Research Proposal – Doctoral Thesis

Systemic Remedies in International Human Rights Law

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1. Introduction

The law of remedies is of essential importance within international human rights law. Human rights without remedies are not effective,[1] and all major human rights instruments provide individuals under their jurisdiction with the right to an effective remedy.[2]

However, the judicial remedy most commonly awarded by the ECtHR, monetary compensation,[3] reaches its limits when violations of an individual's human rights result from underlying systemic problems in the State. This could be the case where the violation results from the application of a discriminatory law, where a State's executive employs discriminatory policies or where a State fails to comply with its positive obligations to ensure the rights of certain protected or vulnerable groups or of a large number of individuals, and the State is not willing to change these practices. In such cases, '[n]ot only is individual justice denied, but the failure to implement effective general measures results in the recurrence of similar infringements, producing repetitive applications and distracting the Court from its essential function'.[4]

Thus, when international human rights courts deal with such violations, corrective or declaratory remedies such as compensation can be inadequate and unsatisfactory, especially when litigants specifically seek to challenge the systemic problem in the State. These shortcomings of corrective remedies might call for a distinct category of remedies, **systemic remedies**. Such remedies are aimed at alleviating the underlying systemic issue, primarily avoiding future violations of the applicant, but also preventing other individuals from being affected by the discriminatory practice by the State. Examples include but are not limited to guidelines and suggestions for actions by the State, general measures to be implemented and/or a continued supervision of the judgement's execution and compliance with the remedies by the deciding Court or an affiliated organ.

This category of remedies lacks a comprehensive investigation in international human rights law. In domestic contexts, courts and tribunals are willing to set forth specific measures and goals for the executive to combat discriminatory or otherwise human rights violating policies, where they find it to be within their power. This is done e.g., regarding climate change[5]

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[1] See eg General Assembly, Basic 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 2006 [A/RES/60/147] preambular para 1, '[r]ecalling the provisions providing a right to a remedy for victims of violations of international human rights law found in numerous international instruments, in particular article 8 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and article 39 of the Convention on the Rights of the Child'.

[2] Eg International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 2; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 13; American Convention on Human Rights (Pact of San José) (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR) art 25.

[3] Veronika Fikfak, 'Changing State Behaviour: Damages before the European Court of Human Rights' (2018) 29 European Journal of International Law 1091, 1095.

[4] Andrew Drzemczewski and James Gaughan, 'Implementing Strasbourg Court Judgments: The Parliamentary Dimension' in Wolfgang Benedek, Florence Benoît-Rohmer, Wolfram Karl and Manfred Nowak (eds), *European Yearbook on Human Rights 2010* (2010) 234.

[5] *Urgenda Foundation v State of the Netherlands* [2015] The Hague District Court C/09/456689 / HA ZA 13-1396, ECLI:NL:RBDHA:2015:7196 55.

or discriminatory practices vis-à-vis Indigenous Groups.[6] This dissertation project undertakes a comprehensive analysis of such remedies before international human rights courts and human rights treaty monitoring bodies.

2. State of Current Research

2.1. Remedies for Human Rights

In the literature on remedies, two dimensions of remedies are usually distinguished: On the one hand, the procedural dimension encompasses 'processes by which arguable claims of human rights violations are heard and decided, whether by courts, administrative agencies, or other competent bodies.'[7] On the other hand, the substantive dimension of remedies refers to 'the actions or measures taken to prevent, redress or compensate the violation of a right'[8] and thus 'the outcome of the proceedings, the relief afforded the successful claimant.'[9] This dissertation will only deal with the latter dimension, the substantive relief offered by international courts and treaty monitoring bodies. However, this might touch upon the first dimension and access to courts/access to remedies, when this is what is required of States to comply with their obligations under international human rights law.

There exists extensive literature on remedies in international human rights law, both on a general and on a body-specific level. First and foremost, Dinah Shelton's important monograph, last revised in 2015, about Remedies in international human rights law remains the primary work on remedies.[10] Shelton addresses the theoretical framework of remedies, but also delves into the competences of the respective human rights tribunals as well as into the substance of remedies (the 'second dimension' of remedies).

Shelton also addresses the purposes and functions of remedies. She notes rectification of injustice and thus '[c]ompensatory or remedial justice' as the primary purpose of remedial justice. Secondly, condemnation and holding responsible of perpetrators, thirdly, general and individual deterrence and finally, restorative or transitional justice are given as functions of remedies.[11] However, Shelton writes that '[i]n general, the law is more advanced and consistent on the issue of the remedies States must provide in domestic law than it is on the role of international human rights bodies when domestic remedies are unavailing or have been exhausted without affording adequate relief.'[12] Moreover, she notes that '[d]espite the lack of domestic remedies that stimulate international petitions or complaints, international human rights bodies deciding these matters frequently limit themselves to finding facts and issuing declaratory judgments, or recommend that compensation of an unspecified amount be paid to the claimants.'[13]

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[6] *First Nations Child and Family Caring Society of Canada v Canada*, 2019 CHRT 39.
[7] Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, Oxford University Press 2015) 16.
[8] Dinah Shelton, 'Human Rights, Remedies' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2006) para 1.
[9] Shelton, *Remedies in International Human Rights Law* (n 7) 16.
[10] Shelton, *Remedies in International Human Rights Law* (n 7).
[11] ibid 19–27.
[12] ibid 1.
[13] ibid.

Remedies for human rights are also addressed in fundamental works on judicial remedies in international law, such as the monograph by Christine Gray, which features the remedial practice of the European and American Courts of Human Rights as it existed at its publication in 1990.[14] However, in the comparison of her analysis of the Courts' jurisprudence and remedial powers to more recent analyses, it becomes apparent that in the last 30 years, the conception of remedies and institutional powers have changed significantly since then and that the Courts have asserted a more confident role in guiding States.[15]

There is also significant contemporary literature on the remedies awarded by international human rights courts. This will be addressed in section 2.4. below, which lays out the existing literature on remedial approaches to systemic issues.

2.2. A Theory of Systemic Remedies

Systemic remedies are often implicitly addressed when publications discuss the remedial practices of international human rights courts in cases where non-monetary remedies are awarded. However, only limited existing literature addresses systemic remedies as understood in this research proposal, which allows us to identify various types of systemic remedies and also offers several definitions. Veronika Fikfak identifies structural remedies (as she calls them) as '**remedies [which] aim to bring about change in the structure of relationships and processes within a specific State and seek to modify that State's practice in order to prevent future similar violations**.'[16] Brodsky, Day and Kelly define systemic remedies as aiming 'to ensure that a group that has been affected by discrimination will 'not face the same insidious barriers that blocked their forebears.' The goal of a systemic remedy is to **prevent the same or similar discriminatory practices from occurring in the future**.'[17]

The correct way to categorise this type of remedies is thus the *aim* or *purpose* pursued by them. When a Court issues a systemic remedy, it attempts to change future State behaviour. They can (and should) be accompanied by *corrective* remedies such as restitution or compensation. Squaring this with the purposes of remedies as identified by Shelton, it becomes apparent that it is mainly the preventive function of remedies which is apparent in systemic remedies, trying to deter future violations by holding the State accountable to its obligations under international human rights law.[18] At the same time, it cannot be negated that individual cases and decisions, as well as compensation as a remedy can and will lead to changes in a State's legal system. In order to avoid future cases, States will be inclined to adapt their legal

[14] Christine D Gray, *Judicial Remedies in International Law* (Clarendon Press 1990) 149.
[15] Cf ibid 152, in contrast to contemporary practice as described in 2.4 below; Christine Gray, 'Remedies' in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013) s 5.
[16] Veronika Fikfak, 'Structural Remedies: Human Rights Law' in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (Oxford University Press 2022) para 4.
[17] Gwen Brodsky, Shelagh Day and Frances Kelly, 'The Authority of Human Rights Tribunals to Grant Systemic Remedies' (2017) 6 Canadian Journal of Human Rights 1, 3 citing CN v Canada (Canadian Human Rights Commission), [1987] 1 SCR 1114 at 1116, 40 DLR (4th) 193 [Action Travaildes Femmes SCC], rev'g [1985] 1 FC 96, 20 DLR (4th) (FCA) 668 [Action Travail des Femmes FCA cited to FC]; Laurence R Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 European Journal of International Law 125, 155.
[18] See above, 2.1.

system to conform with the judgement and the decisions thus set 'a set of common European minimum standards for civil and political rights', as Manfred Nowak writes.[19]

Investigating how systemic (or structural) remedies might look, Fikfak notes that '[o]nly very invasive remedies, such as generous compensation schemes, legislative restitution schemes, or a multitude of measures, can lead to a change in the structural relationships within the State or a fundamental shift in the decision-making processes.'[20] Courts might be (and have shown to be) reluctant to award these types of remedies. One the one hand, these remedies come into conflict with the more cautious and restrained approach to reparation they tend to take. Courts might refrain from demanding too much from their State parties in the first place to ensure compliance with the judgment. On the other hand, due to their more strenuous demands of the State and higher costs of implementation, systemic remedies exhibit lower rates of compliance and success. Effective remedies against a structural deficiency could also entail excessive burdens and adverse effects for the affected State, resulting in undesirable consequences.[21] For example, the implementation of effective climate change mitigation and adaptation measures in adherence to their human rights obligations could require a large toll on smaller and economically weaker States.[22]

A significant part of the literature on systemic remedies, as this dissertation understands them, primarily focuses on the domestic arena (mostly in Canadian scholarship[23]). Similarly, existing literature on so-called 'two-track'[24] or 'bi-level'[25] remedies investigates possibilities of following up judgments by international courts to ensure compliance. To some extent, this finds parallels in the Council of Europe Committee of Ministers' supervisory functions.[26]

While not categorising them as systemic, the general literature on remedies for human rights violations[27] and other publications[28] deal with more intrusive remedies in the context of human rights. The academic discourse has further examined the role of victims and particularly vulnerable groups in the context of remedies,[29] such as Indigenous Peoples, Black and People of Colour, women, or children.

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[19] Manfred Nowak, 'Introduction to the International Human Rights Regime', *Introduction to the International Human Rights Regime* (Brill Nijhoff 2003) 171.
[20] Fikfak, 'Structural Remedies: Human Rights Law' (n 16) para 34.
[21] James Crawford and Jeremy Watkins, 'International Responsibility' in Samantha Besson and John Tasioulas (eds), *The philosophy of international law* (Oxford University Press 2010) 294–296.
[22] Generally Fikfak, 'Structural Remedies: Human Rights Law' (n 16) para 8.
[23] Brodsky, Day and Kelly (n 17); David Landau, 'Choosing between Simple and Complex Remedies in Socio-Economic Rights Cases' (2019) 69 University of Toronto Law Journal 105.
[24] Kent Roach, *Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law* (Cambridge University Press 2021).
[25] Gerald L Neuman, 'Bi-Level Remedies for Human Rights Violations' (2014) 55 Harvard International Law Journal 323.
[26] See below, 2.4.
[27] Generally, Shelton, *Remedies in International Human Rights Law* (n 7).
[28] E.g., Başak Çalı, 'Explaining Variation in the Intrusiveness of Regional Human Rights Remedies in Domestic Orders' (2018) 16 International Journal of Constitutional Law 214.
[29] Thomas M Antkowiak, 'An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice' (2011) 47 Stanford Journal of International Law 55; Dinah Shelton, 'Reparations for Indigenous Peoples: The Present Value of Past Wrongs' in Federico Lenzerini, *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press 2008); Veronika Fikfak, 'Non-Pecuniary Damages before the European Court of Human Rights: Forget the Victim; It's All about the State' (2020) 33 Leiden Journal of International Law 335.

In relation to some systemic issues, existing scholarship also considers the question of how to properly remedy structural problems in the State, once a violation of human rights would be found and stresses that it is vital to find appropriate remedies for these structural problems.[30] Moreover, almost all UN treaty bodies have considered the issue of remedies in respect of structural deficiencies in their general comments.[31]

2.3. Areas of Application for Systemic Remedies

Systemic remedies address '**gross and systemic** problems within domestic legal systems.'[32] This formulation is similar to that of 'gross' or 'gross and systematic' human rights violations, which denotes particularly egregious and serious violations of international human rights law.[33] The General Assembly's Basic Principles and Guidelines Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law do call for adequate and effective reparation in cases of violations, including by systemic means.[34]

A second area where systemic remedies are called for concerns instance where the violation might not be of such a fundamental character ('gross'), but all the more widespread ('systemic'). Such remedies might be necessary if **persevering inequalities and deficiencies** in a State lead to repetitive cases before human right courts or tribunals, (e.g. deficiencies in the judicial system of a State) or if a violation affects a **large number of persons** and thus potential applicants and could not be rectified by a monetary award of compensation towards the individual applicant. Moreover, such remedies would be appropriate if novel issues arose before human rights tribunals that concern widespread and systematic practices of States, violating human rights of many people,[35] or systemic human rights violations, affecting minorities or specific vulnerable groups, such as Indigenous peoples, women, Black and People of Colour, or children.[36]

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[30] E.g. in relation to Climate Change, Helen Keller, Corina Heri and Réka Piskóty, 'Something Ventured, Nothing Gained?—Remedies before the ECtHR and Their Potential for Climate Change Cases' (2022) 22 Human Rights Law Review 1, 26; Helen Keller and Corina Heri, 'The Future Is Now: Climate Cases Before the ECtHR' (2022) 40 Nordic Journal of Human Rights 153, 171; Margaretha Wewerinke-Singh, 'Remedies for Human Rights Violations Caused by Climate Change' (2019) 9 Climate Law 224.

[31] E.g. Human Rights Committee, 'General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (United Nations 2004) CCPR/C/21/Rev.1/Add.13; Committee on Economic, Social and Cultural Rights, 'General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights)' (United Nations 2009) E/C.12/GC/20; see Shelton, *Remedies in International Human Rights Law* (n 7) 197.

[32] Fikfak, 'Structural Remedies: Human Rights Law' (n 16) para 34, emphasis by the author.

[33] General Assembly Basic 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 (n 1); Rhona KM Smith, 'Gross and Systematic Human Rights Violations' in Christina Binder, Manfred Nowak, Jane A Hofbauer and Philipp Janig (eds), *Elgar Encyclopedia of Human Rights* (2022).

[34] General Assembly Basic 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 (n 1) paras 15–23.

[35] See generally for human rights violations in relation to climate change: Keller, Heri and Piskóty (n 30); Wewerinke-Singh (n 30).

[36] Víctor Abramovich, 'From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System' (2009) 6 SUR - International Journal on Human Rights 7.

Remedies for human rights violations serve the primary purpose of 'rectify[ing] the wrong done to a victim, that is, to correct injustice'.[37] In many cases, such a narrow approach, including restitution in the specific individual case and compensation, cannot rectify the underlying systemic issues. While all judgments finding a violation arguably have some value as a deterrent and might help to avoid future violations, in some instances more far-reaching remedial approaches are called for. This is particularly apparent when applicants start proceedings strategically, to alleviate structural deficiencies in the system. While the declaratory value of a judgment declaring a violation can be helpful (and will be part of the thesis' examination of systemic remedies), these strategic litigants will often try to achieve more than that, aiming to directly affect their States' policies and structures.

Specifically in relation to climate change and the growing litigation in front of human rights courts, Keller and Heri have stated that provided the ECtHR finds 'Convention violations in climate cases, it will need to develop an appropriate approach to remedies. […] One key question is whether the Court will order States to adhere to the targets set out in the Paris Climate Agreement, which was adopted at the Paris climate conference (COP21) in 2015, and sets out a global framework to limit global warming to well below 2°C.'[38] It is essential to consider questions of remedies in 'new and systemic issues such as the challenge of climate change, [and] it is vital that the Court's approach to remedies be part of ensuring effective judgments, and more than a judicial afterthought.'[39]

A third area often identified as calling for systemic remedies is the judicial sector, where structural deficiencies and lacking guarantees of fair trial in many States lead to repeated violations of human rights.[40]

2.4. Systemic Remedies in the Practice of International Human Rights Courts and Treaty Monitoring Bodies

Any analysis of a Court's powers to award remedies must begin with their respective constitutive instruments and the remedial powers invested in the body.[41] These instruments are usually the main (regional) treaties for the protection of human rights[42] or additional treaties or protocols establishing a Court or tribunal.[43] Between the different regional mechanisms, scholars have identified significant differences in the remedies the instruments are willing to

[37] Shelton, *Remedies in International Human Rights Law* (n 7) 19; see also Antkowiak (n 29).
[38] Keller and Heri (n 30) 171.
[39] Keller, Heri and Piskóty (n 30) 26.
[40] David Kosař, 'Nudging Domestic Judicial Reforms from Strasbourg: How the European Court of Human Rights Shapes Domestic Judicial Design' (2017) 13 Utrecht Law Review 112; David Kosař and Lucas Lixinski, 'Domestic Judicial Design by International Human Rights Courts' (2015) 109 American Journal of International Law 713; 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 Special Issue: The Judicial Power of Africa's Supranational Courts' (2020) 28 African Journal of International and Comparative Law 45.
[41] Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 492: 'Tribunals operate on the basis of their constituent instruments and general international law, which set the limits of their competence and provide criteria for their action. Tribunals must respect their constituent instruments and other norms applicable to their action.'
[42] ICCPR, ECHR, ACHR for the IACtHR
[43] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) OAU Doc OAU/LEG/AFCHPR/PROT (III) art 27(1); Charter of the Organization of American States for the IACHR.

offer to applicants.[44] As Başak Çalı shows, these variations in intrusiveness stem not only from the textual basis and the legal design of the systems, or from their respective developments and case histories, but are rather mainly rooted in the systems' institutional legal cultures.[45]

In respect of the specific institutions, scholarship has investigated the remedial approaches by the courts and bodies, including certain practices that fall within the definition of systemic remedies used by this project. The **Inter-American Human Rights system** has for a long time been the most intrusive in the specific measures the IACHR and the IACtHR request from their State parties in the execution of judgments.[46] They have specified intrusive and deep measures including guarantees of non-repetition, restitution and satisfaction, giving detailed guidance 'to redress the individual violation and to ensure that the violation shall not be repeated'.[47] For the Court, this goes hand in hand with its broad mandate under the American Convention, which includes the power to 'rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied'.[48] As the former President of the Court put it, 'the Court does not see itself only as a guardian of the individual interests of one victim, but as the custodian of the public order created by the system'.[49]

Thomas Antkowiak provides a detailed analysis of the Inter-American Court's jurisprudence on remedies, highlighting its 'holistic notion of rehabilitation'[50] as well as the importance of victim-centered remedies.[51] However, he points out the difficulties in balancing specific injunctions and monetary compensation for the harm suffered, as well as lacklustre compliance with judgments ordering 'legislative and any other measures as may be necessary to adjust the domestic legal system to international human rights provisions'[52] when these measures are too general, vague and aspirational. Where the Court found the treatment of civilians before military courts incompatible with the rights under the Convention,[53] it ordered Peru to amend its domestic laws to end this violation.[54] However, such general statements in operational clauses can also be seen as mere reiteration of the general obligations of States under the Convention.[55]

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[44] Solomon T Ebobrah, 'International Human Rights Courts' in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013) 244.
[45] Çalı (n 28).
[46] Shelton, *Remedies in International Human Rights Law* (n 7) 229.
[47] Cecilia Medina Quiroga, 'The Inter-American Court of Human Rights: 35 Years' (2015) 33 Netherlands Quarterly of Human Rights 118, 121 <https://doi.org/10.1177/016934411503300202> accessed 28 April 2023.
[48] American Convention on Human Rights "Pact of San José, Costa Rica" (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, art 63(1); Douglass Cassel, 'The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights' in Koen De Feyter, Stephan Parmentier, Marc Bossuyt and Paul Lemmens (eds), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2005) 191.
[49] Medina Quiroga (n 47) 121.
[50] Thomas M Antkowiak, 'Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond' (2008) 46 Columbia Journal of Transnational Law 351, 377.
[51] Antkowiak (n 50); Antkowiak (n 29).
[52] *Bulacio v Argentina*, Inter-American Court of Human Rights Series C No 100 (18 September 2003) para 162(5).
[53] see Martin Baumgartner, 'Military Tribunals' in Christina Binder, Manfred Nowak, Jane A Hofbauer and Philipp Janig (eds), *Elgar Encyclopedia of Human Rights* (2022).
[54] *Castillo-Petruzzi v Peru*, Inter-American Court of Human Rights Series C No 52 (30 May 1999) para 226(14).
[55] Antkowiak (n 50) 394–395.

However, the expansive remedial practice of the Inter-American Court of Human Rights has not gone without protest. Clara Sandoval examines the changing jurisprudence of the Court in its increasing deference to its member States' own domestic reparation programmes. In her analysis, she finds that the Court increasingly emphasises its subsidiarity, where a State has a domestic reparation programme for violations of human rights in place.[56] She suggests that a reason for this lies with backlash that the Court has been subject to from its member States, and growing pressure due to alleged financial inability to pay the Court's orders.[57]

The **European Court of Human Rights**' textual foundation arguably provides for less remedial powers, allowing the Court to 'afford just satisfaction' as a remedy.[58] However, increasing scholarly attention has been put to various approaches the Court can and does use to end harmful practices of States and ensure future compliance with judgments and the Convention:

The Court is increasingly involved in the execution of judgments and repeatedly invokes Article 46 of the European Convention of Human Rights 'in order to indicate the individual and/or general measures to be taken by the respondent State in the execution process.'[59] These cases involve 'systemic or structural problems which have been the source of repeated Convention violations'[60] and are sometimes even called 'quasi-pilot judgments'.[61] Alastair Mowbray shows that in these judgments, the Court indicates general measures much more frequently than individual measures.[62] Then-Judge Linos-Alexandre Sicilianos highlighted this tendency already in 2014, and Alice Donald and Anne-Katrin-Speck in 2019 conducted a comprehensive study of the Court's use of Article 46 to issue specific and prescriptive judgments to recommend or require States to take certain measures in the execution of a judgment.[63] They found that the Court prescribes general measures much more often in 'Article 46 cases' than in pilot judgments, but that in regard to Article 46, there is no consistent practice among judges. They conclude that 'it seems certain that the Court's remedial approach will continue to evolve'.[64] Moreover, the distinct pilot procedure at the ECtHR also addresses

[56] Clara Sandoval, 'Two Steps Forward, One Step Back: Reflections on the Jurisprudential Turn of the Inter-American Court of Human Rights on Domestic Reparation Programmes' (2018) 22 The International Journal of Human Rights 1192, 7–9.
[57] ibid 4.
[58] Octavian Ichim, *Just Satisfaction under the European Convention on Human Rights* (Cambridge University Press 2014); Antkowiak (n 50) 408.
[59] Linos-Alexander Sicilianos, 'The Involvement of the European Court of Human Rights in the Implementation of Its Judgments: Recent Developments under Article 46 ECHR' (2014) 32 Netherlands Quarterly of Human Rights 235, 236; Gray (n 15) 892.
[60] 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 University Press 2013) 166.
[61] Council of Europe Committee of Ministers, 'Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights: 6th Annual Report of the Committee of Ministers 2012' (2013) para 37 <https://rm.coe.int/1680592ac8> accessed 12 May 2023; Alastair Mowbray, 'An Examination of the European Court of Human Rights' Indication of Remedial Measures' (2017) 17 Human Rights Law Review 451, 456.
[62] Mowbray (n 61) 476; see, for example, *Zorica Jovanović v Serbia* [2013] ECtHR 21794/08 operative para 6.
[63] Alice Donald and Anne-Katrin Speck, 'The European Court of Human Rights' Remedial Practice and Its Impact on the Execution of Judgments' (2019) 19 Human Rights Law Review 83.
[64] ibid 116.

'dysfunction[s] under national law' and thus systemic problems in the State, leading to repetitive human rights violations and a large amount of cases before the Court.[65]

Moreover, the Council of Europe's Committee of Ministers supervises the execution of the Court's judgments under an enhanced procedure,[66] when either the Court or the Committee of Ministers consider cases to exemplify 'systemic, structural or complex problems' and to 'require sustained and concerted efforts to be made by the respondent States'.[67] In its yearly reports on supervision and execution of judgments of the Court, the Committee of Ministers highlights the progress that has been made, including legislative, constitutional and administrative reform, to alleviate systemic problems in the member States leading to human rights violations.[68] In 2022 alone, the Committee closed its supervision of '200 leading cases requiring specific and often wide-ranging measures by States to guarantee non-repetition of the violations'.[69] The 'Article 46' cases described above, similarly dealing with structural and systemic problems, are mostly subject to this enhanced supervision procedure.[70]

In addition, the traditional remedy used by the European Court of Human Rights, compensatory awards without the indication of general measures for the State to take, arguably holds potential for inducing States to comply with their obligations under the Convention or under a judgment. Veronika Fikfak has written extensively on the role of compensatory awards of the ECtHR and their role of directly or indirectly influencing State behaviour.[71] She claims that rather than focus on compensating the victims (and contrary to the Court's claims), the Court's priority is already to influence State practice and deter future violations.[72] Similarly, Judge Paulo Pinto de Albuquerque wrote with Anne van Aaken about new ways in which compensation might be used to act as punitive damages, in order to better influence State behaviour.[73]

Regarding the **African Human Rights System**, there exists only limited literature on remedies,[74] let alone on systemic remedies. However, the young Court, first operating in 2006,

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[65] Dominik Haider, *The Pilot-Judgement Procedure of the European Court of Human Rights* (Martinus Nijhoff Publishers 2013).
[66] Council of Europe Committee of Ministers, 'Supervision of the Execution of the Judgments and Decisions of the European Court of Human Rights—New Working Methods: Twin-Track Supervision System' <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168049426d> accessed 3 April 2023.
[67] Council of Europe Committee of Ministers, 'Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights: 16th Annual Report of the Committee of Ministers 2022' (2023) 25 <https://rm.coe.int/annual-report-2022/1680aad12f> accessed 12 May 2023.
[68] See the most recent report, Council of Europe Committee of Ministers, 'Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights: 16th Annual Report of the Committee of Ministers 2022' (n 67).
[69] ibid 13.
[70] Donald and Speck (n 63) 106.
[71] Fikfak, 'Non-Pecuniary Damages before the European Court of Human Rights' (n 29); Veronika Fikfak, 'Compliance and Compensation: Money as a Currency of Human Rights' in Rachel Murray and Debra Long (eds), *Handbook on Implementation of Human Rights Law* (Edward Elgar 2022); Fikfak, 'Changing State Behaviour' (n 3).
[72] Fikfak, 'Non-Pecuniary Damages before the European Court of Human Rights' (n 29).
[73] Paulo Pinto de Albuquerque and Anne van Aaken, 'Punitive Damages in Strasbourg' in Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (Oxford University Press 2018).
[74] Plagis (n 40); Gina Bekker, 'The African Commission on Human and Peoples' Rights and Remedies for Human Rights Violations' (2013) 13 Human Rights Law Review 499.

has issued a variety of measures, including general measures such as constitutional and legislative reform,[75] and there exist scattered analyses of areas of its remedial practice, such as in fair trial cases.[76]

The **United Nations** Treaty Monitoring Bodies, particularly the Human Rights Committee, are not competent on the basis of the respective treaties or additional protocols to issue binding remedies. However, in the context of State reports or in individual communications, they sometimes recommend measures to be taken by the State, including legislation to be amended in order to comply with the substantive standards of the respective treaty, such as the ICCPR.

2.5. Compliance by States and Courts Affecting State Behaviour

Markus Burgstaller engaged with theories of compliance with norms of international law rather than the specific issue of judgments and remedial compliance.[77] However, compliance interacts heavily with remedies. In reaction to corrective remedies, scholars have voiced concerns that mere compensation awards might lead in effect to States '[buying] their way out of compliance',[78] some even going so far as equating it to 'just throwing cash at a problem'.[79] Scholars have observed the practice of members of the Council of Europe which predetermine and set aside a certain amount of their yearly budget to pay for compensatory judgments by the European Court of Human Rights.[80] This remedial practice of the ECtHR and particularly its predictability is seen as allowing 'frequent violators to plan the cost of their violations while doing little to address the underlying problems in their legal system'.[81]

Veronika Fikfak engaged with State compliance in her research project Human Rights Nudge.[82] She argues that questions of compliance should not only be an afterthought in the sense of the question whether and to what extent States comply with judgments. Rather, considerations on compliance should be embedded in the decision-making process by the courts, including the question how courts can influence and change State behaviour,[83] 'nudging' States to comply with their obligations under the respective treaty. Most often, these attempts by courts and scholarly suggestions still revolve around monetary compensation,[84] and sometimes even the concept of punitive damages is used.[85]

Various studies have examined the compliance rates of the various human rights tribunals and contrasting their remedial approaches and arsenal of remedies with States'

[75] Micha Wiebusch, 'African Court on Human and Peoples' Rights (ACtHPR)', *Elgar Encyclopedia of Human Rights* (Edward Elgar Publishing 2022) para 27.
[76] Plagis (n 40).
[77] Markus Burgstaller, *Theories of Compliance with International Law* (Brill Nijhoff 2004).
[78] Climate Rights and Remedies Project (CRRP), 'Stream 2: Remedies' <https://www.climaterights.uzh.ch/en/Research/Stream-2.html> accessed 13 July 2022.
[79] Antkowiak (n 50) 387.
[80] Fikfak, 'Changing State Behaviour' (n 3) 1115, citing Federal Law no. 359-FZ on the Federal Budget for 2016, 14 December 2015, Art. 21(5).
[81] ibid 1116.
[82] Veronika Fikfak, 'Human Rights Nudge | ERC Project' <https://www.humanrightsnudge.com> accessed 20 February 2023.
[83] Fikfak, 'Changing State Behaviour' (n 3); Niccolò Ridi and Veronika Fikfak, 'Sanctioning to Change State Behaviour' (2022) 13 Journal of International Dispute Settlement 210.
[84] Fikfak, 'Compliance and Compensation' (n 71).
[85] Pinto de Albuquerque and van Aaken (n 73); see above, 2.4.

exhibited compliance and implementation of judgments.[86] Of particular importance is Laurence Helfer and Anne-Marie Slaughter's 1997 analysis of 'effective supranational adjudication', including a detailed venture into and praise of the effectiveness of ECHR judgments.[87] Since then, further analyses have been undertaken in regard to the Inter-American System, e.g. by James Cavallaro and Stephanie Brewer, finding that compliance is much less pronounced in relation to deep, systemic measures,[88] and recently by Alice Donald and Anne-Katrin Speck in relation to the European Court of Human Rights' impact.[89] What is common to many of these investigations is the recognotion of compensatory awards' inadequacy in relation to deeper deficiencies.[90] However, a comprehensive treatise on systemic remedies and their impact on compliance and State behaviour is not yet part of the academic landscape.

2.6. Contribution of Dissertation to the Literature

While scholars have examined aspects of this topic, the academic literature lacks a comprehensive analysis of systemic remedies. This dissertation seeks to fill this gap, aiming to guide both courts and litigants in human rights affairs on the powers and possibilities in proceedings before various international human rights bodies. Even if the remedial practice of human rights courts and tribunals will not solve issues like climate change and States' responses to it on its own (far from it), to ensure remedial and intra-system consistency and to ensure the international rule of law, it is vital to develop a coherent framework for these structural issues. Whereas systemic remedies are often seen as an effective and preferable solution, concerns about compliance, legitimacy and adequacy might keep Courts from adopting them. This research project aims to clarify the interrelationships between those considerations.

Moreover, it will result in a collection of the practice of human rights courts and treaty bodies, producing a comprehensive dataset of decisions that involve systemic considerations.

3. Research questions

RQ1: Understanding Systemic Remedies

a. What are systemic remedies?

b. What are shortcomings of corrective (non-systemic) remedies before international human rights courts?

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[86] Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (Cambridge University Press 2014); Courtney Hillebrecht, 'The Power of Human Rights Tribunals: Compliance with the European Court of Human Rights and Domestic Policy Change' (2014) 20 European Journal of International Relations 1100; Yuval Shany, 'Compliance with Decisions of International Courts as Indicative of Their Effectiveness: A Goal-Based Analysis' in James Crawford and Sarah Nouwen (eds), *Select Proceedings of the European Society of International Law*, vol 3 (Hart Publishing 2010); Øyvind Stiansen, 'Delayed but Not Derailed: Legislative Compliance with European Court of Human Rights Judgments' (2019) 23 The International Journal of Human Rights 1221.

[87] Laurence Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 Yale Law Journal 273.

[88] James L Cavallaro and Stephanie Erin Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court' (2008) 102 American Journal of International Law 768.

[89] Donald and Speck (n 63).

[90] Roach (n 24); Kent Roach, 'The Disappointing Remedy? Damages as a Remedy for Violations of Human Rights' (2019) 69 University of Toronto Law Journal 33; Leiry Cornejo Chavez, 'New Remedial Responses in the Practice of Regional Human Rights Courts: Purposes beyond Compensation' (2017) 15 International Journal of Constitutional Law 372.

RQ2: Systemic Remedies in the Jurisprudence of Human Rights Courts

a. How do International Courts approach structural/systemic human rights violations?

b. What is the basis of these approaches in the Courts' constitutive instruments and the general law of State responsibility?

RQ3: (How) Do systemic remedies affect State behaviour? Are they able to effectuate systemic change?

RQ4: What are implications of systemic remedies? How can applicants and Courts influence the level of impact on State practices and structural human rights violations, and how do States respond to judgments indicating systemic remedies??

4. Methods for Answering the Research Questions

RQ1: Understanding Systemic Remedies

a. What are systemic remedies?

This preliminary research question lays out the terminological and theoretical groundwork, and establishes a common understanding of the investigated issues. Specifically, it develops a framework categorisation for systemic remedies, both in contradistinction to corrective (or non-systemic) remedies, and within the area of systemic remedies, establishing further categories for grouping different remedies.

This questions also aims to identify specific systemic grievances that, if found to violate individuals' human rights, would call for systemic remedies. These issues will, firstly, be identified by analysing the caseload of HR courts and treaty bodies, identifying issues that are repeatedly dealt with and generate repeated applications by individuals. This indicates that the individual cases, even if they lead to a finding of a violation, do not effectuate systemic change alleviating the causes of the repeated breaches. Secondly, some Courts use certain procedures to manage repetitive cases appearing in their docket. The ECtHR's pilot procedure is an example for this. Lastly, certain areas of human rights law inherently have a systemic character. Examples for this could be found in discriminatory policies of a State, or climate- and environment-related human rights violations.

This analysis will uncover areas that constitute significant systemic issues relevant for the practice of international human rights Courts and treaty monitoring bodies. Some of these areas will constitute a significant share of the bodies' case load because of their systemic character (e.g. deficiencies in a State's judicial system). The area of environmental and climate change litigation before international human rights courts will in the future present new challenges regarding the implementation of judgments, but before that already in creating effective and adequate remedies for the individuals affected by them.

b. What are shortcomings of corrective (non-systemic) remedies before international human rights courts?

This research question will investigate and outline as a starting position current remedial approaches by international Courts. This will be done on the foundation of the existing general

literature on remedies for human rights[91] and more recent human rights jurisprudence to close the gap of the last few years and provide an accurate and actual overview over the remedial approaches.

This dissertation starts from the assumption that mostly, human rights remedies so far have been corrective and, unlike in the earlier stages of the European Court of Human Rights, States are less willing to execute the Courts' judgments. It will then analyse their adequacy in fields of systemic grievances in a State, as identified in RQ1.a.

In order to do this, the research will chart the performance of corrective remedies against the purposes of remedies.[92] Domestic literature on systemic remedies in human rights cases, as well as arguments developed in more recent and specialised literature on remedies for human rights and compliance with judgments of human rights courts will assist with this analysis.

RQ2: Systemic Remedies in the Jurisprudence of Human Rights Courts

a. How do International Courts approach structural/systemic human rights violations?

This research question leads to the crucial analytical element of the thesis, which will yield a comprehensive collection of cases in which some form of systemic remedies have been awarded, across multiple regional courts and treaty monitoring body. In particular, the study will encompass cases in front of the ECtHR, both IACHR and IACtHR, the African Court on Human and Peoples' Rights and the Human Rights Treaty Monitoring Bodies under the United Nations Human Rights System (including CCPR, CESCR, CEDAW, CRC, and CERD). To some extent, existing surveys and studies can serve as guidelines. In particular, prior scholarship examined the ECtHR's and the IACtHR's jurisprudence on remedies more generally.

The thesis will collect cases that fit the aforementioned criteria for structural human rights violations and consider the remedial approaches developed in response. In addition to the effect of the remedial approaches, the project will investigate the stated aim of the courts and the self-perception of the courts in regard to their powers. The cases may include both instances when the judgments purport to change the State's behaviour and when they do not (and the systemic character of the remedy might in the judgment be only secondary, while primarily the Court provides the individual with a remedy).

This question will also deal with certain mechanisms similarly trying to prevent future repeated violations and investigate, to what extent these mechanisms can be reconciled with the concept of systemic remedies. In the context of the European Human Rights System, this encompasses for example post-judgment supervision by the CoE Committee of Minsters and the ECtHR's pilot judgment procedure.

The part of the thesis corresponding to this research question will likely constitute the most extensive part of the thesis.

b. What is the basis of these approaches in the Courts' constitutive instruments and the general law of State responsibility?

[91] See above, section 2.1.
[92] Shelton, *Remedies in International Human Rights Law* (n 7) 19–27.

In connection with the cases, the thesis will analyse how both the constitutive treaties and the institutional, historical and cultural backgrounds of the respective courts and mechanisms influence their approach to systemic remedies. Comparing the instruments and practices of the respective courts can give insights into whether and how their approach is rooted within the respective instruments.

In addition, this question will investigate the relationship between obligations under international law to *cease* a wrongful act and to *make restitution,*[93] resulting from a State's non-compliance with its obligations under the respective human rights regime in the first place, and the effect of the remedies imposed on the States by international courts.

RQ3: (How) Do systemic remedies affect State behaviour? Are systemic remedies able to effectuate systemic change?

It is one question whether and how Courts implement systemic considerations when deciding on remedies after they found violations of human rights. Another question, however, is whether States comply with such remedies, given that they will consider themselves more encroached upon by judgments demanding specific action and change of behaviour, rather than cessation of a wrongful act and potentially backward-looking compensation.

Considerations of compliance and legitimacy and a weighing thereof may also form part of a Court's decision process in the determination of remedies. This part aims to uncover Courts' and litigants' strategies to bridge the gap between judgments finding violations and the States' failure to change their behaviour that leads to human rights abuses. Importantly, other types of remedies, including individual corrective remedies, might achieve the same results, even without specifying general or indidual measures.[94] The project will investigate whether there is an advantage in specifying general measures for the State going beyond the individual case.

Therefore, this research question attempts to investigate the success (in cases observed thus far) and potential (for future cases) of systemic remedies to change a State's behaviour. Since an empirical analysis of compliance and change of State behaviour in relation to the multitude of cases collected under RQ2 would be far beyond the scope of this dissertation, the investigation will rely on international law scholarship concerned with compliance with human rights judgments and the potential of Courts changing State behaviour. In particular, Veronika Fikfak's Human Rights Nudge provides a significant dataset both on compliance (including country-specific compliance reports) and behavioural approaches to remedies.[95]

RQ4: What are implications of systemic remedies? How can applicants and Courts influence the level of impact on State practices and structural human rights violations? How do States respond to judgments indicating systemic remedies?

This research question will investigate the ramifications of the remedial practices outlined above. Particularly, it is of interest whether and how individual applicants (or lawyers

[93] See ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts' UNGA Res 56/83 (2001) UN Doc A/56/10 (ARSIWA) art 32, art 35.
[94] See above, 2.2.
[95] Veronika Fikfak, 'Human Rights Nudge | Publications' <https://www.humanrightsnudge.com/publications> accessed 20 February 2023.

representing them/organisations strategically litigating certain issues) adapt to the remedial practices of Courts. After all, the remedies granted by a Court can and will be dependent on the relief sought by the applicant(s) in the proceeding. This could also include activities by individuals or groups to hold States accountable at the sub-State level and to influence them to adhere to a given judgment.[96]

Moreover, this question aims to investigate strategies of some individuals and groups in the proceedings before international Courts concerning systemic issues. Specifically, how do groups engaging in strategic litigation frame their case before the respective court, including the requested remedies, when their pronounced aim is not individual redress, including cessation vis-à-vis the individual and potential compensation, but rather systemic change on a more fundamental level? Do their strategies, the choice of forum and the way in which they present their claims account for the potential of systemic remedies before the respective Court?

[96] Daniel Peat, Veronika Fikfak and Eva van der Zee, 'Behavioural Compliance Theory' (2022) 13 Journal of International Dispute Settlement 167, 178.

5. Preliminary Structure of the Thesis

1. Introduction
2. Identifying Systemic Remedies
   - 2.1. Remedies in Human Rights Law
   - 2.2. Systemic Human Rights Violations/Areas of Application
   - 2.3. Types of Systemic Remedies
     - 2.3.1. Monetary Remedies
     - 2.3.2. Non-Monetary Remedies
3. Systemic Remedies before International Human Rights Courts and Commissions
   - 3.1. European Human Rights System
   - 3.2. Inter-American Human Rights System
   - 3.3. African Human Rights System
   - 3.4. United Nations Human Rights System
4. Impacts of Systemic Remedies
   - 4.1. Changing State Behaviour through Systemic Remedies
   - 4.2. States' Responses to Expanded Remedial Assertiveness
   - 4.3. Litigation Strategies of Applicants in Pursuit of Systemic Change
5. Potential and Dangers of Systemic Remedies
   - 5.1. Effectiveness of Remedies
   - 5.2. Compliance and Backlash
6. Conclusion

6. Preliminary Bibliography

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