Chapter 3: The Special Nature of Remedies in International Human Rights Adjudication

The previous chapter examined the issue of legislative remedies in general international adjudication, finding that although general international courts such as the ICJ would in principle have the authority to issue such remedies, it is unlikely that they will do so having in mind their particular role and remedial practice. This is different in the case of human rights courts, which have already included legislative remedies in their judgments. Arguably, this is a consequence of the different functions of the latter courts, which are not to solve disputes among equals, but to supervise compliance with concrete treaties and determine possible infringements in an unequal relationship between states and their citizens. But perhaps there are also additional motives in this respect. This chapter will therefore focus on the question of whether remedies before human rights courts possess special functions and features, and whether legislative remedies are an intrinsic part of such specialty.

In order to answer this question, the first section of the chapter will explore the special nature of human rights remedies from an abstract perspective, while the second section will explore the remedial practice of the three regional human rights courts. This will offer an overview of the remedial landscape before each of these courts, with a particular focus on the use of legislative remedies, which will be introduced in the third section of this chapter. Such measures will be situated in the remedial context of each human rights court and some general issues will be examined in this respect, before starting with the case law analysis that will be included in the second part of this book.

I. A Remedial Lex Specialis *in International Human Rights Law?*

As examined in the previous chapter, remedies in general international law have acquired a particular shape and scope, with its basis in the PCIJ's *Factory at Chorzów* judgment and the subsequent practice of the ICJ, leading to the codification provided in the ARSIWA. From that point of departure, each sub-field of international law has developed its own law and practice

on secondary obligations for the breach of primary norms.[460] This is also the case with international human rights law, a sub-field of international law that has been developing for over seventy years. In this regard, former IACtHR and ICJ judge Cançado Trinidade already argued in 2005 that international human rights law should possess an 'autonomy', in order to adapt the traditional rules and concepts of general intentional law in a way that would allow for increased protection of the individual.[461] The specialty of international human rights adjudication *vis-à-vis* general international adjudication has been extensively dealt with, although authors have mostly focused on issues of interpretation and jurisdiction, and not so much on remedies.[462] One exception in this respect is Shelton, who concludes that international human rights law "has created a mixture of remedies drawn from the traditional law on state responsibility, domestic legal systems, and the different views of judges about the role of tribunals in affording relief to victims of state abuse".[463] This is an issue closely related to the frequently discussed topic of the fragmentation of international law, as the area of remedies is one in which such fragmentation can be observed.[464]

460 For example, in the field of international humanitarian law see Cristián Correa, Siuchi Furuya and Clara Sandoval, Reparation for Victims of Armed Conflict, *Max Planck Trialogues on the Law of Peace and War* (vol. II), Cambridge: CUP, 2020. Regarding international trade law, see for example Chester Brown, 2007, p. 218 (arguing for instance that "'compensation' under WTO law does not have the same meaning as in general international law"); and for the field of international environmental law, see Pierre-Marie Dupuy and Jorge Viñuales, *International Environmental Law*, Cambridge: CUP, 2nd ed., 2018, at pp. 291-354.

461 Antonio Augusto Cançado Trinidade, "International Law for Humankind: Towards a New Jus Gentium", *Recueil des Cours* 316, The Hague, 2005.

462 See for example Lucius Caflisch and Antônio Augusto Cançado Trinidade, "Les conventions américaine et européenne des droits de l'homme et le droit international general", *Revue générale de droit international public* 108, 2004, pp. 5-63; Anne van Aaken and Iulia Motoc (eds.), *The European Convention on Human Rights and General International Law*, Oxford: OUP, 2018.

463 Dinah Shelton, "The Jurisprudence of Human Rights Tribunals on Remedies for Human Rights Violations", in J.F. Flauss (ed.), *International Protection of Human Rights and Victims' Rights*, Bruxelles: Bruylant, 2009, at p. 58. See also for an analysis of the specialty of human rights remedies, Frédéric Vanneste, *General International Law Before Human Rights Courts*, Antwerp: Intersentia, 2010, at pp. 504-528.

464 See ILC, *Fragmentation of international law: difficulties arising from the diversification and expansion of international law*, Report finalised by Martti Koskenniemi, 2016. See also, focusing on the perspective of the ICJ, Martti Koskenniemi and Päivi Leino, "Fragmentation of International Law? Postmodern Anxieties", LJIL 15(3), 2002, pp. 553 – 579.

This section will thus examine the special features of remedies in international human rights law from an abstract perspective, before focusing on the actual remedial practice of human rights courts and the issue of legislative remedies, examining how the courts started to include this type of remedial orders and providing a general overview of this practice. In order to analyse this issue more broadly, it is first useful to compare the main codifications concerning remedies in general international law (the ARSIWA) and human rights law (the UN Basic Principles).[465] Thereafter, the specialty of human rights remedies will be examined from functional, doctrinal and regulatory perspectives.[466]

1. The ARSIWA *vis-à-vis* the UN Basic Principles

One useful way to gain a first glimpse at the differences concerning remedies in these two fields of international law is by comparing how such remedies are codified. Remedies in general international law are codified in the ARSIWA – examined in detail in the previous chapter – while a codification of remedies in human rights law can be found in the UN Basic Principles on the Right to a Remedy and Reparation, which were adopted by the UNGA in December 2005.[467] The latter instrument represented an important development in international law, as the aspect of remedies used to belong to the sphere of inter-state responsibility, and before the Basic Principles, there was no codification of available remedies in human rights law or humanitarian law.[468] This document underwent a very long drafting

465 These are however not the only codifications in this regard. For example, the HRCee has laid down its own guidelines on the issue of remedy and reparation, which are however very similar if not identic to the UN Basic Principles. See HRCee, *Guidelines on measures of reparation under the Optional Protocol to the International Covenant on Civil and Political Rights*, 2016.

466 In this respect, it will be explored whether such specialty can flow from international human rights regulations, from the functions of remedies in this field, and from the practice of human rights courts.

467 UN Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the UN General Assembly on 16 December 2005, available at: https://www.ohchr.org/en/instrumentsmechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation.

468 See Theo van Boven, "Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines", in Carla Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, Brill, 2009, p. 20.

process, where its scope was substantially expanded. Originally, its author Theo van Boven was charged with the task of conducting a study on "the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms".[469] The final text, adopted sixteen years later, covers not only these three aspects but includes a rather comprehensive set of principles and guidelines, pertaining both to the procedural and the substantive dimension of the right to a remedy and reparation.

As van Boven explains, the political backing of this process came mostly from Latin American states, and to a lesser extent from Western European states.[470] This is perhaps due to the fact that the IACtHR had already developed a rather progressive remedial practice during the late 1990s and the early 2000s, as will be seen below.[471] Thus, Latin American states were already familiar with extensive remedies for human rights violations. The same goes to a lesser extent for European states, as the ECtHR also began to widen its remedial focus during that time.[472]

Although the Basic Principles are certainly not binding, as its Preamble highlights, they can be regarded as "declaratory of legal standards in the area of victims' rights".[473] Nevertheless, the issue of whether these standards match the international legal practice is still "far from settled".[474] The drafters of the Basic Principles took into account, among treaties and other documents, the previous judgments and decisions of human rights courts and treaty bodies. However, it is unclear whether the subsequent practice of these bodies continues to be reflected therein, especially due to the rapid development of their remedial jurisprudence since 2005. In any case, after the adoption of the Basic Principles, international human rights bodies have engaged more with their mandate of providing remedies to victims, even generating a "new behaviour on remedy and reparation" in accordance with these standards.[475]

469 Van Boven in Ferstman et al. (eds.), 2009, p. 28.
470 See van Boven in Ferstman et al. (eds.), 2009, p. 29.
471 A major shift in the remedial practice of the IACtHR took place between 1998 and 2001. See below section II. 1(b).
472 The ECtHR's first individual and general remedies (besides compensation) were also ordered in 2004, See section II. 1(a).
473 Van Boven in Ferstman et al. (eds.), 2009, p. 32.
474 Clara Sandoval, "The Legal Standing and Significance of the Basic Principles and Guidelines on the Right to a Remedy and Reparation", *ZaöRV* 78, 2018, p. 566.
475 Sandoval, *ZaöRV* 2018, p. 567.

The ARSIWA also includes a similar codification of remedies for general international law which was adopted in 2001, four years before the Basic Principles. This instrument clarifies in its Art. 33 that the obligations contained therein are intended to "be owed to another state, to several states, or to the international community as a whole".[476] Thus, individuals are in principle left out of the scope of application of the ARSIWA, whereby this provision shows that the ARSIWA "seem to recognize the need for a *lex specialis* for reparations for human rights violations".[477] Several authors have therefore advocated against the application of general international law and principles on state responsibility by human rights courts.[478]

Nevertheless, the Commentary to the ARSIWA mentions that this codification is applicable to "the whole field of the international responsibility of states, whether the obligation is owed to one or several states, to an individual or group, or to the international community as a whole".[479] In this respect, Crawford stated that the ARSIWA "are clearly conceived as applying –subject to the *lex specialis* rules– to human rights treaties".[480] Similarly, Buyse mentions that individuals "should have a right to reparation applying the ILC Articles by analogy".[481] Indeed, general international law and the ARSIWA have also been heavily influenced by the practice of

476 ARSIWA, Art. 33(1). This is notwithstanding the fact that Art. 33(2) recognises that rights arising from the international responsibility of the state "may accrue directly to any person or entity other than a State".

477 Vanneste, 2010, p. 508.

478 See for example Malcolm Evans, "State Responsibility and the ECHR", in Malgosia Fitzmaurice and Dan Sarooshi (eds.), *Issues of State Responsibility before International Judicial Institutions*, Hart, 2004, p. 159, stating that the character of the ECHR "make the international principles of State responsibility irrelevant to its operation". Similarly, Melanie Fink, "The European Court of Human Rights and State Responsibility", in Christina Binder and Konrad Lachmayer (eds.), *The European Court of Human Rights and Public International Law: Fragmentation or Unity?*, Nomos, 2014, p. 93.

479 ILC Commentary, reproduced in James Crawford, *The ILC Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge: CUP, 2002, p. 76.

480 James Crawford and Amelia Keene, "The Structure of Sate Responsibility under the European Convention on Human Rights", in Anne van Aaken and Iulia Motoc (eds.), *The European Convention on Human Rights and General International Law*, Oxford: OUP, 2018, at p. 178.

481 Antoine Buyse, "Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law", *ZaöRV* 68, 2008, pp. 129-153, at p. 135.

human rights institutions.[482] Thus, remedies in these two areas are closely connected.

As mentioned in the previous chapter, the classification of remedies provided in the ARSIWA divides the forms of reparation along the lines of restitution, compensation and satisfaction, and adds cessation and guarantees of non-repetition as separate consequences of internationally wrongful acts. On the other hand, the UN Basic Principles include five main remedial categories, labelling all of them as reparations: restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition. In this respect, one difference that stands out between the ARSIWA and the Basic Principles is that the former instrument does not include rehabilitation among its remedial categories. The main reason for this difference is precisely that the ARSIWA were intended to apply mainly for inter-state relations, and not for the relation between a state and its citizens. In this regard, a state cannot benefit from rehabilitation measures, such as medical or psychological care; these are measures specifically directed towards individual victims.

The other significant difference at play is the fact that cessation and guarantees of non-repetition are treated as legal consequences of an internationally wrongful act distinct from reparation in accordance with the ARSIWA. In the UN Basic Principles, on the other hand, cessation is included under the heading of satisfaction, and guarantees of non-repetition are considered reparatory measures and not separate consequences of a violation. The latter issue is especially surprising, as the beneficiaries of such guarantees are usually not the victims of the specific violation but rather other potential victims or society as a whole.[483] Thus, it might have been more convincing to include guarantees of non-repetition as a secondary state obligation separate from the obligation to provide reparation. The Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, which was adopted the same year as the UN Basic Principles, actually treat reparation and guarantees of non-repetition as two distinct issues.[484] This is most likely a better approach, as the concept of reparations is related to the redress of

482 Rober McCorquodale, "Impact on State Responsibility", in Menno T. Kamminga and Martin Scheinin (eds.), *The Impact of Human Rights Law on General International Law*, Oxford: OUP, 2009, pp. 235-254.

483 With respect to cessation, see also Shelton, 2005, p. 149, arguing that it is part of the general obligation to abide by international law and not a form of reparation.

484 UN Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (E/CN.4/2005/102/Add.1), 8 February 2005.

specific victims and is past-oriented, contrary to such guarantees which are future-oriented and for the benefit of society as a whole.

In sum, it can be observed that despite the differences regarding the categorisation of remedies in the ARSIWA and the UN Basic Principles, the provisions are still closely related and include rather similar secondary obligations resulting from the breach of primary ones. However, further differences can be observed when looking at the actual functions, regulations and practices concerning remedies in international human rights law.

2. The Special Function of Remedies in International Human Rights Adjudication

The most obvious difference between remedies in human rights law and those pertaining to the field of general international law is that the beneficiaries of the former remedies are generally not states but individuals. This clearly changes the purpose and function of remedies in this area. It is moreover a development that was not contemplated at the time of *Factory at Chorzów* and the early international law on remedies.[485] Thus, international human rights courts had to develop their own remedial practice departing from that of general international law but rather, adapting it to their own context and victims. In order to examine the different functions of remedies, a first look into the remedial practice of human rights courts is therefore necessary.

In this regard, a number of aspects have emerged in which remedies before human rights courts distance themselves from those before general international courts. For example, the healing purpose of remedies is much more present in the former field. This explains the aforementioned inclusion of rehabilitation as an autonomous remedial category under the UN Basic Principles and the use made by human rights courts of this type of remedy, ordering states to provide medical and psychological treatment to victims. Instead, one of the main purposes of remedies in general international law is to put an end to the internationally wrongful act. Measures of cessation are thus given more importance in this field, as was shown in the previous chapter.

485 As Dionisio Anzilotti wrote in 1906, "la conduite d'un État, toute contraire qu'elle soit au droit international, ne saurait jamais donner naissance à un droit de l'individu à la réparation du dommage souffert" (Dionisio Anzilotti, "La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers", 13 *Revue Générale de Droit International Public*, 1906).

In addition, the purpose of deterrence has also a greater weight in human rights remedies. Although in human rights adjudication "[t]he goal of deterrence is intrinsically present within all remedial measures",[486] this is most clearly seen in the extended use of guarantees of non-repetition. Courts such as the ICJ are probably not too worried about repetitive cases (i.e. cases against the same state and about the same substantive issue) when designing their remedial measures. It is indeed very rare that the same inter-state dispute reaches the ICJ more than once.[487] On the contrary, repetitive violations (although suffered by different victims) are rather common before regional human rights courts, especially before the ECtHR.[488] Thus, deterrence becomes a more important element in these courts' remedial landscape, not only to prevent additional violations from taking place but also as a means of managing the various courts' caseloads. The extended use of guarantees of non-repetition in human rights adjudication is a good example of it, as they serve the purpose of preventing repetitive violations. This can also explain why legislative reforms are ordered mainly in international human rights law, and not in other areas of international adjudication.

Moreover, it is also relevant to note the subsidiary function of remedies in international human rights adjudication. As provided by the right to a remedy and reparation included in human rights treaties, the redress of human rights violations is an issue that needs to be solved primarily by domestic authorities. Only when they fail to do so can human rights courts step in. On the contrary, in general international law, the jurisdiction of courts is usually based on a treaty clause or an agreement among the parties that gives the ICJ or another international adjudicatory body the primary competence to decide over a dispute. Thus, the possibility of having access to a remedy at the domestic level does in principle not play a role before the ICJ, while it is a key aspect in the remedial practice of human rights courts. Subsidiarity comes into play during the whole procedure before human rights courts, not only in the remedial stage. In this respect, Besson

486 Cornejo, *I•CON* 2017, p. 374.

487 An exception in this regard concerns the *Jurisdictional Immunities* case, decided by the ICJ in 2012 and resubmitted by Germany in 2022 (see ICJ, *Questions of jurisdictional immunities of the State and measures of constraint against State-owned property (Germany v. Italy)*, Application Instituting Proceedings containing a Request for Provisional Measures, General List No. 183, filed in the Registry of the Court on 29 April 2022).

488 See on repetitive violations, section II.1(a) below.

identified three types of human rights subsidiarity: 'procedural subsidiarity' is the one related to the admissibility requirements, while 'substantive subsidiarity' determines the intensity of review and 'remedial subsidiarity' has to do with the choice of remedies.[489] The latter type of subsidiarity is the one most relevant for this analysis, and it is also where sharper differences among human rights courts can be found.

Subsidiarity is especially relevant before the ECtHR, where this principle has played an increasingly important role in recent decades.[490] The strict adherence to the principle of subsidiarity is, in fact, one of the main explanations for the ECtHR's remedial cautiousness, as will be explained below. The IACtHR and the ACtHPR usually include in their judgments a long list of rather specific remedies for the state to implement. This shows that, according to their understanding, if the state failed to remedy the situation in the first place and this led to the finding of a human rights violation by these courts, it is their task to indicate the specific steps that need to be taken to solve the problem. The Strasbourg Court has a different understanding of this issue, namely that even in those cases in which the victims could not obtain redress for a human rights violation at the domestic level – which in turn resulted in the finding of an infringement by the Court – the state remains primarily responsible for choosing the means for remedying it. Although the payment of a specific sum in the form of compensation is usually ordered in the ECtHR's judgments, this Court is still rather cautious with respect to other remedial orders, including them only exceptionally.[491]

In this regard, it is useful to distinguish between the negative and positive dimensions of subsidiarity. 'Negative subsidiarity' limits the intervention of the higher level (in this case, human rights courts) in favour of the lower level (the national authorities), on the grounds of the higher democratic legitimacy, the better placement and the expertise of the latter. The 'positive

489 Samantha Besson, "Subsidiarity in International Human Rights Law — What is Subsidiary about Human Rights?", *American Journal of Jurisprudence* 61 (1), 2016, pp. 69–107, at pp. 78-83.

490 In 2014, Robert Spano argued that the ECtHR had entered the "age of subsidiarity". See Robert Spano, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity", *HRLR* 14(3), 2014, pp. 487-502. Moreover, with the entry into force of Protocol 15 in 2021, the principle of subsidiarity is now part of the Preamble to the ECHR.

491 See however Besson, *AJJ* 2016, p. 83, highlighting that "[i]n recent years, remedial subsidiarity has become more and more under threat in the ECtHR's case-law, especially in the Court's struggle against the lack of enforcement of its judgments by domestic authorities".

subsidiarity' on the other hand implies the duty of the higher level to act whenever the lower level fails in its task of effectively protecting its citizens from human rights violations.[492] In a remedial context, this means to determine the concrete secondary obligations that flow from that breach.[493] In this context, the ECtHR pays arguably more attention to the so-called negative subsidiarity than to the positive one.[494] Both the IACtHR and the ACtHPR have instead a rather 'positive-subsidiarity approach' in the remedial stage of the judicial procedures. This can also be interpreted as a direct consequence of differences in the provisions that regulate the human rights courts' remedial competences, which include a subsidiary element in the case of the ECHR but not in that of the other treaties. The principle of subsidiarity makes in any case an important contribution to the specialty of remedies in human rights adjudication.

3. The Regulation of the Human Rights Courts' Remedial Competence

In general international adjudication, the main legal basis for a court to order specific remedies flows from the states' customary obligation to remedy an internationally wrongful act – as already indicated in *Factory at Chorzów*.[495] This customary nature of the obligation to remedy is, however, not so clear with respect to human rights violations. There are still a significant number of states around the world that are not subject to any sort of compulsory human rights jurisdiction and thus have no state practice in redressing its citizens after a human rights violation.[496] The legal basis for

492 See in this respect Carozza, *AJIL* 2003, pp. 44 et seq., See also Marisa Iglesias, "Subsidiarity, margin of appreciation and international adjudication within a cooperative conception of human rights", *I•CON* 15(2), 2017, p. 403.

493 See Buyse, *ZaöRV* 2008, p. 135, indicating that the "subsidiary international role entails that human rights institutions (…) can also themselves recommend or order specific reparations to be made, but only if the national level has failed to play its role".

494 This can be seen not only in its remedial practice, but also in the areas of procedural subsidiarity (with increasingly strict rules of admissibility) and the substantive subsidiarity (with the frequent use and paramount importance of the margin of appreciation).

495 The ICJ has also declared that when jurisdiction exists, no separate legal basis for remedies is necessary (ICJ, *LaGrand* (2001), para. 48).

496 See Tomuschat, *TJICL* 2002, p. 183 ("At the present time there exists no general rule of customary international law to the effect that any grave violation of human rights creates an individual reparation claim under international law"). However,

human rights courts to order specific remedies is thus to be found in the respective human rights instruments.

This section will therefore briefly examine the remedial provisions of the three regional instruments, as well as the specific legal basis for ordering legislative measures. The first human rights instrument adopted – the UDHR – provided only for the right to a remedy before domestic institutions "for acts violating the fundamental rights granted (…) by the constitution or by law".[497] As highlighted by Tomuschat, it is still unclear whether this provision implies as well a right to reparation when a primary norm of the UDHR itself has been violated.[498] Such a provision was expressly included first in the ECHR, comprising not only the right to a domestic remedy in its Art. 13 for "everyone whose rights and freedoms as set forth in this Convention are violated", but also the right to a remedy before the ECtHR itself. The procedural aspect of this remedy is contained in Art. 34 ECHR, while the substantive one is laid down in Art. 41 ECHR.[499] The latter provision is thus the main legal basis for the ECtHR to order remedies, although due to its narrow scope, the Court has interpreted other provisions broadly in order to allow for an expansion of its remedial practice, as will be seen next.

a) The ECHR's limited remedial provision

The ECHR makes only one express reference to remedies in its Art. 41, which allows the Court to afford 'just satisfaction' to the injured party if its domestic law *"allows only partial reparation to be made"*. The concept of 'just satisfaction' has been traditionally understood in a narrow sense, comprising exclusively the payment of a monetary sum. Although it could arguably be interpreted more broadly, encompassing individual measures such as the release of prisoners or the overturn of domestic judgments, it is difficult to interpret this concept as including also general measures,

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the right of individuals to a remedy and reparation can be considered part of regional customary law in Africa, the Americas and Europe (see on human rights and regional customary law Vanneste, 2010, pp. 375-385). Actually, the IACtHR considered already in its first case on reparations that Art. 63 ACHR codifies a customary rule (IACtHR, *Velasquez Rodriguez vs. Honduras* (1989), para. 23).

497 Universal Declaration on Human Rights, Art. 8.

498 Christian Tomuschat, "Reparation for Victims of Grave Human Rights Violations", *Tulane Journal of International and Comparative Law* 10, 2002, pp. 157-184, at p. 161.

499 See on the difference between the procedural and substantive dimension of remedies the Introduction to this book.

such as the amendment of domestic laws. This is because conceptually 'just satisfaction' makes direct reference to the victims of the human rights violation, who are the addressees of such a form of reparation.[500] General measures such as legislative reforms are usually not for the benefit of the concrete victims of the violation but of other potential victims, in order to prevent them from materialising as such, or even of society in general.[501]

As a matter of fact, states were especially concerned with the possibility of the Court being able to challenge domestic laws during the drafting process of the ECHR.[502] One of the first drafts of the Convention contained a provision allowing for a wide array of remedial measures, declaring that the ECtHR "may either prescribe measures of reparation or it may require that the State concerned shall take penal or administrative action in regard to the persons responsible for the infringement, or it may demand the repeal, cancellation or amendment of the act".[503] However, this was rejected by the majority of state representatives, and the CoM instead proposed a provision suggesting that "the only form of reparations will be compensation".[504] The draft report to the CoM actually indicated that "the Court should only be permitted to give a ruling on cases of violations of the *individual* rights protected by the Convention and not of cases of violation of the Convention by legislative acts as such".[505] Thereby, the drafters "sought to create a 'sovereignty shield' that limited the Court's intrusiveness".[506]

500 In this respect, Art. 41 ECHR states that the Court shall "afford just satisfaction to the injured party". See Ichim, *Just Satisfaction,* 2014, p. 18, arguing that "[t]he Convention identifies the notion of 'just satisfaction' with the entire spectrum of reparation available to an injured party" although "[i]t normally takes the form of financial redress". See however Cassesse, "Towards Moderate Monism", 2012, arguing that Art. 41 should be interpreted differently in order to allow for extensive remedial measures, including those of a legislative nature.

501 See below section II. 3(e). See also Chapter 1 of this book.

502 See Ichim, *Just Satisfaction,* 2014, p. 11.

503 Convention for the Collective Protection of Individual Rights and Democratic Liberties by the States, Members of the Council of Europe, and for the establishment of a European Court of Human Rights to ensure observance of the Convention, Doc. INF/5/E/R, I *TP* 296–303, at pp. 300–302, Art. 13(b); cited in Schabas, *Commentary to the ECHR*, 2015, p. 830.

504 Schabas, *Commentary to the ECHR*, 2015, p. 831.

505 Preliminary Draft of the Report to the Committee of Ministers, 24 February 1950, Doc. CM/WP 1 (50) 1, A 847, III *TP* 246–79, at pp. 274–6 (emphasis in the original), cited in Schabas, *Commentary to the ECHR*, 2015, p. 831.

506 Helfer, *EJIL* 2008, p. 147.

This position prevailed to a great extent and was included in Art. 41 ECHR with the statement about providing "just satisfaction to the injured party". Therefore, due to this narrow legal basis, when the ECtHR started to include non-monetary measures in its judgments it needed to adopt an expansive interpretation of other provisions. Art. 46(1) ECHR plays the main role in this regard. This article states that "[t]he High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties". When the ECtHR orders the reform of domestic laws, it generally does so by relying on this provision. In this regard, the Strasbourg Court has come to sustain that Art. 46 includes an obligation to adopt the necessary individual and general measures to adequately comply with a judgment, without the need for the Court to expressly include them in its judgments.[507] Such an expansion of the legal basis was however criticised by judges dissenting to the early judgments with legislative measures,[508] and some authors also recommend a stronger legal basis for non-financial measures.[509]

Additionally, in accordance with Art. 19 ECHR, the primary function of the ECtHR is to ensure compliance with the obligations under the Convention. As legislative reforms can contribute significantly to the restoration of an ECHR-compliant status, this could also imply the competence to order

507 ECtHR, *Scozzari and Giunta vs. Italy* (2000), para. 249 ("The Court points out that by Article 46 of the Convention the High Contracting Parties undertook to abide by the final judgments of the Court in any case to which they were parties, execution being supervised by the Committee of Ministers. It follows, inter alia, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects").

508 See for example the partly dissenting opinion of Judge Zagrebelsky in *Hutten-Czapska v. Poland* (2006), noting "the weakness of the legal basis of the pilot-judgment procedure in its most evident aspect. I am referring to the indication in the operative provisions of the need for the State to amend its own legislation in order to solve a general problem affecting persons other than the applicant".

509 See for example Jannika Jahn, "Ruling (In)directly through Individual Measures? Effect and Legitimacy of the ECtHR's New Remedial Power", *ZaöRV* 74, 2014, p. 3 ("If the use of mandatory individual measures is to be expanded, it is hence recommended – de lege ferenda – that this power be provided with a clear legal basis so that the Court does not run the risk of losing its acceptance by the Convention states"). Similarly, Ichim, *Just Satisfaction,* 2014, pp. 255-256.

such measures,[510] and the Court has also relied on this provision in order to do so.[511] Thus, Arts. 41, 46 and 19 ECHR, when taken together, can form an annexe competence that serves as the legal basis for the ECtHR to order legislative remedies in its judgments. Former ECtHR judge Sicilianos adds in this respect Art. 32 ECHR (which reflects the principle of the *Kompetenz-Kompetenz*), and points to various resolutions of the CoM, arguing that they constitute 'subsequent practice' in the sense of Art. 31 VCLT.[512]

In sum, it can be observed that the remedial rules of the ECHR were originally rather limited, as they did not provide for other remedies besides 'just satisfaction'. Notably, the concept of *restitutio in integrum* – of crucial importance for remedies in general international law – was not included in the ECHR nor developed in the early case law of the ECtHR. This changed with the adoption of the ACHR, which includes a remedial provision allowing for remedies similar to those of general international law, including — besides the obligation to compensate victims — an additional obligation to remedy all consequences of the violation.

b) The ACHR's expansive remedial provision

The power of the IACtHR to order remedies is regulated under Art. 63(1) of the ACHR in a much broader way than that of its European counterpart.[513] This provision states the following:

> *If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.*[514]

The first draft of the ACHR, prepared by the Inter-American Council of Jurists in 1959, included a provision on remedies that was very similar to the

510 Sicilianos, *NQHR* 2014, p. 256; Jahn, *ZaöRV* 2014, p. 33.
511 ECtHR, *Manushaqe Puto vs. Albania* (2014), para. 105.
512 Sicilianos, *NQHR* 2014, pp. 259-260.
513 For a comparison between the remedial provisions of the ECtHR and the IACtHR, see for example Alexandra Huneeus, "Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts", *YJIL* 40(1) 2015, p. 8.
514 ACHR, Article 63(1).

one contained in the ECHR, mentioning "just compensation" as the only form of reparation "if the domestic law of the said Party allows only partial reparation to be made".[515] This was maintained in the proposal made by the IACmHR in 1968 but in the last days of negotiating the ACHR in the San José Conference of 1969, the current, far more comprehensive provision emerged and was eventually adopted.[516] As it stands, this provision offers a strong legal basis for the adoption of broad remedial measures. Although it does not specify the substance of available remedies, this has also been interpreted by the Court in a rather expansive way.

Besides the aforementioned Art. 63 ACHR, which already provides a broad mandate to issue a variety of remedies, legislative measures are supported by an additional provision. In fact, most of these orders have been directly linked to violations of the obligation to legislate contained in Art. 2 ACHR, which is considered to provide the legal basis for legislative remedies.[517] This provision establishes that

> *[T]he States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.*[518]

This general obligation to legislate finds no equivalent in the ECHR but is common in other human rights treaties, including the ACHPR.[519] The IACtHR thus often finds, in addition to other violations, that the law in question "violates *per se* Article 2 of the American Convention".[520] In such cases, the violation of Art. 2 is always found in conjunction with another human rights violation caused by the application of the law.[521] Thus, it can be observed that the ACHR contains a remedial provision that not only allows for the Court to order measures similar to those in general international law but even goes beyond that, with its general obligation to

515 Draft Convention on Human Rights, Inter-American Council of Jurists, September 1959, reproduced in the *Inter-American Yearbook of Human Rights*, 1968, p. 269.
516 Hennebel and Tigroudja, *Commentary to the ACHR*, 2022, p. 1303.
517 Novak, *Recueil des Cours* 2017, p. 162 ("The Inter-American Court is competent to order the amendment of the domestic legislation of States under Article 2 of the American Convention on Human Rights").
518 ACHR, Article 2.
519 See Chapter 1 of this book.
520 See for example IACtHR, *Suárez Rosero v Ecuador* (1997), para. 98.
521 This is due to the fact that the IACtHR cannot perform a review of legislation *in abstracto*. See in this respect Chapter 1 of this book.

legislate proving to be a solid basis for the request of legislative reforms. A similar conclusion can be reached when examining the remedial provision included in the ACHPR, which can be interpreted as being even more forward-looking than that of the ACHR.

c) The ACHPR's concise yet wide remedial provision

The ACtHPR is by far the youngest of the three regional human rights courts. The ACHPR entered into force in 1986, but it didn't foresee the creation of a court, only that of a quasi-judicial body – the ACmHPR – that was established in 1987. Moreover, out of the three main regional human rights instruments, the ACHPR is the only one that does not contain a provision on the remedies that victims are entitled to receive. For that reason, the African Commission has been cautious on that front, especially during its early practice.[522] It took almost another twenty years until the *Protocol to the ACHPR on the Establishment of an African Court on Human and Peoples' Rights* (also known as the Ouagadougou Protocol) entered into force in 2004.[523] This Protocol regulates the establishment and functioning of the ACtHPR, including a specific provision on remedies in its Art. 27, which determines that

> *If the Court finds that there has been a violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment or fair compensation or reparation.*[524]

It can be observed that the drafters of the Protocol took inspiration from the American Convention, as this provision is drafted in a similar way to Art. 63 ACHR. Although it is more concise and does not include the aspects about ensuring the enjoyment of the right that was infringed, the general thrust of both provisions is almost identical. It also departs from the approach of the ECHR and clearly allows for the possibility of ordering

522 See Shelton, 2015, pp. 232-237.

523 Actually, one of the reasons for the adoption of this Protocol and the establishment of a court was the correction of this "weakness" of the ACmHPR, as it has no clear mandate to issue remedies. See Frans Viljoen, "The African Court of Human and Peoples' Rights: An Introduction", *UN Audiovisual Library*, available at: https://media.un.org/en/asset/k19/k19bku06w8.

524 Protocol to the ACHPR on the Establishment of an African Court on Human and Peoples' Rights, Article 27.

non-monetary measures. It could be even seen as going beyond the ACHR's remedial provision, as it refers to "remedy[ing] the violation" in general, and not only the consequences of it. It has been therefore considered "one of the most progressive and broadest provisions regarding reparations".[525]

Even though the main remedial provision can already be interpreted as encompassing such competence, the ACHPR includes an additional legal basis to issue legislative remedies, like its American counterpart. This is the general obligation to legislate contained in Art. 1 ACHPR, stating that state parties "shall undertake to adopt legislative or other measures to give effect to [the rights contained in the Charter]". It has been however argued that this obligation is not as strong as that of other treaties, as it talks about "giv[ing] effect" to rights, instead of "guaranteeing" or "ensuring" them.[526] By contrast, Murray claims that this provision would require states to provide constitutional protection for the rights of the ACHPR.[527]

4. The Specialty of Remedies According to Human Rights Courts

Human rights courts themselves have also commented on the specialty of their remedial approaches *vis-à-vis* those in general international adjudication. On the one hand, the point of departure for justifying the expansion of human rights courts' remedies beyond monetary measures has been the judgment of *Factory at Chorzów*. The three regional human rights courts made reference to this judgment of the PCIJ in order to sustain their competence to order such measures.[528] Furthermore, in their early judgments,

525 Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, Cambridge: CUP, 2012, p. 82. This is also the view of Shelton, who argues that "[t]his provision is broader than all the current mandates of international human rights bodies to afford remedies to victims of human rights abuse" (Shelton, 2015, pp. 237-238).

526 Nsongurua J. Udombana, "Between Promise and Performance: Revisiting States' Obligations under the African Human Rights Charter", *Stanford Journal of International Law* 40, 2004, pp. 105-142, at p. 126.

527 Rachel Murray, *The African Charter on Human and Peoples' Rights: A Commentary*, Oxford: OUP, 2019, p. 19.

528 See ECHR, *Papamichalopolous v. Greece* (1995), para. 36; IACtHR, *Aloeboetoe vs. Suriname* (1993), para. 49; ACtHPR, *Rev. Christopher Mtikila vs. Tanzania* (2011), para. 27. On the IACtHR, see however Tomuschat in Tulane Journal (2002), p. 166, arguing that "the jurisprudence of the Inter-American Court is predicated on a basic misunderstanding" because "neither the Permanent Court of International Justice nor its successor, the ICJ, has ever said that states are under an obligation

human rights courts categorised the remedies that they could order along the lines of the ARSIWA.[529]

On the other hand, the remedial case law of these courts progressively departed from that in general international adjudication. This departure led to regional human rights courts themselves confirming the *lex specialis* nature of human rights adjudication. For example, the IACtHR argued in 2005 that the ACHR

> *constitutes lex specialis regarding State responsibility, in view of its special nature as an international human rights treaty vis-à-vis general international law. Therefore, attribution of international responsibility to the state, as well as the scope and effects of the acknowledgement made in the instant case, must take place in light of the Convention itself.*[530]

The ECtHR has been more flexible, arguing that it has to "determine State responsibility in conformity with the governing principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty".[531] Thus, it seems that courts themselves take into account the specialty of human rights law, although such arguments are not so often found with respect to reparations, where the influence of general international law is perhaps more clearly seen.

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to compensate their own citizens". Moreover, the IACtHR departed already in its first judgment from *Factory at Chorzów* by stating that compensation would be the "most usual" way of providing such reparation (IACtHR, *Velásquez Rodríguez v. Honduras* (1989), para. 25). On the contrary, the PCIJ affirmed in *Factory at Chorzów* that the primary form of reparation is restitution, and compensation would only come into play when restitution was no longer possible (see Chapter 2 of this book).

529 See ACtHPR, *Ernest Zongo vs. Republic of Burkina Faso* (2015), paras. 20-21, 29, specifying that under ARSIWA reparation shall take the form of restitution, compensation, and satisfaction. On the other hand, the judgment of IACtHR, *Velásquez Rodríguez v. Honduras* (1989), paras. 25 and 26, having been issued before the adoption of ARISWA, points at the elements that reparation should include, but without including satisfaction nor guarantees of non-repetition. However, some years later the Court expanded its understanding of the concept of reparation, by arguing that it is "a generic term that covers the various ways a State may make amends for the international responsibility it has incurred (restitutio in integrum, payment of compensation, satisfaction, guarantees of non-repetitions among others)". Thereby it moved much closer to the categorisation of ARSIWA, although it had still not been adopted. See IACtHR, *Loayza Tamayo v. Peru* (1998), para. 85.

530 IACtHR, *Mapiripán vs. Colombia* (2005), para. 107.

531 ECtHR, *Bankovic vs. Belgium* (2001), para. 57.

Interim Conclusion: The Progressive Specialisation of Remedies before Human Rights Courts

In sum, this section has shown that although remedies possess certain special features in human rights law if compared to general international law, this does not represent a fundamental difference. The codification of remedies provided by the ARSIWA and the UN Basic Principles are quite similar, despite some particularities in their respective categorization of remedial measures. In addition, human rights courts also initially based their remedial competences on general international law considerations, although they slowly departed from them in order to highlight the special character of human rights law. One important difference in this respect concerns the function of remedies in human rights law, especially its subsidiary role.

With respect to the legal bases for remedies included in international human rights instruments, they are also rather similar to those of a customary nature in general international law, with the exception of Art. 41 ECHR, that is narrower. In addition, both the IACtHR and the ACtHPR have a strong legal basis for ordering legislative reforms, while the ECtHR has developed such a legal basis through its extensive interpretation of Art. 46 ECHR.[532] In sum, despite some legal design differences, there is an apparent similarity between general international law and human rights law in the area of remedies. With that being said, the remedial specialty in human rights adjudication can be more clearly observed when examining the actual practice of the three courts in this respect and comparing it to that of general international courts.

II. The Remedial Practice of Human Rights Courts

In order to examine the special nature of remedies in international human rights adjudication, it becomes relevant to look at the actual practice of human rights courts. This includes the evolution of the remedial practice before each of the three regional human rights courts as well as the remedies they currently apply. This will serve to shed light not only on the special features of remedies in this area but also on the differences among these

532 This does additionally offer a "legal design explanation" for the respective court's remedial intrusiveness, which will be examined below. See Çalı, *I•CON* 2018, pp. 227-229.

courts and the role of legislative measures in this respect. Remedies before human rights courts range from very specific and intrusive injunctions to broad requirements that aim to empower domestic actors to decide how to solve certain problems within a relatively wide range of options.

In this respect, Neuman identifies three approaches that can be taken by human rights tribunals towards the issue of remedies.[533] The first approach is called the "direct remedy model" and it implies that courts can directly order a wide range of remedies. He labels the second approach as the "monitoring model", whereby the tribunal defines the remedial goal or the minimum elements of a remedy and leaves discretion to the state in order to choose among alternatives, and the third approach as the "negotiation model", implying that the tribunal will facilitate and sometimes supervise a negotiation among the interested parties in order to find the appropriate remedies. The practice of the ACtHPR and the IACtHR would in this context be closer to the 'direct remedy model', while that of the ECtHR would be rather a 'monitoring model'. However, as Neuman recognises, most human rights courts and bodies do not ascribe exclusively to one of these models but rather apply what can be seen as hybrid models. There has also been a progressive change whereby human rights courts have arguably transited from remedial models closer to that of monitoring towards that of direct remedies. In this respect, it is useful to have a look at the evolution of the remedial practice of each regional human rights court.

1. The Evolution of the Human Rights Courts' Remedial Practice

The early remedial practice of the three regional human rights courts and its evolution is particularly relevant in order to understand their respective remedial approaches. In this respect, one can find three very different situations, whereby the evolution of the geopolitical context surrounding these human rights protection systems is also important. In the case of the ECtHR, its remedial practice has been evolving very slowly for many years, from an approach that was limited to declaratory judgments to the inclusion of implicit obligations and then of individual and general remedial measures. On the other hand, the IACtHR had also a rather cautious remedial approach at the beginning, but it only lasted for a few years and then it carried out a radical transformation, to the point where

533 See Gerald L. Neuman, "Bi-Level Remedies for Human Rights Violations", *Harvard International Law Journal* 55(2), 2014, pp. 323-360.

it is now generally considered as the international court with the most progressive remedial practice. Finally, the ACtHPR directly started ordering highly intrusive measures in its first judgments. These developments will be examined more closely below.

a) The evolution of the ECtHR's remedial practice

For a long time, the ECtHR's judgments were considered "essentially declaratory".[534] In accordance with this position, the Strasbourg Court was not empowered to decide how a judgment should be implemented, nor which specific consequences flowed from the finding of a violation. Therefore, a typical outcome would be for it to declare that the finding of a violation constitutes in itself an adequate just satisfaction, although the most common remedy was (and still is) the payment of a monetary sum to the victims under the 'just satisfaction' provision.

Non-monetary remedial measures were thus avoided by the ECtHR for many years. This is clearly reflected in the case of *Marckx vs. Belgium* (1979), which has become one of the landmark cases of the ECtHR on the issue of remedies as well as on the compatibility of domestic laws and the Convention. The applicants claimed that the Belgian Civil Code of the time was discriminatory with respect to the establishment of maternal affiliation of children born out of wedlock, as well as the patrimonial rights flowing from it.[535] Despite finding that the law as such was in violation of the ECHR, the ECtHR stressed that it would be "for the respondent State, and the respondent State alone, to take the measures it considers appropriate to ensure that its domestic law is coherent and consistent".[536]

The *Marckx* case was therefore used by the ECtHR to establish a clear position concerning remedial measures. Even in cases where a domestic law as such was contrary to the convention, it was up to the state to decide whether a legislative reform would be appropriate. This remained its position towards remedies and specifically towards the reform of domestic laws

534 As for example stated in ECtHR, *Marckx vs. Belgium* (1979), para. 42.
535 ECtHR, *Marckx vs. Belgium* (1979), para. 13.
536 ECtHR, *Marckx vs. Belgium* (1979), para. 42. It suggested that its judgments should have effects beyond the concrete case "especially since the violations found stem directly from the contested provisions and not from individual measures of implementation", but left to the State the choice of means for executing its obligation to abide by the judgment.

for a long period. It often rejected requests made by victims with respect to different types of non-monetary remedial measures.[537] After some years, however, it became clear that adequate redress for victims could not always be achieved solely by means of monetary compensation measures.[538]

The first time the ECtHR deviated from this established line of jurisprudence was in *Papamichalopoulos vs. Greece (1995).* In this case, the victims suffered an unlawful expropriation which had been continuing for over twenty-five years, in violation of their right to property. The Court therefore ordered in the operative part of the judgment the return of the land within six months. However, it subsequently established that if the State should fail to provide such restitution, it would have to pay the applicants a monetary sum.[539] Although "such alternative obligations are not genuine individual measures",[540] as the option to substitute them for compensation makes them non-binding, it was a step in that direction.[541]

Another milestone for the evolution of the ECtHR's jurisprudence with regard to non-monetary measures was the case of *Scozzari and Giunta*

537 For example, in a case of 1982 in which the victims asked for the annulment of their disciplinary and criminal sanctions, the Court affirmed in its judgment that it was not "empowered" to order this (ECtHR, *Le Compte, Van Leuven and De Meyere vs. Belgium* (1982), para. 13). In another case it declared that it had no jurisdiction to request the reopening of a judicial proceeding (ECtHR, *Saidi vs. France* (1993), para. 47). When a legislative reform was sought by the victims, the Court stated that "the Convention does not empower it to accede to such a request. It reiterates that it is for the State to choose the means to be used in its domestic legal system in order to comply with the provisions of the Convention or to redress the situation that has given rise to the violation of the Convention" (ECtHR, *Yağci and Sargin vs. Turkey* (1995), para. 81).

538 See generally Costas Paraskeva, "European Court of Human Rights: From declaratory judgments to indications of specific measures", *EHRLR* 1, 2018, pp. 46-56.

539 ECtHR, *Papamichalopolous vs. Greece* (1995), operative paras. 2 and 3.

540 Ichim, *Just Satisfaction,* 2014, p. 207.

541 This approach of ordering non-monetary measures with the possibility of opting out by paying a monetary sum has been used by the ECtHR in several judgments (See for example ECtHR, *Brumarescu vs. Romania* (2001), operative paras. 1 and 2; *Ramadhi vs. Albania* (2007), operative para. 6; *Taganrog LRO vs. Russia* (2022), operative para. 13). The CoM actually specified that it is applied in "certain property cases", where states can "choose between restitution and compensation" (CoM, Supervision of the Execution of Judgments of the ECtHR, 3rd Annual Report, 2009, p. 19). However, this approach has been even employed with respect to legislative remedies (see ECtHR, *L. vs. Lithuania* (2007), operative paras. 5 and 6, ordering a legislative reform in very concrete terms, but including the alternative of paying a monetary sum). See also, criticising this approach, Ichim, *Just Satisfaction,* 2014, pp. 39-42.

vs. Italy (2000), dealing with a violation of the right to family life due to the suspension of parental rights and the insufficient contact between the applicant and her children. Here, although no concrete measures were included in the operative paragraphs, the Court first used a formula that has become very important for its remedial practice. On the basis of Art. 41 ECHR, it declared that

> *a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects.*[542]

The ECtHR thus determined for the first time that some judgments require the adoption of non-monetary measures, even if this is not expressly requested, thereby extending the scope of Art. 41 beyond the mere obligation of payment. Despite this statement, the ECtHR still held that the State "remains free to choose the means by which it will discharge its legal obligation under Article 46".[543] This changed a few years later, in 2004, when the Court started to include reparations both of an individual and general nature in its judgments.[544]

Individual non-monetary remedies were first ordered by the ECtHR in the case of *Assanidze vs Georgia (2004)*, concerning an arbitrary detention contrary to Art. 5 ECHR. Here, the Court introduced in the operative paragraphs the duty to secure "the applicant's release at the earliest possible date",[545] grounding this decision on the fact that "the violation found in the instant case does not leave any real choice as to the measures required to remedy it".[546] This approach has since been progressively expanded to further situations in which the ECtHR holds that there is only one way of redressing or even ceasing the violation.

With respect to general measures, it is important to take into account two fundamental developments that affected the European human rights

542 ECtHR, *Scozzari and Giunta vs. Italy* (2000), para. 249.
543 ECtHR, *Scozzari and Giunta vs. Italy* (2000), para. 249.
544 In the context of the ECtHR, this distinction is commonly used, whereby individual measures are those directly affecting the victims and general measures are those affecting other potential victims or society in general.
545 ECtHR, *Assanidze vs. Georgia* (2004), operative para. 14.
546 ECtHR, *Assanidze vs. Georgia* (2004), para. 202.

protection system during the 1990s, which are the main causes for the introduction of such measures.[547] The first is the enlargement of the system, with the incorporation of most of the former Eastern Bloc into the CoE. With this development, the ECtHR turned from overseeing twenty-three states relatively homogenous states in the early 1990s[548] to overseeing forty-seven states of "an unprecedented and formidable diversity".[549] Moreover, these new countries were mostly still in transition and had therefore weak institutions and democratic procedures.[550] As Sadurski puts it, "with the new arrivals into the CoE system (…) it clearly appeared that many problems were not so much due to occasionally erring courts but rather have to do with the substance of the laws themselves".[551] As a consequence, the ECtHR had to transit from "being a 'fine-tuner' of the national legal systems" to "policing the national systems in which serious violations of rights occurred".[552]

The other major development was the entry into force of Protocol 11 in 1998. This Protocol allowed individuals to have direct access to the Court. Before this, the European Commission on Human Rights acted as a gatekeeper, assessing the admissibility of cases and deciding which ones to refer to the Court, similarly to the procedure before the IACtHR and the ACtHPR.[553] Since the entry into force of Protocol 11, every individual can present a case directly before the Court under certain circumstances. This produced a huge inflow of applications at the early 2000s, concerning

547 On these developments, see among others Philip Leach, "No longer offering fine mantras to a parched child? The European Court's developing approach to remedies", in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds.), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, Cambridge: CUP, pp. 142-180; Huneeus, *YJIL* 2015; Sadurski, *HRLR* 2009; Helfer, *EJIL* 2008.

548 Former ECtHR judge Rudolf Bernhardt held in 1987 that "[t]he main reason for the effectiveness of the European Convention and the Court is the considerable measure of homogeneity among European states". See Rudolf Bernhardt, "Commentary: The European System", *Connecticut Journal of International Law* 2, 1987, at p. 299.

549 Sadurski, *HRLR* 2009, at p. 400.

550 See Sadurski, *HRLR* 2009, p. 410, arguing that "the less-than-ready applicants were let in – on the basis of a principle that it is better to have a troublesome country in than out".

551 Sadurski, *HRLR* 2009, pp. 413-414.

552 Sadurski, *HRLR* 2009, p. 401.

553 See generally Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights,* Oxford: OUP, 2010.

mainly 'repetitive' cases, which in turn provoked "a docket crisis of major proportions".[554]

In this context, the Steering Committee on Human Rights of the CoE (CDDH) issued a report in 2003 introducing some proposals in order to guarantee the long-term effectiveness of the system.[555] Among them, it included the possibility for the Court to identify cases with an underlying structural problem, as well as the source of this problem. However, the Court was expressly asked to abstain from indicating a corrective measure for the identified problem.[556] Shortly afterwards, the CoM also invited the Court to identify "as far as possible" the existence of a structural problem and its source,[557] while it avoided mentioning the issue of the indication of corrective measures.[558]

The reaction of the ECtHR to this recommendation came swiftly, not only identifying structural problems but going further and ordering a solution to them. Three months after the CoM Resolution, it issued the first of the so-called 'pilot judgments' in the case *Broniowski vs. Poland* (2004), dealing with property rights in the context of the transition from communist regimes to democracy.[559] The ECtHR determined that the violation in this case "originated in a widespread problem which resulted from a malfunctioning of Polish legislation and administrative practice and which has affected and remains capable of affecting a large number of persons".[560] Then, after referring to the aforementioned CoM resolution, the Court included a measure in the operative paragraphs stating that Poland "must, through appropriate legal measures and administrative practices, secure the implementation of the property right in question in respect of the

554 Helfer, *EJIL* 2008, p. 127.

555 Steering Committee for Human Rights (CDDH), Guaranteeing the long-term effectiveness of the European Court of Human Rights, CM(2003)55-Add, 8 April 2003.

556 The underlying reason for this, according to the CDDH, was the subsidiary role of the ECtHR. See CDDH, 2003, para. 14 ("The subsidiary role of the Court was underlined in that it would not be invited to indicate the corrective measures to execute a judgment").

557 Resolution Res(2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem (adopted by the Committee of Ministers on 12 May 2004, at its 114th Session).

558 However, a CoM Recommendation adopted at the same time included a general obligation for states to adopt the appropriate measures in order to solve these structural problems (Recommendation Rec(2004)6 of the Committee of Ministers to Member States on the improvement of domestic remedies, 12 May 2004).

559 For more details on this case, see Chapter 4 of this book.

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

remaining Bug River claimants or provide them with equivalent redress in lieu".[561]

The ECtHR continued using the pilot judgment procedure in the following years, and they eventually became an important element of the Court's jurisprudence. In 2011, this procedure was formalised through its inclusion in Art. 61 the Rules of the Court, establishing two main substantive elements that all pilot judgments need to include. First, as the main condition for initiating the procedure is that the facts of the application reveal the existence of a systemic dysfunction, the Court is required to identify the "nature" of that problem. Second, the Court shall also indicate "the type of remedial measures which the Contracting Party concerned is required to take at the domestic level by virtue of the operative provisions of the judgment". [562] Therefore, some sort of remedy must be ordered whenever a pilot judgment is issued.[563] The remedial practice of the ECtHR thus suffered a notable transformation during the early 2000s. However, as will be seen below, non-monetary remedies are still highly exceptional in the Strasbourg jurisprudence. This is different with respect to the IACtHR.

b) The evolution of the IACtHR's remedial practice

The remedial practice of the IACtHR has attracted the interest of scholarship for a long time.[564] The wide array of remedial measures before that Court has been highlighted in this regard and some of them have received particular attention, such as the obligation to investigate and punish human

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

562 See Rules of the ECtHR, Rule 61, para. 3. Other conditions are of a rather procedural nature, such as the duty to collect the views of the parties on the systemic problem or the requirement that the procedure is initiated either by the Court or by a member state.

563 This is further specified in another provision, establishing that if the parties reach a friendly-settlement agreement, this needs to include a declaration by the respondent state on the implementation the 'general measures' ordered in the judgment. See Rules of the ECtHR, Rule 61, para. 7.

564 See for example Fabian Novak, "The System of Reparations in the jurisprudence of the Inter-American Court of Human Rights", *The Hague Academy of International Law: Recueil des Cours* 392, 2017, pp. 9-203; Antkowiak, *CJTL* 2008; Dinah Shelton, "Reparations in the Inter-American System", in David Harris and Stephen Livingstone (eds.), *The Inter-American System of Human Rights,* Oxford: OUP, 2004, pp. 151-172.

rights violations,[565] or the orders to restitute indigenous territory.[566] In has been even argued in this regard that "[r]eparations at the Inter-American Court have radically transformed international and domestic law".[567] Part of this impact is owed to the innovative legal basis for ordering remedies that was examined before, but also to the development of the IACtHR's approach towards this issue during its early years.

The IACtHR was formally established in 1979 after the ACHR was ratified by eleven member states and entered into force in 1978. However, no contentious cases were decided by the IACtHR until about a decade later. This was due to the Inter-American Commission, to which individuals need to apply before reaching the Court, not transferring any contentious cases to the latter.[568] Thus, during its first years of existence, the IACtHR limited its judicial practice to the award of advisory opinions, which can also be requested by the state parties and other organs of the OAS.[569]

After such contentious cases started arriving before the IACtHR in the late 1980s, the Court issued its first judgment on reparations in the well-known case of *Velasquez Rodriguez vs. Honduras* (1989), dealing with enforced disappearances in Honduras. Some of the victims made a request for reparations with no less than twelve different remedies, including the prosecution of the perpetrators, public apologies and other symbolic measures.[570] The Court however took a rather narrow remedial approach in this first instance and limited itself to ordering the payment of financial compensation to the victims. This narrow approach towards remedies remained the same in the following judgments.[571] The IACtHR did not affirm, as the

565 See for example Giovanna Maria Frisso, "The Duty to Investigate Violations of the Right to Life in Armed Conflicts in the Jurisprudence of the Inter-American Court of Human Rights", 51 *Israel Law Review*, 2018, pp. 169-191.

566 Gabriela Cristina Braga Navarro, "The Struggle after the Victory: Non-compliance in the Inter-American Court of Human Rights' Jurisprudence on Indigenous Territorial Rights", *JIDS* 12, 2021, pp. 223–249.

567 Judge Elisabeth Odio Benito, "Preface", in Hennebel and Tigroudja, *Commentary to the ACHR*, 2022, p. ix.

568 According to Neuman, the reason for it was that "[t]he long-established Commission did not welcome a new Court that might impair its autonomy and undermine its prestige" (Gerald L. Neuman, "Import, Export and Regional Consent", *EJIL* 19(1), 2008, p. 103).

569 The advisory jurisdiction of the Court was nevertheless also a way for it to review domestic laws during that time. See on that Chapter 1 of this book.

570 IACtHR, *Velásquez Rodríguez v. Honduras* (1989), para. 7.

571 See Shelton, 2015, pp. 391 et seq. However, the IACmHR was at the same time taking a different approach and issuing more 'intrusive' remedies. See on that Başak Çalı,

ECtHR did at that time, that it had no competence to order non-monetary measures, but in practice, it abstained from doing so and limited itself to the "usual" remedies of compensation.[572]

This, however, started to change with the judgment on reparations in the case of *Aloebotoe v. Surinam* (1993). Here, the IACtHR departed from its previous approach and ordered non-pecuniary measures, namely the establishment of a foundation and the reopening of a school.[573] Thereafter, the use of non-pecuniary remedial measures slowly gained ground over the 'traditional' approach. In *El Amparo vs. Venezuela* (1996), the IACtHR ordered for the first time to investigate human rights violations and punish those responsible, and in *Loayza Tamayo vs. Peru* (1998) it prescribed the reinstatement of the victim in her former employment and the nullification of all legal consequences flowing from a domestic judgment.[574] Although it took some more years,[575] this rather progressive approach towards remedies eventually became the standard practice in the IACtHR's case law, especially since 2001.[576]

In this respect, one of the major advocates of non-pecuniary remedies at the IACtHR was its former president Cançado Trinidade, who illustrated his position through a number of separate opinions. For example, in a separate opinion to a judgment of 2001, he stated that

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"Explaining variation in the intrusiveness of regional human rights remedies in domestic orders", *I•CON* 16(1), 2018, pp. 214-234, at p. 217.

572 See on the IACtHR's early remedial jurisprudence Antkowiak, *CJTL* 2008, pp. 365-368. See also Huneeus, *YJIL* 2015, pp. 8-11, explaining how the IACtHR first adopted what she calls a "declaratory model of human rights litigation", which "soon revealed its limits" due to the democratic deficits and inequalities present in the region.

573 IACtHR, *Aloeboetoe et al. v. Suriname* (1993), operative paras. 2 and 5.

574 IACtHR, *Loaza Tamayo vs. Peru* (1998), operative paras. 1 and 3. In addition, here it included for the first time remedial measures consisting in the reform of domestic laws (see below section III).

575 See in this respect Antkowiak, *CJTL* 2008, p. 370, arguing that after Loayza Tamayo the IACtHR "fell back into the comfortable remedial scheme of Velasquez-Rodriguez", avoiding to issue guarantees of non-repetition in some cases in which these would have been justified.

576 In 2001 the IACtHR issued 10 judgments on reparations, almost as many as it had issued since its inception. These judgments included a wide array of remedial measures, both of an individual and of a general nature. According to Antkowiak, "the Tribunal's current approach to redress was almost fully developed during that critical year" (Antkowiak, *CJTL* 2008, pp. 371-372).

> *"[t]he day when the work of determining the reparations due to the victims of violations of fundamental human rights were to be reduced exclusively to a simple fixing of compensations in the form of indemnizations (…) a calculating machine would suffice. The day this were to occur – which I hope will never come – the labour itself of an international tribunal of human rights would be irremediably devoid of all sense".*[577]

Trinidade's opinion demonstrates that judges' personal convictions can have an important influence on the development of human rights courts' jurisprudence and remedial practice.[578]

c) The evolution of the ACtHPR's remedial practice

Finally, due to its young age and low number of judgments, the ACtHPR's remedial practice has not evolved as much as those of the other two courts. As mentioned before, this Court became gradually operational after the entry into force of the Ouagadougou Protocol in 2004. It did take, however, some additional time until its first decision on admissibility (in 2009) and its first judgment on the merits (in 2013). Contrary to the other regional human rights courts, the ACtHPR did not start with a cautious approach towards remedies and developed this practice progressively but instead issued far-reaching remedial measures from the beginning.

The first judgment the ACtHPR decided on the merits was *Tanganyika Law Society and Legal and Human Rights Centre vs. Tanzania* (2013), dealing with the violation of electoral rights. There, the ACtHPR found the incompatibility of a provision of the Tanzanian Constitution with the ACHPR, as this provision prevented independent candidates from running for office.[579] Although the Court stated that it would reserve the issue of reparations for a subsequent judgment, it indicated in the operative part of the merits judgment that "[t]he Respondent is directed to take constitutional, legislative and all other necessary measures within a reasonable time

577 IACtHR, *"Street Children" vs. Guatemala* (2001), Separate Opinion of Judge A.A. Cançado Trindade, para. 37.

578 Se generally in this respect Gregor Maučec and Shai Dothan, "The effects of international judges' personal characteristics on their judging", *LJIL* 35, 2022, pp. 887-895.

579 For a critical view of this decision, see Alain Didier Olinga, "La première décision au fond de la Cour africaine des droits de l'homme et des peoples", *Revue des droits de l'homme* 6, 2014, pp. 1-23.

to remedy the violations (...)".[580] Thus, already in its first judgment, the ACtHPR did not hesitate to interfere with states' sovereignty to the highest extent, in the form of ordering a constitutional reform. This is probably influenced by the time in which the ACtHPR started to operate. By 2013, the international law on remedies as well as the practice of regional and global human rights bodies had evolved to a point in which ordering such intrusive measures was not uncommon.[581]

Similarly to the IACtHR in its early years, the ACtHPR used to divide the merits stage and the reparations stage of a case into two different judgments. Thereby, it generally included the remedial measures of a general nature in judgments on merits, and those of an individual nature in judgments on reparations. For example, legislative reforms are commonly found in its early judgments on the merits,[582] while some of its first judgments on reparations included not only compensatory remedies but also orders to investigate and prosecute the perpetrators of human rights violations,[583] as well as the expunging of criminal convictions from judicial records.[584] In sum, the ACtHPR did not develop its remedial practice progressively, as the other regional human rights courts did, but instead made extensive use of the available remedies already in the first opportunities it had.

2. The Current Remedial Landscape before Human Rights Courts

Having considered the evolution of the three human rights courts' remedial practices, it is also useful to have a brief outlook of the current remedial practice before each of them. There are important differences to be observed with respect not only to the intensity and intrusiveness of these remedies but also to the main reasons for each of the courts to make use of them.[585] In this regard, the general remedial landscape before each of the courts will be examined, as well as their use of specific remedial

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

581 Actually, the IACtHR had already ordered constitutional reforms in several cases (for example in IACtHR, *Caesar vs. Trinidad and Tobago* (2005) or in *Boyce vs. Barbados* (2007)), and even the ECtHR had recommended such reforms (as in ECtHR, *Sejdić and Finci vs. Bosnia and Herzegovina* (2009)).

582 As for example in ACtHPR, *Lohé Issa Konaté vs. Burkina Faso* (2014).

583 ACtHPR, *Ernest Zongo vs. Burkina Faso* (2015), para. 111 (x).

584 ACtHPR, *Lohé Issa Konaté vs. Burkina Faso* (2016), para. 60 (i).

585 See generally Çalı, *I•CON* 2018; Cornejo, *I•CON* 2017.

categories. This will allow not only for a comparison between the remedial practice before general international courts and human rights courts but also between the three regional human rights courts.

a) The remedial landscape before the European Court of Human Rights

In recent times, both individual and general remedial measures have found their place in the case law of the ECtHR, after it developed these remedial competences cautiously and incrementally during the last few decades. The most common approach of the Court is still to issue judgments that are essentially declaratory, frequently ordering the payment of monetary compensation. However, it is currently not rare to find non-monetary remedial measures in some judgments, although there are still no clear criteria or a consistent judicial practice as to the concrete cases in which these remedies should be included, nor to the specific substance of those measures.[586]

Several authors have examined the remedial practice of the ECtHR. For example, in 2014, former ECtHR's judge Sicilianos (writing extra-judicially) identified "more than 160 judgments" in which the ECtHR had indicated individual and/or general measures on the basis of Art. 46 ECHR.[587] This number, however, does not differentiate between judgments including these measures in the reasoning and the operative part, nor disaggregates the individual and general measures. According to this judge, "[a]n assessment of this important practice would require an analytical study", while he aimed only at giving "a brief picture" in this regard.[588]

Such an analytical study was carried out by Donald and Speck in 2019, statistically analysing all pilot and Article 46 judgments issued between 2004 and 2016. They found that during this period the ECtHR has issued 29 pilot judgments and 170 'Article 46 judgments'.[589] However, while all pilot judgments include remedial measures in the operative part, only 36 of the 170 Article 46 judgments did so, and these were mostly individual

586 See Alastair Mowbray, "An Examination of the European Court of Human Rights' Indication of Remedial Measures", *HRLR* 17, 2017, p. 478. See also Glas, *NQHR* 2016, p. 49, noting that "the Court does not elaborately reason its decision to apply the [pilot judgment] procedure".
587 Sicilianos, *NQHR* 2014, pp. 235–262.
588 Sicilianos, *NQHR* 2014, pp. 237-238.
589 Donald and Speck, *HRLR* 2019, pp. 5-6.

measures.[590] Mowbray also examined the indication of remedial measures by the ECtHR, but focusing only on those issued in the period between 2013 and 2015.[591] He finds that during these three years, the ECtHR issued only nine judgments with remedial measures in the operative part, whereby seven of them prescribed individual measures and only three general measures.[592]

It can thus be observed that most remedial measures ordered by the ECtHR are of an individual nature,[593] while those of a general nature are mostly (but not only) limited to the pilot judgment procedure.[594] Moreover, the indication of remedial measures by the ECtHR responds to two fundamental reasons. In the case of individual remedies, these are mainly included when the nature of the violation leaves no real choice as to the measures required to redress it.[595] In fact, Keller and Marti found that most of the ECtHR's individual measures are included in exceptional cases related to illegal detentions, unfair judicial proceedings or property.[596] With respect to general remedies, the main reason for its inclusion is that the violation reveals the existence of a systemic problem that can give rise to numerous well-founded applications before the ECtHR.[597] If the violation is due, for example, to a deficient legislative framework, redressing the individual victims is not enough, as the legislative malfunctioning will probably affect many other individuals who can also bring forward complaints to the ECtHR. Thus, the underlying reason has more to do with docket control than any other considerations.

590 Donald and Speck, *HRLR* 2019, p. 9.
591 Mowbray, *HRLR* 2017.
592 One of the judgments contained both individual and general remedial measures in the operative part.
593 See Donald and Speck, *HRLR* 2019, p. 9, arguing that judges "feel more comfortable to be prescriptive as regards individual measures, where the nature of the violation tends to leave no real alternative".
594 See for example ECtHR, *Lukenda vs. Slovenia* (2005); Grudić vs. Serbia (2012). See also Sicilianos, *NQHR* 2014, p. 240 ("Quasi-pilot judgments may also contain a paragraph on execution measures in their operative part").
595 See among others Jahn, *ZaöRV* 2014, p. 15; Keller and Marti, *EJIL* 2016, p. 839.
596 Keller and Marti, *EJIL* 2016, p. 842.
597 See in this regard for example Glas, *NQHR* 2016, pp. 41-70.

b) The remedial landscape before the Inter-American Court of Human Rights

The remedial practice of the IACtHR has evolved to a point at which it is probably the international court that includes the widest and most creative array of measures in its judgments.[598] Notably, in most cases the remedies are of a structural nature, going beyond the concrete victims of the human rights violation. This is one of the reasons why it is sustained that the jurisprudence of the IACtHR has acquired a transformative dimension.[599] This has been praised by some authors,[600] while others have held that the IACtHR should be more cautious, in order "not to jeopardise the entire regional human rights system with aggressive reparation judgments".[601]

This extensive remedial practice is also one of the main features which distinguishes the IACtHR from the ECtHR. Thereby, the geopolitical context in which the IACtHR has operated for the last decades is very relevant for this distinction and the remedial approach of this court. When it was established and began its judicial practice, the IACtHR was overseeing a region where military dictatorships and internal conflicts predominated, and where enforced disappearances, extrajudicial executions and torture were sadly common in many states. Moreover, the weak national courts and the fragility of some of the region's democracies resulted in a culture of impunity and a lack of effective domestic remedies.[602] This implied serious wide-scale human rights violations that could not be redressed by means of a simple monetary compensation, but required additional measures, especially in order to secure the '*nunca más*' (never again) requests of Latin

598 See Çalı, *I•CON* 2018, pp. 217-220.

599 See von Bodgandy and Urueña, *AJIL* 2020, p. 439, arguing that the IACtHR's "far-reaching orders on reparation (…) have grown to be a key component of transformative constitutionalism". See also generally Ximena Soley, "The Transformative Dimension of Inter-American Jurisprudence", in Armin von Bogdandy et al. (eds.), *Transformative Constitutionalism in Latin America*, Oxford: OUP, 2017.

600 See David L. Attanasio, "Extraordinary Reparations, Legitimacy, and the Inter-American Court", *University of Pennsylvania Journal of International Law* 37(3), 2016, p. 815.

601 Lisa J. Laplante, "Bringing effective remedies home: the inter-American human rights system, reparations, and the duty of prevention", *NQHR* 22(3), 2004, pp. 347-388, at p. 387. Similarly, Antkowiak, *CJTL* 2008, pp. 418-419.

602 See Neuman, *EJIL* 2008, at p. 101.

American societies in the aftermath of these dictatorships and civil wars.[603] Even though the situation has changed in the region and the democratic credentials of Latin American states have strongly improved during the last decades, the IACtHR is still heavily influenced by this self-understanding concerning its transformative mandate and by the lack of trust in domestic institutions, which is clearly reflected in the remedies it orders.

Another contextual reason for the remedial practice of the IACtHR is related to the number of cases it decides. While the ECtHR issues more than 1,000 judgments each year, the IACtHR nowadays delivers only around twenty judgments annually, and this number was considerably lower some years ago. Thus, as highlighted by Cavallaro and Brewer, "it remains an organ of extremely limited access for the vast majority of victims of human rights violations".[604] This is very likely one reason which explains why the IACtHR aims to amplify the impact of each case it decides, going beyond the individual applicants and triggering structural transformations.[605] One of the main ways to achieve this is through these extensive remedial orders, with its main focus on guarantees of non-repetition.

c) The remedial landscape before the African Court of Human and Peoples' Rights

Being relatively young, the ACtHPR can be said to be still developing its remedial approach. Between its first judgment on the merits in 2013 and the end of 2022, the ACtHPR has issued judgments with remedial measures in seventy-seven cases. In this regard, an exponential growth of judgments can be observed during the last years, whereby the ACtHPR has kept developing its remedial approach. As highlighted by Clooney and

603 See Çalı, *I•CON* 2018, p. 229, describing such measures as "nunca más remedies". On the 'nunca más' legacy at the IACtHR, see von Bogdandy and Urueña, *AJIL* 2020, pp. 408-413.

604 James Cavallaro and Stephanie Erin Brewer, "Reevaluating Regional Human Rights Litigation in the Twenty First Century: The Case of the Inter-American Court", *AJIL* 102(4), 2008, p. 781. The main reason put forward by the authors to explain this small number of judgments is the "meager financial and political support from the OAS" (at p. 782).

605 Cavallaro and Brewer, *AJIL* 2008, p. 795 ("considering the equally urgent situation of the hundreds or thousands of victims whose cases will never be heard by it, the Court (…) must use each case that comes before it as an opportunity to advance the broader issue underlying the litigation").

Webb, the ACtHPR is one of the few international bodies that "tend to cross-reference remedies granted by other bodies or even explain in their own jurisprudence why a remedy is appropriate for a particular violation of a right in one case but not another".[606]

In this respect, it can be observed that the ACtHPR has taken inspiration from the other regional human rights courts in the development of its remedial practice, especially from the IACtHR.[607] Despite still lacking a consolidated remedial jurisprudence, the landscape of remedies before the ACtHPR is nowadays similar to that of its Inter-American counterpart. However, the ACtHPR has been more cautious with regard to certain remedial measures, particularly those aiming at restitution and rehabilitation, while it has instead put its focus on guarantees of non-repetition. When comparing the remedial case law of these two courts in recent years, one can also observe that the array of remedies included in the inter-American case law is still wider and more diversified than in the African one.

3. A Classification of Remedies before Human Rights Courts

In order to have a closer look at the remedial landscape before regional human rights courts, their remedies will be categorised in accordance with the classification of the aforementioned UN Basic Principles, i.e., along the categories of restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition. By contrast, the ECtHR usually divides its non-monetary remedies between measures directed towards the victim (labelled individual measures) on the one hand, and towards further potential victims (general measures) on the other. Thereby, individual measures comprise restitution, rehabilitation and satisfaction, while the concept of general measures refers mostly just to guarantees of non-repetition, and compensation is treated as a separate remedy, called 'just satisfaction'. The IACtHR on the other hand uses a much closer classification to the one

606 Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law,* Oxford: OUP, 2020, p. 59.

607 The practice of the ECtHR does also have an influence in this development, as can be observed for example with the introduction in 2020 of a 'pilot judgment procedure' before the ACtHPR, which has however not been applied yet. See in this respect Kevin Toro Sánchez, "The right to reparations in the contentious process before the African Court on Human and Peoples' Rights: A comparative analysis on account of the revised Rules of Court", *African Human Rights Law Journal* 21, 2021, pp. 812-835, at pp. 828-830.

provided in the Basic Principles, dividing the remedies it may order into six categories, namely those of restitution; rehabilitation; satisfaction; compensation; obligation to investigate, prosecute and punish; and guarantees of non-repetition.[608] Thus, it adds the measures of investigation as a distinct category from that of satisfaction, where these measures are usually included.[609]

a) Restitution

Restitution is considered the primary form of reparation in general international law, although it plays a less important role in human rights adjudication. This is due to the fact that after a human rights violation it "may be especially difficult or even impossible" to restore the victims' previous situation.[610] According to the UN Basic Principles, restitution "includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property".[611] As pointed out by Novak with respect to the IACtHR, human rights courts have gone beyond the approach towards restitution used in general international law, as instead of restoring a situation that existed before the violation they seek to put the victim in the hypothetical situation that would have existed if the violation had never taken place.[612] This is especially the case in situations where courts find a pattern of structural discrimination.[613]

608 See IACtHR, *Annual Report*, 2018, p. 68. Some authors use different typologies. For example, Antkowiak, *CJTL* 2008, pp. 371-386, distinguishes between "victim-centered remedies", "remedies directed to society as a whole" and "remedies directed at discrete communities".

609 However, in some cases it has also considered these measures as forms of cessation or even as guarantees of non-repetition. See Novak, *Recueil des Cours* 2017, pp. 113-114.

610 Buyse, *ZaöRV* 2008, p. 138.

611 UN Basic Principles, para. 19.

612 Novak, *Recueil des Cours* 2017, p. 80.

613 See for example IACtHR, '*Cotton Field*' *vs. Mexico* (2009), para. 450 ("the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, reestablishment of the same structural context of violence and discrimination is not acceptable"). See generally Elisabeth Veronika Henn, *International Human Rights Law and Structural Discrimination*, Berlin: Springer, 2021, especially at pp. 171 et seq.

In the case law of the ECtHR, measures of restitution have consisted among others in the release of prisoners,[614] the enforcement of domestic decisions,[615] the re-establishment of contact between an applicant and her daughter,[616] or the reinstatement of the victim as supreme judge.[617] Notably, it has ordered these measures only when it considered that there was no other way of remedying the violation. Similarly, the IACtHR has also ordered the release from detention,[618] the reinstatement of workers,[619] or the restoration of property[620] and family ties.[621] But it has gone beyond these rather traditional forms of restitution in human rights law, including measures such as the reforestation of indigenous territory,[622] or the restitution of nationality.[623] Moreover, the IACtHR does not take into account whether the victim can be redressed through other forms of reparation but instead includes the measures of restitution alongside the other reparatory measures.

With respect to the ACtHPR, a development concerning its approach to restitution can be observed in recent times.[624] Between 2015 and 2018, it generally avoided ordering restitution measures, especially in fair trial violations where the retrial or the release of the victims was requested. It argued that it could only order such measures under special and/or compelling circumstances and that the circumstances of these cases did not meet that threshold.[625] This argument was sustained in a consider-

614 See among others ECtHR, *Assanidze vs. Georgia* (2004); *Fatullayev vs Azerbaijan* (2010); *del Rio Prada vs. Spain* (2013).
615 ECtHR, *Ilic vs. Serbia* (2007), operative para. 3; *Kostic vs. Serbia* (2008), operative para. 3; *Pelipenko vs. Russia* (2014), operative para. 1.
616 ECtHR, *Gluhaković vs. Croatia* (2011), operative para. 3.
617 ECtHR, *Oleksandr Volkov vs. Ukraine* (2013), operative para. 9.
618 IACtHR, *Loayza Tamayo vs. Peru* (1998).
619 For example in IACtHR, *Loayza Tamayo vs. Peru* (1998); *Baena Ricardo vs. Panama* (2001).
620 For example, IACtHR, *Tibi vs. Ecuador* (2004); *Awas Tingi vs. Nicaragua* (2001); *Saramaka vs. Suriname* (2007).
621 IACtHR, *Fornerón vs. Argentina* (2012).
622 IACtHR, *Kichwa de Sarayaku vs. Ecuador* (2012).
623 IACtHR, *Ivcher Bronstein vs. Peru* (2001).
624 See on this particular issue, Misha Ariana Plagis, "The Makings of Remedies: The (R)Evolution of the African Court on Human and Peoples' Rights' Remedies Regime in Fair Trial Cases", *African Journal of International and Comparative Law* 28, 2020, pp. 45-71.
625 See for example ACtHPR, *Alex Thomas vs. Tanzania* (2015), para. 157.

able number of fair trial-related judgments against Tanzania,[626] with the ACtHPR stating that "it is not an appeal court to quash or reverse the decision of domestic courts".[627] This represented an important difference to the approach taken by the IACtHR, where restitution measures are the most usual consequence of fair trial violations. This position was therefore criticised in the literature,[628] as well as by ACtHPR's judges in separate opinions.[629]

The ACtHPR approach towards restitution started to change in late 2018 when it found in a case that the most appropriate reparation would be the retrial of the applicant,[630] and in another one that the circumstances of a fair trial violation were sufficiently serious and compelling to order the release of the victim.[631] Thereafter, orders to release or retry prisoners have become more common, although they are still far from becoming the standard practice for fair trial violations.[632] Recently, the ACtHPR has even

626 ACtHPR, *Mohamed Abubakari vs. Tanzania* (2016); *Christopher Jonas vs. Tanzania* (2017); *Kijiji Isiaga vs. Tanzania* (2018); *Thobias Mango vs. Tanzania* (2018); *Amir Ramadhani vs. Tanzania* (2018); *Anaclet Paulo vs. Tanzania* (2018); *Minani Evarist v. Tanzania* (2018); and *Armand Guehi vs. Tanzania* (2018).

627 ACtHPR, *Kijiji Isiaga vs. Tanzania* (2018), para 95. See also ACtHPR, *Ernest Francis Mtingwi vs. Malawi* (2013), paras. 14 and 15. The ACtHPR not only rejected to order the annulment of judicial decisions, but even of administrative ones. For example, it argued in a case that that it "does not have the power to rule on the requests made by the Applicant in paragraph 122 to annul the decision of the Respondent State to expel him" (ACtHPR, *Anudo Ochieng Anudo vs. Tanzania* (2018), para. 127).

628 See for example Ally Possi, "It is better that ten guilty persons escape than that one innocent suffer: the African Court on Human and Peoples' Rights and fair trial rights in Tanzania", *African Human Rights Yearbook* 1, 2017, p. 334, arguing that "the Court should not shy away from ordering concrete remedial measures such as the release of the applicant, whenever the respondent state is found to have violated some fundamental fair trial norms".

629 For example, two judges submitted dissenting opinions in the case of *Alex Thomas*, stating that they "cannot find a more 'specific and/or compelling' [reason] than that the Applicant has been in prison for about 20 years out of a 30-year prison term (…) Our view is therefore that, there is no other remedy in the circumstance other than, that the Applicant be released" (ACtHPR, *Alex Thomas v. Tanzania* (2015), Dissenting Opinion by Elsie Nwanwuri Thompson and Rafaâ Ben Achour, paras. 6-8).

630 ACtHPR, *Diocles William v. Tanzania* (2018), operative para. xi.

631 ACtHPR, *Mgosi Mwita Makungu v. Tanzania* (2018), para. 85.

632 This development in the field of restitution has been even labeled as a "(r)evolution of the remedies regime of the [ACtHPR] for violations of the right to a fair trial" (Plagis, *AJICL* 2020, p. 45). However, most judgments issued in the last few years concerned violations of the right to free legal assistance in Tanzania, and besides

stated that it "has the power to order the annulment of [a presidential] election if it deems this measure appropriate to remedy the violation found".[633] It can thus be observed that the ACtHPR's remedial jurisprudence is still in development with respect to restitution, while that of the other two human rights courts is more consolidated.

b) Compensation

As restitution is often no longer possible after a human rights violation, compensation is the remedial category mostly applied by regional human rights courts. This is also the only category explicitly mentioned in the respective human rights treaty provisions on remedies.[634] Compensation is ordered in most judgments in which the ECtHR finds a violation, as well as in almost every judgment of the IACtHR and the ACtHPR. In the latter case, an evolution of compensatory measures similar to that on restitution can be observed, as before 2018 the victims of fair trial violations were usually not afforded such measures, while since then it has become almost a standard practice for these violations.[635]

The UN Basic Principles state that compensation should be provided "for any economically assessable damage".[636] Thus, it usually comprises both material and non-material damages, covering both direct and indirect victims, but without a punitive character. Material damages usually cover direct losses and loss of profits, while non-material damages include moral damage and in the case of the IACtHR also losses for what this Court has defined as a 'harm to the project of life', i.e., to "the options that an individual may have for leading his life and achieving the goal that he sets for himself".[637] In sum, it can be observed that measures of compensation

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some scarce exceptions the requests to release the victims were dismissed by the ACtHPR.

633 ACtHPR, *XYZ vs Benin (I)* (2020), para. 30.

634 See above section I.3 of this chapter.

635 Plagis, *AJICL* 2020, pp. 60-62.

636 Basic Principles, para. 20. This includes "(*a*) Physical or mental harm; (*b*) Lost opportunities, including employment, education and social benefits; (*c*) Material damages and loss of earnings, including loss of earning potential; (*d*) Moral damage; [and] (*e*) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services".

637 IACtHR, *Loayza Tamayo vs. Peru* (1998), para. paras. 147-153. See also *Las Dos Erres vs. Guatemala* (2009); *Furlan vs. Argentina* (2012).

are much more common in human rights adjudication than in general international adjudication. This is also because monetary payments can make more of a difference for individual victims than for states. In order to make a difference for states, such compensatory measures would need to acquire massive proportions, which in turn can become problematic for the state that is ordered to pay them.[638]

c) Satisfaction

Satisfaction is also a particularly important remedial category with respect to human rights violations. In this regard, it can be observed that the IACtHR has made extensive use of these remedial measures, while in the case law of the other two regional courts, such instances are much rarer.[639] In general international law, satisfaction consists mainly of public apologies and acknowledgement of responsibility, although the ICJ has ordered them only in the form of declaratory judgments.[640] By contrast, human rights courts have gone beyond this traditional understanding of satisfaction.[641] For example, the IACtHR has put the focus on symbolic measures,[642] including not only apologies and acknowledgements of responsibility,[643] but also the building of monuments or public spaces in the victims' honour, or the naming of streets, schools or scholarships after them.[644] Another typical

638 See for example the problems concerning compliance with ECtHR, *Georgia vs. Russia (No. I)*, Just Satisfaction (2019), where the payment of ten million € was ordered in the form of just satisfaction.

639 See Sicilianos, *NQHR* 2014, pp. 254-255, stating that measures of restitution and guarantees of non-repetition are "well known in the European system", while those of satisfaction and rehabilitation "are rather rare".

640 See Chapter 2 of this book.

641 Moreover, in general international law the measures of satisfaction are usually only issued when restitution and compensation are not available, while in the case of human rights courts these measures are mostly complementary to the other forms of reparation.

642 As pointed by Cavallaro and Brewer, *AJIL* 2008, p. 821, "[t]he Court's issuance of symbolic reparations is a positive step insofar as it signals an awareness that its judgments will have greater impact when they receive public attention within a Country".

643 Among many other cases, see for example IACtHR, *Barrios Altos vs. Peru* (2001), *Plan de Sanchez vs. Guatemala* (2004), *La Cantuta vs. Peru* (2006).

644 As for example in IACtHR, *Mapiripán vs. Colombia* (2005) (building a monument), *Myrna Mack Chang vs. Guatemala* (2003) (naming a street); or *Molina Theissen vs. Guatemala* (2004) (naming a school).

form of satisfaction in the case law of the IACtHR is the search and delivery of the victims' remains, especially in cases of enforced disappearances or extrajudicial executions.[645]

The investigation of the facts and punishment of those responsible is also usually considered a measure of satisfaction that has great importance for human rights violations. This is also a remedy which is included quite often in the IACtHR's case law,[646] as it is closely related to the right to truth, a concept that this Court has developed and given important weight to.[647] The frequent use of these remedial measures in human rights adjudication additionally reflects the fact that domestic authorities are frequently unwilling or unable to carry out such investigations and prosecutions in the first place.[648] The ECtHR and the ACtHPR have also exceptionally ordered the investigation into human rights violations,[649] but further measures of satisfaction, such as the aforementioned symbolic measures, are absent from the jurisprudence of these two courts.[650] Besides that, all three human rights courts occasionally state that a judgment constitutes in itself a form of satisfaction, similarly to the ICJ,[651] and both the IACtHR and the ACtHPR also order in most cases the publication and circulation of the judgment or parts of it. In sum, measures of satisfaction are playing a more prominent role in the field of human rights than in general international law, although important differences between the practice of the IACtHR and that of the other two courts can be observed. While the former includes a wide array of satisfaction measures, the latter two limit them mostly to investigations into human rights violations and the publication of judgments.

645 Among many others in IACtHR, *Las Dos Erres vs. Guatemala* (2009), *Bámaca Velazquez vs. Guatemala* (2002).

646 For a list of cases, see Novak, *Recueil des Cours* 2017, pp. 110-113.

647 See Eduardo Ferrer Mac-Gregor, "The Right to the Truth as an Autonomous Right under the Inter-American Human Rights System", *Mexican Law Review* 9(1), pp. 121-139.

648 See Cornejo, *I•CON* 2017, pp. 390-391.

649 ECtHR, *Nihayet Arici vs. Turkey* (2012), operative para. 6; *Gasangusenov vs. Russia* (2021), operative para. 7; ACtHPR, *Ernest Zongo vs. Burkina Faso* (2015), para. 111 (x).

650 An exception in this regard are symbolic monetary awards (see Ichim, *Just Satisfaction*, 2014, pp. 141-144).

651 Actually, the IACtHR does so in every case in which it finds a violation, while the ACtHPR states this in most of its judgments and the ECtHR rather exceptionally.

d) Rehabilitation

Rehabilitation is a distinctive remedial category of human rights law. The UN Basic Principles are rather vague on this remedy, mentioning only that it "should include medical and psychological care as well as legal and social services".[652] Some authors have also considered scholarships and other measures of educational support as forms of rehabilitation.[653] Perhaps surprisingly, as one could think about rehabilitation as the cornerstone of a victim-oriented remedial approach, this is the remedial category less used by human rights courts.

The IACtHR is again the only regional human rights court that includes measures of rehabilitation consistently.[654] This usually comprises medical and psychological treatment for victims and their families, in accordance with their specific situation and needs. By contrast, the ECtHR includes measures of rehabilitation only very rarely in cases related to persons with disabilities held in detention,[655] while the ACtHPR has ordered them so far only in one judgment.[656] This scarcity of rehabilitation measures could be related to the fact that judgments of human rights courts are issued many years after the violation, with medical treatment being usually no longer necessary. The costs of the past treatment are then sometimes included in the measures of compensation. However, this reason is weaker with respect to psychological treatment, as serious human rights violations often produce trauma that requires nearly life-long treatment. Thus, both the ECtHR and the ACtHPR should probably give more weight to this type of remedial measures.

e) Guarantees of Non-Repetition

In human rights law (unlike in general international law), guarantees of non-repetition are not designed to benefit the victim (or the injured state

652 UN Basic Principles, para. 21.

653 See Novak, *Recueil des Cours* 2017, p. 89. Note however that this author does not consider rehabilitation as an independent remedial category but as a form of restitution.

654 See Shelton, 2015, pp. 394-396. For a list of cases in which rehabilitation was ordered, see also Novak, *Recueil des Cours* 2017, pp. 86-87.

655 One of these exceptional cases is ECtHR, *Sławomir Musiał vs. Poland* (2009), operative para. 4 (a).

656 ACtHPR, *Léon Mugesera vs. Rwanda* (2020), para. 177 (xvii).

in the latter case), but rather 'society as a whole'.[657] In this regard, these guarantees aim to solve structural problems that might be subjacent to the specific human rights violations.[658] Guarantees of non-repetition have gained enormous importance in the case law of the IACtHR, as these measures are one of the main elements in the 'transformative dimension' of this Court's jurisprudence.[659] The ACtHPR has also put a particular focus on such guarantees, including them in almost half of its judgments.

The UN Basic Principles mention a lot of different examples under this category,[660] but for the sake of clarity, guarantees of non-repetition can be divided into three main sub-categories: administrative reforms, legislative reforms and training for public officials. In the case law of human rights courts, these guarantees have concerned mostly legislative reforms (which will be examined in detail), but the other two sub-categories have also played an important role. Guarantees of an administrative nature concern mostly the amendment of domestic policies, practices or situations that are contrary to human rights provisions.[661] In the case law of the IACtHR,

657 See generally Schönsteiner, *AUILR* 2011. The ACtHPR has argued in this respect that guarantees of non-repetition are "not intended to repair individual prejudice but to remedy underlying causes of violation", adding however that it will also order such measures "in cases where the violation will not cease or is likely to reoccur [with respect to the same victims]" (See ACtHPR, *Andrew Ambrose @Cheusi vs. Tanzania* (2020), paras. 169-170).

658 Hennebel and Tigroudja, Commentary to the ACHR, 2022, p. 1329 ("the main objective is to remedy structural shortcomings or deficiencies, whether social, political, or legal, which are likely to contribute to the violations observed and which make it impossible to prevent them").

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

660 This includes "(a) Ensuring effective civilian control of military and security forces; (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality; (c) Strengthening the independence of the judiciary; (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders; (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces; (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises; (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution; and (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law" (UN Basic Principles, para. 23).

661 Novak, *Recueil des Cours* 2017, p. 172.

this has affected *inter alia* the improvement of detention centres,[662] or that of structural conditions in indigenous communities,[663] as well as the implementation of policies for the protection of women or human rights defenders.[664] The ECtHR and the ACtHPR have also exceptionally ordered the reform of administrative practices or the establishment of compensation schemes.[665] The education and training of public officials, on the other hand, has been only ordered by the IACtHR. These educational measures are mostly issued for public officials of a specific state institution, "such as armed forces, police, judges and prosecutors, medical personnel, penitentiary officials, among others".[666]

III. Legislative Remedies in the Case Law of Human Rights Courts

At present, each regional human rights system has reached a point in which the respective court has developed a rather consistent practice of ordering states to reform their domestic laws under certain circumstances. This is especially true in the case of the IACtHR, where ninety-nine judgments with legislative remedies can be found until the end of 2022. This represents as much as 32% of the IACtHR's judgments on reparations. The first judgment of the IACtHR with legislative remedies is *Loayza Tamayo vs. Peru* (1998). This case related to a civilian woman condemned by military courts without the possibility of appealing to ordinary justice. The domestic laws that allowed for this conviction had already been declared incompatible with the ACHR in the judgment on the merits, as they foresaw a military trial for everyone accused of treason or terrorism.[667] In the judgment on reparations, the Court ordered Peru to "adapt Decree-Laws 25,475 (Crime

662 IACtHR, *Lori Berenson vs. Peru* (2004), *Pacheco Teruel vs. Honduras* (2012).

663 This affects issues such as the lack of water or food supplies, or the access to health or education. See IACtHR, *Aloeboetoe vs. Suriname* (1993), *Yakye Axa vs. Paraguay* (2005); *Plan de Sanchez vs. Guatemala* (2004).

664 On the former, see for example IACtHR, *Cotton Field vs. Mexico* (2009). Concerning the latter, see for example IACtHR, *Luna Lopez vs. Honduras* (2013).

665 Such as in ECtHR, *Kuric and others vs. Slovenia* (2012), operative para. 9 ("Dit, à l'unanimité, que l'Etat défendeur doit (…) mettre en place un système d'indemnisation ad hoc au niveau interne"). See also ECtHR, *M.C. vs. Italy* (2013), operative para. 11. With respect to the ACtHPR, see for example *Suy Bi Gohore Emile vs. Côte d'Ivoire* (2020), ordering the state to ensure the organisation of elections to the Electoral Bureau at the local level.

666 Novak, *Recueil des Cours* 2017, p. 157.

667 See in this respect Chapter 4 of this book.

of Terrorism) and 25,659 (Crime of Treason) to conform to the American Convention on Human Rights".[668] Thereafter, the reforms of domestic laws became a rather common remedy in the Inter-American jurisprudence, particularly since 2001.[669] These have concerned a wide variety of issues, some of which have represented important developments in international human rights law.[670]

In the case of the ECtHR, this number is considerably lower but nevertheless significant. Between its first judgment with legislative remedies in 2004 and the end of 2022, this Court has ordered legislative measures in thirty-four judgments. Although this number points to a certain consistency in its practice and is higher than in the case of the ACtHPR, the exceptional nature of this remedial practice can be clearly observed when comparing it percentage-wise. While in the case of both the IACtHR and the ACtHPR legislative remedies are included in approximately one-third of the respective courts' final judgments on reparations, this is done in less than one per cent of those of the ECtHR. As mentioned before, the first judgment with legislative remedies before the ECtHR was its first pilot judgment, *Broniowski vs. Poland* (2004). Legislative remedies are, in fact, mostly included in the context of the pilot judgment procedure.[671] However, it is important to note that not all legislative remedies are issued in pilot judgments and that not all pilot judgments contain legislative remedies or even deal with domestic laws.[672] Legislative measures are mostly included by the ECtHR in cases related to property rights, inhuman conditions of

668 IACtHR, *Loayza Tamayo v. Peru* (1998), operative para. 5.

669 While until 2001 this remedy had been ordered only in the case of *Loayza Tamayo*, in that year the IACtHR included legislative measures in six judgments, thus consolidating this practice.

670 This includes for example the measures concerning the abrogation of amnesty laws, or those ordering the amendment of laws in order to recognise indigenous territory. See Chapter 4 of this book.

671 See Markus Fyrnys, "Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights", *GLJ* 12(5), 2011.

672 In order to apply the pilot judgment procedure, the ECtHR must determine the existence of "a structural or systemic problem". When explaining the difference between these two concepts, some authors have argued that the latter ones stem from "legal deficiencies" or "inadequate legislation", while "[s]tructural problems may involve situations, in which the legal mechanisms seem appropriate, but the problem concerns practice" (Jakub Czepek, "The Application of the Pilot Judgment Procedure and Other Forms of Handling Large-Scale Dysfunctions in the Case Law of the European Court of Human Rights", *International Community Law Review* 20 (2018), pp. 347–373, at pp. 352-353).

detention, and excessive length of domestic judicial proceedings, but the remedies usually concern the accessory violation of the right to an effective domestic remedy.[673]

Finally, in the case law of the ACtHPR, seventeen judgments with legislative remedies can be found until the end of 2022. Despite it being a rather low number, this is mainly due to the scarce total number of judgments issued by the ACtHPR so far.[674] It is a remedy that has become rather common in its jurisprudence, already since its first judgment on the merits in 2013.[675] The African Court has not offered a lengthy legal justification concerning its power to order the reform of domestic laws but it has instead simply assumed this competence from the beginning. Nevertheless, in some instances, this competence was contested by states. Among others, Benin submitted an objection arguing that the ACtHPR "lacks jurisdiction to assess national laws conformity in accordance with international conventions", adding 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".[676] Such objections have been consistently rejected by the Court, with the argument that Art. 3(1) of the Protocol allows it to determine the occurrence of human rights violations "including where such violations result from the application of a national law", noting in addition "that international conventions take precedence over domestic laws".[677] This section will briefly explore some general issues concerning these remedial measures, including the particular case of legislative remedies before the ECtHR, the role of human rights courts as positive or negative legislators and the function that these remedies have in human rights adjudication.

673 See generally Chapter 4 of this book.

674 However, the total number of judgments issued by the ACtHPR has been exponentially growing during the last years. While in the period of 2013-2018 it issued an average of 2,4 judgments with reparations annually, in the period of 2018-2022 this number augmented to 13 of such judgments annually on average.

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

676 ACtHPR, *Houngue Eric Noudehouenou vs. Benin* (2020), para. 21.

677 ACtHPR, *Ajavon vs. Benin* (2020), para. 49.

1. The Special Case of Legislative Remedies before the ECtHR

As mentioned in the introduction of this book, the need for legislative action after a judgment of the ECtHR is not as straightforward as in the case of the other two regional courts, due to the role of the CoM. When supervising compliance with the ECtHR's judgments, the latter body can request additional measures besides those expressly ordered in the operative part of the judgment. This is however also highly dependent on the findings and recommendations of the court. Thus, regarding the judgments of the ECtHR and the need for legislative action, there are three possible scenarios.

In the first scenario, the judgment completely avoids discussing the necessity of a legislative reform. This is the most common situation, as the ECtHR generally abstains from indicating the consequences of a violation. In this scenario, it is rather exceptional that the CoM requires such a reform in order to close the case. Nevertheless, the state can still engage in a legislative reform *motu propio* after the judgment, for various reasons.[678] This can be done directly by legislative authorities,[679] but most commonly it is the higher courts of states that step in and take the ECtHR jurisprudence into account in order to quash legislation.[680]

678 See for example Polakiewicz, "International Law and Domestic (Municipal) Law", in *MPEPIL*, para. 37 ("Numerous judgments by the ECtHR have prompted or accelerated legislative or administrative reforms in the respondent and sometimes even in third States"). A typical motive in this respect is the avoidance of future condemnations, as highlighted by Ichim, *Just Satisfaction,* 2014, p. 35 ("Compared with its Inter-American counterpart, the [European] Court exerts significantly less leverage as to the modification of internal legislation, though one has to admit that it has an indirect influence, coupled with a rational interest of the state in preventing future condemnations").

679 See Alice Donald, "Parliaments as Compliance Partners in the European Convention on Human Rights System", in Saul, Follesdal and Ulfstein (eds.), *The International Human Rights Judiciary and National Parliaments*, Cambridge: CUP, 2017, pp. 75 – 109.

680 See generally on the role of domestic judges in the implementation of ECtHR judgments Raffaela Kunz, *Richter über internationale Gerichte? Die Rolle innerstaatlicher Gerichte bei der Umsetzung der Entscheidungen von EGMR und IAGMR*, Heidelberg: Springer, 2020. The ECtHR actually expects such intervention by domestic courts, indicates Amrei Müller, "Domestic authorities' obligations to co-develop the rights under the European Convention on Human Righs", *International Journal of Human Rights* 20(8), 2016, pp. 1058-1076, at p. 1064.

A comparative analysis of this practice in different states can be found in an edited volume by Keller and Stone Sweet.[681] They find that states "have developed procedures designed to provide legislative authorities with information and counsel on the relevance of the ECHR", including parliamentary committees and advisors that examine the conventionality of domestic laws taking into account the Court's jurisprudence.[682] More recently, Kunz showed several examples of domestic courts that "disapply or even quash laws that have been declared by the human rights courts to violate the conventions", mentioning examples of Switzerland and Germany, among others.[683] Moreover, she highlights that domestic courts do not only take into account judgments against their own states but also against other states, "in order to preventively bring the legal order in accordance with the convention standards".[684]

The second scenario takes place when the ECtHR recommends a legislative reform (with different degrees of intensity) in the reasoning of the judgment. This is done mostly in the so-called 'Article 46 judgments', which include a section under that provision that suggests the appropriate remedial measures. The Court introduces such sections with a common formula, whereby a judgment

> "*imposes on the respondent State the legal obligation not just to pay those concerned the sums awarded by way of just satisfaction pursuant to Article 41 of the Convention but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if necessary, individual measures which it considers appropriate to incorporate into domestic law in order to put an end to the violation found by the Court and to redress as far as possible the effects*"[685]

In 'Article 46 judgments', this general rule is followed by an exception, indicating that "[h]owever, in certain special circumstances the Court has found it useful to indicate to a respondent State the type of measures that might be taken to put an end to the situation which has given rise to

681 Helen Keller and Alec Stone Sweet (eds.), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford: OUP, 2008.

682 Helen Keller and Alec Stone Sweet, "Assessing the Impact of the ECHR on National Legal Systems", in Keller and Stone Sweet (eds.), 2008, pp. 686-687.

683 Raffaela Kunz, "Judging International Judgments Anew? The Human Rights Courts before Domestic Courts", *EJIL* 30(4), 2019, pp. 1129–1163, at pp. 1139 – 1142.

684 Kunz, *EJIL* 2019, p. 1140.

685 As for example in ECtHR, *Ooo Informatsionnoye Agentstvo Tambov-Inform vs. Russia* (2021), para. 124.

the finding of a violation".[686] Afterwards, the recommended measure is specified. Sometimes this is done in a very broad way, stating for example that "[i]t will be for the respondent State to implement (…) such measures as it considers appropriate to secure the rights of the applicants and other persons in their position".[687] In other judgments the suggested measure is more concrete, specifying for example the legal effect that it should produce.[688] Legislative measures have played a prominent role in these judgments. Although the ECtHR usually leaves the door open to accepting other kinds of measures instead of legislative ones,[689] it is not uncommon to find judgments that are very specific as to the legislative nature of the measures recommended.[690] Some 'Article 46 judgments' also indicate the expected outcome of the legislative reform[691] or identify the concrete provisions to be amended.[692] The ECtHR has even recommended constitutional reforms in the context of 'Article 46 judgments'.[693]

686 ECtHR, *Ooo Informatsionnoye Agentstvo Tambov-Inform vs. Russia* (2021), para. 125; *Guðmundur Andri Ástráðsson v. Iceland* (2020), para. 312.

687 ECtHR, *Shlykov and others vs. Russia* (2021), para. 110.

688 See for example ECtHR, *Grabowski vs. Poland* (2015), para. 68 ("the respondent State should undertake legislative or other appropriate measures with a view to eliminating the practice which developed under section 27 of the Juvenile Act (…) and ensuring that each and every period of the deprivation of liberty of a juvenile is authorised by a specific judicial decision").

689 See for example ECtHR, *Ooo Informatsionnoye Agentstvo Tambov-Inform vs. Russia* (2021), para. 128, where the ECtHR is requesting the implementation of "appropriate legislative or jurisprudential measures (…)". In other cases, legislative measures are "preferable" but not indispensable. See in this respect ECtHR, *László Magyar vs. Hungary* (2014), para. 71; *Harackchiev and Tolumov vs. Bulgaria* (2014), para. 280.

690 See for example ECtHR, *Oleksandr Volkov vs. Ukraine* (2013), para. 200 ("These measures should include legislative reforms involving the restructuring of the institutional basis of the system"); *Katz vs. Romania* (2009), para 35 ("La Cour estime que l'Etat devrait, avant tout, prendre les measures législatives nécessaires"). See also ECtHR, *Hasan and Eylem Zengin vs. Turkey* (2007), para. 84; *Chanyev v. Ukraine* (2014), para. 35.

691 For example, in the case of *Kuzmina and others vs. Russia* (2021), para. 120, the ECtHR stated that "the Russian legal framework pertaining to the conduct of operational-search activities must be amended so as to provide for a clear and foreseeable procedure for authorisation of undercover operations, such as test purchases and operational experiments, by a judicial body providing effective guarantees against abuse". Similarly, in ECtHR, *M. and others vs. Bulgaria* (2011), para. 138.

692 See ECtHR, *Atiman vs. Turkey* (2014), para. 47 ("To that end, the Court considers that section 39 of the Regulation on the Powers and Duties of the Gendarmeries should be amended").

693 ECtHR, *Zornić vs. Bosnia and Herzegovina* (2014), para. 43; *Anchugov and Gladkov vs. Russia* (2013), para. 111.

It is, however, rather unclear whether such indications in the argumentative part of judgments are binding for states or not.[694] Formally, the operative paragraphs of the judgments are the sole part which is mandatory to implement.[695] However, some authors – and judges – have considered that when the ECtHR uses mandatory language in its reasoning, the measure spelled out this way has a binding nature.[696] In any case, the last word on the necessity to implement such measures lies again in the hands of the CoM. Although these judgments' indications form the basis of the execution process and thus limit the freedom of the state in this regard,[697] there is still room for negotiation within the CoM.[698]

This is not the case when judgments include such statements in its operative part, thus leaving no alternative for states other than implementing them.[699] In this respect, Donald and Speck, after conducting a series of interviews, highlight that a "former senior Court official ventured that

694 See for example Donald and Speck, *HRLR* 2019, p. 3, acknowledging "that the distinction between recommendatory and prescriptive judgments is contestable in view of judicial disagreement as to the precise legal effect of indicating remedial measures in the operative part as opposed to the main body of a judgment". See also Keller and Marti, *EJIL* 2016, at p. 832, recommending "to distinguish more clearly between recommendations and consequential orders and to always include the latter in the operative part of judgments".

695 See Helfer, *EJIL* 2008, p. 147 ("The remedies that the Court indicates are legally binding when they are phrased in mandatory language and appear in the operative part of the judgment").

696 Sicilianos for example argues that these Art. 46 indications range from mere recommendations to real injunctions, suggesting that this depends on the concrete wording used by the ECtHR. See Sicilianos, *NQHR* 2014, pp. 244 et seq. As to the judges, see the dissenting opinion of Judge Pinto de Albuquerque *et al.* in ECtHR, *Moreira Ferreira vs. Portugal (No. 2)* (2017), para. 17 ("The reopening clause is a key means for the execution of the Court's judgments whose legal force does not depend on whether it is inserted in the reasoning or the operative part of the judgment").

697 See Sicilianos, *NQHR* 2014, p. 245 ("Although such expressions, contained in the corpus of the judgment and not in the operative part, do not seem to create, as such, legal obligations *stricto sensu*, they denote the intention of the Court to strongly urge the respondent State to take the appropriate measures and the Committee of Ministers to exercise its supervisory function under Article 46, para. 2 in order to ensure the desirable result").

698 See Kjetil Mujezinović Larsen, "Compliance with Judgments from the European Court of Human Rights: The Court's Call for Legislative Reforms", *NJHR* 31(4), 2013, pp. 496–512.

699 This is shown for example in the provisions regulating the pilot judgment procedure, establishing that the type of remedial measures that the concerned state is required to take will be identified "by virtue of the operative provisions of the judgment" (ECtHR, Rules of the Court, Rule 61, para. 3).

where indications are in the operative part: '[T]he Committee of Ministers will feel that there is nothing to discuss. The Court has ordered it, and that's that'".[700] In sum, even though the implementation of ECtHR's recommendations to reform domestic laws in 'Article 46 judgments' will generally be requested in order to close the supervision proceedings, there is no certainty of it, as this is not always the case.

Thus, the third and most relevant scenario relates to the cases in which the Court expressly orders the reform of domestic laws, including this requirement in the operative paragraphs of the judgments. These are highly exceptional cases, but those are at the same time the only cases in which the CoM will with no doubt require the state to carry out such reforms to close the case. Nevertheless, it is also important to note in this regard that these general measures included in the operative provisions are generally rather vague as to their legislative nature.[701] The ECtHR usually avoids being too specific in these binding provisions.[702] Instead, most of them are worded in rather broad terms, and the need for legislative reforms is identified by reading the operative paragraph in conjunction with the relevant paragraphs of the judgment's reasoning. For example, in one of its first judgments with legislative remedies, the ECtHR ordered Poland to adopt "appropriate legal and/or other measures [to] secure in its domestic legal order a mechanism maintaining a fair balance between the interests

700 Donald and Speck, *HRLR* 2019, p. 23. See also Ichim, *Just Satisfaction,* 2014, pp. 219-220 ("Given that the operative provisions are binding, the state may not contest them").

701 See Lize Glas, "The Functioning of the Pilot-Judgment Procedure of the European Court of Human Rights in Practice", *NQHR* 34(1), 2016, pp. 41-70, at p. 52, noting that "the description of the measures in the operative provisions remains general; the Court does not specify which measure the State must take". For some exceptions in which the legislative nature of the remedial measures was clearly spelled out, see ECtHR, *Tunikova vs. Russia* (2021), operative para. 8 ("the respondent State must introduce, without further delay, amendments to the domestic legal and regulatory framework"); *Greens and MT vs. UK* (2010), operative para 6, establishing the obligation to "bring forward, (…) legislative proposals intended to amend the 1983 Act and, if appropriate, the 2002 Act" and to "enact the required legislation". See also ECtHR, *Grudić v. Serbia* (2012), operative para. 3, ordering the state to "implement the relevant laws in order to secure payment of the pensions and arrears in question".

702 See Ichim, *Just Satisfaction*, 2014, p. 216 ("The problem with the general measures is that they are not precise. Unlike individual measures, the Court does not indicate a course of action, but leaves the choice to the breaching state"). See on remedial specificity Chapter 5 of this book.

of landlords and the general interest of the community".[703] This statement could be seen as allowing the state to adopt non-legislative measures to solve the problem. However, when analysing the reasoning of this judgment, one can see that the ECtHR specifies that the systemic problem at stake is "the malfunctioning of Polish housing legislation".[704] As observed by Sadurski with respect to this judgment, "no amount of good will and tinkering by law-enforcers could improve the situation as long as the law remains in force".[705]

In most cases, these legislative measures are linked to a violation of Art. 13 ECHR, and prescribe the introduction of domestic remedies for specific human rights violations.[706] The idea behind this right is to provide individuals with a way of obtaining redress at the domestic level, without having to initiate a procedure before the ECtHR.[707] Until the late 2000s, this provision was considered "dormant",[708] or even "obscure".[709] However, its scope and relevance were progressively expanded due to the docket crisis of the ECtHR and its increased focus on subsidiarity.[710]

703 ECtHR, *Hutten Czapska vs. Poland* (2006), operative para. 4.

704 ECtHR, *Hutten Czapska vs. Poland* (2006), para. 237.

705 Sadurski, *HRLR* 2009, at p. 425. Moreover, one of the main arguments of Judge Zagrebelsky when dissenting to this measure was that, by ordering legislative remedies, the ECtHR "is entering territory belonging specifically to the realm of politics and that its indications go beyond its jurisdictional competence" (ECtHR, *Hutten Czapska vs. Poland* (2006), Dissenting Opinion of Judge Zagrebelsky).

706 Article 13 ECHR establishes that "[e]veryone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity". It is important to note that in this case the concept of domestic remedies is used in its procedural understanding, contrary to the way it is generally used along this book, which refers to its substantive understanding. See above section I(b) of this Introduction.

707 The weight given to the right to an effective remedy by the ECtHR reflects the great importance of the principle of subsidiarity in the European system of human rights protection, giving priority to the domestic level and limiting the ECtHR's interventions to those cases in which the domestic remedy was not available or ineffective. See Costas Paraskeva, "Returning the Protection of Human Rights to Where They Belong, At Home", *International Journal of Human Rights* 12(3), 2008, pp. 415-448.

708 Keller and Stone Sweet, in Keller and Stone Sweet (eds.), 2008, p. 708.

709 Helfer, *EJIL* 2008, p. 144.

710 See generally Michael Reiertsen, *Effective Domestic Remedies and the European Court of Human Rights: Applications of the European Convention on Human Rights Article 13*, Cambridge: CUP, 2022.

Several elements point to the legislative nature of measures ordering the introduction of domestic remedies. First, according to the ECtHR, such domestic remedies cannot depend on the goodwill of the state or other practical arrangements but instead need to be positively laid down and regulated in the domestic legal order. This is shown in several cases dealing with expulsion orders, in which the remedies against such orders had no automatic suspensive effect. States argued that it was sufficient for remedies to have a suspensive effect "in practice", as the domestic courts decided in almost every case to stay the deportation procedure.[711] However, the ECtHR considered that this arrangement failed to comply with Art. 13, as there was no guarantee that the authorities would comply with that practice in every case.[712] The Court stated that, in accordance with the rule of law, "the requirements of Article 13 (…) take the form of a guarantee and not of a mere statement of intent or a practical arrangement".[713]

Similarly, the ECtHR often states that the remedy shall be set up "in the national legal system",[714] and it would be difficult to imagine a domestic remedy sufficiently regulated and effective that is established only through judicial practice. This can be seen in a case related to the excessive length of judicial proceedings in Bulgaria, where the State argued that domestic judges already took into account the excessive length of criminal proceedings when sentencing. The ECtHR did not consider this to be an effective remedy because "that practice is not based on express statutory language".[715] Moreover, in several of these cases, the Court expressly determined that the structural problem "resulted from inadequate legislation",[716] that violations of Art. 13 ECHR would "require clear and specific changes in the domestic legal system",[717] or even that it would be "highly unlikely (…) that such an effective remedy can be set up without changing the domestic legislation on certain specific points".[718] Thus, as can be observed, legislative incorporation is a necessary element of an effective domestic remedy.

711 See for example ECtHR, *A.C. vs. Spain* (2014), para. 95; *Allanazarova v. Russia* (2017), para. 97.
712 See for example ECtHR, *Singh vs. Belgium* (2014), para. 97.
713 ECtHR, *Čonka v. Belgium* (2002), para. 83; *Gebremedhin [Gaberamadhien] vs. France* (2007), para. 66.
714 See for example ECtHR, *Gazsó vs Hungary* (2015), para. 39.
715 ECtHR, *Dimitrov and Hamanov vs. Bulgaria* (2011), para. 118.
716 ECtHR, *Lukenda vs. Slovenia* (2005), para. 93.
717 ECtHR, *Ananyev vs. Russia* (2009), para. 212.
718 ECtHR, *Burdov vs. Russia (No. 2)* (2009), para. 138.

In this context, a progressive prescriptiveness of legislative requirements can be observed before the ECtHR. What the ECtHR usually does is to mention in a first judgment the incompatibility of a law, perhaps wording it with more prescriptive terms or recommending a reform under Art. 46 in subsequent judgments related to the same law, and including it as a legislative remedy in the operative part only if the state is still failing to carry out such a reform.[719] In any case, the ECtHR's measures that will be examined in the following chapters are only those expressly included in the operative provisions of a judgment, although the reasoning will the taken into account in order to establish the legislative nature of these remedies. These are the only cases in which the need for legislative action is formally prescribed and does not depend on the will of the state nor the negotiations taking place before the CoM.

2. Human Rights Courts: Positive or Negative Legislators?

An important question concerning legislative remedies is whether human rights courts more frequently request states to either enact laws or repeal them, i.e., whether they act more as negative or positive legislators in this respect. Novak, referring to the IACtHR, argues that legislative reparations can consist of "(a) the enactment of new legislation; (b) the reform or abrogation of existing law; [and] (c) the non-enactment of new legislation incompatible with the American Convention".[720] However, it becomes apparent that the latter type is extremely rare, as in order for a law to be reviewed after an alleged human rights violation, this law needs to have been enacted in the first place. Even cases of abstract review, where the law does not need to have been applied to the victim of the case, are always dealing with laws in force and not draft laws.[721] On the other hand, it is unconvincing to put legislative reforms and derogations in the same category. Very often the legislative amendments ordered by human rights

719 See Sadurski, *HRLR* 2009, p. 428 ("When the Court has no reason to trust the State that it will get the message after a gentler, more habitual signal from the Court, it will abandon traditional subtleties and display no restraint: it will no longer disguise its condemnation of the legislation in the language of individual violation"). See also Ichim, *Just Satisfaction*, 2014, p. 219.

720 Novak, *Recueil des Cours* 2017, p. 163.

721 Advisory opinions, on the other hand, could concern the review of draft laws. See on both legislative review by human rights courts *in abstracto* and on advisory review of legislation, Chapter 1 of this book.

courts do not imply any sort of repeal. Instead, most legislative reforms ordered by human rights courts are of a positive nature, requiring the inclusion of specific elements in a domestic provision. Thus, it seems easier to divide the legislative remedies along these lines, i.e. those requesting positive legislative reforms on the one hand and those requesting negative reforms on the other.[722]

Looking a bit closer at the legislative remedies issued by human rights courts, one can observe that both the ECtHR and the IACtHR have acted more often as positive than negative legislators. This is most evident in the case law of the ECtHR, where almost all of its legislative measures have concerned the enactment of new laws instead of the amendment or repeal of existing ones. The requirement of introducing an effective domestic remedy is implemented either through the adoption of a new law regulating such a remedy or through the amendment of an existing law in order to add this regulation. Thus, in any case, the introduction of a domestic remedy represents a positive reform of domestic laws.

Positive reforms are also ordered more often by the IACtHR, although the difference between both categories is not as big as in the case of the ECtHR. The IACtHR has very often expressly ordered negative amendments in the form of a repeal of legislative provisions, such as those concerning the mandatory death penalty.[723] Ordering to strike down entire laws is rarer, although this is what was done for example in the case of amnesty laws considered contrary to the Convention.[724] However, in most cases the reforms ordered by this Court are still of a positive nature, mainly requesting the enactment of laws or provisions for the protection of vulnerable groups, or for an increased protection of fair trial rights.

This aspect is different in the case law of the ACtHPR, where negative reforms have played a more prominent role than positive ones. This is due to the fact that this court orders legislative reforms mainly when it finds a domestic provision incompatible with human rights instruments, while the other two courts focus more on legislative gaps that cause violations. For example, in cases with legislative remedies concerning political rights, the ACtHPR always requested to remove specific provisions, such as those

722 There are however a small number of legislative measures that are neutral in this respect, either because they are very vague or because they include elements of both a positive and a negative nature. See in this respect Chapter 5 of this book, with more details.

723 See for example IACtHR, *Raxcacó Reyes vs. Guatemala* (2005).

724 See for example IACtHR, *Barrios Altos vs. Peru* (2001).

prohibiting independent candidates,[725] preventing courts from reviewing an election[726] or restricting the right of association of political parties.[727] This court has also ordered to abrogate provisions of criminal codes that foresaw the mandatory imposition of the death penalty,[728] or defamation laws that contemplated imprisonment for this crime.[729] Positive reforms have also been ordered, but much more scarcely and only rather recently.[730]

In sum, one can clearly see the differences among human rights courts in this regard. While the ECtHR orders almost exclusively positive reforms of legislation and the ACtHPR negative reforms, the IACtHR stands in between, ordering both types of reforms, although slightly more often those of a positive nature.[731] This also represents a difference if compared to legislative remedies in constitutional law, which are usually of a negative nature.[732]

3. Legislative Remedies as Guarantees of Non-Repetition?

Legislative reforms ordered by human rights courts are generally considered to pertain to the category of guarantees of non-repetition. This has been stated by numerous authors, as well as by the courts themselves.[733] It is also true in most of the cases. For example, as mentioned before, one

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

726 ACtHPR, *Jebra Kambole vs. Tanzania* (2020).

727 ACtHPR, *Ajavon vs. Benin* (2020).

728 ACtHPR, *Rajabu et al. vs. Tanzania (2019)*; *Amini Juma vs Tanzania* (2021).

729 ACtHPR, *Lohé Issa Konata vs. Burkina Faso* (2016).

730 For example, in 2022 the ACtHPR requested the introduction of laws to secure the right of indigenous communities to be effectively consulted (ACtHPR, *African Commission on Human and Peoples' Rights vs. Kenya* (2022)) and to ensure the higher independence of constitutional courts (ACtHPR, *Oumar Mariko vs. Mali* (2022)).

731 See in this respect Chapter 5 of this book.

732 See however Allan-Randolph Brewer Carías, *Constitutional Courts as Positive Legislators*, Cambridge: CUP, 2011.

733 For example, in the IACtHR's judgments, legislative measures are always included in a section under the heading of guarantees of non-repetition. Concerning literature, see for example Marcela Zúñiga Reyes, "Garantías de no repetición y reformas legislativas", *Revista Derecho del Estado* 46, 2020, pp. 25-55. See also, more generally, Phillip Stöckle, *Guarantees of Non-Repetition: Die Anordnung struktureller Reformen durch den Inter-Amerikanischen Gerichtshof für Menschenrechte*, Berlin: Duncker & Humblot, 2021.

of the main reasons for the ECtHR to order such measures is to create an "effect of preventing recurrence" in order to avoid the Court becoming overloaded with 'repetitive' applications.[734] The victims of human rights violations are moreover generally not the main beneficiaries of such reforms, as the law has already been applied to them and their legal situation has mostly changed due to the time that elapsed between the violation and the judgment.[735] Thus, the main aim of legislative measures is to prevent other potential victims from materialising as such.

This can be clearly seen in the legislative remedies related to the protection of vulnerable groups, where the orders to enact legislation that offers better protection are intended to prevent other members of such groups from becoming victims of a human rights violation. Legislative measures related to fair trial rights, such as those concerning judicial independence or the right to appeal, are similarly aiming to solve a structural problem that can affect several individuals other than the victims of the case. Thereby, if the procedural requirements before domestic courts are not compatible with the respective convention, the number of individuals who can be potential victims of fair trial violations is considerable. Thus, the deterrent effect of legislative remedies figures prominently in certain constellations of cases.[736]

However, there are also some instances in which legislative remedies adopt another function. This is especially the case with some forms of satisfaction. In this respect, when a domestic provision (or the lack of it) is causing a continuous human rights violation for the victim at hand, its reform could be considered a measure of cessation rather than a guarantee of non-repetition.[737] This is for example what occurs with most legislative

734 Ichim, *Just Satisfaction*, 2014, p. 253.

735 With respect to the ECtHR, this is especially the case with reparations related to conditions of detention and excessive length of judicial proceedings, where victims have mostly been transferred to another prison or cell in the former case and obtained a final judgment in the latter. But see on the contrary *Xenides-Arestis vs. Turkey* (2005), operative para. 5, ordering the State to "introduce a remedy which secures genuinely effective redress for the Convention violations identified in the instant judgment *in relation to the present applicant* as well as in respect of all similar applications pending before it" (emphasis added).

736 Actually, the protection of vulnerable groups and fair trial rights are by far the two categories of cases in which human rights courts issue legislative reparations more often. See Chapter 4 of this book.

737 See for example, with respect to the IACtHR, Attanasio, *UPJIL* 2016, pp. 840-849. See also Hennebel and Tigroudja, *Commentary to the ACHR*, 2022, p. 1305.

remedies of the ECtHR, which can be seen not only as guarantees of non-repetition but also as a direct order to cease continuing Art. 13 ECHR violations related to the lack of domestic remedies.[738] Similarly, in the case of the IACtHR, a violation of Art. 2 ACHR comes into play when the domestic legal order is not compatible with the Convention. Thus, the adaptation of domestic laws can be seen both as a cessation of such violations and as a guarantee of non-repetition at the same time.[739] Moreover, in some cases, legislative reforms are necessary to comply with the investigation of human rights violations and prosecution of those responsible, which is another form of satisfaction. This can be seen in the orders to annul amnesty laws that prevent such investigations and prosecutions.

In general, both for the IACtHR and the ACtHPR to order legislative remedies, no structural problems leading to a potential inflow of applications are necessary, in contrast to the ECtHR. Instead, it is sufficient for these courts to note that the violation in the individual case is rooted in a domestic law or the absence thereof. For that reason, they usually make no reference to other potential victims when issuing legislative remedies. Thereby, such remedies can often adopt the function of providing satisfaction, as they are requested by victims and the court focuses exclusively on that request, without taking the risk of a repeating violation into account.[740]

Besides satisfaction and guarantees of non-repetition, legislative remedies can sometimes also be ordered as a way of providing restitution to victims.[741] For example, in cases related to property rights violations where states are obliged to adopt a law allowing victims to claim such properties, this can serve to achieve the aim of restituting them. Such remedies have been issued by the IACtHR with respect to indigenous property rights, and by the ECtHR regarding property rights in the context of transition or state succession.[742] The main aim of such legislative remedies is thus to provide legal certainty as to the implementation of the state's obligation to restitute

738 The ECtHR's legislative measures most commonly order the enactment of domestic remedies after finding a violation of the right to an effective remedy under Art. 13 ECHR, thus clearly aiming at the cessation of this violation.

739 See for example Cornejo, *I•CON* 2017, p. 385, mentioning a case in which a "legislative reform was ordered (…) because the Court considered it to be a means for cessation and non-repetition in view of the background of the case".

740 See in this respect for example Shelton, 2015, p. 397, highlighting that "[t]he line between satisfaction and guarantees of non-repetition is not easy to draw".

741 See Polakiewicz, in *MPEPIL*, para. 37, arguing that measures such as legislative amendments can be regarded from a theoretical point of view "as a measure of *restitutio in integrum*".

742 See Chapter 4 of this book.

these properties, although contrary to other measures of restitution, these extend beyond the concrete victims of the case and include as beneficiary every other person that is affected by such unlawful expropriations.

Similarly, in some exceptional cases, legislative remedies have served the purpose of rehabilitation. This can be most clearly seen in the case of *Vera Rojas vs. Chile* (2021), where the IACtHR requested the continuation of the victim's medical treatment in the event of her parents' deaths or their inability to pay. In order to secure this continuation of the treatment, the IACtHR specified that Chile shall "enact a legal provision to provide legal certainty regarding compliance with this obligation".[743] Thus, it can be observed that legislative remedies can also serve to guarantee long-term compliance with other remedial measures, such as restitution or rehabilitation.

Similar to general international law, the only category of human rights remedies in which legislative reforms do not fit is that of compensation, as this category refers exclusively to monetary payments. On the other hand, legislative remedies in human rights adjudication are probably closer to guarantees of non-repetition than those in general international adjudication, where this category takes in practice more often the form of symbolic assurances of non-recurrence. However, as elucidated above, even in human rights adjudication legislative reforms can often serve purposes additional to that of non-repetition.

Interim Conclusion: The Self-Understanding of International Courts in Light of their Remedial Practice

In sum, it can be concluded that there is a remedial *lex specialis* in human rights law and that legislative remedies form part of it. Although the three human rights courts initially based their remedial practice on the general law of state responsibility, each of them slowly departed from it and nowadays it can be considered that there is an autonomous law of state responsibility for human rights violations. In practice, one of the main differences between remedies in general international adjudication and human rights adjudication lies in the fact that certain categories of remedies, such as satisfaction and guarantees of non-repetition, are rather common in the latter field while they are very rare in the former. For example, under the

743 IACtHR, *Vera Rojas vs. Chile* (2021), para. 165; operative para. 7.

ARSIWA measures of satisfaction are only to be afforded when restitution and compensation measures are unavailable. Instead, in the case law of human rights courts these are rather complementary measures that are included on top of those of restitution and compensation. In addition, measures of rehabilitation pertain exclusively to the field of human rights law. This is closely related to the special functions played by remedies in human rights adjudication, as was explained in this chapter. Moreover, human rights violations are often of such nature that restitution is no longer possible, and thus compensation becomes in practice the primary form of reparation in this area.[744] Thus, the remedial practice of human rights courts clearly shows the special nature of remedies in this field. As a consequence, the specific remedies employed by human rights courts (such as the legislative measures) should arguably not be evaluated through the prism of the general law of state responsibility, but in the context of the human rights law framework.

This chapter also explained how the remedial practice of the three courts originated and evolved, and how it currently differs. Several explanations are offered for this divergence, mainly related to the remedial legal basis included in the respective instruments, and to the historical and political context in which the three courts were created and evolved. Some of these explanations were already laid down by Çalı in an article where she examined the variation in the regional human rights courts' remedial intrusiveness. However, she concludes that another explanation is more convincing, which she calls the "legal culture explanation".[745] In accordance with this explanation, it is the "national legal cultures and shared expectations from these institutions in their regional contexts" that shape their identity and thus also their remedial practice.[746] In this regard, it is true that some constitutional courts of the Global South, such as in the Americas and Africa, have engaged in what is called 'transformative constitutionalism'.[747] This constitutional approach seeks to achieve structural changes through

744 See in this respect Buyse, *ZaöRV* 2008, pp. 137-138.

745 Çalı, *I•CON* 2018, pp. 230-232. The other two explanations refer to the legal design (i.e. the legal basis for ordering remedies) and to the cause-history (the historical context in which the courts have operated). These two explanations were examined along this chapter.

746 Çalı, *I•CON* 2018, p. 230.

747 This term was actually first employed by Klare while referring to the Constitutional Court of South Africa (see Karl E. Klare, "Legal Culture and Transformative Constitutionalism", *South African Journal of Human Rights* 14, 1998, pp. 146-188.), and it has also been used to describe the judicial practice of the Colombian Constitutional

constitutional adjudication, which is not far from the approach taken by the IACtHR and the ACtHPR. Thus, it is likely that these courts are influenced in their remedial practice by the domestic courts of their respective region. With that being said, it is most probably a combination of various factors that have led to the different remedial landscapes and approaches of the three courts.

In general, the remedial practice of courts reveals a lot about how they perceive their own role in their respective regions. In this respect, the ECtHR's main objective is to redress the individual victims that appear before it, while at the same time trying to keep states relatively satisfied with the system and preventing it from collapsing under the number of pending applications. Conversely, the IACtHR has embraced its transformative role and tries to make the most out of each case it decides in terms of achieving structural changes, without worrying too much about the states' attitude or even about compliance with its judgments. Finally, the ACtHPR appears to still be looking for its adequate place in human rights adjudication. On the one hand, it has gone beyond the ECtHR's approach, by often almost disregarding the individual aspects of the victim and focusing only on the general issues that the cases imply. On the other hand, it does usually not go as far as the IACtHR in terms of the creativity and diversity of remedial measures, being especially cautious with respect to measures of satisfaction or the training of public officials.

While the first part of this book analysed the concept of legislative remedies as well as the remedial practice of courts in both the field of general international law and human rights law, the second part will exclusively focus on the legislative measures ordered by regional human rights courts. It will do so through a case law analysis, where a typology of such measures will be established in Chapter 4, the way in which they are spelled out and the remedial deference afforded to domestic legislatures will be examined in Chapter 5 and the consequences of such measures will be explored in Chapter 6. As will be observed throughout the second part, there is a common understanding among human rights courts as to the type of human rights issues that are tackled through legislative remedies, although with different priorities in this respect. Important differences between human rights courts can also be found in terms of the specificity of such

Court (see Manuel Jose Cepeda and David Landau, *Colombian Constitutional Law*, Oxford: OUP, 2017).

measures and the room of manoeuvre left for their implementation, while its consequences are also to some extent system-dependent.