Chapter 1: The Concept of Legislative Remedies

The first step to understanding and analysing legislative remedies before human rights courts is to explore the different elements surrounding this concept. As explained in the introduction, legislative remedies are binding measures issued by a judicial body that prescribes legislative reforms. This is a rather common remedy before constitutional courts, but this book will focus on international adjudication, where this remedy is much more exceptional. Although it is a fact that the three regional human rights include these types of remedial measures in some of their judgments, there are however a number of questions related to the relationship between domestic laws and international human rights law.

To what extent do human rights treaties contain obligations to legislate? Do victims of human rights violations have a secondary right to the reform of laws that contributed to the violation? How do human rights courts carry out the review of domestic laws? Who can request such a review? Can they also perform an advisory review of legislation? What is the role of legislative remedies in the constitutionalisation of human rights law? Are these remedies comparable to the ones issued by domestic constitutional courts when reviewing legislation? Why are legislative remedies considered more intrusive than other remedies of human rights courts? Are these courts legitimated to order the reform of domestic laws?

This chapter will attempt to provide an answer to these different questions, before delving into the issue of remedies in general international law and human rights law in the next chapters, where legislative remedies will be situated in their remedial context. In order to tackle all these issues, this chapter will first examine the obligations to legislate in accordance with human rights treaties, showing that legislative remedies can be conceptualised as a reiteration or concretization of primary obligations to legislate under these treaties. Then, the chapter will look at the review of domestic laws carried out by regional human rights courts, focusing on two particular issues. First, the competence to request a review of legislation will be examined, an issue that is closely related to the 'victim requirement' in human rights adjudication. Here, particular attention will be put on the innovative approach of the ACtHPR, where any individual or NGO can claim that a law is contrary to the human rights obligations of the corresponding state without the need to be qualified as a victim or to be affected by the law.

Secondly, the advisory review of legislation will be explored, as the three courts have developed different mechanisms in this regard.

Finally, the last section of the chapter will turn around legislative remedies and the constitutionalisation of human rights adjudication. It will be shown that this remedial practice contributes to an increased constitutionalisation of this regime, but at the same time, important differences persist with respect to the legislative measures issued by constitutional courts. In addition, this section will also examine the intrusiveness of these particular measures, as well as the legitimacy concerns related to them.

I. Obligations to Legislate under Human Rights Treaties

Every human rights treaty, both at the universal and the regional level, contains certain obligations for state parties to legislate. In this context, the concept of treaty obligations to legislate is understood as those provisions that require direct legislative action by states. Thus, the indirect requirements to legislate, for example in order to restrict certain rights, are not included in this analysis.[54] There are two main types of legislative human rights obligations. On the one hand, some provisions prescribe the adoption of all necessary legislative measures in order to implement the rights of the corresponding treaty in general, called here 'general obligations to legislate' (1). On the other hand, obligations to legislate that concern a concrete right or a particular human rights issue are called here 'specific obligations to legislate' (2). In the traditional distinction between negative obligations to respect and positive obligations to protect and fulfil human rights, obligations to legislate can be part of all three, depending on the concrete issue they tackle.[55] Although these are mostly positive obligations, some of the treaty provisions contain also obligations to modify or abolish

54 Such indirect obligations to legislate are typically found in provisions concerning certain political rights, such as the freedom of expression or of association, whose restriction needs to be "prescribed by law". See for example Articles 10(2) and 11(2) of the ECHR.

55 For example, specific obligations to legislate in order to protect certain vulnerable groups or to prevent or punish certain acts are clearly part of the obligation to protect, while the obligations to modify or repeal domestic laws are more related to the obligation to respect. General obligations to legislate have elements of respect, protection and fulfilment, as the line between them is not always clear. See Laurens Lavrysen, "Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights", in Yves Haeck and Eva Brems (eds.),

laws that are contrary to the purpose of the corresponding treaty. In addition, human rights treaty obligations to legislate are not only those expressly provided in the treaty provisions but can also be implicit in them or be developed through the case law of the supervisory bodies (3).

This section will thus provide a general overview of the obligations to legislate included in human rights treaties and then examine its relation to legislative remedies (4). Although the following chapters focus only on the legislative measures included in judgments of the three regional human rights courts, this section will not only take into account the three regional human rights conventions but also the nine 'core' UN human rights treaties, in order to have a complete overview of these obligations.[56] There are in this respect important differences in the number of obligations to legislate included in each human rights treaty. Notably, at a regional level, the ACHR stands out with seven of these obligations, while the ECHR contains only two of them and the ACHPR just a single one. At the universal level, the human rights treaties which include the highest number of obligations to legislate are the CRC and CEDAW, with five of these obligations. The ICCPR and the CRPD include four, the ICMW, the ICERD and the ICPED three, and the ICESCR and the CAT only two.

1. General Obligations to Legislate

Obligations requiring states to legislate in order to give effect in general to the rights contained in the corresponding treaty are part of the so-called 'general measures of implementation', usually included at the beginning of each treaty.[57] These obligations imply that upon ratification, states shall make the necessary amendments in order to conform their domestic laws to the treaty provisions.[58] In this regard, the obligations to legislate are

Human Rights and Civil Liberties in the 21st Century, Dordrecht: Springer, 2014, pp. 69-130, at pp. 72-76.

56 See OHCHR, The Core International Human Rights Instruments and their monitoring bodies, available at: https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx.

57 See for example CRC, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child*, 2003. See also, with respect to the ACHR, Eduardo Ferrer Mac-Gregor and Carlos Pelayo Möller, *Las Obligaciones Generales de la Convención Americana sobre Derechos Humanos*, Mexico: UNAM, 2017.

58 This does however not require the incorporation of these treaties into domestic law. See HRCee, *General Comment 31: The nature of the general legal obligation*

mostly included alongside the general obligations to respect and fulfil those rights,[59] although this is not always the case.[60] Moreover, a reservation concerning these provisions is incompatible with the treaties' object and purpose.[61]

Such general obligations to legislate can be found in five of the nine core universal human rights treaties[62] and two of the three regional human rights conventions.[63] It has to be noted, however, that sometimes these general obligations overlap with specific obligations to legislate in order to protect a concrete group, especially when the object of the treaty in question is the protection of that group.[64] Certainly, some of these provi-

---

imposed on States Parties to the Covenant (CCPR/C/21/Rev.1/Add.13), adopted on 29 March 2004, para. 13 ("States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant"). See also Paul M. Taylor, *A Commentary on the International Covenant on Civil and Political Rights*, Cambridge: CUP, 2020, p. 70. See however, concerning Art. 2(1) CAT, Gerrit Zach, "Article 2: Obligation to Prevent Torture", in Manfred Nowak, Moritz Birk, and Giuliana Monina (eds.), *The UN Convention Against Torture and its Optional Protocol: A Commentary*, 2nd ed., Oxford: OUP, 2019, pp. 72-97, at p. 81, arguing that "positive obligations of states, (…) aimed at fulfilling a certain human right by means of legislative (…) and other measures, are always relative and, therefore, subject to the principle of progressive implementation".

59 See for example Article 1 of the ACHPR ("The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them").

60 For example, the ACHR includes the general obligations of respect and guarantee in its Art. 1, while Art. 2 of this Convention includes an obligation "to adopt (…) such legislative or other measures as may be necessary to give effect to those rights or freedoms".

61 HRCee, *General Comment 31: The nature of the general legal obligation imposed on States Parties to the Covenant* (CCPR/C/21/Rev.1/Add.13), adopted on 29 March 2004, at para. 5.

62 Art. 2.2 ICCPR, Art. 2(1) ICESCR, Art. 4 CRC, Art. 4(1)(a) CRPD, Art. 84 ICMW. One human rights treaty does even contain a procedural obligation specifying conditions about how states should comply with their general obligations to legislate. This is the case of Art. 4(3) CRPD, establishing that states shall "closely consult with and actively involve persons with disabilities, (…) through their representative organisations" in the implementation and development of legislative measures.

63 Art. 2 ACHR and Art. 1 ACHPR.

64 This is for example the case with Art. 2(a) CEDAW, requesting states to "embody the principle of the equality of men and women in their national constitutions or other appropriate legislation". Nevertheless, other treaties aiming at the protection of a particular group include both a general obligation to legislate and a specific one for the protection of such group. This is for example the case of the CRC, in its Arts. 3(2) and 4.

sions establish that states shall make the rights effective through legislation *or* through other measures.[65] The CESCR declared in this respect that "in many instances legislation is highly desirable and in some cases may even be indispensable".[66] Some authors have argued that these general obligations of implementation constitute an obligation of result rather than an obligation of conduct,[67] while others have stated that legislative measures are always necessary in this context, albeit sometimes not sufficient.[68]

Moreover, it can be argued that general obligations to legislate are part of customary international law.[69] In accordance with Art. 27 of the VCLT, no violations of international treaties can be justified under the basis of domestic laws. Furthermore, such a customary character can also be inferred from the PCIJ's *Advisory Opinion on the Exchange of Greek and Turkish Populations* (1925), where the PCIJ mentioned "a principle which is self-evident, according to which a State which has contracted valid international

65 See for example Art. 2(2) ICCPR. On the contrary, see Art. 2(1) ICESCR, according to which the full realisation of the rights shall be achieved "by all appropriate means, including particularly the adoption of legislative measures". See however Philip Alston and Gerard Quinn, "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights", *Human Rights Quarterly* 9(2), 1987, pp. 156-229, at p. 166, arguing that these obligations to legislate are different in the case of the ICCPR and the ICESCR as in the former case it is "abundantly clear that legal measures are required" while in the latter one "it is unclear whether states are required to take such action".

66 See CESCR, *General Comment 3: The Nature of States Parties' Obligations (Art. 2, Para. 1 of the Covenant)*, 14 December 1990, para. 3. See on the other hand HRCee, General Comment No. 31, para. 13, appearing to leave the door open for a change in practice instead of legislation ("Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees").

67 Anja Seibert-Fohr, "Domestic Implementation of the International Covenant on Civil and Political Rights", *Max Planck Yearbook of United Nations Law* 5, 2001, pp. 399-472, at p. 419.

68 As an effective implementation of these laws is also needed. See for example Andrea Broderick, "Article 4: General Obligations", in Ilias Bantekas et al. (eds.), *The UN Convention of the rights of Persons with Disabilities: A Commentary*, Oxford: OUP, 2018, p. 119, stating that "[w]hile the adoption of legislative measures is indispensable, obligations under Article 4(1)(b) encompass a panoply of duties that is much broader than the mere adoption of legislation". See also similarly Zach, in Manfred Nowak et al. (eds.), 2019, p. 83.

69 This was stated in the case of IACtHR, *"Juvenile Reeducation Institute" vs. Paraguay* (2004), para. 205 ("In general international law, it is a universally accepted principle of customary law that a State that has ratified a human rights treaty must make the necessary amendments to its domestic laws to ensure proper compliance with the obligations it has undertaken").

obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken".[70] In the case of the ECHR, despite the absence of a general obligation to legislate in the Convention, the Court has also assumed that the general obligation to 'secure' the Convention rights under Article 1 implies an obligation to legislate for that purpose.[71] However, it has been noted that this is a customary norm that many states fail to comply with.[72]

These general obligations to legislate are a good reflection of the subsidiarity principle, according to which domestic actors are primarily responsible for the implementation of human rights treaty norms.[73] Moreover, these provisions are usually understood to have an 'accessory character', meaning that they can only be infringed in conjunction with another article of the respective treaty.[74] Nevertheless, these types of general obligations to legislate are usually a strong legal basis in order for treaty bodies or courts to request legislative reforms, as the compatibility of domestic law with the treaty in question turns into a primary obligation for state parties.[75] These general obligations have also served as a basis for courts and treaty bodies to develop further specific obligations to legislate besides those explicitly included in human rights treaties, as will be seen below.

70 PCIJ, *Exchange of Greek and Turkish Populations (Lausanne Convention VI, January 30th, 1923, Article 2)*, Series B No. 10, 21 February 1925, p. 20.

71 See ECtHR, *Maestri vs. Italy* (2004), para. 47 ("Furthermore, it follows from the Convention, and from Article 1 in particular, that in ratifying the Convention the Contracting States undertake to ensure that their domestic legislation is compatible with it"). See also Alstair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford: Hart, 2004, at p. 225.

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

73 See Manfred Nowak, *UN Covenant on Civil and Political Rights – CCPR Commentary*, 2nd ed., Kehl am Rhein: N.P. Engel Publishers, 2005, p. 27.

74 See for example Taylor, 2020, p. 60. With regard to the CRC, see John Tobin, "Article 4: A State's General Obligation of Implementation", in John Tobin (ed.), *The UN Convention on the Rights of the Child: A Commentary*, Oxford: OUP, 2019, p. 109, arguing that this provision, "like its normative cousins from the ICESCR and ICCPR (…), is not intended to be read in isolation from the individual rights to which it applies".

75 See in this regard Taylor, 2020, pp. 77-78.

2. Specific Obligations to Legislate

Besides these general obligations to legislate, almost every human rights treaty also includes specific obligations to legislate, relating to concrete rights, groups, or acts. These provisions pertain to the so-called 'non-self-executing norms' of human rights treaties, as there is a need for states to take a certain action – in this case legislative action – in order to make them effective.[76] This section will examine the specific obligations to legislate included in human rights treaties, dividing them into four main categories: (a) obligations to legislate in order to protect specific rights, (b) obligations to legislate in order to protect specific groups, (c) obligations to legislate in order to prevent or punish certain acts, and (d) obligations to modify or abolish domestic laws.

a) *Obligations to legislate in order to protect specific rights*

There are a number of human rights treaty provisions that require states to protect certain rights by law. For example, one right that states are typically required to protect through legislation is the right to life. This is prescribed at a regional level by Art. 4 ECHR and Art. 4 ACHR, and at the universal level by Art. 6(1) ICCPR and Art. 9 ICMW.[77] This means that if states lack domestic law provisions aiming at the protection of the right to life, they will have to legislate to that effect. According to the HRCee, this implies on the one hand that states must adopt appropriate laws in order to "protect life from all reasonably foreseeable threats, including from threats emanating from private persons and entities", and on the other hand that the reasons for any deprivation of life by state authorities must be prescribed by law with sufficient precision.[78]

Other provisions aiming at the protection of specific rights are those that require states to regulate in their domestic laws the exercise of such rights. This is for example the case with Art. 27(1) CRPD, including an obligation

76 See in this regard for example CERD, *General Comment No. 35: Combating racist hate speech*, 26 September 2013, para. 13 ("As article 4 is not self-executing, States parties are required by its terms to adopt legislation to combat racist hate speech that falls within its scope").

77 The latter concerning specifically the right to life of migrant workers and their families.

78 HRCee, *General Comment 36: Article 6 (Right to Life)*, 3 September 2019, paras. 18-20.

to regulate through legislation a number of aspects concerning the right to work of persons with disabilities, such as their ability to exercise labour and trade union rights, the access to general technical and vocational training, and the promotion of their employment, both in the private and in the public sector. Besides the protection of the right to life, the ECHR only contains one other obligation to legislate, in Art. 2 of its Protocol 7, concerning the regulation of the right to appeal in criminal matters. The provision specifies that "[t]he exercise of this right, including the grounds on which it may be exercised, shall be governed by law". On the other hand, Art. 18 ACHR, which concerns the right of every person to a given name, specifies that "[t]he law shall regulate the manner in which this right shall be ensured for all".[79]

b) *Obligations to legislate in order to protect specific groups*

In addition to obliging states to legislate in order to protect certain rights, human rights treaties also seek to protect specific groups that are considered vulnerable and in need of special protection. These obligations are usually included in treaties that aim at the protection of these groups, such as CRC, CRPD and CEDAW. The protection of these groups through legislation thereby reinforces the long-term effectiveness of the treaty in question and provides a legal basis for taking additional measures.

The CRC contains several obligations to legislate aiming at the protection of children, both in general and specifically "from all forms of physical or mental violence", and "from the illicit use of narcotic drugs and psychotropic substances".[80] The CRPD includes similar protective obligations with regard to persons with disabilities, mentioning their legislative protection "from all forms of exploitation, violence and abuse".[81] CEDAW on the contrary departs from a protective approach, stipulating the state's obligation to adopt "all appropriate measures, including legislation, to ensure the full development and advancement of women",[82] and to "embody the principle of the equality of men and women in their national constitutions

79 ACHR, Art. 18.

80 CRC, Arts. 3(3), 19(1) and 33, respectively.

81 CRPD, Art. 16(1).

82 CEDAW, Art. 3. This provision is understood to provide a legal basis for requiring states to incorporate a gender perspective into their domestic laws. See in this regard Christine Chinkin, "Article 3", in Marsha A. Freeman, Christine Chinkin and Beate

or other appropriate legislation".[83] Another form of non-discrimination through law is prescribed by the ACHR, determining that "[t]he law shall recognize equal rights for children born out of wedlock and those born in wedlock".[84]

c) *Obligations to legislate in order to prevent and punish specific acts*

Most obligations to legislate under human rights treaties relate to the prevention or the punishment of certain acts. Some of these obligations are to a certain extent overlapping, such as CAT's obligation to adopt the necessary legislative measures in order "to prevent acts of torture" and CRPD's prescription for states to legislate in order "to prevent persons with disabilities (…) from being subjected to torture".[85] Similarly, the ICCPR requires to prohibit by law any type of discrimination,[86] and this is also prescribed by CEDAW regarding the discrimination of women,[87] by ICERD with respect to racial discrimination,[88] and by the CRPD concerning the discrimination on the basis of disabilities.[89] The latter provisions are in line with the general assumption that the elimination of *de jure* discrimination is a necessary prerequisite for achieving *de facto* equality.[90]

Rudolf (eds.), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary*, Oxford: OUP, 2012, pp. 101-122, at p. 108.

83 CEDAW, Art. 2. The CEDAW Committee has in this respect regularly recommended states to incorporate women's rights into their constitutions. See Andrew Byrnes, "Article 2", in Marsha A. Freeman et al. (eds.), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary*, Oxford: OUP, 2012, pp. 71–99, at p. 79.

84 Art. 17(5) ACHR.

85 CAT, Art. 2(1) and CRPD, Art. 15.

86 Article 26 ICCPR. The HRCee has also specified in this regard that "when legislation is adopted by a state party, it must comply with the requirement of article 26 that its content should not be discriminatory" (HRCee, *General Comment No. 18: Non-discrimination*, 10 November 1989, para. 12).

87 Article 2(b) CEDAW. In accordance with the CEDAW Committee, this includes the obligation to provide "appropriate remedies for women who are subjected to discrimination contrary to the Convention", which should encompass "changes in relevant laws". See CEDAW Committee, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, para. 32.

88 Article 3(d) CERD.

89 Article 27(a) CRPD.

90 See Andrea Broderick, in Ilias Bantekas et al. (eds.), 2018, p. 120.

Most of the obligations to prevent and punish specific acts through legislation are also aimed at the protection of children and other vulnerable groups.[91] For example, the ICESCR's only specific obligation to legislate establishes that children's "employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development *should be punishable by law*. States should also set age limits below which the paid employment of child labour *should be prohibited and punishable by law*".[92] A similar obligation is also included in Art. 32(2) CRC, specifying further details on this legislative duty of states.[93] In addition, the Optional Protocols to the CRC are also aiming at the protection of children by imposing a requirement to criminalize certain acts, such as the sale of children for sexual exploitation or forced labour;[94] the production, distribution, dissemination, or possession of child pornography;[95] and the recruitment or use in hostilities of persons under the age of eighteen.[96] Finally, the ICPED includes a prescription for states to "prevent and punish under its criminal law (…) the wrongful removal of children [and] the falsification, concealment or destruction of documents attesting to the true identity of [these] children".[97]

Another type of overlapping obligation can be found between the universal and the regional level. For example, both the ICCPR and the ACHR prescribe states to prohibit by law the propaganda of war and

91 That is the case of CRPD's obligation to "put in place effective legislation (…) to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted" (CRPD, Art. 16.5). CEDAW, on its side, requests states to adopt "all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women" (CEDAW, Art. 6).

92 ICESCR, Art. 10(3) (emphasis added). These two aspects are in accordance with ILO Conventions No. 182 and 138, respectively. See Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials*, Oxford: OUP, 2014, pp. 837-841.

93 Actually, the CRC Committee has recommended states in several instances to "strengthen" or "amend" their laws in order to ensure that they include provisions that prohibit child labour. See Philip Alston, "Article 32: The Right to Protection from Economic Exploitation", in John Tobin (ed.), *The UN Convention on the Rights of the Child: A Commentary*, Oxford: OUP, 2019, p. 1246.

94 Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, Art. 3(1)(a).

95 Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, Art. 3(1)(c).

96 Optional Protocol on the Involvement of Children in Armed Conflict, Art. 4(2).

97 ICPED, Art. 25(1).

the incitement to discrimination, hostility or violence.[98] In contrast with Art. 4 ICERD, containing a very similar obligation, this does not need to be prohibited by criminal law,[99] but the prohibition requires some sort of sanction or punishment.[100] The HRCee actually explained that the difference between these prohibitions and other lawful limitations to the freedom of expression is precisely "that for the acts addressed in article 20, the Covenant indicates the specific response required from the State: their prohibition by law".[101]

d) *Obligations to modify or repeal domestic laws*

As it has been made evident, most obligations to legislate contained in human rights treaties concern the enactment of legislation, either to prevent or punish certain acts or to protect concrete rights or groups of persons. However, there are also some treaty obligations that refer to the modification or repeal of existing laws. This primarily concerns domestic laws that have a discriminatory effect. The ICERD includes an obligation for states to "amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination".[102] Additionally, both CEDAW and CRPD oblige states "to modify or abolish existing laws, regulations, customs and practices which constitute discrimination" against

98 Art. 20 ICCPR and Art. 13(5) ACHR.

99 See the different terminology used. Whereas Art. 4 ICERD requires offending speech to be "punishable by law", Art. 20 ICCPR stated it shall be "prohibited by law". See in this regard also Taylor, *ICCPR Commentary*, 2020, pp. 585-586. CERD stated that "[a]s a minimum requirement, and without prejudice to further measures, comprehensive legislation against racial discrimination, including civil and administrative law as well as criminal laws, is indispensable to combating racist hate speech effectively" (see CERD, *General Recommendation No. 35*, 2013, para. 9).

100 HRCee, *General Comment 11: Article 20 (Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred)*, 29 July 1983, para. 2. These sanctions can have a criminal, civil or administrative nature (see Taylor, *Commentary ICCPR*, 2020, p. 586).

101 HRCee, *General Comment No. 34*, para. 51.

102 CERD, Art. 2 (c). See in this regard Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary*, Oxford: OUP, 2016, p. 187, stating that it is a "common practice" of the CERD to issue concrete recommendations for states to review, amend or rescind discriminatory laws.

women and persons with disabilities, respectively.[103] Finally, CEDAW includes a specific obligation of periodically reviewing protective laws "in light of scientific and technological knowledge" and amending, repealing or extending them as necessary.[104]

3. Implicit Obligations to Legislate

This section has provided an overview of the obligations to legislate expressly included in human rights treaties. However, these are not the only aspects that states need to regulate through legislation in accordance with these treaties. In this respect, there are many obligations to legislate that are implicit and that have been developed and established mainly through the case law of the respective court or treaty body. This specification of implicit obligations is in accordance with the general obligations to legislate outlined before. As states have the customary (and often also treaty-based) obligation to adjust all of their domestic laws to the corresponding human rights treaty, the supervisory bodies can concretise this mandate by indicating how it should be implemented in particular situations, thereby expanding the number of specific obligations to legislate.

This can be seen through the example of the ECHR, which—despite containing only two explicit obligations to legislate—implicitly requires legislative action in several areas. In this respect, the ECtHR has developed an important number of positive obligations linked to each Convention

103 CEDAW, Art. 2 (f) and CRPD, Art. 4(1)(b). According to the CRPD Committee, this obligation should encompass civil, family, criminal, labor and education laws. See CRPD Committee, *Concluding Observations on Costa Rica*, 12 May 2014, para. 8. The CEDAW Committee has taken a similar approach in this regard, while it has also encouraged states to regularly analyse the gender impact of new and existing laws, and to undertake regular reviews of legislation. See Byrnes, in Marsha A. Freeman et al. (eds.), 2012, p. 91.

104 CEDAW, Art. 11(3). It has been argued that the focus of this provision is related to the unnecessary mandatory protection of women, which would restrict their "equality of opportunity in employment by excluding them from specific jobs or tasks and by perpetuating negative stereotypes regarding their need for protection" (Frances Raday, "Article 11", in *CEDAW Commentary*, 2012, p. 302). This is the only obligation of this character in human rights treaties, as the former ones refer to the modification or abolishment of discriminatory laws only at the time of ratifying the respective Convention.

right, among them the obligations to legislate.[105] This is, for example, the case with the right to an effective domestic remedy under Art. 13 ECHR, which often has inherent legislative implications, as will be explained in Chapter 3. In addition, concerning the right to family life, the ECtHR stated for example in *Marckx vs. Belgium* (1979) that "respect for family life implies in particular (…) the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family".[106] In this context, the ECtHR has also developed an obligation to criminalize specific acts in the domestic legal framework, in order to deter human rights violations.[107] For example, in *X and Y vs. the Netherlands* (1985), dealing with the sexual abuse of mentally handicapped persons, the Court argued that "[e]ffective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions".[108] Similarly, in *M.C. vs. Bulgaria* (2003), the Court argued that states "have a positive obligation inherent in Articles 3 and 8 to enact criminal-law provisions effectively punishing rape".[109]

The obligations to legislate can also evolve over time, as the respective court or treaty body interprets and develops the provisions of the corresponding treaty in light of a specific time and context. In this respect, when supervision bodies conduct an evolutionary interpretation of the corresponding treaty, they can find that certain laws are no longer compatible with it. For example, the HRCee added a new (negative) obligation to legislate in its General Comment 34 by determining that "laws that penalize the expression of opinion about historical facts are incompatible with the obligation that the Covenant imposes to State Parties".[110]

105 See generally Dimitris Xenos, *The Positive Obligations of the State under the European Convention of Human Rights*, Abingdon: Routledge, 2013.
106 ECtHR, *Marckx vs. Belgium* (1979), para. 31.
107 See in this respect Laurens Lavrysen and Natasa Mavronicola (eds.), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR*, London: Bloomsbury, 2020.
108 ECtHR, *X and Y vs. the Netherlands* (1985), para. 27.
109 ECtHR, *M.C. vs. Bulgaria* (2003), para. 153.
110 HRCee, *General Comment No. 34*, para. 49.

4. From Obligations to Legislate to Legislative Remedies: Is There a Victims' Right to Legislative Reforms?

The human rights obligations to legislate explored in this section are primary obligations that states need to implement when ratifying a human rights treaty. Thus, the legal order of states must be compatible with the respective treaty at the time of ratifying it and must remain compatible as long as the state remains bound by the treaty. Although the general obligation to protect human rights does not always mean that they need to be protected through law, this is the case when it is expressly mandated by a treaty or when the corresponding treaty body develops that obligation. Moreover, every time a state adopts or amends a domestic law it needs to make sure that it is compatible with its treaty obligations. If it fails to comply with these primary obligations, the supervision bodies can find a violation of the treaty and are in principle authorised to establish a secondary obligation for the concerned state to reform its domestic laws. In this respect, every legislative remedy issued by a human rights court is linked to the non-compliance of obligations to legislate, although this is not always mentioned by the courts. Both the ACtHPR and the IACtHR usually link their legislative remedies to violations of the general obligation to legislate included respectively in Art. 1 ACHPR and Art. 2 ACHR, while in the case of the ECtHR, it is most often linked to the violation of Art. 13 ECHR and the implicit positive obligations to legislate according to this provision.

As it can be observed, these obligations to legislate usually provide a sufficient legal basis for human rights courts or treaty bodies to prescribe legislative reforms. In some cases, it is precisely these obligations that trigger the finding of a treaty violation.[111] General obligations to legislate are thereby broad enough to allow for the review of domestic laws against any treaty provision, or even against the object and purpose of a treaty in general. Even if human rights violations usually originated in the application of a specific law and not in the law as such, if a legislative provision leaves no room for a rights-friendly application it becomes clear that the legislator needs to intervene. Concerning specific obligations, it is worth noting that those explicitly included in human rights instruments are only rarely triggering legislative remedies. For example, a very extended specific obligation

111 See for example Seibert-Fohr, in *Max Planck Yearbook* 2001, p. 411 ("Without the assumption of legal obligations the Committee could not have found such violations").

is that of protecting the right to life through legislation, as mentioned before. This provision has however not given rise to much jurisprudence concerning the legislative protection of this right.[112] This is most likely because the right to life is generally secured in states' criminal laws. This is also the case with other specific obligations to legislate in accordance with regional human rights treaties, such as the right to appeal in the case of the ECHR, that has not been linked to any of its legislative measures. On the other hand, as will be seen in Chapter 4, there are some categories of legislative remedies that are mirrored in the aforementioned categories of obligations to legislate. This is the case with the obligations to legislate in order to protect specific groups, or the one aiming at the prevention and punishment of certain acts.[113]

In sum, obligations to legislate are included in every human rights treaty, both explicitly and implicitly, as the adaptation of domestic laws to an international treaty has a customary character under international law. This leads to the question of whether legislative reforms are a right of victims of human rights violations or an obligation of states after committing a violation. It is different in this context for victims to have a subjective right to an amendment of the law than for states to be objectively obliged to carry out a legislative reform.[114] Victims of human rights violations have the right to an effective remedy (in the procedural sense) and reparation. These secondary rights have to be claimed primarily before domestic courts, in accordance with the subsidiarity principle. However, under most domestic jurisdictions individuals cannot request a legislative reform, nor are most domestic courts (except for constitutional courts) competent to order such reforms. From this perspective, legislative reforms do not seem to fit in the concept of secondary rights of individuals arising from human rights violations.

It is thus necessary to consider the differences between the redress of concrete victims and other remedies of human rights courts that are directed at the protection of society in general and the prevention of further vio-

112 An exception is for example the case law of the IACtHR requesting states to modify its laws related to the death penalty, that can be interpreted as dealing with the legislative protection of the right to life. For more information, see Chapter 4 of this book.

113 These are respectively mirrored in the legislative remedies aiming at the protection of vulnerable groups and in those prescribing the adequate codification of criminal offences. See Chapter 4 of this book.

114 See generally on this difference Anne Peters, *Beyond Human Rights - The Legal Status of the Individual in International Law*, Cambridge: CUP, 2016, pp. 167-193.

lations. For this reason, it seems more apt to consider legislative remedies (and guarantees of non-repetition more generally) as distinct from other remedial measures, as the main beneficiaries of such remedies are not the victims appearing before the Court. It would be therefore probably more accurate to define legislative measures included in the judgments of human rights courts as a concretization or reiteration of the obligations to legislate that can be found in human rights treaties. If states have the customary obligation to adapt their domestic legislation to the treaties that bind them, this includes the interpretation of such treaties provided by its authoritative interpreter, in this case the regional human rights courts. When these courts issue a legislative remedy, they are in fact interpreting the states' primary obligation to legislate and adapting it to a concrete situation. From this perspective, it can be argued that victims do not have the right to have the legislation amended after suffering a human rights violation, but states have an implicit obligation to amend it whenever it is found to be contrary to a human rights treaty. What human rights courts then do when issuing legislative remedies is to make these implicit obligations explicit, giving them form and substance. It is, therefore, probably more accurate to define legislative reforms as an obligation of states rather than a secondary right of victims.

In any case, the competence of human rights courts to order legislative measures seems rather clear from an international law perspective. When they find that a state has failed to comply with its primary obligation to legislate, this constitutes an internationally wrongful act that gives rise to a secondary obligation of remedying it, in this case through a legislative reform. The legal basis for the imposition of legislative remedies is thus a combination of these obligations and the remedial provisions included in human rights treaties, which will be examined in Chapter 3. However, before issuing legislative remedies human rights courts generally perform a review of the domestic laws against the standards of the respective convention. This type of judicial review is very common, going beyond the issue of legislative remedies. It will be explored in the next section.

II. The Review of Legislation by Human Rights Courts

It is common to all three regional human rights courts to review domestic laws rather often in their judgments. This is because the alleged human rights violations often stem from the application of a law, mostly through

administrative acts but sometimes also through judicial decisions. Thereby, human rights courts usually extend their review to the law as such and not only to its application.[115] This type of review is generally unproblematic, being an intrinsic aspect of human rights adjudication. There are, however, two aspects related to the human rights courts' review of domestic laws that deserve closer attention.

The first aspect concerns the competence to request a review of legislation before human rights courts. In the European system, the compatibility of a law with the ECHR can be challenged in principle only by the alleged victim of a human rights violation caused by the application of that law. On the other hand, in the Inter-American system, this review can also be requested by persons other than the alleged victim, although the law needs to have been applied to an identified victim. This is different in the African system, where individuals and NGOs can request the review of legislation without identifying any concrete victim. This is a notorious development in human rights adjudication, allowing for the review of legislation *in abstracto*. It has been nevertheless generally overlooked by scholarship and will therefore be examined in this section.

Another aspect which has not received much attention but seems relevant as well concerns the possibility for human rights courts to carry out a review of legislation through advisory opinions. Here, the IACtHR is arguably the court in which this competence is most clearly crystallised, being expressly included in a provision of the ACHR. It is also the only court that has reviewed specific domestic laws through its advisory opinions, but surprisingly scarcely. The ECtHR could arguably carry out such a review through its 'new' advisory function under Protocol 16, although it has interpreted its own competences in this respect rather narrowly. Finally, whether the ACtHPR would have the competence to perform an advisory review of legislation is still rather unclear, in light of the regulation of this advisory role and its practice in this respect.

115 For example, in cases related to restrictions of the freedom of expression, association or religion, the first requirement is that the restrictive measure is taken on the basis of a domestic law. In this context, the courts review not only whether the laws in question can be qualified as such, but also if they are compatible with the relevant international standards.

1. The Competence to Request a Review of Legislation before Human Rights Courts

In general, the review of domestic laws by human rights courts is triggered by a specific action based on that law that causes an alleged human rights violation towards a concrete victim. This can be a judicial decision or an administrative act in the application of the law. This is known as legislative review *in concreto*.[116] Nevertheless, it must be noted that such a concrete review can have an abstract element, in that sometimes the object of the review is the law itself and not the specific measure of application.[117] It is, however, still a review *in concreto* because the law is reviewed in the context of its application in a specific individual case. On the contrary, legislative review *in abstracto* takes place when the compatibility of a law with human rights instruments is assessed independently of specific instances in which it was applied.[118]

The predominance of the concrete review of legislation is mainly due to the human rights courts' jurisdiction *ratione personae*, which requires alleged victimhood in order to submit a complaint. Thus, one condition for human rights courts (at least for the IACtHR and the ECtHR) to review a piece of legislation is that it must have been applied to a concrete individual in the context of an alleged violation. Through this approach, both the ECtHR and the IACtHR have reviewed the conventionality of domestic laws in numerous instances. Besides the exceptions outlined below, the review performed by these two courts is in principle always *in concreto*, based on specific instances of application of the law. If the law has not been applied to the alleged victim, these courts will generally refuse to review it. However, the ACtHPR has adopted a very different approach to this issue,

116 See for example ECtHR, *Lopes de Sousa Fernandes vs. Portugal* (2017), para. 188: "the question whether there has been a failure by the State in its regulatory duties calls for a concrete assessment of the alleged deficiencies rather than an abstract one".

117 As explained by Keller and Kühne, it is often not possible to throw a clear line between the review of an individual-concrete administrative act that applies a law and the review of the abstract-general law as such (Helen Keller and Daniela Kühne, "Zur Verfassungsgerichtsbarkeit des Europäischen Gerichtshofs für Menschenrechte", *ZaöRV* 76, 2016, p. 268). See also Janneke Gerards, "Abstract and Concrete Reasonableness Review by the European Court of Human Rights", *EHRLR* 1, 2020, pp. 218-247, defining this as an "abstract reasonableness review".

118 For a discussion on concrete and abstract review in the US, see Alec Stone Sweet and Martin Shapiro, *On Law, Politics, and Judicialization*, Oxford: OUP, 2002, at pp. 347-375.

which generally allows for a review of domestic laws even if no concrete victims are identified.

a) *The 'victim requirement' before human rights courts*

The victim requirement generally implies that the individuals or NGOs submitting a complaint to human rights courts need to be themselves the victims of the alleged human rights violation, or in any case that there needs to be at least one concrete and identifiable victim. In addition, the acts or decisions being challenged before these courts need to be related to that specific victim.[119] Thus, to claim that a domestic law is incompatible with a human rights treaty, the applicant needs to be able to prove that the law in question was applied in the context of the alleged violation. In this respect, the act causing the human rights violation is usually not the law as such, but the implementation measure directed towards the individual.[120]

The 'active' *ratione personae* competence of the ECtHR, according to Art. 34 ECHR, requires victimhood in order to submit an application to the Court.[121] In this respect, the Strasbourg Court has expressly stated in numerous cases that applicants are not allowed to complain about a provision of domestic law simply because they consider, without having been directly affected by it, that it may contravene the Convention.[122] Moreover, NGOs can generally apply to the ECtHR only if their rights as legal persons are affected, but not if the alleged violation concerns the rights of third persons or even of the organisations' members as natural persons.[123]

---

119 See for example ECtHR, *Minelli vs. Switzerland* (1983), para. 35: "The Court (...) has to give a ruling not on the Zürich legislation and practice *in abstracto* but solely on the manner in which they were applied to the applicant".

120 Thus, usually the review is focused on an individual-concrete act instead of an abstract-general act. An example of this approach can be found in the case of ECtHR, Mazurek vs. France (2000), para. 54.

121 Under Article 34 of the ECHR, the Court "may receive applications from any person, nongovernmental organisation or group of individuals *claiming to be the victim of a violation* by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto" (emphasis added).

122 See e.g. ECtHR, *Centre for Legal Resources on behalf of Valentin Câmpeanu vs. Romania* (2014), para. 101.

123 An exception was done in ECtHR, *Centre for Legal Resources on behalf of Valentin Câmpeanu vs. Romania* (2014) due to the "victims' vulnerability on account of their age, sex or disability, which rendered them unable to lodge a complaint on the matter with the Court" (para. 103).

The IACtHR's jurisdiction *ratione personae* represents the next step in this regard, as the Commission accepts applications from persons and organisations other than the victim of the alleged human rights violation.[124] The Court has specified in this respect that the applicants do not have to be the alleged victims, nor have the victims' authorisation to submit an application.[125] However, an indirect 'victim requirement' can also be found. In accordance with Article 35 (1) of the Rules of Procedure of the IACtHR, the Commission needs to identify the concrete victim(s) when referring a case to the Court. The Commission has therefore rejected to examine claims in which the victims were not identified or identifiable.[126]

b) *Exceptions to the victim requirement*

There are some exceptions to this victim requirement. The ECtHR has accepted under specific conditions to review a domestic law that was not applied to the individuals or NGOs submitting an application. This is for example the case with the victim's next-of-kin, whose legal standing before the ECtHR has been recognised in some cases, both on behalf of the actual

124 As explained in the Introduction, in the Inter-American system only states and the IACmHR have *locus standi* before the Court. Alleged victims of human rights violations cannot access the IACtHR directly but need to apply to the Commission. Therefore, when looking at the *ratione personae* jurisdiction of the IACtHR it is relevant to examine the rules of admissibility before the IACmHR. In this respect, Article 44 of the ACHR establishes that "[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party".

125 See for example IACtHR, *Saramaka vs. Surinam* (2007), para. 22. As mentioned by Pasqualucci, "[t]he innovative provision allowing unrelated parties to complain of human rights violations has proven particularly effective in the Inter-American system where poverty, lack of education, and lack of legal assistance would otherwise hinder access to the enforcement organs of the regional system" (Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge: CUP, 2003, p. 133).

126 For example, in the case of *Ivete Jordani Demeneck vs. Brazil* the applicants claimed that the violation affected "all adult and mentally disabled persons". The Commission determined that it had no competence *ratione personae* to deal with the case because it was "a representation in the abstract, similar to an *actio popularis*". (IACmHR, *Ivete Jordani Demeneck vs. Brazil* (2012), para. 20).

victims and on their own behalf as indirect victims.[127] This concept of indirect victims is generally recognised in human rights law,[128] and it is commonly applied by the other two regional courts, too.[129]

One group of exceptions to the identification of victims by the IACmHR are the cases concerning massive or collective violations, where it has not been able to identify all victims.[130] There are, in this context, cases where the list of victims is left open even after the final judgment is handed down by the IACtHR.[131] For example, in the case of *Mapiripán vs. Colombia* (2005), concerning a massacre in which dozens of individuals were executed and thrown into a river, it was not possible to identify every direct and indirect victim. Therefore, the Court decided that all indirect victims could claim the reparations ordered in the judgment within twenty-four months after the identification of their next of kin if they proved their relationship with the deceased.[132] In addition, there are also cases in which

127 Indirect victims are those directly affected by the violation against a third person, usually a close relative. Especially in cases of death or disappearance where the state is allegedly responsible, family members have been regarded as indirect victims of violations of the right to life.

128 The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation state that "the term 'victim' also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization" (UN Basic Principles, para. 8).

129 See generally Clara Sandoval, "The Concepts of 'Injured Party' and 'Victim' of Gross Human Rights Violations in The Jurisprudence of the Inter-American Court of Human Rights: A Commentary on their Implications for Reparations", in Carla Ferstman, Mariana Goetz and Alan Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, Leiden: Brill, 2009, pp. 243–282, pp. 257 et seq.

130 See IACmHR, *Pueblos Mayas y miembros de las comunidades de Cristo Rey, Belluet Tree, San Ignacio, Santa Elena and Santa Famili vs. Belice* (2015), para. 27, where it allowed that victims could be identified in the future according to specific criteria. This was also accepted by the Court, for example in IACtHR, *Castro Castro Prison vs. Peru* (2006), para. 178. See however *Favela Nova Brasília vs. Brazil* (2017), paras. 35-39, where the Court refused to include additional victims because the Commission's failure to identify them previously was not justified.

131 See Sandoval, in Ferstman, Goetz and Stephens (eds.), 2009, pp. 266-272.

132 This case nevertheless turned controversial because after the payment of reparations by the state it turned out that several of those claiming to be indirect victims of the massacre had made it up, and it was argued that neither the Commission nor the Court had done enough to prevent this. See Camila Uribe and Natalia Restrepo, "Could the Inter-American Human Rights System have prevented the Existence of False Victims in the Mapiripán Case?", 23 *Revista Colombiana de Derecho Internacional*, 2013, pp. 203-234. See also Sandoval, in Ferstman, Goetz and Stephens (eds.), 2009, p. 269.

all members of a particular community – or even the community as such –are considered to be direct victims of a human rights violation.[133]

These exceptions do not, however, imply an abstract review of laws, as they mostly concern concrete acts of death or disappearance, even if the applicant is not the direct victim of that act or if the list of victims remains open. Nevertheless, this is different with respect to other exceptions to the victim requirement. This concerns especially two broad categories of cases before the ECtHR, that are labelled here as those concerning 'potential victims' and 'possible victims'. A similar concept has also been applied by the IACtHR, referring to 'self-executing laws'.

i. Potential and possible victims before the ECtHR

The concept of potential victims has been used by the ECtHR in order to refer to those individuals who run the risk of being directly affected by a law because it targets a specific category of persons that they belong to. In such cases, the Court has accepted to consider each person pertaining to the concrete category as a potential victim. This was first done in *Marckx vs. Belgium* (1979), dealing with the recognition of children born out of wedlock. The ECtHR established in this case that the Convention "entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it".[134]

This approach was then developed in further cases, related to specific groups that were affected by a law because of their ethnicity, religion or sexual orientation, among others.[135] It is, therefore, a category of cases that usually relates to discriminatory laws, although the ECtHR has extended this concept beyond the usual categories of 'minorities' or 'vulnerable

133 See IACtHR, *Advisory Opinion 22/16* (2016), paras. 82 and 83; see also IACtHR, *Saramaka vs. Suriname* (2007) where all members of this indigenous community were considered victims of the human rights violations.

134 *Marckx vs. Belgium* (1979), para. 27.

135 For example, in a case of 1981 related to a law punishing homosexual acts in the UK, the Court considered that even if it was not applied to him "the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life" (*Dudgeon v. the United Kingdom* (1981), para. 41. Similarly in *Norris vs. Ireland* (1988), paras. 32-34. Concerning religion, see for example *S.A.S vs. France* (2014), para. 57.

groups'.[136] Nevertheless, an individual claiming to be a 'potential victim' needs to provide "reasonable and convincing evidence of the likelihood that a violation affecting him personally will occur; mere suspicion or conjecture is insufficient".[137]

The second category, labelled here as cases concerning 'possible victims' in order to differentiate it,[138] refers to domestic laws that provide a legal basis for the implementation of secret measures, such as surveillance measures. Here, the ECtHR has admitted claims in cases where the applicants had no means of knowing whether such implementation measures had been applied to them.[139] This allowed the ECtHR to review the legislative framework of several states in the area of secret surveillance. Thus, in the case of 'potential victims' the relevant law has not (yet) been applied to the applicants, though they run the risk of being affected by it, while 'possible victims' have no way of knowing whether they have been affected by the

136 For example, in *Michaud vs. France* (2012), the category of persons considered as potential victims were all those exercising as lawyers. The case concerned a French law obliging lawyers to report on suspicions regarding money laundering by their clients, which would violate the professional confidentiality, falling under Art. 8 ECHR. The French state objected arguing that the applicant "did not claim that the legislation in question had been applied to his detriment, but simply that he had been obliged to organise his practice accordingly and introduce special internal procedures" and that he "was in fact asking the Court to examine *in abstracto* the conformity of a domestic law with the Convention" (*Michaud vs. France* (2012), para. 49). The ECtHR however dismissed this objection considering that the applicant was among the group of people that run the risk of being directly affected by the law, as it was directed towards all French lawyers (at paras. 51-52. Similarly, in *Burden vs. UK* (2006)).

137 Schabas, *Commentary to the ECHR*, 2015, p. 743. This takes place for example in cases where a violation is likely to occur after an individual is deported to a third state (a classic example in this regard is ECtHR, *Soering vs. UK* (1989)). In these cases, the applicant can be considered a potential victim once the deportation procedure has reached a certain stage in which a concrete risk is manifested, such as in those cases where an expulsion order has already been issued.

138 The ECtHR refers to both of these categories as 'potential victims', without differentiating them.

139 The first time it used this approach was in *Klass vs. Germany* (1978), and this approach has also been applied to NGOs, that have been allowed to claim before the Court that laws allowing for secret measures directly affected their rights as legal persons (for example in *Centrum för Rättvisa vs. Sweden* (2021), at paras. 175-177).

law. In addition, 'possible victims' are usually not belonging to a specific group, contrary to 'potential victims'.[140]

ii. Self-executing laws before the IACtHR

In general, the IACtHR has adopted a similar stance to the ECtHR in terms of refusing to review domestic laws *in abstracto*, thus requiring that they were applied to the alleged victim(s) in order to examine them.[141] The IACtHR's position towards the review of domestic laws was made clear in its early years, through an advisory opinion of 1994. It was requested by the IACmHR and asked the Court among others about the legal effects of a law adopted by a state after ratifying the Convention when this law manifestly violates the obligations contained therein. The Court answered that the adoption of such a law would be contrary to the Convention, but in order to determine the consequences it distinguished between 'self-executing norms' and 'non-self-executing norms'.[142]

The Court considered that non-self-executing norms do not represent in themselves a human rights violation and therefore cannot be reviewed if they have not been applied to specific individuals.[143] With respect to self-executing norms, it stated that they trigger international responsibility without the need for them to be applied to a specific individual. The

140 See *Klass vs. Germany* (1978), para. 37 ("To that extent, the disputed legislation directly affects all users or potential users of the postal and telecommunication services in the Federal Republic of Germany").

141 In numerous cases, the IACtHR has affirmed that "[t]he purpose of the Court's contentious jurisdiction is not to review domestic laws in abstract; rather it is exercised in order to decide specific cases in which it is alleged that an act [or omission] of the State, executed against specific individuals, is contrary to the Convention". See IACtHR, *Cepeda Vargas vs. Colombia* (2010), para. 51; *Genie Lacayo vs. Nicaragua* (1995), para. 50; *Usón Ramírez vs. Venezuela* (2009), para. 154; *Cabrera García and Montiel Flores vs. Mexico* (2010), para. 207.

142 The former are laws that directly affect individuals upon their entry into force, while the latter ones "require subsequent normative measures, compliance with additional conditions, or, quite simply, implementation by state authorities" before they can affect the legal sphere of individuals (IACtHR, *Advisory Opinion 14/94*, 1994, para. 41).

143 IACtHR, *Advisory Opinion 14/94* (1994), para. 42. The Court specifically stated that "there is no provision in the Convention authorizing the Court, under its contentious jurisdiction, to determine whether a law that has not yet affected the guaranteed rights and freedoms of specific individuals is in violation of the Convention" (at para. 49).

IACtHR mentioned in this respect the example of discriminatory laws, arguing that "a norm that deprives a portion of the population of some of its rights —for example, because of race— automatically injures all the members of that race".[144] Nevertheless, this exception has not played an important role in the IACtHR's jurisprudence. Even if it declared in some judgments that a law is *per se* contrary to the Convention, these were always laws that had been applied in the context of a human rights violation.[145] It has therefore not developed the concept of potential victims to the same extent as the ECtHR.[146]

However, an evolution can be observed before the IACtHR whereby the required link between the law and the victim has been loosened to some extent.[147] This evolution is most evident if one compares two cases related to laws that were adopted or amended after the facts of the case. In *Velez Loor vs. Panama* (2010), the IACtHR considered that it could not rule on 'new' migration laws that had not been applied to the victims and the facts of the case.[148] Nine years later in *Gorigoitia vs. Argentina* (2019), the Court nevertheless accepted to review laws that were adopted after the facts of the case.[149] In this case, the IACtHR ordered Argentina to reform these laws

144 IACtHR, *Advisory Opinion 14/94* (1994), para. 43.

145 See for example IACtHR, *Suarez Rosero vs. Ecuador* (1997). See also the judgments concerning amnesty laws included in Chapter 4 of this book.

146 This notion of potential victims has only been applied exceptionally by the IACtHR. For example, in a case against Trinidad and Tobago where 32 individuals had been sentenced to death in accordance with a law that was found to be contrary to the Convention, the IACtHR considered all of them as victims despite the fact that only one of them had actually been executed. The Court argued in this respect that "the mere existence of the Offences Against the Person Act in itself constitutes a per se violation of that provision of the Convention" (IACtHR, *Hilaire, Constantine and Benjamin vs. Trinidad and Tobago* (2002), para. 116. See on this case Chapter 4 of this book).

147 See on this generally Pasqualucci, *The Practice and Procedure of the IACtHR*, 2002, pp. 133-134.

148 In this case, the applicants claimed not only that the migration laws applied to the victims were contrary to the Convention, but also that the reform of these laws adopted after the facts of the case had failed to remedy these incompatibilities. (IACtHR, *Velez Loor vs. Panama* (2010), para. 285).

149 This case dealt with an alleged denial of justice, because the regulation of the cassation appeal did not allow for a full review of judgments. The domestic laws governing this type of appeals had also been reformed some years after the facts of the case, but the applicants claimed that the new laws were still contrary to the ACHR. The state objected to this claim, arguing that the contested laws were not applied to the victims and thus it constituted an abstract review (IACtHR, *Gorigoitía vs. Argentina* (2019), para. 16). The Court however rejected the objection in this

adopted after the facts of the case, because its substance was the same as in those applied to the victim of the case.[150]

In sum, although some cautious steps in that direction can be observed in recent case law, the IACtHR has been deeply reluctant to review domestic laws *in abstracto*, possibly even more so than the ECtHR. This is perhaps due to the different constitutional traditions in these two regions. Abstract review is very common in European constitutionalism, where it can be requested by certain organs of the state.[151] On the other hand, American constitutionalism tends to favour concrete review.[152] This could be reflected in the fact that the ECtHR has been more flexible than the IACtHR on that front, allowing for more exceptions to its victim requirement. But in the African region, one can find a completely different situation, with no victim requirement whatsoever and with the abstract review being generally permitted.

iii. The absence of a victim requirement before the ACtHPR

The ACtHPR represents a unique case in regional human rights adjudication with respect to the abstract review of domestic norms. As it was mentioned in the introduction, in accordance with Art. 34(6) of the African Court's Protocol states can submit an optional declaration whereby they allow individuals and NGOs to apply directly to the Court, without having to lodge their claim first before the Commission. In this regard, the ACtHPR has made clear in its case law that NGOs as well as individuals can claim that the state committed a human rights violation without any sort of victim requirement. This includes also the possibility of claiming that the mere existence of a law violates human rights.

The ACtHPR's first judgment on the merits concerned an application by an individual and two NGOs alleging the unconventionality of a Tanzanian

---

case, arguing that the issue at stake was not only to review the conventionality of laws that had been applied to the applicant, but also "subsequent actions aimed at ensuring full review in cassation matters" (at para. 21).

150 IACtHR, *Gorigoitía vs. Argentina* (2019), paras. 72-74.

151 Note, however, that many constitutional courts have also the competence to perform a concrete review of laws, in the context of referrals by ordinary courts or individual applications.

152 See on how these two constitutional traditions adopted diverging forms of review Alec Stone Sweet, "Why Europe Rejected American Judicial Review: And Why It May Not Matter", *Michigan Law Review* 101(8), 2003, pp. 2744-2780.

constitutional provision prohibiting independent candidates to run for election.[153] The individual formed a political party in order to participate in the elections and the State therefore objected that he was no longer affected by this law. However, on the latter point the Court argued that

> *even if the Applicant has successfully formed a political party, he cannot be stopped from challenging the validity of the laws in question and from asserting that the same amounts to a violation of the Charter. A matter such as this cannot and must not be dealt with as though it were a personal action, and it would be inappropriate for this Court to do so. If there is a violation, it operates to the prejudice of all Tanzanians, and if the Applicants' applications succeed, the outcome inures to the benefit of all Tanzanians.*[154]

This was indeed a remarkable statement for a human rights court, apparently allowing for individuals and NGOs to challenge laws even when no specific individual was affected by them. This broad interpretation of its personal jurisdiction has been maintained by the ACtHPR in many subsequent cases. For example, the ACtHPR has found that individuals can submit 'public interest cases', aiming "to protect the interest of public at large, rather than specific private interests".[155] A clear example in this regard is *Ajavon vs. Benin* (2020). Here, the applicant requested the ACtHPR "to order the Respondent State to suspend" no less than seven domestic laws due to its incompatibility with international human rights instruments, although he was not directly affected by them, nor did he identify any concrete victim. Despite the objections by Benin, the ACtHPR accepted this complaint and went on to examine each of the contested laws, finding an incompatibility with respect to most of them. Moreover, the ACtHPR examined not only the laws that had been challenged by the applicant but some additional ones, too.[156]

---

153 ACtHPR, *Tanganyika Law Society and Legal and Human Rights Centre* vs. *Tanzania* (2013).

154 ACtHPR, *Tanganyika Law Society and Legal and Human Rights Centre* vs. *Tanzania* (2013), para. 110.

155 ACtHPR, *Suy Bi Gohore Emile vs. Côte d'Ivoire* (2020), para. 105.

156 In this respect, the applicant alleged that the Beninese Law No. 2018-34, regulating the exercise of the right to strike, was contrary to this right (para. 129). The Court found that not only the contested law, but also two further domestic laws of Benin (which had not been challenged by the applicant) in fact prohibited the right to strike, in violation of the principle of non-regression under the ICESCR (paras. 140-142). These were the Beninese laws governing respectively the public service

Several states have objected to the ACtHPR's competence to review domestic laws *in abstracto* by making reference to the material jurisdiction of the Court, which extends "to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the states concerned".[157] For example, the Malian government objected in one case arguing that "the Applicants' claims relate more to [the] harmonisation of national laws with the African Charter on Human and Peoples' Rights rather than to the issue of application and interpretation of the Charter and other conventions".[158] The ACtHPR has nevertheless consistently replied to such objections by determining that the compatibility of a domestic norm with the respective treaty is an issue related to its interpretation and/or application, thus comprised in its material jurisdiction.[159]

Other states have objected by making reference to the victim requirement. For example, Benin raised a number of preliminary objections to the Court's jurisdiction *ratione personae* in cases related to domestic legislation, arguing that the requirement of victim status was missing.[160] The Court has nevertheless rejected all these objections, expressly stating in this

---

and the police personnel, as in both cases the laws prevented these particular groups from exercising their right to strike.

157 Article 3(1) of the Protocol establishing the ACtHPR. Note that it is a broader provision than the ones dealing with the material jurisdiction of the other two regional human rights courts, as it includes all human rights instruments ratified by the parties, while the ECHR mentions only the Convention and the Protocols thereto, and the ACHR refers exclusively to the human rights instruments with a regional scope ratified by the parties.

158 ACtHPR, *APDF and IHRDA vs. Mali* (2018), para. 17. In another case, Benin objected to the Court's jurisdiction expressly arguing that "no provision confers on [the ACtHPR] the power to review in abstracto the conformity of domestic legislation with international conventions" (ACtHPR, Ajavon vs. Benin (2020), para. 45), and the same state has also argued that the ACtHPR "lacks jurisdiction to assess national laws conformity in accordance with international conventions" (ACtHPR, *Houngue Éric Noudehouenou vs. Benin* (2020), para. 21). In the latter case, the state even claimed that "once the Constitutional Court rules that a provision is in conformity with the Constitution, it cannot be challenged on the basis that it results in human rights violations".

159 ACtHPR, *Tanganyika Law Society and Legal and Human Rights Centre* vs. *Tanzania* (2013), para. 86. See also *APDF and IHRDA vs. Mali* (2018), para. 27, with the ACtHPR stating that the alleged incompatibility concerned rights included in the Charter and other treaties and would thus fit in the definition of Article 3(1) of the Court's Protocol.

160 In the case of ACtHPR, *XYZ vs. Benin (II)* (2020), the State raised a preliminary objection arguing that the applicant was not affected by the reform and had no

respect that Article 5(3) of the Court's Protocol, "do not require individuals or NGOs to demonstrate a personal interest in an Application in order to access the Court, especially in the case of public interest litigation".[161] The ACtHPR has recognised that this constitutes a distinctive approach, by arguing that it represents "a peculiarity of the African regional human rights system characterised by the objective nature of human rights litigation".[162] In some cases, the ACtHPR has also responded to state objections by adopting a similar position to that of the ECtHR concerning potential victims, although with a broader scope. While the ECtHR applies the notion of potential victims only to certain persons or groups that are directly targeted by the law, the ACtHPR has argued that certain laws affect all citizens, and therefore every individual of the corresponding state can challenge them before the Court.[163]

In sum, it can be observed that the ACtHPR has adopted an approach towards the review of domestic laws that is rather unusual in international adjudication. While both the ECtHR and the IACtHR generally limit the review of laws to instances in which the contested law has been applied to alleged victims, this is not the case before the ACtHPR. Despite its young age, the latter court has thus developed a particular form of adjudication that is arguably sensitive to its regional context. The ACtHPR justified this approach mentioning "the practical difficulties that ordinary African vic-

legitimate interest in it, and that this would constitute a reason of inadmissibility. See also, with a similar preliminary objection, *Ajavon vs. Benin* (2020).

161 ACtHPR, *XYZ vs. Benin (II)* (2020), para. 48. See also *Ajavon vs. Benin* (2020), para. 58, where the Court stated that "neither the Charter, nor the Protocol, nor do the Rules require that the Applicant and the victim have to be the same".

162 ACtHPR, *Ajavon vs. Benin* (2020), para. 59.

163 This is for example the case with electoral laws. In the case of ACtHPR, *XYZ vs. Benin (II)* (2020), the Court replied to Benin's objection concerning the lack of jurisdiction stating that "[c]onsidering that the Applicant himself is a citizen of the Respondent State and that the revised provisions of the electoral laws have a potential impact on his right to participate in the government of his country, it is evident that he has a direct interest in the matter" (ACtHPR, *XYZ vs. Benin (II)* (2020), para. 57). The same has also been affirmed by the ACtHPR with respect to constitutional reforms, stating that "the amendment of laws such as the constitution, which is the supreme law of the land, is of particular interest to all citizens as it has a direct or indirect bearing on their individual rights and the security and well-being of their society and country" (*XYZ vs. Benin (II)* (2020), para. 49).

tims of human rights violations may encounter in bringing their complaints before the Court".[164]

The ACtHPR is considerably less known in its region than the other two courts in their respective regions. Victims of human rights violations, due to the lack of education and legal assistance, are often prevented from knowing how to access the ACtHPR. From that perspective, the ACtHPR – mainly with the help of NGOs – is playing a role that aims to provide justice to those disenfranchised or otherwise lacking the possibilities to appear before it. It has in this context also accepted that not only laws but also specific acts of state agents can be challenged by individuals and NGOs despite not being affected by them.[165] On the other hand, this approach is not without problems concerning the subsidiary role of international human rights adjudication, especially when legislative remedies are attached to this abstract review.[166] In addition, the ACtHPR runs the risk of being flooded with applications, especially if local civil society groups or opposition parties take advantage of this approach to initiate strategic litigation against incumbent governments.[167]

164 ACtHPR, *XYZ vs. Benin (II)* (2020), para. 48. In one case it even added that "it is an estimable virtue and duty of a responsible citizen to stand for the preservation of public interest" (ACtHPR, *Houngue Éric Noudehouenou vs. Benin* (2020), paras. 27 and 38-40).

165 In ACtHPR, *Ajavon vs. Benin* (2020), the applicant accused the state of having violated the right to life when the army fired live rounds at protesters, killing dozens (para. 158). This is despite the fact that he had not been present in these protests or otherwise directly affected by the repression of protesters. The Court however examined the facts and found violations of the right to life, the prohibition of torture and the right to dignity under the ACHR, although it did not mention any specific victim in this respect (para. 174).

166 Subsidiarity, which is considered "a key principle in international law and adjudication", can be seen as requiring that domestic bodies "have first the opportunity to remedy the issue(s) and only after they have failed to do so should the supranational body step in" (see Rachel Murray and Clara Sandoval, "Balancing Specificity of Reparation Measures and States' Discretion", *JHRP* 12(1), 2020, pp. 101-124, at p. 115). Under this view, it can be problematic if a human rights courts orders preventive legislative reforms, before an actual human rights violation has taken place.

167 See in this respect James Thuo Gathii and Jacquelene Wangui Mwangi, "The African Court of Human and Peoples' Rights as an Opportunity Structure", in James Thuo Gathii (ed.), *The Performance of Africa's International Courts: Using Litigation for Political, Legal, and Social Change*, Oxford: OUP, 2020.

2. The Advisory Review of Legislation

Contentious cases are not the only instances in which regional human rights courts can review the domestic legislation of states. This can also happen through advisory proceedings. Each of the three regional human rights instruments foresees a different advisory competence for the respective court, and each court has developed a distinct practice in this regard. However, the advisory competence of all three courts has the potential of allowing them to review domestic laws of states, albeit to a different degree. It is nevertheless a potential that has remained to a large extent underdeveloped. Rather, the only court that has made use of it is the IACtHR, and only in two early instances.

The advisory competence of the ECtHR is twofold, with its 'traditional' advisory proceedings regulated in articles 47-49 ECHR on the one hand, and the 'preliminary reference' advisory proceedings that were incorporated with Protocol 16 on the other. The 'traditional' advisory role of the ECtHR – which applies to requests made by the CoM – is ill-suited for the review of domestic laws, especially due to its narrow material scope. Article 47(2) expressly excludes any hypothetical issue that the ECtHR might have to consider in the future through contentious proceedings. This is clearly the case with potentially incompatible domestic laws. In addition, the ECtHR determined that decisions about the compatibility of other instruments with the Convention would fall outside the scope of Art. 47.[168] Therefore, it does not appear feasible that the Court would engage in a review of domestic laws through this 'traditional' advisory mechanism.

On the other hand, the 'preliminary reference' advisory role introduced with Protocol 16 offers a more promising path in this respect, if the laws in question are connected to domestic judicial proceedings. Under this mechanism, the highest domestic courts can request advisory opinions from the ECtHR with respect to cases pending before them. Contrary to the Art. 47 procedure, Protocol 16 states that the Court's advisory opinions can deal not only with the interpretation of the Convention but also with its application by national authorities. The application of the ECHR takes place domestically through acts of the executive, legislative and judicial

168 In one of the advisory opinion requests by the CoM, a question was related to the compatibility the CIS Convention with the ECHR. The Court stated in this respect that reviewing this compatibility in the abstract would fall outside the scope of Art. 47 ECHR. See ECtHR, *Decision on the competence of the Court to give an advisory opinion*, 02 June 2004, para. 24.

authorities. Therefore, such acts of application of the ECHR could arguably comprise domestic laws. In this respect, a Reflection Paper issued by the ECtHR in 2013 during the process of adopting this Protocol mentioned that the concept of 'questions of principle' included in Art. 1 of Protocol 16, "could also cover cases raising an issue with regard to the compatibility with the Convention of legislation, a rule or an established interpretation of legislation by a court".[169] Therefore, it appears that this extension of the scope of review implies that domestic laws could be the subject of advisory opinions of the ECtHR.

However, looking at the advisory opinions delivered so far by the ECtHR under Protocol 16, this assumption becomes less clear.[170] Several requests have dealt with domestic laws, including cases where the domestic courts had to decide about the constitutionality of a legislative provision.[171] In these opinions, the Court came to relevant findings concerning certain requirements for domestic laws, in general, to be compatible with the Convention,[172] but it clearly distanced itself from reviewing the concrete norms at stake.[173] For example, an advisory opinion request by the French *Conseil d'État* in the course of a constitutional review of legislation asked about the discriminatory nature of a domestic provision. The ECtHR included a number of criteria for determining whether a law could be considered dis-

169 ECtHR, *Reflection Paper on the Proposal to Extend the Court's Advisory Jurisdiction*, para. 29, available at: https://www.echr.coe.int/Documents/2013_Courts_advisory_jurisdiction_ENG.pdf.

170 Until the end of 2022, the ECtHR issued five Advisory Opinions through the mechanism laid down in Protocol 16.

171 As in ECtHR, *Avisory Opinion P16-2019-001* (2020); *Advisory Opinion P16-2021-002* (2022).

172 For example, in the first advisory opinion requested by the French Cour de Cassation, the ECtHR decided that "Article 8 of the Convention requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother" (ECtHR, *Advisory Opinion P16-2018-001* (2019), operative para. 1).

173 In several advisory opinions, the ECtHR stated that its role was only to issue an opinion concerning the questions posed, and that it has no jurisdiction "to evaluate the merits of the parties' views on the interpretation of domestic law" (ECtHR, *Advisory Opinion P16-2018-001* (2019), para. 25; Advisory Opinion P16-2020-002 (2022), para. 61). Moreover, in an advisory opinion requested by the Constitutional Court of Armenia in the course of a review of legislation that was in turn requested by a first-instance court, the ECtHR argued that its role was only to "inform the Constitutional Court's own interpretation of the domestic provisions relevant for the case before it" (ECtHR, *Avisory Opinion P16-2019-001* (2020), para. 50).

criminatory, but stated that "[i]t is, inter alia, in the light of these elements that the *Conseil d'État* will have to determine whether or not the difference in treatment introduced by the legislative provision being challenged in the proceedings before it satisfies the requirement of proportionality and, accordingly, whether or not this difference in treatment can be considered compatible with Article 14 taken in conjunction with Article 1 of Protocol No. 1".[174] This shows that the ECtHR has avoided reviewing the compatibility of specific provisions through its advisory procedure under Protocol 16. Therefore, although on paper this procedure appears like a venue for the ECtHR to perform an advisory review of legislation, the restrictive interpretation that the Court has adopted so far regarding its scope of review prevents it from carrying out this task.

In the case of the IACtHR, the regulation of its advisory jurisdiction under Article 64 of the ACHR contains a provision expressly determining that "[t]he Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments". This provision has a unique character in the international judicial landscape, with the ACHR being the only treaty that expressly allows states to ask an international judicial body for a review of their domestic laws *in abstracto*. Nevertheless, there is only one state which has made use of this provision, the country that hosts the IACtHR.

Costa Rica submitted three requests for a review of its domestic legislation between 1984 and 1991. The first of these requests asked whether a draft constitutional reform concerning the conditions for obtaining the state's nationality was compatible with several rights of the Convention.[175] The Court decided that one provision of the draft constitution would be discriminatory, as it stipulated preferential treatment for one of the spouses in cases of naturalization applicable to marriage. The following year, in 1985, Costa Rica submitted another request, this time about the compatibility of a domestic law establishing compulsory membership in an association in order to practice journalism, which the IACtHR found to be contrary to the freedom of expression.[176] Finally, the same state submitted

174 *Advisory Opinion P16-2021-002* (2022), para. 111.

175 This allowed the Court to clarify that the terms 'domestic laws' in Art. 64(2) ACHR refer to any type of legal norm, including constitutional provisions, as well as draft legislation not yet in force (IACtHR, *Advisory Opinion 4/84* (1984), paras. 14 and 29).

176 IACtHR, *Advisory Opinion 5/85* (1985), para. 85.

another request concerning a draft law in 1991, but the Court considered this request inadmissible as a case related to this law was already being reviewed by the IACmHR through the contentious procedure.[177]

Since Costa Rica's last request in 1991, states have not made further use of Article 64(2) ACHR in order to request advisory opinions about their own laws. This is somewhat surprising, as some states have been very active in requesting advisory opinions on the basis of Article 64(1) ACHR for more general issues,[178] some of them closely related to their domestic legal order.[179] What potentially prevents states from making such requests for legislative review is the quasi-binding character that the Court itself has attached to its advisory opinions.[180]

In any case, the advisory proceeding of the IACtHR under Art. 64(2) clearly allows for a legislative review through advisory opinions. Its downside however is that only governments can submit requests about their own domestic laws, and other domestic bodies or international bodies such as the IACmHR have no role under this procedure. Allowing other domestic

177 It held in this respect that the questions presented "could produce, under the guise of an advisory opinion, a determination of contentious matters not yet referred to the Court, without providing the victims with the opportunity to participate in the proceedings". (IACtHR, *Advisory Opinion 12/91* (1991), para. 28).

178 Since 2014, Colombia has requested three advisory opinions from the Court, while Panama, Costa Rica and Ecuador have requested one each. See https://corteidh.or.cr/solicitud_opiniones_consultivas.cfm.

179 For example, the Colombian government requested an advisory opinion on whether limiting presidential re-elections affects the right to political participation (see IACtHR, *Advisory Opinion 28/21* (2021)). This limitation of presidential mandates is established in the Colombian Constitution, and thus the issue could have been asked through Art. 64(2) ACHR.

180 Certainly, in the early years of its advisory practice the IACtHR stated several times that the advisory opinions lack the binding character of judgments (IACtHR, *Advisory Opinion 01/82* (1982), para. 51; IACtHR, *Advisory Opinion 15/97* (1997), para. 26). However, this perspective changed with the introduction of the doctrine of conventionality control, according to which state authorities need to apply the Inter-American standards in their domestic context (see Chapter 5 of this book). Domestic judges need to take into account the ACHR and its interpretation by the IACtHR when ruling on domestic issues, as well as legislators when drafting domestic laws. In an advisory opinion issued in 2014, the IACtHR expressly stated that "the different organs of the State must carry out the corresponding control of conformity with the Convention, based also on the considerations of the Court in exercise of its non-contentious or advisory jurisdiction" (IACtHR, *Advisory Opinion 21/14* (2014), para. 31). Thus, if the IACtHR would find a domestic law incompatible with the Convention in these advisory proceedings, the concerned state would have an obligation to amend it accordingly.

institutions, such as legislatures or high courts, or Inter-American bodies such as the IACmHR, to request advisory opinions on the compatibility of domestic laws with the ACHR would be a solution for revitalising this procedure. However, it seems highly unlikely that states would agree to a conventional reform in order to allow it. Thus, unless the Inter-American institutions do something to encourage governments to submit requests for advisory opinions under Art. 64(2) ACHR, this mechanism for the advisory review of legislation is likely to remain dormant.

Finally, whether the ACtHPR is capable of exercising some sort of legislative review through its advisory jurisdiction is still rather unclear. The relevant provision refers to the competence to "provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments".[181] In principle, this formulation is broad enough to include the review of domestic laws' compatibility with human rights instruments. In early comments about the ACtHPR's advisory jurisdiction, some authors however suggested that the Court may refuse to adopt such an interpretation, due to the resistance that African states have traditionally showed with respect to interferences in their domestic sphere.[182] Having in mind the degree of intrusiveness that the ACtHPR displayed in its contentious jurisprudence, this inference seems nevertheless outdated. In this respect, other authors have advocated in favour of a broad interpretation, arguing that "[i]n case a member state submits a request for an opinion on the compatibility of one of its own domestic laws, there simply is no unwanted intrusion in internal affairs. Denying such a request would imply an unnecessary refusal to provide a service to a state that presumably takes human rights seriously".[183] Others have even clearly affirmed that the ACtHPR's advisory jurisdiction encompasses the review of domestic laws.[184]

181 See Article 4(1) of the Protocol on the Establishment of the ACtHPR.

182 Gino J. Naldi and Konstantinos Magliveras, "Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights", *NQHR* 16, 1998, p. 440 (cited in Anne Pieter van der Mei, "The Advisory Jurisdiction of the African Court on Human and Peoples' Rights", *African Human Rights Law Journal* 5(1), 2005, pp. 27-46, at p. 41).

183 Van der Mei, *AHRLJ* 2005, p. 42.

184 José Pina-Delgado, "Advisory Proceedings: African Court on Human and Peoples' Rights (ACtHPR)", in *MPEIPro*, ("States can request opinions [to the ACtHPR] on the compatibility of their domestic legislation with international human rights treaties").

With that being said, none of the requests for advisory opinions decided so far are related to any concrete domestic laws.[185] Although the ACtHPR has adopted a rather restrictive interpretation concerning the personal competence to request an advisory opinion,[186] in a case in which such a request is made by a competent body the Court would most probably accept to review domestic laws under these proceedings. This becomes clearer if one takes into account the aforementioned jurisprudence of the ACtHPR concerning the abstract review of laws in contentious proceedings. As the ACtHPR will carry out a legislative review whenever an individual or an NGO claim in contentious proceedings – without being directly affected by it – that a domestic law is contrary to the ACHPR or other instruments, it would seem logic that the same review could also be performed through an advisory proceeding. In any case, the clarification of this issue will need

185 The closest was the request made by an NGO about the compatibility of vagrancy laws with African Charter. It does not make reference to one specific law but to criminal offences that can be found in "at least 22 countries in Africa", and asks about the compatibility of these laws and about the states' "positive obligations to repeal or amend their vagrancy laws" (ACtHPR, *Advisory Opinion on the Compatibility of Vagrancy Laws with the African Charter of Human and People's Rights and other Human Rights Instruments applicable in Africa*, 2020, pp. 2 and 6). The ACtHPR admitted this request, stating with respect to the questions posed that its advisory jurisdiction comprises the assessment of "the compatibility of the matters raised in a request for an opinion with the Charter and other applicable human rights standards". It then determined that vagrancy laws are contrary to a number of provisions of the ACHPR and further instruments and highlighted that "State Parties to the Charter have a positive obligation to, inter alia, repeal or amend their vagrancy laws and related laws" (operative para. vi).

186 The ACtHPR only found that it had jurisdiction to issue three advisory opinions out of fifteen requests. The main reason for these rejections of requests made by NGOs was that the ACtHPR interpreted the concept of "any African organization recognized by the OAU" (which are the organisations that can submit requests for advisory opinions) as covering only those having a Memorandum of Understanding (MoU) with the AU, but not those with an observer status at the ACmHPR, which are the ones that can submit a contentious case to the ACtHPR if states issue a declaration under Art. 34(6) of the ACtHPR's Protocol. In this regard, the conditions for such a MoU with the AU are much stricter than those of the Commission, and this implies that most African NGOs are impeded from requesting advisory opinions to the ACtHPR. See Anthony Jones, "Form over Substance: The African Court's restrictive approach to NGO standing in the SERAP Advisory Opinion", *African Human Rights Law Journal* 17(1), 2017, pp. 320-328.

an advisory opinion request specifically related to the compatibility of a concrete law.[187]

3. From the Review of Legislation to Legislative Remedies

The review of domestic laws is very closely linked to legislative remedies in the case of both the IACtHR and the ACtHPR. These courts, when finding an incompatibility of domestic laws with the respective instrument, will generally order its reform. In the case of the ECtHR, this is different; the link is much looser, as a finding of the unconventionality of a law does usually not lead to an order to reform it. As will be explained in more detail in Chapter 3, when the ECtHR considers a domestic law incompatible with human rights standards it will find a violation, but usually portray it as limited to the specific measure of implementation of that law *vis-à-vis* the victim.[188] Despite the Court not expressly stating it, judgments where an incompatibility is found can be seen as implying the need for legislative reforms, but this is not formally binding for the state.[189] The ECtHR's main focus is to provide redress to the specific victims. When a violation is clearly stemming from a structural problem that has its origin in a domestic law, the ECtHR will recommend a reform in the argumentative part of the judgment. If the state then fails to carry out the reform and numerous repetitive cases concerning the same structural issue keep arriving, the

187 See in this respect Gathii and Mwangi, in Gathii (ed.), 2020, p. 217, arguing that the fact that not many advisory opinion requests have been submitted to the ACtHPR is "perhaps because it does not have express jurisdiction to issue advisory opinions 'about the compatibility of a State's domestic laws with the treaties within the Court's jurisdiction'".

188 See Keller and Stone Sweet, in Keller and Stone Sweet (eds.), 2008, pp. 691-692 ("The Court constructs Convention rights as general norms, which it treats as having prospective legal consequences for States. At the same time, its powers are largely limited to the rendering of individual (retrospective and particular) justice to victims of specific abuse").

189 See for example Stiansen, *IJHR* 2019, p. 1224, arguing that although "the ECtHR typically does not spell out the need to change legislation explicitly (…) where a judgment finds existing legislation to violate human rights standards, legislative changes are often needed". See also Polakiewicz, in *MPEPIL*, para. 37 ("In individual applications, when specific measures of implementation constitute the main object of an application, the ECtHR's judgments often reveal inconsistencies or *lacunae* in the underlying legislation or practices that have provoked the human rights violation in the individual case. In such cases legislative or administrative reforms are called for as a measure to prevent similar breaches of the ECHR").

ECtHR will include this as a binding obligation in the operative part, as it will be explained in more detail later in this book.

On the contrary, in the case law of the IACtHR, it is important to differentiate between the victims and the beneficiaries of remedies in a concrete case.[190] There are indeed a number of remedial measures that are not aiming at the redress of the concrete victims or injured parties, but rather at the benefit of "society as a whole", as stated by the Court in several cases.[191] Legislative reforms are typically included among these remedies.[192] Therefore, although the IACtHR adopted a rather strict interpretation of the victim requirement, generally avoiding to review laws *in abstracto*, it has not limited its remedies to the concrete victims of the case but has instead expanded the notion of beneficiaries, mostly including remedial measures of both an individual and a general nature in the same judgment. This is to some extent similar before the ACtHPR, although in this case making society as a whole the beneficiary of its remedies has arguably more to do with the absence of concrete victims in numerous cases. As it has generally allowed individuals and NGOs to challenge domestic laws *in abstracto*, it follows that often the remedial measures can only be of a general nature.

Nevertheless, it is important to note in this context that legislative remedies are often not the result of a review of concrete legislative provisions, but rather of legislative omissions. For example, most legislative remedies issued by the ECtHR concern cases in which states failed to introduce provisions in their domestic legal order allowing for the redress of certain human rights violations. Similarly, all three courts have found that some vulnerable groups lack effective legislative protection, or that specific human rights violations are not adequately criminalised under domestic law. This is closely related to the differences between negative and positive legislative remedies, which will be explained in Chapter 5. With respect to the review of legislation, this difference usually implies that in the case of positive legislative remedies human rights courts can limit its review to finding that adequate laws are missing.

190 See Sandoval, in Ferstman, Goetz and Stephens (eds.), 2009, p. 273.

191 See for example IACtHR, *Trujillo Oroza vs. Bolivia* (2002), para. 110; *La Cantuta vs. Peru* (2006), para. 162, *Arellano vs. Chile*, para. 157. See also Judith Schönsteiner, "Disuassive Measures and the Society as a Whole. A working Theory of Reparations in the Inter-American Court of Human Rights", *American University International Law Review*, 2008, pp. 127-164.

192 Other remedies directed towards 'society as a whole' are for example the training of public officials or the prosecution and punishment of the perpetrators of human rights violations.

In sum, obligations to legislate, review of legislation and legislative remedies before human rights courts are three closely connected issues. Having briefly examined the first two, the rest of this book will focus on the latter one, the remedial measures that order legislative reforms. But before analysing the concrete practice of the three regional courts in this respect in the following chapters, the final section of this chapter will briefly examine the possible constitutional nature of these remedies and the role they play in the constitutionalisation of human rights law.

III. Legislative Remedies and the Constitutionalisation of Human Rights Law

For a number of years now, legal scholars (as well as international relations scholars and political scientists, among others) have been writing about the constitutionalisation of international law.[193] While this term has been used with many connotations and examined through different lenses and approaches,[194] it refers broadly to a trend in the evolution of international law during the 20th century, where it has incorporated and adapted domestic constitutional principles, institutions and procedures.[195] This is the case not only for the 'holy trinity' of constitutional law – i.e. democracy, rule of law and human rights – but also for other constitutional principles such as proportionality,[196] subsidiarity,[197] or solidarity.[198] Moreover, international law has turned from state-centrism and bilateralism to the

193 See generally Jan Klabbers, Anne Peters and Geir Ulfstein (eds.), *The Constitutionalization of International Law*, Oxford: OUP, 2009. The origin of this debate can be found in the writings of several German legal scholars during the early 1990s. See for example Bruno Simma, "From Bilateralism to Community Interests in *International Law*", *Recueil des Cours de l'Academie de Droit International* 250, 1994, pp. 217-384.

194 See Antje Wiener et al., "Global constitutionalism: Human rights, democracy and the rule of law", *Global Constitutionalism* 1(1), 2012, pp. 1-15.

195 Anne Peters, "Constitutionalisation" in Jean d'Aspermont and Sahib Singh (eds.), *Concepts for International Law - Contributions to Disciplinary Thought*, Cheltenham: Edward Elgar, 2019, pp. 141-153, at p. 141. See also Anne Peters, "Fragmentation and Constitutionalization", in Anne Orford and Florian Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law*, Oxford: OUP, 2016, pp. 1011–1032.

196 Anne Peters, "Proportionality as a Global Constitutional Principle", in Anthony F. Lang and Antje Wiener (eds.), *Handbook on Global Constitutionalism*, Cheltenham: Edward Elgar, 2017, pp. 248-264.

197 Paolo G. Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law", *AJIL* 97(1), 2003, pp. 38-79.

virtually universal acceptance of certain norms and an increased role for individuals.[199] This debate around the constitutionalisation of international law is generally encompassed in the broader scholarly movement of global constitutionalism. According to Peters, this is a movement which "both identifies some features and functions of international law (in the interplay with domestic law) as 'constitutional' and even 'constitutionalist' (positive analysis) and seeks to provide arguments for their further development in a specific direction (normative analysis)".[200]

The constitutionalisation of international law takes place not so much on the overall level –there is no world constitution yet[201]– but rather on specific areas (both geographical and disciplinary).[202] Therefore, authors have mainly focused on issues related to the constitutionalisation of specific sub-fields of international law. This was traditionally the case for international trade law[203] and EU law,[204] and more recently also other sub-fields

198 Rüdiger Wolfrum and Chie Kojima (eds.), *Solidarity: A Structural Principle of International Law*, Heidelberg: Springer, 2010.

199 See generally Anne Peters, *Beyond Human Rights*, 2016. On that point see also Ekaterina Yahyaoui Krivenko, *Rethinking Human Rights and Global Constitutionalism: From Inclusion to Belonging*, Cambridge: CUP, 2017, p. 20 ("Any version of international constitutionalism will usually acknowledge that a constitutionalist reading of international law implies a more active role for and more attention to individuals). Challenging this perspective, Astrid Kjeldgaard-Pedersen, "Global Constitutionalism and the International Legal Personality of the Individual", *Netherlands International Law Review* 66, 2019, pp. 271–286.

200 Anne Peters, in d'Aspermont and Singh (eds.), 2019, p. 1011.

201 See however Bardo Fassbender, "The United Nations Charter as the Constitution of the International Community", *Columbia Journal of Transnational Law* 36, 1998, pp. 529–619.

202 Anne Peters, "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures", *LJIL* 19(3), 2006, pp. 579-610, at pp. 601-602.

203 See John O McGinnis and Mark L Movsesian, "The World Trade Constitution", *Harvard Law Review* 114, 2000, 511–605.

204 For a classic example, see Eric Stein, "Lawyers, Judges, and the Making of a Transnational Constitution", *AJIL* 75, 1981, pp. 01–27. See also Joseph HH Weiler, *The Constitution of Europe*, Cambridge: CUP, 1999.

such as international environmental law[205] or international criminal law. [206] International human rights law plays also a very important role in this sort of sectoral constitutionalisation. In this respect, there is an evident parallelism between international human rights treaties and constitutional codifications of fundamental rights. Despite the possible differences regarding the typology and substance of rights at these two levels, in both cases, they perform the function of setting limits to states' exercise of governmental power towards individuals within their jurisdiction.[207] One of the core features of modern constitutionalism is the focus on the protection of fundamental rights, subject to judicial review. Some authors talk even about human rights in general as a constitutional order, which comprises the international, regional and domestic layers.[208] There is also a constitutionalist logic in the relation between human rights treaties and domestic laws. The former can be seen as pertaining to a sort of 'upper track', establishing certain conditions and features of the 'lower track' norms, in this case, domestic laws. This relation can be observed in the previously examined obligations to legislate included in human rights treaties.

One of the main challenges that has been highlighted regarding the constitutionalisation of international human rights law is the lack of a judicial enforcement of these rights at the international level comparable to the one exercised by domestic constitutional courts.[209] Nevertheless, since the late 1990s clear signs of an increased constitutionalisation can be observed before regional human rights courts. These courts' role and jurisprudence is getting closer to the one of constitutional courts, and legislative remedies are arguably part of this rapprochement, as will be shown below.[210]

---

205 James R. May and Erin Daly, "Human Rights Developments in Global Environmental Constitutionalism", in James R. May and Erin Daly (eds.), *Human Rights and the Environment: Legality, Indivisibility, Dignity and Geography*, Cheltenham: Edward Elgar, 2019, pp. 93–109.

206 Andrea Birdsall and Anthony F. Lang, "The International Criminal Court and Global Constitutionalism", in Anthony F. Lang and Antje Wiener (eds.), *Handbook on Global Constitutionalism*, Cheltenham: Edward Elgar 2017, pp. 383-394.

207 Peters, *LJIL* 2006, p. 599 labels this as the "confining function". See also Stephen Gardbaum, "Human Rights as International Constitutional Rights", *EJIL* 19(4), 2008, pp. 749–768, at p. 750.

208 Wayne Sandholtz, "Human rights courts and global constitutionalism: Coordination through judicial dialogue", *Global Constitutionalism* 10(3), 2021, pp. 439-464.

209 Gardbaum, *EJIL* 2008, p. 751.

210 This part will not deal with the constitutionalisation of international organisations, which relates mostly to their internal structure and characteristics, and aspects such as transparency and participation. Although this constitutionalist perspective

1. Regional Human Rights Courts as International 'Constitutional' Courts?

The international judiciary is an important agent in the process of constitutionalisation of international law,[211] and regional human rights courts have played and continue to play a paramount role in this context. Their functions are indeed comparable to those of domestic constitutional courts at various levels. On the one hand, they are superior organs in their respective legal orders and they review the states' acts against (international) constitutional standards, which include human rights.[212] On the other hand, their aim is also to guarantee the effectiveness of their respective constitutional document (in this case human rights conventions), thereby restricting the states' sovereignty and protecting individuals against unlawful interventions.

This aim is pursued both by providing individual justice and by setting the minimum human rights standards in their respective region through authoritative interpretations.[213] Their judgments thus affect not only the relation between the individual and constitutional bodies of the state but between different constitutional organs, too.[214] The fact that these courts exercise judicial review over state acts already contributes to the international rule of law,[215] and while performing this review they expressly make use of several constitutional principles outlined above, such as subsidiarity and proportionality. Finally, the criteria used to examine the restriction of rights are also the ones used by constitutional courts.[216]

---

is also relevant for the regional human rights courts, this section will focus on the constitutional functions of these courts, and mainly on legislative remedies as a specific type of constitutional function.

211 See Anne Peters, "Are we Moving towards Constitutionalization of the World Community?", in Antonio Cassesse (ed.), *Realizing Utopia: The Future of International Law*, Oxford: OUP, 2012, pp. 118–135, at p. 119.

212 Geir Ulfstein, "Transnational Constitutional Aspects of the European Court of Human Rights", *Global Constitutionalism* 10(1), 2021, pp. 151 - 174. As Wildhaber and Greer put it, "to a large extent, the ECtHR decides broadly the same kind of issues as a domestic supreme or constitutional court, and also in largely similar ways" (Wildhaber and Greer, *HRLR* 2012, at p. 668).

213 With regard to the ECtHR, see Keller and Kühne, *ZaöRV* 2016, p. 257-259.

214 Ulfstein, *Global Consitutionalism*, 2021, p. 152.

215 Peters, *LJIL* 2006, p. 601 ("An international rule of law would probably require some form of judicial review (…) of acts of states").

216 I.e. legality, public interest, necessity and proportionality. See e.g. Keller and Kühne, *ZaöRV* 2016, p. 272.

It should be noted, however, that regional human rights courts are not substituting domestic constitutional courts but rather complementing them, as they act only in those instances in which they consider that domestic courts have failed to protect the individual and to comply with the aforementioned minimum standards, in accordance with the exhaustion of domestic remedies rule and the principle of subsidiarity.[217] There are, additionally, certain limits to the regional human rights courts' constitutional nature. The first of them concerns their lack of capacity to exercise other types of constitutional litigation, such as that concerning competence-related issues among domestic bodies or different administrative levels in federal states.[218] In the context of regional human rights protection systems, additional constitutional bodies are missing, as there is no proper legislature and executive.[219] Another main difference between regional human rights courts and domestic constitutional courts is the lack of self-enforceability of the former's judgments, which need to be implemented by domestic authorities. Instead, the judgment of a domestic constitutional court affects the validity of the concerned act immediately, without an additional step being necessary.[220] This, of course, makes an important difference with respect to the effectiveness of judgments in constitutional *vis-à-vis* regional human rights settings, and some see it as incompatible with a constitutional role.[221]

However, all three regional human rights courts have been labelled as constitutional courts of their respective regions. This is especially the case for the ECtHR, as a number of scholars have examined the constitutional

217 Keller and Kühne, *ZaöRV* 2016, p. 260. This is however sometimes also the case for domestic constitutional courts, that usually act in individual cases only when the lower courts have failed to do so in an appropriate way.

218 See Keller and Kühne, *ZaöRV* 2016, p. 270.

219 In the European human rights protection system, the closest would be the PACE and the CoM, but their functions are very different from the ones of their domestic counterparts.

220 In this respect, at a supranational level only the CJEU has afforded direct effect to is judgments.

221 Jonas Christoffersen, "Individual and Constitutional Justice: Can the Power Balance of Adjudication be Reversed?", in Jonas Christoffersen and Mikael Rask Madsen (eds.), *The European Court of Human Rights between Law and Politics*, Oxford: OUP, 2011, pp. 181–203, at p. 195.

aspects of this court.[222] This gained momentum during the late 1990s,[223] especially since the ECtHR itself defined the Convention as "a constitutional instrument of public order" in 1995,[224] and the Court turned into a permanent body with direct access for individuals in 1998. Intervening in structural issues inside states that suffer systemic deficiencies – through the introduction of the pilot judgment procedure – reinforced its constitutional role.[225] Despite this debate turning predominantly around the constitutional aspects of the ECtHR, the IACtHR has also been ascribed a constitutional character,[226] and the ACtHPR has been even labelled as a "super-constitutional court".[227] There are however some differences with respect to the constitutional character of each of these courts, as will be seen below.

a) Diverging constitutional elements of regional human rights courts

Despite the common constitutional features of regional human rights courts, each of them has arguably achieved a different degree of constitutionalisation, with diverging elements in this respect. For example, an aspect that brings the ECtHR closer to a constitutional court is the exercise of jurisdiction over all members of the international organisation it belongs

222 See *inter alia* Keller and Kühne, *ZaöRV* 2016, Ulfstein, *Global Constitutionalism* 2021. Others, such as Sadurski, have argued in this respect that the question of whether or not to consider the ECtHR as a constitutional court is largely a matter of "the yardstick used to measure constitutional character" (Wojciech Sadurski, *Constitutionalism and the Enlargement of Europe*, Oxford: OUP, 2012, at p. 44).

223 Note however that some authors already came up with this idea before the 1990s. See for example Jochen Frowein, "Der europäische Menschenrechtsschutz als Beginn einer europäischen Verfassungsrechtsprechung", *Juristische Schulung*, 1986, pp. 845-851.

224 ECtHR, *Loidizou vs. Turkey* (1996), para. 75. This claim has thereafter been repeated by the Court several times. See for a more recent instance, ECtHR, *Aliyev vs. Azerbaijan* (2018), para. 225.

225 Sadurski, *HRLR* 2009, p. 402. On the pilot judgment procedure, see Chapter 3 of this book.

226 Laurence Burgogue-Larsen, "La Corte Interamericana de Derechos Humanos como Tribunal Constitucional", in Armin von Bogdandy, Héctor Fix Fierro and Mariela Morales Antoniazzi (coords.), Ius Constitutionale Commune *en América Latina: Rasgos, Potencialidades y Desafíos* Mexico: UNAM, 2014, pp. 421-457.

227 Adem Kassie Abebe, "Taming regressive constitutional amendments: The African Court as a continental (super) constitutional court", *I•CON* 17(1), 2019, pp. 89-117, especially at p. 110.

to (the CoE). This is not the case with the IACtHR and the ACtHPR, which are only competent with regard to the member states of the OAS and the AU that have expressly accepted to be subject to these courts' jurisdiction.

In addition, individuals of all states can have direct access to the ECtHR, while this is not the case with the other two regional courts.[228] This certainly does not mean that everyone is always entitled to access the ECtHR directly, as a number of procedural and substantive conditions have to be met, but that is also the case for individual proceedings before domestic constitutional courts.[229] In the case of the IACtHR, the system consists of a twofold structure, whereby individuals can only submit their claims before the IACmHR, a quasi-judicial body. The Commission, upon receiving such a claim, tries to reach a friendly settlement among the parties, and if that fails it issues a number of recommendations in order to remedy a potential violation. Only if the state party refuses to comply with such recommendations, it will refer the case to the IACtHR. This is also the case in the African system, with the exception that individuals and NGOs can directly access the ACtHPR if states expressly accept it through an optional declaration. Thus, as a considerable amount of the proceedings in the Inter-American and African systems are taking place before a non-judicial body, a fundamental element of constitutional law (access to justice) is missing in this case.

Another distinctive constitutional element can be observed with regard to the election of judges to the ECtHR. As it occurs with most constitutional courts, judges are elected through a parliamentary body. In the case of constitutional courts, this is done through domestic parliaments, while in the case of the ECtHR through PACE, which is composed of members of the forty-seven domestic parliaments and is therefore the parliamentary body of the CoE. Each state presents a list of three potential candidates to PACE and this body decides which one will occupy the seat in the Court. On the other hand, in the case of the IACtHR and the ACtHPR, the judges are elected respectively through the General Assembly of the OAS and the Assembly of Heads of State and Government of the AU. These are bodies

228 As explained in the Introduction. See on this constitutional feature Johann Justus Vasel, *Regionaler Menschenrechtsschutz als Emanzipationsprozess*, Berlin: Duncker and Humblot, 2017, p. 183.

229 For example, the exhaustion of domestic remedies rule of the ECHR is also present in many constitutional systems, that require an individual to exhaust all ordinary judicial avenues before submitting a constitutional complaint. The same occurs with other requirements, such as the temporal limits, or the need to show that the victim has suffered a significant disadvantage.

composed of governmental representatives, thus lacking the parliamentary character of PACE.

However, an aspect in which the ECtHR's jurisprudence is less constitutionalised than the one of its Inter-American and African counterparts concerns its extensive use of declaratory judgments, in which no individual or general remedies are indicated besides the payment of a monetary compensation.[230] Constitutional courts are in this respect only rarely issuing measures of compensation, but focus mostly on other type of remedies, often those of a general nature. This is also why the introduction of the pilot judgment procedure by the ECtHR was labelled as an "emphatic expression of [the ECtHR's] constitutional turn".[231] The ECtHR did not only start to issue remedies of a constitutional nature with this procedure – an issue that will be examined below – but the selection of cases for the pilot judgment procedure can also be compared to that of constitutional courts. The latter usually deals exclusively with individual cases that have a certain 'constitutional relevance', while in the pilot judgment procedure, the ECtHR identifies cases that reflect a 'systemic problem' in a state party. Although these two concepts are not exactly the same, as the constitutional relevance often includes interpretative issues that are not giving rise to systemic problems, the selection of salient cases can be considered similar to some extent.

At the IACtHR, besides its extended use of remedial measures of a constitutional character, another distinctive constitutional feature can be found in its doctrine of conventionality control. Through this doctrine, the IACtHR mandates domestic courts and other constitutional bodies to review the compatibility of laws and administrative acts with the American Convention, as interpreted by the Court. This can be compared at a constitutional level to a form of decentralised constitutionality control, where ordinary judges can review the constitutionality of legal provisions in cases before them, against the standards developed by the corresponding constitutional court. Moreover, in domestic law-making procedures, the legislature often asks for a legal report in order to assess the constitutionality of draft laws. For this reason, it has been argued that conventionality control

230 See Chapter 3 of this book.
231 Sadusrski, *HRLR* 2009, p. 450.

"resembles more a conception of the Convention as a federal Constitution and setting the Court as a supreme court in a federal State".[232]

Finally, in the case of the ACtHPR, a particular constitutional aspect lies in the wide scope of its contentious jurisdiction, which extends not only to the interpretation and application of its constitutive treaty (as it occurs with the contentious jurisdiction of the ECtHR and the IACtHR) but also "any other relevant Human Rights instrument ratified by the States concerned".[233] According to the African Court's interpretation, this also includes the African Charter on Democracy. In this regard, it has been argued that while the ACPHR's provisions correspond to the fundamental rights provisions of domestic constitutions, the African Charter on Democracy complements it with the democratic principles usually present in those constitutions, such as the separation of powers or the minimum requirements for the amendment of constitutions.[234] Thus, the judicial review exercised by the African Court is more constitutional in the sense that it is not limited to issues of a strict human rights character, but comprises aspects of a more institutional nature.[235] In addition, the review of domestic laws *in abstracto* is also a notable constitutional feature that has been developed by the ACtHPR.[236]

b) Individual vs. constitutional justice before human rights courts

For some years now, a debate has taken place around the issue of whether human rights courts should provide individual or constitutional justice. It

232 See Ariel E. Dulitzky, "An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights", *Texas Law Review* 50, 2015, pp. 45-93, at p. 62, comparing it to the Supremacy Clause of the U.S. Constitution, which "commands local and state judges to disregard any other conflicting rule in the laws or constitution of their State".

233 See Article 3(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights. See also Adamantia Rachovitsa, "On New 'Judicial Animals': The Curious Case of an African Court with Material Jurisdiction of a Global Scope", *HRLR* 19(2), 2019, pp. 255–289.

234 Abebe, *I•CON* 2019, p. 110.

235 Abebe, *I•CON* 2019, p. 113 ("the African Court has a much wider substantive basis [than its European and Inter-American counterparts] to review the compatibility of laws (…) including not only traditional fundamental rights but also several institutional aspects").

236 See above section II.1 of this chapter.

has focused mainly on the ECtHR, as it is the human rights court that receives by far more scholarly attention.[237] In general, those in favour of the individual justice paradigm maintain that the Court should exclusively focus on redressing the individual applicants, while those advocating for the constitutionalisation of the ECtHR argue that it should be selective on the cases it decides, focusing only on those having a 'constitutional' character and increasing its use of structural remedies.[238] These normative claims appeared in the context of the 'caseload crisis' faced by the ECtHR, especially during the early 2000s, and found one of its main proponents in Luzius Wildhaber, former President of the Court. In 2002 he considered it "essential for the Court to be given the means to reduce the flow of cases so that it can concentrate on its constitutional role".[239] Ten years later, in 2012, Greer and Wildhaber still maintained that due to the backlog of cases, there were only two inevitable types of transition, either "to constitutionalisation" or to "stagnation and collapse".[240] They argued that "the Court should adjudicate the tiny fraction of the total number of applications it receives in a more 'constitutional' or principled manner", *inter alia* by interpreting the Convention "as a whole with a view to maximizing the effect of each judgment both in the respondent state and in the Council of Europe states generally".[241] It can be argued that this is precisely what the other two regional courts do, as they deal with a small number of cases and thus try to maximise the impact of every judgment.[242]

Until now the individual justice position has prevailed before the ECtHR, despite the introduction of some constitutional elements, such as the aforementioned pilot judgment procedure or the admissibility requirement of having suffered a 'significant disadvantage'.[243] Lovat and Shany mention in this respect that despite the reluctance of mandate providers to support a shift towards constitutional justice, "evidence exists that they have

237 Luzius Wildhaber, "A Constitutional Future for the European Court of Human Rights?", *Human Rights Law Journal* 23, 2002; Helfer, *EJIL* 2008, p. 127.

238 Greer and Wildhaber, *HRLR* 2012, p. 663; Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects*, Cambridge: CUP, 2006.

239 Wildhaber, *HRLJ* 2002, p. 161.

240 Greer and Wildhaber, *HRLR* 2012, p. 658.

241 Greer and Wildhaber, *HRLR* 2012, p. 686.

242 See on the impact of the remedial measures, Chapter 6 of this book.

243 This admissibility requirement was introduced with the entry into force of Protocol No. 14 in 2010 and has allowed the ECtHR to avoid dealing with 'minor' human rights violations, thus reducing its caseload to some extent.

implicitly acknowledged such a shift".[244] However, the backlog problem is arguably still an issue, carrying with it a considerable delay in the proceedings before the ECtHR. This is seen as a serious practical problem, as the Court is failing to comply with the standards it sets for states in terms of the right to a fair trial.[245] It is therefore likely that this debate will continue in the future, as projects to reform the European human rights protection system are still ongoing.

Furthermore, there are other authors who do not position themselves on either side of the individual vs. constitutional justice debate but argue instead in favour of a 'pluralist' conception of the ECtHR's functions. For example, Keller and Stone Sweet state that the ECtHR has a variety of functions, depending on the specific states and rights at stake. Among those functions, they expressly mention the delivery of "constitutional justice".[246] This is certainly supported by the Court's case law, mentioning already in 1978 that its task is "not only to decide cases but to elucidate, safeguard and develop the rules instituted by the Convention".[247] Similarly, Çalı identifies several functions performed by the Court, with one of them being "to trigger reform".[248] There is however a difference between triggering reform and mandating reform, especially in terms of the constitutional character of such functions. This is where legislative remedies add a substantial constitutional element to the courts' case law.

While the ECtHR has continued to deliver mostly individual justice, this is arguably different in the case of the other regional human rights courts. This can be observed on the one hand in the small number of cases they decide, especially if compared with the ECtHR. The IACtHR's and ACtHPR's case law is still limited to a yearly average of about twenty judgments, while the ECtHR delivers over 1,000 judgments each year. This is due not only to issues surrounding the structure of the Inter-American and African systems (especially the lack of direct access to the Court mentioned before) but also to a lack of resources to decide a high number of cases. As a consequence, there is necessarily some type of selection of cases, especially

244 Henry Lovat and Yuval Shany, "The European Court of Human Rights", in Yuval Shany (ed.), *Assessing the Effectiveness of International Courts*, Oxford: OUP, 2014, p. 260.

245 See 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, at p. 167.

246 Keller and Stone Sweet, in Keller and Stone Sweet (eds.), 2008, p. 703.

247 ECtHR, *Ireland vs. UK* (1978), para. 154.

248 Çalı, *EHRLR* 2008, p. 299.

before the IACmHR, which receives a considerable number of applications. In addition, both the IACtHR and the ACtHPR aim to make the most out of the few cases they decide, using their case law as a transformative tool to change social and legal realities. They thus need to look beyond the concrete victims that appear before them. This is also reflected in the wide array of remedial measures that these courts include in their judgments, which are often of a structural nature. Some examples thereof are precisely legislative remedies, which are arguably fulfilling a constitutional function.

2. Legislative Remedies as a Sign of Increased Constitutionalisation

As it was mentioned, the review of domestic legislation is rather common before human rights courts, especially with laws that have been applied in concrete cases of alleged human rights violations. The international judicial review of domestic laws is considered to be one of the main features of global constitutionalism, as it relies on that particular vision of international law and also serves to anchor this specific approach.[249] Legislative remedies however go beyond that and provide for an increased constitutionalisation of these regimes. They bring human rights adjudication closer to constitutional adjudication in its most common understanding, implying that courts can determine the consequences of the review.[250] In this context, it is quite different for an international court to find that a domestic law is incompatible with the treaty in question than to include a binding remedy ordering the reform of such law. In addition, legislative measures contribute notably to the internalisation of human rights, which is considered one of the main aims of global constitutionalism.[251] Such internalization does not take place exclusively through the incorporation of human rights standards in domestic law, as a process of 'socialization' of such standards is also necessary, but the legislative incorporation is, without a doubt, a step in that direction.

249 Başak Çalı, "International Judicial Review", in Anthony F. Lang and Antje Wiener (eds.), *Handbook on Global Constitutionalism*, Cheltenham: Edward Elgar, 2017, pp. 291-303, particularly at pp. 291 and 301.

250 There are constitutional systems in which courts are only empowered to issue declarations of incompatibility or other non-binding legislative measures, such as the UK or Canada, but these are rather the exception.

251 Çalı, in Lang and Wiener (eds.), 2017, p. 300.

When legislative remedies are included in the judgments, this makes courts transition from what is known at a constitutional level to be a weak-form judicial review of legislation to a strong-form one.[252] Although these two forms of judicial review can also have different degrees of strength or weakness, the weak-form review generally implies that decisions lack formal finality.[253] Thus, the law in question stays in force and the courts' 'declaration of incompatibility' can be overridden by the ordinary legislator.[254] This is the case for example with judicial review of legislation in the UK under the Human Rights Act, as well as in other common law states such as Canada or New Zealand. Strong review is generally understood as the ability of courts to strike down or invalidate legislation so that it can no longer be applied by the executive or the judiciary. These decisions can be overridden only through a constitutional amendment. This is the type of review performed by most European constitutional courts or by the US Supreme Court. When issuing legislative remedies, human rights courts arguably perform a review situated in the weaker scale of the strong-form. They do not limit themselves to finding an incompatibility between domestic laws and the Convention in a declaratory way, which is what they do in the absence of legislative remedies. Instead, they order the legislator to act in a specific way, with a variable degree of discretion in this regard, despite stopping short of invalidating the laws.[255] Legislative remedies are thus clearly a sign of an increased constitutionalisation of these courts.[256]

For this reason, the introduction of legislative remedies by the ECtHR through the pilot judgment procedure was seen as a constitutional step taken by that court. As Sadurski puts it, "this law-judging function of

252 See generally Mark Tushnet, "Judicial Review of Legislation", in Mark Tushnet and Peter Cane (eds.), *The Oxford Handbook of Legal Studies*, Oxford: OUP, 2005, pp. 164–182. See also Çalı, in Lang and Wiener (eds.), 2017, p. 298, mentioning the importance of the IACtHR's "expansive and detailed remedies (…) akin to strong judicial review in domestic constitutional contexts".

253 See in this regard Rosalind Dixon, "The Forms, Functions, and Varieties of Weak(ened) Judicial Review", *I•CON* 17(3), 2019, pp. 904-930.

254 The concept of weak-form judicial review was introduced by Mark Tushnet, "Alternative Forms of Judicial Review", *Michigan Law Review* 101, 2003, p. 2782.

255 See on the discretion afforded to the legislator in legislative remedies, Chapter 5. As previously explained, one fundamental difference with constitutional courts in this respect is the lack of direct effect of human rights judgments, in the sense that a law cannot be invalidated directly but requires a subsequent act by the national legislature or constitutional court.

256 See Wojciech Sadurski, "Quasi-constitutional Court of Human Rights for Europe?", *Global Constitutionalism* 10(1), 2021, pp. 175-185.

the Court makes it more obviously 'constitutional'".[257] The constitutional dimension of legislative remedies has not received that much attention in the case of the other two regional courts, probably due to the fact that legislative remedies were present since (almost) the beginning of their adjudicatory practice,[258] and because there are usually no cases with a weak-form and others with a strong-form review.[259] In this regard, no such 'constitutional turn' has taken place in the remedial practice of the IACtHR and the ACtHPR. Nevertheless, some developments of the latter courts related to its legislative remedies have also been examined through a constitutional lens. For example, the fact that the ACtHPR declared the incompatibility of constitutional provisions and even ordered to reverse constitutional amendments resulted in it being labelled as a regional "(super)constitutional court".[260] There are, however, still important differences between the legislative remedies of human rights courts and those of constitutional courts.

3. The Differences between Legislative Remedies in Constitutional and International Settings

Even though binding orders to reform legislation bring forward the constitutionalisation of human rights courts, these measures are still not equal to those commonly issued by domestic constitutional courts. Some of the main differences concern the effects of legislative remedies in the legal order of the state, the nature of these measures, and the moment of the legislative process in which they can be issued.

a) The effects on the domestic legal order

One difference that makes legislative remedies issued by regional human rights less intrusive than those of most constitutional courts is the aforementioned lack of domestic direct effects. Although they create an international obligation for states to amend their legislation, the act of giving effect

257 Sadurski, *HRLR* 2009, p. 432.
258 See Chapter 3 of this book.
259 When these courts find a law or a legislative omission to be incompatible with the respective treaty, they will generally include a legislative remedy in this respect.
260 Abebe, *I•CON* 2019, especially at p. 110.

to the decision still rests in the hands of domestic bodies. This makes an important difference, as a domestic legislative procedure still needs to take place, which includes democracy-enhancing aspects such as parliamentary debates and representative voting. On the contrary, when a constitutional court strikes down a domestic law, it usually becomes invalid from the moment the judgment is delivered. Thereby, the act of law-making takes place exclusively through the judicial decision, which can be more troublesome from a democratic perspective. In addition, legislative remedies before human rights courts usually leave a margin of discretion to the legislator. Even if this body is obliged to carry out a reform, legislative remedies vary in their specificity as to the expected outcome. Whether the margin left to the legislature in deciding the outcome of the reform is wide or narrow will also make an important difference as to its intrusiveness, an aspect that will be explored more closely in Chapter 5.

Human rights courts have, in this respect, generally refused to attempt providing their legislative measures with direct effects. For example, in the case *Ajavon vs. Benin* (2020), the applicant requested the ACtHPR "to strike down laws", but the Court rejected this request arguing that "it cannot take the place of the legislature of the Respondent State".[261] Thereby it referred to the fact that human rights judgments cannot have the effect of annulling laws, as immediately afterwards it highlighted that "it may, however, order measures with a view to repealing such laws or amending them so as to make them compliant with international human rights standards".[262]

The IACtHR nevertheless attempted to break down this barrier in its judgments concerning amnesty laws, where it declared that these laws "lack legal effects", without an additional domestic act repealing the law being necessary in this respect.[263] However, this approach presents serious theoretical and practical problems from the perspective of both domestic and international law, as the IACtHR is attributing a supranational force to its judgments that they lack domestically. In this respect, as international judgments are not self-executing, state action is an indispensable element for its enforcement.[264] In addition, the obligations to legislate under hu-

261 ACtHPR, *Ajavon vs. Benin* (2020), para. 356.
262 ACtHPR, *Ajavon vs. Benin* (2020), para. 356.
263 See for example IACtHR, *Barrios Altos vs. Peru* (2001), operative para. 4 ("Amnesty Laws No. 26479 and No. 26492 are incompatible with the [ACHR] and, consequently, lack legal effect"). See also Pasqualucci, *Practice and Procedure of the IACtHR*, 2012, p. 217, defining this as an "unprecedented step".
264 See Hillebrecht, 2014, p. 21.

man rights treaties are also state-oriented, implying that domestic action is necessary.[265] This is also shown in the concrete cases of amnesty laws, which did not become null and void domestically after the judgments of the IACtHR. Instead, a domestic procedure was initiated as a consequence of the legislative measures and the laws were repealed through an action by either the respective constitutional court or by the legislature. In sum, although legislative remedies create an (additional) international obligation for states to reform their laws, they cannot produce the reform by themselves.

b) The predominantly positive nature of legislative remedies before human rights courts

Another important difference concerns the nature of these legislative measures, whereby the measures of human rights courts can be more intrusive than those of constitutional courts. In the case of constitutional adjudication, legislative remedies are generally understood as being of a negative nature, as the assessment of the compatibility of actual laws with the constitution usually results in striking down such laws when this is not the case.[266] On the contrary, legislative remedies of human rights courts are more often than not of a positive nature, ordering legislative enactments. As a result of the obligations to legislate included in human rights treaties, it is not uncommon that a human rights violation stems from a legislative omission of the state.

As it will be explored in more detail in Chapter 5, the legislative remedies of the ECtHR are almost exclusively of a positive nature, while in the case of the IACtHR, this is more balanced but also predominantly positive and the ACtHPR is the only one ordering more often reforms of a negative nature. It has therefore been argued that the review powers of human rights courts can go beyond that of domestic constitutional courts due to the imposition of positive obligations to states, "including putting in place domestic legislative frameworks to respect rights".[267]

265 See Christina Binder, "The Prohibition of Amnesties by the Inter-American Court of Human Rights", *GLJ* 12(5), 2011, pp. 1203-1230, at p. 1216.

266 See however Allan Brewer-Carias, *Constitutional Courts as Positive Legislators*, Cambridge: CUP, 2011.

267 Çalı, in Lang and Wiener (eds.), 2017, p. 297.

c) The moment of the legislative process for issuing remedies

Another distinction concerns the moment in which the legislative measures are imposed. In several states, constitutional courts are empowered under certain circumstances to perform an *ex-ante* review of legislation in the final stages before its formal adoption. In such cases, a law can be struck down even before it enters into force. On the contrary, the legislative review carried out by human rights courts is necessarily *ex-post*, as only valid laws can produce a human rights violation.[268] Even in those 'abstract' cases outlined before, in which no violation of specific rights of an individual is required for human rights courts to intervene, the law needs to be able to produce actual effects for it to be reviewed.

The IACtHR was indeed criticised for finding that a draft law was incompatible with the Convention and ordering Guatemala to stop the procedure for its adoption. This took place in the context of the IACtHR supervising the execution of several remedial measures that prescribed the investigation of human rights violations perpetrated during Guatemala's internal armed conflict, as well as the prosecution and punishment of those responsible.[269] A legislative proposal put forward in 2019 intended to grant amnesty for every human rights violation committed during this internal conflict. In view of that, the IACtHR issued a resolution finding that this new law would have a negative and irreparable impact on the right of access to justice of the victims of these cases and that it would be *per se* contrary to the Convention, in accordance to its settled jurisprudence on amnesty laws.[270] The IACtHR therefore attached an order of provisional measures to this resolution, expressly ordering Guatemala to terminate the legislative proceedings.

---

268 However, as mentioned before, the advisory review of legislation carried out by some human rights courts (especially that of the IACtHR) can also take place before its adoption.

269 This conflict was one of the longest in the region, lasting from 1960 until the Peace Agreements of 1996. It confronted the armed forces of the state with Marxist guerrilla groups. As is the case with many Latin American conflicts of that time, one of the main features of the Guatemalan conflict is the high number of massacres and enforced disappearances, especially against indigenous peoples.

270 IACtHR, *Members of the Village of Chichupac and neighboring communities of the Municipality of Rabinal, Molina Theissen and 12 other Guatemalan's Cases v. Guatemala*, Provisional Measures and Monitoring Compliance with Judgment (2019), paras. 36-37. On the IACtHR's jurisprudence concerning amnesty laws, see Chapter 4 of this book.

This was criticised by one of the judges in its dissenting opinion, arguing that the draft law had not yet affected the victims' rights and that the Court would thus be prevented from intervening due to the absence of a wrongful act.[271] This would hold true if the IACtHR had found a human rights violation under its adjudicatory function, but in this case, it acted in accordance with its function of supervising compliance with previous judgments. This order therefore cannot be considered a remedy as such, but a provisional measure intended to secure the implementation of another remedy. However, it can be argued that the IACtHR entered swampy ground with this decision, as the subsidiary nature of human rights courts generally prevents them from interfering with legislative procedures, especially if domestic bodies are in principle capable of remedying the inconsistencies before the law affects individual rights. This is precisely what occurred, as the Guatemalan law did not pass the parliamentary proceedings. It remains the only instance in which a human rights court has ordered to put an end to an ongoing legislative procedure. Thus, although an *ex-ante* review is arguably better suited to prevent human rights violations, human rights courts can only act with respect to laws that produce actual effects. This is also an aspect which reduces its intrusiveness if compared with constitutional courts, that can prevent draft laws from entering into force.

4. Legislative Remedies and the Sovereignty of States

A final aspect which needs to be taken into consideration regarding the 'quasi-constitutional' dimension of legislative remedies concerns its intrusiveness upon the sovereignty of states. An added concern with respect to legislative remedies of human rights courts compared to those of constitutional courts is that they affect not only the democratic principle but also the sovereignty principle.[272] Of course, every type of review carried out by an international court implies an intrusion into the sovereign realm of states. The differences in this respect are a matter of degree, with legislative remedies arguably attaining one of the highest levels of intrusiveness. For this reason, the legitimacy of human rights courts to issue this type of remedies needs to be explored.

271 IACtHR, *Members of the Village of Chichupac and neighboring communities of the Municipality of Rabinal, Molina Theissen and 12 other Guatemalan's Cases vs. Guatemala,* Provisional Measures and Monitoring Compliance with Judgment (2019), Dissenting Opinion of Judge Vio Grossi.

272 On the issue of legislative measures and democracy, see Chapter 5 of this book.

a) The increased intrusiveness of legislative remedies

The fact that legislative remedies are not directed at the executive – who is the usual respondent body of international judgments – but at the legislature, makes them considerably more intrusive than other measures. There are fundamental differences between remedies that are directed at the executive (in the form of administrative reforms, release of prisoners, restitution of property or monetary compensation) and those directed at the legislature. First, there is a notable difference in terms of the source of authority, as legislation is directly adopted by elected representatives, while the representative component of executive acts is only indirect. Secondly, according to the rule of law and the principle of legality, acts and decisions of the executive always need to be carried out on the basis of legislation authorising them. This requirement of legislative authorisation already constrains executive discretion considerably. Therefore, the judicial review of executive decisions and concomitant remedies ordering governments to take action are generally unproblematic. In fact, in domestic settings, the constitutional review of decisions taken by the executive or lower courts is seen as "a non-controversial standard judicial function".[273] Even the strong opponents of a judicial review of legislation agree that "[c]ertainly the rule of law seems to require something like close judicial supervision of the executive".[274]

Furthermore, in most states under the regional courts' jurisdiction, the legislature is structured to allow for transparency and participation. This includes public debate and deliberation in the context of law-making, which can help to take into account a wide range of views and perspectives, thereby ensuring that the interests of different groups within society are represented in the legislative process. This is not the same in the decision-making processes of the executive branch. The domestic legislature is thus typically viewed as the key component of the democratic states' political system, and as such, the measures that override its decisions or otherwise direct its actions can be seen as a strong intrusion in the states' sovereign sphere, a type of intervention usually reserved for constitutional courts. The legislature therefore deserves a wider scope of deference, an aspect that will be explored in more detail in Chapter 5 of this book.

273 See Çalı, in Lang and Wiener (eds.), 2017, p. 292.

274 Jeremy Waldron, "The rule of law and the role of courts", *Global Constitutionalism* 10(1), 2021, pp. 91–105, at p. 91.

On the other hand, the effective protection of human rights often requires legislative interventions. Some authors have highlighted in this context the necessity of securing human rights through legislation because the protection of rights cannot exclusively depend on "administrative goodwill" or the "wide discretionary powers of particular state authorities".[275] In addition, the legislative element provides for legal certainty and stability in the protection of rights. If the protection of rights was limited to administrative measures, this would allow for an easy modification of such safeguards after a change of government. Legislative protection implies higher procedural hurdles and majority thresholds in this respect. Therefore, legislative remedies can render the protection of human rights more effective domestically, although this does not mean *per se* that international courts are legitimised to issue them.

b) The legitimacy of legislative remedies

While sovereignty has many different features and understandings, one of its main elements is self-governance. States are certainly giving up some of their self-governance prerogatives when accepting the supervision of an international court. The question then turns around the extent of this cession of sovereignty.[276] This is the well-known argument of states' consent as a source of legitimacy of international courts. It is thus relevant to examine to what extent states consented to the international review of legislation when subjecting themselves to the jurisdiction of human rights courts.

In this context, one of the main objectives of regional human rights protection systems is that of harmonising human rights protection in the different member states, with the obligations established in these treaties serving as a minimum standard in this respect.[277] One of the foundations of human rights treaties is thus to act as a framework of fundamental norms protecting certain interests and taking them away from the domestic

275 Lavrysen, "Protection by Law", 2014, p. 86.

276 Von Staden argues in this respect that "[w]here the exercise of judicial review, then, is based on such explicit delegation, it is not as such democratically deviant, as long as the terms of delegation are being observed". Andreas von Staden, "The democratic legitimacy of judicial review beyond the state: Normative subsidiarity and judicial standards of review", *I•CON* 2012, p. 1034.

277 The former President of the IACtHR, García-Sayan defined such harmonisation as a "central element" of the ACHR. See García-Sayan, *Texas Law Review*, 2011, p. 1837.

majority rule. The review of domestic laws can therefore be considered one of the main functions of human rights courts.[278] Adding this to the treaty obligations to legislate examined before, it can be argued that states have at least consented to a weak-form judicial review of legislation when subjecting themselves to the jurisdiction of human rights courts.

Concerning the strong-form review and legislative remedies, this could be seen differently. At the moment of its inception, it was certainly not foreseen that any of the three regional human rights courts would have the power to order legislative reforms. Instead, this competence has been developed through their respective judicial practice. It can thus be argued that the courts have gone "beyond what was envisaged as part of the delegation of authority".[279] However, the original consent of states still implied accepting that their legal order should conform to the respective human rights treaty, including an obligation to adapt it if this was not the case. In this respect, what human rights courts do when issuing legislative remedies can also be regarded as the concretisation of a primary obligation, as mentioned before. Moreover, tacit consent to such measures can be implied in the fact that states have – despite some exceptions – accepted them, and in some cases even encouraged courts to make use of these measures.[280]

It has to be noted moreover that there has been a shift in the past decades with respect to the traditional understanding of sovereignty. While it used to have an almost absolute character against external interference, nowadays it is generally accepted that "respect for sovereignty is being linked to respect for human rights".[281] On the basis of the principle of humanity, sovereignty thus carries with it a responsibility to protect human rights, and it can be restricted if a state fails to comply with such responsibility.[282] Peters made this argument with respect to humanitarian interventions, which affect a different element of sovereignty (mainly its external dimension) but are arguably even stronger interferences than those

278 Çalı, in Lang and Wiener (eds.), 2017, p. 297, stating that for this reason, "[i]n the field of international human rights law, the lack of a constitutional fabric argument and the lack of delegation argument are justifiably downplayed".

279 Von Staden, *I•CON* 2012, p 1034.

280 See in this respect Chapter 6 of the book, examining the issues of compliance and backlash with respect to legislative remedies.

281 Peters, *LJIL* 2006, p. 587.

282 See Peters, "Are we Moving towards Constitutionalization of the World Community?", in Cassesse (ed.), 2012, p. 130.

caused by legislative measures.[283] In this context, she claims that "sovereignty has already been relegated to the status of a second-order norm which is derived from and geared towards the protection of basic human rights, needs, interests, and security".[284] Therefore, if a state fails to guarantee the rights of its population, an external intervention can be justified. These considerations lie also at the basis of the 'responsibility to protect principle', endorsed by the UN General Assembly in 2005. Although this principle and humanitarian interventions are still controversial and have been subject to much debate (especially since the NATO-led intervention in Libya of 2011), sovereignty and human rights are nowadays clearly interconnected. In any case, this shows that the legitimacy of sovereignty-intrusive measures needs to be examined beyond the issue of consent.

As will be explained in more detail in Chapter 5, the increasing authoritarian tendencies in several states under the supervision of human rights courts makes the intrusion in their sovereign sphere by these courts more legitimate. It has also been argued with respect to the ECtHR that expanding its mandate in order to protect vulnerable or unpopular groups "can be an affirmative source of legitimacy".[285] As will be shown in Chapter 4, an important number of legislative remedies are precisely directed at the protection of such vulnerable groups. In addition, the aforementioned lack of domestic direct effects of legislative measures allows for courts to use different degrees of remedial deference when issuing them, which has also an important influence on its legitimacy. The fact that such measures allow for – or even trigger – public deliberation around a specific issue is an essential aspect to be considered in this regard, as will be explored in Chapter 5.

In sum, even if legislative remedies are highly intrusive with respect to states' sovereignty, human rights courts are arguably legitimised to issue them under specific circumstances. This legitimacy is derived from the primary obligations to legislate and the cession of sovereignty that states consented to when ratifying a human rights treaty, from the increased interlinkages between sovereignty and human rights protection, and from contextual elements concerning the balance between the degree of defer-

283 Anne Peters, "Humanity as the A and Ω of Sovereignty", *EJIL* 20(3), 2009, pp. 513–544.

284 Peters, *EJIL* 2009, p. 544.

285 Molly K. Land, "Justice as Legitimacy in the European Court of Human Rights", in Nienke Grossman et al. (eds.), *Legitimacy and International Courts*, Cambridge: CUP, 2018, pp. 83 – 113, at p. 83.

ence afforded to the domestic legislature when implementing such remedies and the democratic credentials of the state in question. The latter elements will be explored more closely with respect to the actual legislative measures of human rights courts in Chapter 5 of this book.

c) Legislative remedies and the efficiency of human rights courts

Finally, besides the effectiveness considerations concerning the protection of specific rights, there are also more pragmatic reasons for the use of legislative remedies. These have to do mainly with the caseload problems faced by human rights courts. This has been for many years now one of the main problems affecting the efficiency of the ECtHR and is also increasingly worrying for the other two regional courts.[286] One of the main consequences of this caseload crisis is the notable delay in processing applications. This leads to human rights courts failing to live up to their own standards concerning the excessive length of judicial proceedings and its effects on the right to a fair trial.[287] In addition, it has been argued with respect to the ECtHR that when it fails to provide a timely response to the complaints submitted to it, "the grievances lose their urgency, while the policies and practices they bring to the attention of the Court continue to become entrenched in their politico-legal orders".[288]

These caseload issues, especially before the ECtHR, are closely related to the so-called 'repetitive cases' (i.e., those affecting the same state and the same substantive issue) which constitute more than half of the pending applications before this Court.[289] Even if the caseload problems of the ECtHR slightly improved during the last years, especially due to more

286 In the case of the IACtHR, statistics show that by the end of 2022, 3629 petitions and cases were pending before the IACmHR, while this body refers not more than 40 cases per year to the Court. Therefore, a serious caseload problem can be found in this case before the Commission.

287 See in this context the jurisprudence included in Chapter 4 on legislative remedies concerning the excessive length of judicial proceedings.

288 Esra Demir-Gürsel, "The limits of the European Court of Human Rights vis-a-vis contestation and authoritarianism: concluding observations", in Helmut Philipp Aust and Esra Demir-Gürsel, *The European Court of Human Rights - Current Challenges in Historical Perspective*, Cheltenham: Edward Elgar, 2021, pp. 244–263, at p. 257.

289 Edith Wagner, "Repetitive Cases: European Court of Human Rights (ECtHR)", in *MPEIPro*, para. 2.

restrictive admissibility requirements and other procedural reforms, the number of repetitive cases has remained problematic.[290] This shows that while states are mostly complying with the payment of compensation and other individual measures, they are failing to solve the structural issues that lay behind human rights violations, such as adapting a deficient legislative framework. In this context, authors have found that "the docket of the Court is biased toward particularly problematic cases, where there has already been considerable resistance from the defendant state with respect to recommended policy changes".[291]

Thus, an increased use of legislative remedies could arguably contribute to a decrease in repetitive applications, as such remedies can situate the obligation to solve these structural issues in the forefront, thereby preventing additional violations caused by the application of an incompatible law or by the lack of an adequate legislative framework. The use of legislative remedies might thus be necessary for ensuring the long-term efficiency and sustainability of human rights protection systems.

Interim Conclusion: Domestic Laws in Three Stages of Human Rights Adjudication

In sum, the relation between international human rights adjudication and domestic legislation can be examined around three procedural stages. First, in the pre-judgment phase, one can find the obligations to legislate imposed by human rights treaties. As it was shown above, these obligations can be of a general or specific nature, and they can be explicit or implicit in the treaties. In addition, treaty obligations to legislate also affect the way in which legislative remedies are ascribed to remedial categories, an issue that will be explored in the next chapters. In this sense, these measures are not obligations arising *de novo* as a consequence of a human rights violation, but instead pre-existing commitments that a state has failed to live up to.

Secondly, in the judgment phase, an essential element that links treaty obligations to legislate with domestic laws is the review of legislation carried out by human rights courts. This review constitutes one of the main tasks performed by these courts and does not require extensive analysis concerning its most usual form (an alleged violation that is caused by the application of a law which is potentially incompatible with the human

290 Glas, *HRLR* 2020, p. 125.
291 Staton and Romero, *ISQ* 2019, p. 481.

rights instrument). Instead, this chapter has focused on two aspects that fall outside this traditional understanding, because they relate to situations in which the law was not applied. The first is the competence of courts to perform an abstract review of legislation under specific circumstances and the groundbreaking approach adopted by the ACtHPR in this respect. The second aspect is the advisory review of legislation, which is certainly not that closely related to the remedial part but is still important in order to examine alternative forms of review.

Thirdly, although legislative remedies are technically also included in the judgment, they concern especially the post-judgment phase, when they will need to be implemented. This implementation, as well as other consequences of legislative measures, will be examined in detail later.[292] This chapter has focused instead on the effects of legislative remedies on human rights adjudication as a whole. It has been argued in this respect that legislative remedies make an important contribution to the constitutionalisation of this regime. In this context, an aspect that authors have traditionally highlighted to clearly differentiate constitutional adjudication and human rights adjudication is that in the latter case, courts would lack the capacity to deliver binding orders directed at the legislature.[293] However, when legislative remedies are included in the judgment this difference is to some extent diluted. In addition, this chapter has also called into question other assumptions concerning the absence of constitutional features in human rights adjudication. For example, the alleged lack of competence to exercise judicial review of laws *in abstracto* has also thrown some scepticism towards the constitutionalist reading of the regional human rights courts' functions.[294] However, it has been shown that there are instances in which both the ECtHR and the IACtHR carry out such an abstract review, and that in the case law of the ACtHPR, this has become a very usual practice.

Finally, the last element related to the constitutional dimension of legislative measures concerns the intrusiveness of these measures and the legitimacy of human rights courts to order them. Although these measures can be considered especially intrusive upon the sovereignty of states, it is sustained that such sovereignty considerations are increasingly attached

292 See Chapter 6 for further discussion.

293 For example, Ulfstein, *Global Constitutionalism* 2021, p. 166, argues that the ECtHR is generally less intrusive than constitutional courts in terms of interfering with democratic decision making, because "it is up to the state to decide upon the effects of the ECtHR judgments in national law".

294 See for example Christoffersen, in Christoffersen and Madsen (eds.), 2011, p. 189.

to the effective protection of human rights. If states commit serious and systematic human rights violations as a result of their legislative framework, human rights courts supervising them are legitimised to tackle the root cause of these infringements. In addition, an indirect source of consent can be found in the obligations to legislate outlined above, as states have committed to adapt their legislative framework to the corresponding treaty. These measures can also help to ensure the efficiency of human rights protection systems in the long term. However, courts should be extremely cautious when making use of these remedial measures. On the one hand, the democratic credentials of the respondent states should be taken into account, and on the other hand, these measures should not be overly specific, in order to leave domestic legislatures a margin of deliberation. These are issues that will be assessed with respect to the remedial practice of the three courts in the second part of the book. But before that, legislative remedies will be situated in the remedial landscape of general international law (in Chapter 2) and in that of international human rights law (in Chapter 3).