are several explanations for such lower rates of compliance in the case of legislative remedies.

2. The Reasons for the Low Rates of Compliance with Legislative Remedies

The first of these reasons concerns the procedure for reforming domestic laws, which is clearly more complex than the one leading to the implementation of other measures that can be solely carried out by the executive.[1352] The most common example of solely executive-driven compliance is the payment of compensation, but this is also the case with measures of rehabilitation, symbolic measures or even certain guarantees of non-repetition, such as the provision of human rights training to public officials. In the case of legislative measures, execution is likely to take more time due to the involvement of several domestic bodies.[1353] In this respect, implementation usually needs a legislative proposal by the executive, followed by a parliamentary debate (sometimes in committees and plenary sessions in different

1350 Ben Kioko, *JHRP* 2020, especially at pp. 164-168.

1351 Tarisai Mutangi, in Adeloa (ed.), 2022, p. 192.

1352 See in this respect Murray Hunt, "Enhancing Parliaments' Role in the Protection and Realisation of Human Rights", in Murray Hunt, Hayley Hooper and Paul Yowell (eds.), *Parliaments and Human Rights: Redressing the Democratic Deficit*, London: Bloomsbury, 2015, p. 470 ("Governments are not always the best champions of national parliaments, which can sometimes obstruct or slow down the implementation of a government's will").

1353 Madsen et al., *IJLC* 2018, p. 209.

chambers) and the formal adoption by the legislature,[1354] and possibly an *ex-ante* review by the domestic judiciary.[1355] This also implies more 'veto players' participating in this process, which makes implementation more difficult.[1356] In addition, wider majorities are usually necessary for its implementation, thus depending not only on the will of the government but often on an agreement with opposition parties.[1357]

Huneeus points out these differences between the executive and the legislatures in order to foresee that the latter "will be slower and less likely to implement Court orders".[1358] Stiansen, in his empirical study on legislative compliance with ECtHR judgments, finds that compliance is especially delayed in bicameral systems and states with "political divisions among veto players".[1359] Moreover, the involvement of the legislature is particularly problematic when the political will to implement a judgment is missing. In this respect, some authors have pointed to the extent to which external actors influence the legislature. For example, with respect to legislative measures concerning indigenous territory, an explanation for the low compliance rates points to the "influence of economic power within the Legislature".[1360]

It has therefore been argued that the inclusion of such remedies can be counter-productive for implementation when these measures are "perceived as overly intrusive" or unfeasible to execute.[1361] This can be seen in the aforementioned example on prisoner voting rights, where the refusal of the British Parliament to adopt the requested law was due to a disagreement "with the principle of an international court's decision 'overturning'

1354 See Stiansen, *IJHR* 2019, p. 1226.

1355 Especially domestic constitutional courts play an important role when it comes to legislative repeals, and they are not always compliance partners but can also delay or even prevent implementation. See generally Kunz, *EJIL* 2019.

1356 See Stiansen, *IJHR* 2019, p. 1227, arguing that "veto-player problems are less likely to delay implementation (…) [when] compliance only requires executive action".

1357 Huneeus, *YJIL* 2015, at p. 21, argues that human rights courts "often find themselves in the position of ordering something that their main interlocutor, the executive, cannot single-handedly accomplish", whereby "more intermediary actors mean more potential veto points".

1358 Huneeus, "Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights", *Cornell International Law Journal* 44(3), 2011, p. 517. Similarly, Anagnostou and Mungiu-Pippidi, *EJIL* 2014, p. 213.

1359 Stiansen, *IJHR* 2019, p. 1241.

1360 Navarro, *JIDS* 2021, at p. 235.

1361 See Keller and Marti, *EJIL* 2016, p. 840.

a domestic, democratically arrived at position".[1362] On the other hand, the fact that these exceptional remedial orders by the ECtHR can increase compliance can also be related to cases in which non-compliance is due to a lack of domestic capacity. As argued by Anagnostou and Mungiu-Pippidi, some states do not possess the necessary knowledge and expertise to "define the implications of [ECtHR] judgments and to formulate the most effective measures to remedy the respective violations".[1363] Thus, clear remedial orders provide states with a specific objective that needs to be achieved, and against which implementation will be measured.

In sum, the difficulty in complying with orders to reform legislation seems to relate not so much to criticism (although this aspect is not completely absent), but to the lack of appropriate internal coordination mechanisms to ensure consistent compliance.[1364] Although domestic parliaments have adopted an increasingly important role in the implementation of human rights judgments, this has been mainly done through their power to constrain the executive.[1365] There are arguably not enough established coordination procedures and instruments in place yet for a swift legislative response to judgments of human rights courts.

3. Impact beyond Compliance

Despite the low compliance rates examined before, with legislative remedies it is necessary to look further beyond this issue, also examining the impact that such measures have on the ground. In fact, while the increased possibility of backlash and the low rates of compliance are rather negative consequences of these measures, they can also have a positive impact.[1366] It has been argued in this regard that the effectiveness of human rights courts depends more on the impact of their judgments than on compliance with

1362 De Londras and Dzehtsiarou, *ICLQ* 2017, p. 474.
1363 Anagnostou and Mungiu-Pippidi, *EJIL* 2014, p. 223.
1364 Sarah Lambrecht, "Assessing the Existence of Criticism of the European Court of Human Rights", in Popelier et al. (eds.), 2016, p. 531. See on such mechanisms Dia Anagnostou and Alina Mungiu-Pippidi, *EJIL* 2014.
1365 See generally Donald in Saul et al. (eds.), 2017, examining the "parliamentary capacity to (…) monitor executive action or inaction in respect of human rights judgments".
1366 In this regard, Cavallaro and Brewer "presume that impact matters, and should matter, to regional rights bodies" (Cavallaro and Brewer, *AJIL* 2008, p. 777).

them.[1367] According to international relations scholars, such effectiveness is to a great extent linked to these courts' ability to deter human rights violations.[1368] Legislative remedies are arguably a key aspect in order to achieve this deterrence. Whether states comply with them or not is consequently of lesser importance, as these reparations are able to trigger structural changes and have a deterrent effect in and of themselves.

In recent times, a number of authors have highlighted the need to look beyond compliance in order to assess the performance and effectiveness of human rights courts.[1369] Especially with respect to the IACtHR, some authors consider that solely focusing on compliance with human rights judgments is not the best approach, as it overlooks an important dimension of such decisions.[1370] This is particularly relevant if one sees the mandate of the IACtHR as addressing systemic problems and delivering "transformative jurisprudence".[1371] Similarly, Ayeni argues with respect to the ACtHPR

1367 See for example Kal Raustiala and Anne-Marie Slaughter, "International Law, International Relations and Compliance", in Walter Carlsnaes, Thomas Risse and Beth A. Simmons, *Handbook of International Relations*, SAGE Publications, 2009, pp. 538-558, at p. 539 ("The connection between compliance and effectiveness is also neither necessary nor sufficient").

1368 See Jillienne Haglund, "Domestic Politics and the Effectiveness of Regional Human Rights Courts", *International Interactions* 46(4), 2020, pp. 551-578. See also Par Engstrom, "Introduction: Rethinking the Impact of the Inter-American Human Rights System", in Engstrom (ed.), 2019, p. 4, arguing that "[e]ffectiveness, rather than a limited focus on rule compliance, generally refers to the degree to which the international human rights institutions work to improve human rights conditions and decrease the likelihood of the repetition of abuses".

1369 See Lisa L. Martin, "Against Compliance", in Jeffrey Dunoff and Mark Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations*, Cambridge: CUP, 2013, pp. 591-612; César Rodríguez- Garavito, "Beyond Enforcement: Assessing and Enhancing Judicial Impact", in Malcolm Langford, César Rodríguez- Garavito and Julieta Rossi (eds.), *Social Rights Judgments and the Politics of Compliance: Making It Stick*, Cambridge: CUP, 2017, pp. 79–108; Rainer Grote, Davide Paris and Mariela Morales, "Conclusion: moving beyond compliance without neglecting compliance in international human rights law", in Grote, Paris and Morales (eds.), *Research Handbook on Compliance in International Human Rights Law*, Edward Elgar 2021, pp. 510-522.

1370 See generally Par Engstrom (ed.), *The Inter-American System: Impact Beyond Compliance*, Cham: Palgrave Macmillan, 2019. See also von Bogdandy and Urueña, *AJIL* 2020, pp. 425 et seq.

1371 See Soley in von Bogdandy et al. (eds.), 2017.

that a "compliance optic (…) is too narrow to evaluate the contributions of [the African Court's] decisions to domestic human rights change".[1372]

Impact can take many different forms, whereby it generally refers to the effects of a particular judgment beyond the specific applicants. Judgments of human rights courts can have an impact on issues such as democratic change,[1373] the empowerment of specific domestic institutions,[1374] or the mobilisation of various actors.[1375] For example, at a judicial level impact can be observed when domestic courts adopt in their decisions the interpretations provided by human rights courts.[1376] In this context, one of the most visible forms of impact occurs when international judgments are able to trigger structural reforms domestically. Such an impact is caused not only by legislative remedies but also by judicial interpretations or recommendations more generally, when these result in legislative action by states. This latter form of indirect impact is typically observed in judgments of the ECtHR.[1377] On the other hand, the impact upon the legislation of states is of a more direct nature in the case of IACtHR and ACtHPR judgments, where the "nature and scope of remedies" is considered of great importance for the assessment of such impact.[1378] This direct impact of legislative measures is arguably linked to compliance with them, but there are also further forms of impact that can be generated by such measures.

1372 Victor Ayeni, "Beyond Compliance: Do Decisions of Regional Human Rights Tribunals in Africa Make a Difference?", in Aderomola Adeola (ed.), *Compliance with International Human Rights Law in Africa: Essays in Honour of Frans Viljoen*, Oxford: OUP, 2022, at p. 37.

1373 See Iulia Motoc and Ineta Ziemele (eds.), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives*, Cambridge: CUP, 2016.

1374 See for example Oscar Parra-Vera, "Institutional Empowerment and Progressive Policy Reforms: The Impact of the Inter-American Human Rights System on Intra-State Conflicts", in Engstrom (ed.), 2019, pp. 143-166. Concerning the empowerment of specific institutions, such as NHRIs, see Tom Pegram and Nataly Herrera Rodriguez, "Bridging the Gap: National Human Rights Institutions and the Inter-American Human Rights System", in Engstrom (ed.), 2019, pp. 167-198.

1375 See generally Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, Cambridge: CUP, 2009.

1376 This is best seen in the 'conventionality control' exercised by domestic judges. See generally Pablo González-Domínguez, *The Doctrine of Conventionality Control*, Cambridge: Intesentia, 2018.

1377 See generally Helen Keller and Alec Stone Sweet (eds.), 2008.

1378 Frans Viljoen, "Impact in the African and Inter-American Human Rights Systems: A Perspective on the Possibilities and Challenges of Cross-Regional Comparison", in Engstrom (ed.), 2019, p. 310.

For example, the legislative measures issued by human rights courts also have the potential of triggering reforms in further states subject to the jurisdiction of these courts, in order to prevent adverse judgments in the future.[1379] This can be observed, for example, with the amnesty laws in Latin America. The case in which the IACtHR declared the Peruvian amnesty law to be contrary to the Convention gave legal grounds for the Supreme Court of Argentina to invalidate this state's amnesty law, thereby allowing for the prosecution of various perpetrators of human rights violations during Argentina's military dictatorship. While expressly citing the case of *Barrios Altos vs. Peru* (2001), the Argentinean Court argued that "[t]he Argentine State has assumed a series of duties under international law and, in particular, under the Inter-American legal order, with constitutional hierarchy, which have been consolidated and specified in terms of their scope and content in an evolution that clearly limits the powers of domestic law to condone or omit the prosecution of acts that involve crimes against humanity".[1380]

Another of these layers of impact beyond compliance concerns its social dimension, in the form of changing public perceptions or framing public debates around a concrete issue. For example, the first case on the merits decided by the ACtHPR, *Tanganyika Law Society and Legal and Human Rights Centre vs. Tanzania* (2013), included an order to reform the State's Constitution to allow for independent electoral candidates.[1381] This triggered the inclusion of such a provision in the Draft Constitution of Tanzania only a year later, in 2014. However, it was reported that the referendum for the approval of this Draft Constitution could not be held due to protests from opposition political parties, and thus the measure has remained in a state of non-compliance ever since.[1382] Despite this lack of compliance, the ACtHPR's judgment and its remedial orders are considered

1379 See for example Open Society Justice Initiative, *Strategic Litigation: Impacts and Insights*, 2018, p. 57, mentioning that the legislative measures included in the judgment of the IACtHR *Claude Reyes vs. Chile* (2006) triggered the adoption of right-to-information laws in five further states of the region during the following years. See also, more generally, Laurence Helfer and Erik Voeten, "International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe", *International Organization* 68(1), 2014, pp. 77 - 110.

1380 Supreme Court of Justice of Argentina, *Case of Simón, Julio Hector et al.* (Case No. 17.778), 14 June 2005 (non-official translation).

1381 ACtHPR, *Tanganyika Law Society and Legal and Human Rights Centre vs. Tanzania* (2013), operative para. 3.

1382 See Ayeni, in Adeola (ed.), 2022, p. 57.

to have had a notable impact in the region, as they triggered not only a domestic debate on this issue but also "influenced the perception of state actors across Africa on the issue of independent candidacy".[1383] In this regard, Gathii and Mwangi argue that the ACtHPR is increasingly used as a forum against incumbent governments by civil society organisations and opposition parties, and that this case shows "how filing before international courts is often a strategic decision by individuals and non-state actors as their way of organizing discontent".[1384]

Thereby, in order to take advantage of the potential impact of human rights judgments, civil society organisations have increasingly engaged in so-called 'strategic litigation' before human rights courts. One objective of such strategic litigation is precisely the inclusion of legislative measures in a judgment, especially in the African and Inter-American systems.[1385] Strategic human rights litigation is generally defined as aiming to achieve structural changes through individual applications.[1386] There are many different levels of change that litigation can lead to. For example, it can serve as a catalyst for a public discussion on a particular issue, it can contribute to the development of institutions needed to prevent the reoccurrence of violations, or it can help to shape the narrative of a specific conflict. Among them, a very important level is legal change, which has, in turn, two sides. On the one hand strategic litigation can pursue the development of (international) human rights law, as can be observed in the recent applications

1383 Ayeni, in Adeola (ed.), 2022, p. 70.

1384 See Gathii and Mwangi, in Gathii (ed.), 2020, pp. 248-252.

1385 This is also related to the small number of cases that reach these courts. See Cavallaro and Brewer, *AJIL* 2008, p. 770, arguing with respect to the IACtHR that "[w]ithout this broad strategic focus, supranational litigation (which affords access to only a tiny fraction of victims) will function as a lottery in which the handful of petitioners whose cases reach a court will obtain benefits not available to the vast majority of similarly situated victims".

1386 A similar concept is that of public interest litigation, which consists in using the law to advance issues of public concern. In both cases, the applicant's representatives pursue goals that go beyond the confines of the specific case and parties to it. Although it often also aims at triggering legislative reforms, public interest litigation is not limited to human rights cases with concrete victims. It is pursued in different fora and contexts, such as in environmental litigation, climate litigation or administrative litigation. Nevertheless, a human rights perspective is often used to bring about broader changes, despite the lack of concrete victims in some instances. See for example Jacqueline Peel and Hari M. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*, Cambridge: CUP, 2015; Guillaume Futhazar, Sandrine Maljean-Dubois and Jona Razzaque (eds.), *Biodiversity Litigation*, Oxford: OUP, 2022.

concerning climate change before the ECtHR, seeking an interpretation of the Convention that guarantees certain environmental rights at the international level.[1387] On the other hand, strategic human rights litigation can aim at the development or reform of domestic laws, thereby often seeking specific remedies in this regard.

One of the key aspects of strategic human rights litigation is precisely the request for remedies. This type of litigation is mostly carried out by specialised NGOs representing victims before human rights courts.[1388] Individual applicants are mostly interested in the remedial measures that affect them directly, while NGOs usually have a broader focus and aim to tackle issues affecting a larger number of people through representative cases.[1389] Moreover, litigation before human rights courts is a lengthy endeavour with considerable costs, which can prevent individuals in a vulnerable situation from pursuing such proceedings. NGOs are better equipped at the level of both economic resources and personal expertise. Their participation thus allows vulnerable groups such as indigenous peoples, migrants, prisoners or children to have a voice before human rights courts.[1390] It is not surprising in this regard that an important number of legislative measures have been related to the protection of such groups, as these measures are the product of strategic litigation pursued by NGOs on their behalf. In this context, the organisations intervening strategically before human rights courts often request remedies that are not directly connected to redressing the victims they represent but have a broader impact.

The role of NGOs is particularly important in the context of the Inter-American and African human rights systems. In fact, NGOs have played a key role in the Inter-American human rights system since its early days.

1387 See for example ECtHR, *KlimaSeniorinnen vs. Switzerland* (2024). See also, more generally, Cesar Rodriguez Garavito (ed.), *Litigating the Climate Emergency*, Cambridge: CUP, 2022.

1388 Other actors that are relevant in this context are the legal clinics of universities. See Sandra Carvalho and Eduardo Baker, "Experiencias de Litigio Estratégico en el Sistema Interamericano de Protección de los Derechos Humanos", *Sur: Revista Internacional de Derechos Humanos* 20, pp. 469-479.

1389 See Kate Nash, "Human Rights, Global Justice, and the Limits of Law", in Bardo Fassbender and Knut Traisbach (eds.), *The Limits of Human Rights*, Oxford, OUP, 2019, pp. 69-80, at p. 76 ("Human rights NGOs that support 'test cases' are engaged in strategic litigation intended to establish a new interpretation of legislation or to prompt new law that will steer the polity in a different direction").

1390 See for example Jérémie Gilbert, "Indigenous Peoples and Litigation: Strategies for Legal Empowerment", *JHRP* 12, 2020, pp. 301–320.

Thereby, many important human rights issues in the region "have been advanced, partially and in some instances even primarily through strategic litigation".[1391] For example, strategic litigation has been often carried out in order to secure indigenous rights in domestic legislation.[1392] The case of *Sarayaku vs. Ecuador* (2012) for instance concerned the issue of prior and informed consent by indigenous communities for activities affecting their territory. The goal of this litigation strategy was to secure prior and informed consent under the Ecuadorian legal order, but also to advance the understanding of this indigenous right more broadly.[1393]

In this case, the Sarayaku community had the support of numerous civil society organisations, both in the field of human rights and environmental law.[1394] The IACtHR adopted an interpretation of prior and informed consent in line with the indigenous community's demands, ordering the inclusion of this concept in domestic legislation.[1395] Ecuador had already complied with the remedial measures of the IACtHR concerning compensation and satisfaction in 2013, but failed to implement the legislative changes. The Sarayaku community therefore filed a claim before the Ecuadorian Constitutional Court in 2020, requesting the execution of the IACtHR's orders.[1396] This example shows that strategic litigation often extends beyond the judgment of a human rights court, in order to secure its implementation. This is also an example of impact beyond compliance, as despite the failure of the State to comply with the legislative measures ordered by the IACtHR, the Sarayaku judgment has become "by far the most visible and influential decision on Indigenous rights in the continent, and it's widely cited as a key precedent in international law".[1397]

1391 Ximena Soley, "The Crucial Role of NGOs in the Inter-American System", *AJIL Unbound* 113, 2019, pp. 355-359, at p. 357.

1392 See in this regard Gilbert, *JHRP* 2020, p. 313.

1393 The objective in this respect was to develop a substantive instead of procedural understanding of prior and informed consent, meaning that indigenous communities not only need to be consulted, but its consent needs to be expressly given in the case of projects that directly affect them. See César Rodríguez-Garavito and Carlos Andrés Baquero-Díaz, "Reframing Indigenous Rights: The Right to Consultation and the Rights of Nature and Future Generations in the Sarayaku Legal Mobilization", in Gráinne de Búrca (ed.), *Legal Mobilization for Human Rights*, Oxford: OUP, 2022.

1394 Garavito and Baquero-Díaz, in de Búrca (ed.), 2022, pp. 80-81.

1395 IACtHR, *Kichwa de Sarayaku vs. Ecuador* (2012), operative para. 4.

1396 See in this respect Garavito and Baquero-Díaz, in de Búrca (ed.), 2022.

1397 Garavito and Baquero-Díaz, in de Búrca (ed.), 2022, p. 85.

In the case of the ACtHPR, strategic litigation is also very closely related to legislative remedies. NGOs have also here been considered "essential in developing the African human rights system".[1398] This has been explored by Gathii and Mwangi, finding that especially due to this Court's permissive approach to jurisdiction, the ACtHPR constitutes an "opportunity structure" when domestic institutional spaces are closed off.[1399] As previously explained, the ACtHPR accepts complaints that are brought directly against a law, without the necessity of identifying concrete victims.[1400] NGOs have taken advantage of this and have challenged several laws before this Court.

For example, in the case of *APDH vs. Côte d'Ivoire* (2016), this NGO challenged the compatibility of the Ivorian Law providing for the composition, organisation, duties and functioning of the Independent Electoral Commission. As the organisation had not been affected by the law, individual reparations were not ordered by the ACtHPR, limiting its remedial measures to the amendment of the law in question.[1401] The aim of the NGOs was therefore strategic in the sense that it did not seek any individual benefit from litigation, but focused exclusively on legislative reforms for the benefit of society in general. In turn, this case "provided APDH with a platform to publicize the repressiveness of the Ivorian government", giving this issue increased visibility in media and civil society.[1402] Moreover, NGOs are not the only actors pursuing strategic litigation before the ACtHPR, as individuals seeking to advance specific political objectives play also an important role in this context. Makunya highlighted in this regard the importance of reparations claims made before this Court by "political activists and public interest lawyers challenging the conformity and compatibility of legislative and constitutional norms".[1403]

1398 Daly and Wiebusch, *IJLC* 2018, p. 302.
1399 Gathii and Mwangi, in Gathii (ed.), 2020.
1400 See Chapter 1 of this book. See also in this respect Gathii and Mwangi, in Gathii (ed.), 2020, pp. 223-224 ("Our basic argument is that the African Court's very permissive approach to jurisdiction, admissibility, legal standing, and rules on who bears the costs of litigation has created a body of law that provides more opportunity for filing of other similar cases").
1401 ACtHPR, *APDH vs. Côte d'Ivoire* (2016), operative para. 7.
1402 Gathii and Mwangi, in Gathii (ed.), 2020, p. 246.
1403 Trésor Muhindo Makunya, "Decisions of the African Court on Human and Peoples' Rights during 2020: Trends and Lessons", *AHRLJ* 21(2), 2021, pp. 1230-1264, at p. 1245.

Finally, NGOs have also been engaged in litigation before the ECtHR for a long time.[1404] Although the number of cases in which they participate is rather low if compared to the total number of cases before this Court, it has been argued that its "quality is high, meaning that most of these groups were very strategic about choosing to participate in cases which they believed would lead to significant changes in European law".[1405] Thus, strategic litigation is also relevant before the ECtHR, although it probably takes a different form with respect to remedies. As legislative measures are usually ordered by the ECtHR only after an important number of complaints related to a specific law or the absence of it, the strategy of NGOs is more likely related to the search for a leading case. Once the ECtHR considers that a domestic law is contrary to the Convention or that adequate domestic remedies are not in place, this can trigger numerous additional complaints by individuals who find themselves in a similar situation. If the concerned state fails to solve the structural problem and applications continue arriving, the ECtHR will likely request a legislative reform. Thus, as concrete changes are mostly achieved through repetitive cases, strategic litigation before the ECtHR usually seeks to establish a leading case that can trigger a flood of applications concerning the same issue, which can eventually lead to reforms.

In sum, this section has shown that compliance with legislative remedies is generally rather low, perhaps with the exception of those issued by the ECtHR. These low rates are due to several reasons, whereby the rather complicated process for reforming laws and the absence of domestic coordination mechanisms for legislative compliance play a prominent role. However, the section has also explained that it is necessary to look beyond compliance in order to see the impact of these remedies. This shows a different picture, with a potentially high impact at multiple levels and with several examples of actual impact, which has also led to a practice of NGOs pursuing strategic litigation before human rights courts in order to achieve *inter alia* legislative changes. Thus, despite them being able to cause backlash and diminish compliance, not every consequence of legislative remedies is negative. In this regard, before concluding this chapter, it is

1404 Some of the most active NGOs representing victims before the ECtHR and pursuing strategic litigation are the AIRE, ECCHR and the Human Rights Advocacy Centre (EHRAC). See generally Loveday Hodson, *NGOs and the Struggle for Human Rights in Europe*, Oregon: Hart Publishing, 2011.

1405 See Rachel A. Cichowski, "Civil Society and the European Court of Human Rights", in Christoffersen and Madsen (eds.), *The European Court of Human Rights*, Oxford: OUP, 2011, pp. 77-97, at pp. 95-96.

useful to have a brief look at the reaction of the three human rights courts to these negative consequences.

III. The Reaction of Human Rights Courts

The previous sections have shown, on the one hand, that there is a close relation between some instances of backlash suffered by regional human rights courts and their practice of ordering states to reform domestic laws. This is seen most clearly in examples such as the conflict between the UK and the ECtHR, the restriction of access to the ACtHPR, or the 'Five Presidents Declaration' concerning the IACtHR. On the other hand, it was shown that legislative remedies generally take more time and are more difficult to comply with than other remedial measures. Another question concerns the reaction of human rights courts to instances of backlash and non-compliance. In particular, it becomes relevant to explore whether these three courts have limited the inclusion of legislative measures in their judgments in order to prevent further potential conflicts with states, or if to the contrary they have continued as normal or even increased the use of such measures, perhaps as a display of authority.[1406] Another relevant aspect in this regard is whether they have modified the compliance requirements concerning these measures, in order not only to facilitate its implementation but also to avoid conflict with states.

Authors have observed several reactions of human rights courts to backlash, focusing particularly on those of the ECtHR. It has been argued that "[f]ollowing Brighton, the Court is noted to have started to act as if it received signals sent by state parties".[1407] In this regard, Stiansen and Voeten found an increased judicial restraint by this Court in recent years, especially in its rulings against consolidated democracies.[1408] Similarly, Çalı shows that the ECtHR increasingly applies a 'variable geometry', whereby more deference is afforded to 'good faith interpreters' and Article 18 judgments are used for "signalling the bad faith interpreters".[1409] Others have

1406 In this respect, Abebe for example mentioned with respect to the instances of backlash against the ACtHPR that "[s]imilar possibilities of backlash and experiences may in the future prod the African Court to be more prudent in sensitive cases" (Abebe, *I•CON* 2019, p. 111).

1407 Demir-Gürsel in Aust and Demir-Gürsel (eds.), pp. 248-249.

1408 Stiansen and Voeten, *ISQ* 2020, pp. 770–784.

1409 Çalı, *Wisconsin International Law Journal* 2018.

also focused on the more frequent use of subsidiarity and the margin of appreciation in the ECtHR judgments.[1410] It has been even argued that the Strasbourg Court is "walking back" on human rights.[1411] With respect to the IACtHR, it has been stated that a reaction to Venezuela's withdrawal was the adoption of "a more restrictive take on the exhaustion of local remedies and [the rejection of] cases on these grounds".[1412] However, there is not yet much research on the question of whether backlash has caused an increased remedial self-restraint by human rights courts.

1. Changes in the Use of Legislative Remedies

When examining the three courts' remedial reactions to the aforementioned instances of backlash, three different situations can be observed. With respect to the ECtHR, a decrease in the application of the pilot judgment procedure and more generally in the inclusion of operative remedies in its judgments is notable. Legislative measures were first introduced in judgments of the ECtHR in 2004, and this practice evolved cautiously through very few judgments until it was consolidated in 2009. Between 2009 and 2015, legislative measures were included in twenty-four judgments. After that, a shift can be observed, with only five judgments containing legislative measures in the period 2016-2022. It is thus evident that this remedial practice has decreased considerably in recent years.[1413] This is also the same period in which backlash against this Court has gained momentum. Of course, this does not mean that the remedial self-restraint is directly caused by the instances of backlash, but it points in that direction. This finding is moreover consistent with the other signs of self-restraint

1410 However, in a recent empirical study, Molbæk-Steensig concludes that contrary to an often-repeated assumption about an increased use of the margin of appreciation since the 'Interlaken Process' in 2010, it was applied statistically more often during the 1980s and 1990s than recently. See Helga Molbæk-Steensig, "Subsidiarity does not win cases: A mixed methods study of the relationship between margin of appreciation language and deference at the European Court of Human Rights", *LJIL* 36, 2023, at pp. 91-96.

1411 Helfer and Voeten, *EJIL* 2020.

1412 See Soley and Steininger, *IJLC* 2018, p. 252.

1413 This was also noted by Mowbray in 2017 with respect to further remedial measures, highlighting that "there has been a dramatic decline in the annual numbers of final judgments containing operative part remedial indications" (Mowbray, *HRLR* 2017, p. 460).

displayed by the ECtHR recently in the face of backlash, as mentioned before.

A similar turn, particularly regarding legislative measures, did also take place before the IACtHR. These measures had been included in an average of 40% of the IACtHR's annual judgments until 2012, when this number dropped to an average of 14% of the annual judgments between 2013 and 2019.[1414] This could be seen as a reaction to the individual instances of backlash taking place precisely at that time, particularly those of Venezuela and the DR.[1415] Actually, this shift and increased self-restraint is a remarkable development, as the remedial practice of the IACtHR has been traditionally highlighted as one of the most progressive among international courts,[1416] and was also defined in the past as being "constantly expanding".[1417] However, the instance of collective backlash seems to have triggered the oppo-

1414 Note that in the case of the IACtHR and the ACtHPR the number of judgments with legislative measures is considered on the basis of the annual percentage of judgments including such measures, while in the case of the ECtHR it is considered in terms of the absolute number of judgments with legislative measures per year. This is mainly due to the disproportion in the number of judgments issued by these courts. In this respect, the total number of annual judgments has varied a lot before the IACtHR and the ACtHPR, while before the ECtHR it has remained relatively constant. Moreover, legislative measures are included in less than 1% of the ECtHR's annual judgments, so that examining the evolution of this practice percentage-wise does not make much sense.

1415 It is precisely as of 2013, the year after Venezuela's withdrawal, when the shift in terms of ordering legislative measures can be observed. The strong emphasis put by the IACtHR on the states' obligation to perform the 'conventionality control' is also an explanation for the decreasing use of legislative remedies. In this respect, it has been argued that "when a violation of the ACHR, which is the result of a structural issue, can be prevented by an interpretation of domestic law that is 'consistent' with the jurisprudence of the Inter-American Court, through the application of conventionality control, the Inter-American Court considers that it is not necessary to indicate legislative reform measures" (Hennebel and Tigroudja, *Commentary to the ACHR*, 2022, p. 1329). On the IACtHR's conventionality control, see Chapter 5 of this book.

1416 See generally Elisabeth Lambert Abdelgawad and Kathia Martin-Chenut (eds.), *Réparer les Violations Graves et Massives des Droits de l'Homme: La Cour Interaméricaine, Pionnière et Modèle?*, Paris: Société de Législation Comparée, 2010; see also Antkowiak, *CJTL* 2008, p. 386 ("The Inter-American Court's jurisprudence has established new paradigms in international law for the redress of individuals and groups").

1417 Douglass Cassel, "The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights", in Koen de Feyter *et al.* (eds.), *Out of The Ashes: Reparations for Gross Violations of Human Rights*, Cambridge: Intersentia, 2005, pp. 191-223.

site reaction. In 2020, the year after the 'Five Presidents Declaration', the IACtHR included legislative measures in 42% of its judgments, situating it again at a 'pre-backlash level'. In the following years, the rate was 30% (2021) and 41% (2022), clearly higher than in the period between 2013 and 2019. Thus, although the IACtHR did not officially respond to the challenge posed by this declaration, it seems that its reaction was to expand its remedial jurisprudence as a display of authority.[1418]

Finally, in the case of the ACtHPR, the withdrawals of optional declarations granting access to the Court do not appear to have caused a change in its remedial practice. Instead, the ACtHPR has consolidated this practice during the last years and has kept including legislative measures in a similar number of judgments. In this respect, a notable increase in the yearly number of judgments on reparations can be observed. While the ACtHPR issued a total of twelve judgments on reparations between 2013 and 2017, it issued sixty-five of them between 2018 and 2022. In the earlier timeframe, legislative remedies were included in 25% of these judgments, while they can be found in 24.6% of such judgments in the latter timeframe. Thus, it can be concluded that the instances of backlash experienced by the ACtHPR did not have any apparent effects on its remedial practice, at least with respect to the issue of legislative remedies.

In sum, the instances of backlash seem to have triggered a notable decrease in the use of legislative remedies by the ECtHR, while in the case of the IACtHR, such a decrease took also place after its most recent individual instances of backlash, but the subsequent collective instance of backlash appears to have triggered a move in the opposite direction, with a notable increase in its remedial practice concerning domestic laws. Finally, the various instances of backlash suffered by the ACtHPR are not appearing to have caused any reaction in terms of its use of legislative remedies.

2. Lowering of Compliance Requirements

Another type of reaction to individual instances of backlash, as well as non-compliance with legislative measures, has taken the form of lowering compliance requirements concerning these measures, thereby changing its legislative nature. As previously explained, the IACtHR is the only human

1418 See in this respect René Urueña, "Double or Nothing? The Inter-American Court of Human Rights in an Increasingly Adverse Context", *Wisconsin International Law Journal* 35(2), 2018, pp. 398.

rights court that supervises the execution of its own judgments, while this is done by a separate political body in the cases of both the ACtHPR and the ECtHR. This reaction has therefore predominantly taken place in the latter cases, whereby it is most noticeable in the European system, due to the lack of information about compliance in the African one. The CoM usually decides what is required in order to comply with a judgment of the ECtHR, as this Court most often does not give precise indications in this respect. However, in cases where the ECtHR issues a specific order, such as a legislative remedy, the CoM has accepted deviations from that order.

This can be observed most notably in the previously examined conflict between the ECtHR and the UK on prisoners' voting rights. Even after the adoption of a pilot judgment against the UK, the State failed to advance in its implementation for several years. Although the British Government introduced different legislative proposals, these were not passed by Parliament.[1419] Eventually, the State submitted an Action Plan in 2017 arguing that in view of the Parliament's opposition to passing such legislative measures, the best approach to execute these judgments would be to adopt a number of administrative measures that would allow certain prisoners to vote.[1420] These measures were accepted by the CoM, and the cases were closed in 2018.[1421] Thus, it can be observed that in view of the fact that the conflict and the lack of compliance were mainly related to the legislative nature of the measures ordered, the CoM accepted a deviation from the Court's remedies and validated executive action instead.[1422]

This acceptance of 'reduced compliance' is nevertheless problematic for two reasons. On the one hand, *Greens and MT* is one of the judgments in which the ECtHR has more clearly defined the legislative nature of the measures to be adopted. The relevant operative paragraph states that

> *the respondent State must: (a) bring forward (…) legislative proposals intended to amend the 1983 Act and, if appropriate, the 2002 Act in a manner which is Convention-compliant; and (b) enact the required*

1419 See Ergul Celiksoy, "Execution of the Judgments of the European Court of Human Rights in Prisoners' Right to Vote Cases", *HRLR* 20, 2020, pp. 555-581, especially at pp. 569-575.

1420 Essentially those on temporary license and those on home detention curfew. See Celiksoy, *HRLR* 2020, p. 572.

1421 CoM, *Resolution CM/ResDH(2018)467*, 06 December 2018.

1422 See Celiksoy, *HRLR* 2020, p. 575, arguing that "[w]hile the ECtHR considered that legislative amendment was required, the Committee of Ministers obviously did not share that assessment".

> *legislation within any such period as may be determined by the Committee of Ministers.*[1423]

In accepting administrative measures instead of it, the CoM is arguably diminishing the Court's authority, by signalling that it will accept a deviation from the remedial provisions of the judgments even in those exceptional cases in which the Court is highly specific. On the other hand, it is not the same to have a right secured through legislation and to have it secured through administrative measures. In the latter case, the legal protection of the right is much weaker and a government can very easily modify the protective measures.[1424] Thus, securing rights through legislation is not equivalent to doing so via administrative measures, and the CoM should have had a stronger position on this issue, although it probably looked for a way out of this longstanding conflict with the UK. In any case, this shows one type of institutional reaction to backlash, which does not affect so much the remedies issued by courts but states' compliance with them.

Interim Conclusion: System-Dependent Consequences of Legislative Remedies

To conclude, this chapter has shown that the consequences of legislative remedies are different depending on which human rights court issues them. For example, although recent instances of backlash are rather common in front of the three courts, its relation to concrete legislative measures diverges in this respect. This is most probably due to the fact that domestic audiences, in particular governments and other state bodies, do not have the same expectations as to the role of each of these regional human rights courts. The understanding of these different roles is strongly influenced by the previous practice of each court, but also by the context in which they operate.

In the case of the ECtHR, the general understanding for a long time was that its judgments would perhaps include recommendations but stop short of prescribing any mandatory actions that states should carry out in order to comply with them. Ordering a legislative reform would then probably be the most unexpected outcome of a judgment under this tra-

1423 ECtHR, *Greens and MT vs. UK* (2010), operative para. 6.

1424 See on the importance of securing rights through legislation Chapter 1 of this book.

ditional understanding. This started to change with the incorporation of the former Eastern Bloc under the jurisdiction of the ECtHR and the subsequent introduction of the pilot judgment procedure. However, Western European democracies likely expected that such remedial developments would exclusively affect the newly incorporated states, as they understood that only these states had systemic deficiencies. This is what may have caused the instance of backlash concerning the UK, as the expectations of the State were that ECtHR's role was perhaps to 'fine-tune' its domestic arrangements, but in no case to go as far as ordering a reform of its laws. Such expectation was even stronger on a topic such as its electoral norms, which is understood to be one of the fields in which the sovereign power of a state is reflected. These unfulfilled expectations can explain the backlash of the UK, but also the criticism of other states such as Switzerland or the Netherlands against this Court. However, this is arguably not the case for the majority of states under the ECtHR's jurisdiction, as can be observed by the support given to its remedial practice in the context of the 'Interlaken Process'.

The expectations of states are different in the case of the IACtHR. Driven by its '*nunca más*' mission, the understanding of this court's role since its very early years has comprised its capacity to interfere with states' sovereignty at the highest extent, *inter alia* by ordering structural reforms. It is probably for this reason that the individual instances of backlash against this court are not so much connected to its capacity to order legislative reforms *per se*, but to the specific content of these prescribed reforms. In this respect, states were probably not expecting that the IACtHR would be a 'fine-tuning' court avoiding intrusiveness. Instead, extensive remedial orders were part of the IACtHR's practice almost from the beginning, and at that time the regional context was arguably one that required such intrusive interventions, due to the lack of states' willingness and capacity to carry out the necessary reforms by themselves. However, times have changed and nowadays most Latin American states have turned into rather robust democracies highly capable of responding to human rights violations. This is probably a reason for the instance of collective backlash against this court, in which the governments of five of the strongest states in the region attempted to change this traditional understanding of the IACtHR's role and bring it closer to that of its European counterpart.

States' expectations are also at the core of the instances of backlash against the ACtHPR. Although this court included legislative remedies already in its first judgment on the merits, this practice (as well as the

ACtHPR's case law) developed rather slowly and did not gain consistency until about 2019. In this respect, States were probably not expecting a very intrusive court when they submitted their optional declarations granting individuals and NGOs direct access to the ACtHPR, which was mostly made in the early 2010s.[1425] They were especially not expecting issues such as the abstract review of legislation, a competence that has not been adopted by any other international court and that became evident only in recent years.[1426] This can be observed in some of the states' objections to the African Court's competence.[1427] Thus, by noticing that almost every case decided by the ACtHPR was submitted to it directly by individuals or NGOs, states probably found that restricting access by withdrawing the optional declarations was an effective way of curtailing the Court's expanding authority.

Besides the issue of backlash, the other main consequence of legislative remedies, which relates to (non-)compliance with such measures, is also system-dependent. One can see in this respect that the exceptional nature of such measures in the European system can have positive effects on compliance, as these measures have increased visibility and are thereby able to put additional pressure and generate reputational costs. However, it needs to be noted that this increased compliance is observed only when comparing it to the legislative measures ordered by the other two regional courts. If one compares it with other measures of the ECtHR, it becomes clear that financial compensation is more easily implemented. This is also the case before the other two human rights courts, where legislative remedies are among the measures that take the longest to be executed. This is mainly related to institutional and technical aspects of the implementation process, such as the absence of adequate mechanisms to coordinate the different bodies involved in legislative reforms or the increased amount of 'veto players' in the legislative procedure.

1425 As argued by Gathii and Mwangi, "although the African Court was designed in a manner protective of the sovereignty of African states, the manner in which litigants have used it indicates that the constraints the states designed may not always work in the ways they anticipated". Gathii and Mwangi, in Gathii (ed.), 2020, p. 253).

1426 See Chapter 1 of this book.

1427 See for example the state objection in the case of ACtHPR, *Ingabire Victoire Umuhoza vs Rwanda* (2017), para. 52 ("[The ACtHPR is not] "a legislative body which can (…) make national legislation in lieu of national legislative Assemblies").

In addition, legislative measures have also the most notable intrinsic impact in the European system, where they allow the Court to get rid of repetitive cases concerning the same law. This holds true for the other two systems as well, but there the number of repetitive cases and backlog in general is not as problematic as in the European system. In fact, although the number of pending judgments before the ECtHR has decreased in recent years (mainly due to the restriction of admissibility criteria),[1428] the "high number of repetitive applications has remained problematic".[1429] Besides this intrinsic impact on the system itself, legislative remedies can also produce effects on third states, that sometimes carry out their own legislative reforms in order to avoid adverse judgments. Other forms of impact include those on the social level, by triggering certain debates or empowering actors or social movements that push for reform. In this regard, when a court orders a legislative reform, civil society can articulate its demands around compliance with an international judgment that is binding for the state. Moreover, both the European and the inter-American systems allow for third-party interventions in the process of supervising compliance with judgments, so that civil society and NGOs can also give their views on the adequacy of the reform in question. This also implies that even a vague remedy that allows for deliberation at the domestic level can thereafter be re-evaluated at the international level in order to assess the content of the reform. As it was shown, specialised NGOs have taken advantage of this and engaged in strategic litigation before regional human rights courts aiming precisely at legislative reforms in concrete states.

Finally, there are also notable variations in the reaction of human rights courts to these consequences. In this respect, the most evident reaction has taken place in the European system. The ECtHR has not only notably reduced the inclusion of legislative remedies in the face of backlash, but the CoM has even lowered the compliance requirements regarding some of these measures previously ordered by the Court, thereby changing its legislative nature. On the other hand, the IACtHR seems to have initially diminished its use of legislative remedies shortly after several individual instances of backlash, but then increased it when several states collectively questioned this practice. Before the ACtHPR, the inclusion of legislative measures has remained rather constant despite the notable increase in the number of judgments decided by this Court in the last years. Thus, its

1428 See Dinah Shelton, "Significantly Disadvantaged? Shrinking Access to the European Court of Human Rights", *HRLR* 16(2), 2016, pp. 303–322.

1429 Glas, *HRLR* 2020, p. 125.

remedial practice does not seem to have been affected by these negative consequences.