

5. INTERNATIONAL AND REGIONAL HUMAN RIGHTS LAW IN CRISIS?

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SUMMARY: 1. Introduction; – 2. Symptoms; – 2.1. Populism and nationalist criticism; – 2.2. Growing hostility towards human rights institutions: backlash within institutional/organizational structures; – 2.3. Resistance to decisions and lack of implementation; – 3. Diagnosis; – 3.1. Nationalism and authoritarian regimes; – 3.2. Inefficiency of international human rights institutions; – 3.3. Lack of coordination between systems at the national, regional and international levels; – 4. Therapy; – 4.1. Improving the efficiency of human rights protection institutions; – 4.2. Better coordination of substantive standards at the three levels – national, regional, international; – 4.3. Better coordination of national, regional and international monitoring systems

1. INTRODUCTION

The development of the international system of human rights protection after the Second World War has generally been considered a success story. Since the 1948 Universal Declaration of Human Rights and the two Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights of 1966, numerous international human rights treaties have been adopted. They provide always more detailed standards, with focus on specific human rights problems (e.g., torture, enforced disappearances) and particularly marginalized groups (e.g., children, persons with disabilities). Also, the mechanisms for monitoring compliance have been

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strengthened, with individual communications procedures adding to predominantly state reporting procedures at global level and the establishment of regional human rights courts in Europe, the Americas and Africa. In particular after the end of the Cold War in the 1990s the international human rights movement saw its high-days.

This success has however come under increasing pressure especially in the last decade. People speak of “limits”,¹ “twilight”² or “endtimes of human rights”,³ and ask “can human rights survive?”.⁴ There is a malaise in the human rights system and its institutions. It may be inscribed into a more general crisis of multilateralism as also witnessed in other contexts, as for example the World Trade Organisation. Against this background, this contribution undertakes to explore and analyse this human rights-malaise. In doing so, it first discusses the various symptoms, both, inside and outside the human rights regime (Section 2). Then, it turns to a diagnosis of the pathologies – quite different for the various regional and international human rights protection systems – behind these symptoms, that may be diagnosed (Section 3). Ultimately, this contribution recommends different therapies to treat the human rights diseases (Section 4).

2. SYMPTOMS

Various signs – “symptoms” – illustrate the increasing backlash against human rights institutions. It shows in raising populism and nationalist criticism of these institutions (Section 2.1); a growing hostility within institutional/organizational structures (Section 2.2) as well as the non-compliance with human rights bodies’ decisions (Section 2.3).

2.1. Populism and nationalist criticism

That human rights protection has come under increasing pressure around the world is visible first in the realm of political rhetoric. Populist governments in numerous states (Turkey, Hungary, Venezuela, Bolivia, Ecuador, Benin, Rwanda, Cote-d’Ivoire) criticize especially regional human rights tribunals, accusing them of illegitimate interference in domestic affairs.

¹ FASSBENDER and TRAISBACH (eds.), *The Limits of Human Rights*, Oxford, 2019.

² POSNER, *The Twilight of Human Rights Law*, Oxford, 2014.

³ HOPGOOD, *The Endtimes of Human Rights*, Ithaca, 2015.

⁴ GEARTY, *Can Human Rights Survive?*, Cambridge, 2006.

On the one hand, critics claim that the development of human rights standards is carried out by illegitimate institutions that pursue their own obscure interests. Hungary's Prime Minister Orbán, for example, declared that the Hungarian people should be protected against "foreign networks and institutions" and portrayed human rights protection institutions as "guided by dark forces" whose goal was to subvert national identities.⁵ Bolivia's ex-president Morales described Inter-American human rights institutions as "instruments of domination", and Venezuelan President Maduro accused them of not pursuing human rights concerns but rather seeking to harm the socialist state.⁶ The government of Benin accused the African Court of Human and Peoples' Rights of being "a source of legal uncertainty".⁷ The Rwandan government sees it as manipulated by the perpetrators of the genocide.⁸

Such narratives are often accompanied by accusations of a lack of democratic legitimacy of these institutions. Human rights protection institutions would protect the rights of "others" and not those of the respective state's own population and, in general, contradict democratic majority vote.⁹

Another reproach often made in this context is that human rights institutions ignore the security interests of states, especially in the fight against terrorism and migration: The "security argument" against human rights gained momentum especially after 11 September 2001. Human rights are portrayed as instruments from another era that would not be suitable for solving current problems; worse, they would prevent governments from effectively addressing those problems.¹⁰

Even in countries less suspect of populist rhetoric, such arguments are put forward against human rights protection institutions: For example, the Swiss "self-

⁵ For details, see BÍLKOVÁ, "Populism and Human Rights", in NIJMAN and WERNER (eds.), *Netherlands Yearbook of International Law. Populism and International Law*, Den Haag, Vol. 49, 2018, p. 143 ff., p. 143.

⁶ See Primera, "Venezuela abandona el sistema de derechos humanos interamericano", *El País*, 10 September 2013, available at: <https://elpais.com/internacional/2013/09/10/actualidad/1378780644_769381.html>.

⁷ See Statement by the Minister of Justice of Benin, Gouvernement de la République du Benin, "Retrait du Bénin de la CADHP - Déclaration du ministre de la Justice et de la Législation", 28 April 2020, available at: <<https://www.gouv.bj/actualite/635/retrait-benin-cadhp---declaration-ministre-justice-legislation/>>.

⁸ International Justice Resource Center, "Rwanda Withdraws Access to African Court for Individuals and NGOs", 14 March 2016, available at: <<https://ijrcenter.org/2016/03/14/rwanda-withdraws-access-to-african-court-for-individuals-and-ngos/>>.

⁹ Hungary's Prime Minister Orbán, for example, stated that Hungary would opt for democracy when there was a choice between "international human rights and democracy". The Venezuelan government accuses Inter-American human rights institutions of being part of a conspiracy against the (Venezuelan) state. The government of Cote d'Ivoire stated that the African Court of Human and Peoples' Rights undermined state sovereignty and eroded the foundations of the rule of law. See also BÍLKOVÁ, *cit. supra* note 5, p. 145, 166ff; see further CALI, "Political Limits of International Human Rights: A Response", in FASSBENDER and TRAISBACH (eds.), *The Limits of Human Rights*, Oxford, 2019, p. 137 ff., p. 144.

¹⁰ Cf. e.g. BÍLKOVÁ, *cit. supra* note 5, p. 145.

determination initiative” claims a contradiction between popular sovereignty and human rights.¹¹ In the United Kingdom, a tension is construed between human rights and parliamentary sovereignty.¹² In Denmark, the European Court of Human Rights (ECtHR) is accused of acting in an over-centralist and interventionist manner.¹³ Outside Europe, the Dominican Republic opposed the Inter-American Court of Human Rights (IACtHR, Inter-American Court) for its intrusive attitude and intervention in domestic affairs.¹⁴

2.2. Growing hostility towards human rights institutions: backlash within institutional/organizational structures

In addition, there is backlash in the context of institutional/organizational structures, ranging from withdrawal over demands for a re-dimensioning, to lack of support from the respective regional organization; often directly related to the accusations referred to above. Venezuela, for example, withdrew from the American Convention on Human Rights (ACHR) in 2012;¹⁵ it followed Trinidad and Tobago, which had already left the Convention in 1998.¹⁶ Peru, Ecuador, and Bolivia at least

¹¹ If the initiative had been accepted, the Swiss Constitution would have taken precedence over, *inter alia*, the ECHR in case of conflict. KELLER and WALTHER, “Resistance in Switzerland: Populist Rather Than Principled”, in BREUER (ed.), *Principled Resistance to ECtHR Judgments - A New Paradigm?*, Berlin, 2019, p. 161 ff., p. 188.

¹² See, e.g., MADSEN, “From boom to backlash? The European Court of Human Rights and the transformation of Europe”, in AUST and DEMIR-GÜRSEL (eds.), *The European Court of Human Rights. Current Challenges in Historical Perspective*, Cheltenham, 2021, p. 21 ff., pp. 37-38.

¹³ Hartmann, “A Danish Crusade for the Reform of the European Court of Human Rights”, EJIL: Talk!, 14 November 2017, available at: <<https://www.ejiltalk.org/a-danish-crusade-for-the-reform-of-the-european-court-of-human-rights/>>; see also MADSEN, *cit. supra* note 12, p. 41.

¹⁴ See for details *infra*, Section 2.2.

¹⁵ Gov’t of the Bolivarian Republic of Venezuela, Ministry of the Popular Power for Foreign Affairs of the Bolivarian Republic of Venezuela, “Note 000125”, 6 September 2012, available at: <http://www.oas.org/dil/esp/Nota_Republica_Bolivariana_de_Venezuela_al_SG_OEA.PDF>. See also Mejía-Lemos, “Venezuela’s Denunciation of the American Convention on Human Rights”, ASIL Insights, 9 January 2013, available at: <<https://www.asil.org/insights/volume/17/issue/1/venezuelas-denunciation-american-convention-human-rights>>. Venezuela also withdrew from the OAS Charter in 2017. However, this was not accepted by the IACtHR. See IACtHR, “Advisory Opinion OC-26/20, Denunciation of the American Convention on Human Rights and the Charter of the Organization of American States and the Consequences for State Human Rights Obligations”, 9 November 2020, available at: <https://www.corteidh.or.cr/docs/opiniones/seriea_26_eng.pdf>. For details, see Steininger, “Don’t Leave Me This Way: Regulating Treaty Withdrawal in the Inter-American Human Rights System”, EJIL: Talk!, 5 March 2021, available at: <<https://www.ejiltalk.org/dont-leave-me-this-way-regulating-treaty-withdrawal-in-the-inter-american-human-rights-system/>>.

¹⁶ See CERNA, “Denunciation of the American Convention on Human Rights: The Trinidad and Tobago Death Penalty Cases”, available at: <<https://www.corteidh.or.cr/tablas/r31601.pdf>>.

threatened with withdrawal;¹⁷ as did the Dominican Republic, which also publicly considered this option¹⁸ after the Dominican Constitutional Court had declared that the submission to the jurisdiction of the IACtHR was unconstitutional.¹⁹ In Europe, the United Kingdom threatened to withdraw from the European Convention on Human Rights (ECHR); such voices have also been heard in Denmark and Switzerland.²⁰ In 2022, after its war of aggression against Ukraine, Russia withdrew/was excluded from the Council of Europe (and, six months afterwards, from the ECHR),²¹ having already threatened with such withdrawal in 2017. Four African states – Rwanda, Benin, Cote d’Ivoire as well as Tanzania (the latter after all seat of the African Court of Human and Peoples’ Rights) – withdrew their consent to the Court’s jurisdiction to receive complaints directly from individuals and NGOs.²² The sub-regional tribunal of the South African Development Community (established in 2005) was ultimately even disbanded following its first (controversial) ruling against Zimbabwe in 2008 in which the expropriation of white landowners was at stake.²³

There have also been calls for a re-dimensioning, a pushing back of regional human rights protection systems. In Europe, this showed, for example, with the reform process initiated in Interlaken and the adoption of the – ultimately moderate – Protocol No. 15 to the ECHR, which entered into force in August 2021 and

¹⁷ See for details RAGONE, “The Inter-American System of Human Rights: Essential Features”, in VON BOGDANDY et al. (eds.), *Transformative Constitutionalism in Latin America. The Emergence of a New Ius Commune*, Oxford, 2017, p. 279 ff., p. 300. Peru had withdrawn its recognition of the IACtHR’s jurisdiction on 9 July 1999. After Fujimori’s flight, the country’s relationship with the IACtHR normalized.

¹⁸ The withdrawal of the declaration of submission to the jurisdiction of the IACtHR was not recognized by the Inter-American Court. While the Dominican Republic has not formalized its withdrawal from the ACHR, it has ceased cooperation with the IACtHR. For details, see SOLEY and STEININGER, “Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights”, *International Journal of Law in Context* 14, 2018, p. 237 ff.

¹⁹ See, for example, IACtHR, *Case of expelled Dominicans and Haitians v. Dominican Republic*, Judgment of 28 August 2014 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 282. For details, SOLEY and STEININGER, *cit. supra* note 18.

²⁰ See MADSEN, *cit. supra* note 12.

²¹ Council of Europe Secretariat, “Notification of Russia”, DD(2022)101, 15 March 2022.

²² See African Court on Human and Peoples’ Rights, “Declarations”, available at: <<https://www.african-court.org/wpafc/declarations/>>. Among the reasons to explain the withdrawals were the establishment of an autocratic regime (Benin); or the flood of lawsuits (Tanzania). See generally De Silva and Plagis, “A Court in Crisis: African States’ Increasing Resistance to Africa’s Human Rights Court”, *OpinioJuris*, 19 May 2020, available at: <<http://opiniojuris.org/2020/05/19/a-court-in-crisis-african-states-increasing-resistance-to-african-human-rights-court/>>. GERALD and WIEBUSCH, “The African Court on Human and Peoples’ Rights: Mapping Resistance against a Young Court”, *International Journal of Law in Context* 14, 2018, p. 294 ff.

²³ For Details COWEL, “The Death of the Southern African Development Community Tribunal’s Human Rights Jurisdiction”, *Human Rights Law Review* 13, 2013, p.153 ff.

incorporated references to the subsidiarity principle and the margin of appreciation doctrine into the Convention text. Denmark has subsequently called for even more restrictive reforms.²⁴ Five Latin American states (Argentina, Brazil, Colombia, Paraguay and Chile) expressed similar concerns about the “autonomy” of Inter-American human rights protection institutions in 2019 and called for their curtailment, in reliance on the subsidiarity principle.²⁵

Another form of backlash is found in the lack of cooperation with international human rights protection institutions. An example would be the individual complaints and state reporting procedure under the International Covenant on Civil and Political Rights (ICCPR) in which states often ignore information requests from the Human Rights Committee (HRC).²⁶ The numerous late or undelivered state reports, in addition to domestic capacity problems, also suggest (at the very least) the low importance attached to treaty monitoring mechanisms.²⁷

A lack of support for the human rights institutions by the regional organization in question is also a factor here, which is particularly evident in the case of the African Union (AU) and can be observed, for example, in the weak follow-up to violation decisions by the African human rights institutions.²⁸

²⁴ Cf. HARTMANN, *cit. supra* note 13.

²⁵ República Argentina, la República Federativa del Brasil, la República de Chile, la República de Colombia y la República del Paraguay, “Declaración Sobre el Sistema Interamericano de Derechos Humanos”, 24 April 2019, available at: <<https://www.mre.gov.py/index.php/noticias-de-embajadas-y-consulados/gobiernos-de-argentina-brasil-chile-colombia-y-paraguay-se-manifiestan-sobre-el-sistema-interamericano-de-derechos-humanos>>.

²⁶ Cf. JOSEPH, “International Covenant on Civil and Political Rights”, in BINDER et al. (eds.), *Elgar Encyclopedia of Human Rights*, London, 2022, para. 53. See also JELIC and MÜHREL, “The Human Rights Committee - Challenges and Prospects for Enhanced Effectiveness and Integration”, *Journal of Human Rights Practice* 14, 2022, p. 17 ff. with further examples, e.g., Azerbaijan, Hungary, Laos.

²⁷ Notoriously, reports are late or not submitted at all in the African regional system (see the website of the African Commission on Human and Peoples’ Rights, available at: <<https://www.achpr.org/statistics>>). Reporting also leaves much to be desired under international human rights treaties in the framework of the UN: for example, about one third of states are late with their reports. See, e.g., SEIBERT-FOHR, “The UN Human Rights Committee”, in OBERLEITNER (ed.), *International Human Rights Institutions, Tribunals, and Courts*, Berlin, 2018, p. 117 ff., p. 124; JELIC and MÜHREL, *cit. supra* note 26.

²⁸ The African system to monitor execution is similar to the European system; it is effectuated through the AU Executive Council (and the AU Assembly). On the lack of political follow-up, see, e.g., VILJOEN, “Forging a credible African system of human rights protection by overcoming state resistance and institutional weakness: compliance at a crossroads”, in GROTE, MORALES ANTONIAZZI and PARIS (eds.), *Research Handbook on Compliance in International Human Rights Law*, London, 2021, p. 362 ff., pp. 371-390.

2.3. Resistance to decisions and lack of implementation

Resistance to decisions, sometimes vehement criticism, or their delayed, only partial or entirely lacking implementation are other symptoms of the illness of human rights protection systems. True, the deficient implementation of individual decisions is not the sole and probably not the primary factor determining the “success” of human rights jurisprudence. After all, the impact and positive effects of the human rights institutions’ decisions regularly reach further than their immediate implementation.²⁹ Nevertheless, widespread non-implementation is a sign of the erosion of human rights protection.³⁰

Indeed, even statistically, the extent of implementation is sobering, especially at the international level and in the African region. Less than a quarter (24%) of the HRC’s decisions are implemented;³¹ in Africa, it is only 14% of the African Commission’s decisions and 7% of the Court’s judgments;³² at least partial implementation of the African Court’s judgments comes to a meagre 18%. While in Europe and in the Americas, the implementation rate is comparatively higher, there are specific problem areas: in Europe, implementation deficits are evident, for example, in post-conflict situations and domestic contexts with structural problems, such as deficient investigations in relation to abuse allegations against state authorities and poor prison conditions.³³ In the Inter-American region, implementation is specifically poor when it comes to concrete reparation measures, such as the obligation to prosecute and reopen cases.³⁴

²⁹ See e.g. VERA, “The Impact of Inter-American Judgments by Institutional Empowerment”, in VON BOGDANDY et al. (eds.), *Transformative Constitutionalism in Latin America. The Emergence of a New Ius Commune*, Oxford, 2017, p. 357 ff. More generally, GROTE, MORALES ANTONIAZZI and PARIS, “Conclusion: moving beyond compliance without neglecting compliance in international human rights law”, in GROTE, MORALES ANTONIAZZI and PARIS (eds.), *cit. supra* note 28, p. 510 ff., pp. 520-522.

³⁰ Cf. *ibid.*, p. 521. To focus only on impact would diminish the normative expectations of states.

³¹ JOSEPH, *cit. supra* note 26.

³² At least partial implementation of court rulings comes to just a meagre 18%. See for details WIEBUSCH, “African Court on Human and Peoples’ Rights”, in BINDER et al. (eds.), *Elgar Encyclopedia on Human Rights*, London, 2022, para. 46; Cf. also the documentation of the African Court of Human and Peoples’ Rights, “Strategic Plan 2021-2025”, 2021, para. 97, available at: <<https://www.african-court.org/wpafc/african-court-on-human-and-peoples-rights-strategic-plan-2021-2025/>>.

³³ See Council of Europe, Committee of Ministers, “Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights”, 2020, available at: <<https://rm.coe.int/2020-cm-annual-report-eng/1680a1f4e8>>.

³⁴ See for instance CRUZ MARIN, “Compliance with the Judgments of the Inter-American Court of Human Rights”, Center for Justice and International Law, p. 1 ff., p. 26; BAILLIET, “Measuring Compliance with the Inter-American Court of Human Rights: The Ongoing Challenge of Judicial Independence in Latin America”, NJHR 31, 2013, p. 477 ff.

In addition to this statistically demonstrable general unwillingness to implement the findings of the respective bodies, there is specific resistance to certain decisions.³⁵ Thus, domestic courts across Europe criticize ECtHR rulings for overreach and intrusiveness, which has already led to the question as to whether “principled resistance” represents a new paradigm.³⁶ To give just a few examples: well-known are the (abstract) limits of the “last word of the German constitution”, which the German Federal Constitutional Court empathetically pointed out to the ECtHR in the *Görgülü* case.³⁷ In Austria, recent criticism by the Austrian Constitutional Court in relation to changes in the ECtHR’s case law (e.g., on the prohibition of double jeopardy/*ne bis in idem*, see *Zolothukin v. Russia* of 2009) seems particularly noteworthy.³⁸ In Switzerland, it is the resistance of the Swiss Federal Court in the *Schlumpf* case, in which the ECtHR was accused of not correctly assessing the Swiss legal situation and of acting *ultra vires*.³⁹ Even if the indicated limits were not relevant to the decision and the judgments were ultimately implemented, the criticism was loud and vehement. Still only partially or minimally implemented are the well-known judgments of the

³⁵ Not all cases of lacking implementation, however, are signs of resistance to human rights protection institutions. Reasons also lie in the domestic legal sphere, for instance in legal obstacles to implementation. See *infra*, Section 3.2.

³⁶ BREUER (ed.), *Principled Resistance to ECtHR Judgments – A New Paradigm?*, Berlin, 2020.

³⁷ German Constitutional Court (BVerfG), *Görgülü*, Decision of the Second Senate of 14 October 2004, 2 BvR, para. 35. Cf. generally BREUER, “Principled Resistance to the European Court of Human Rights and its case law: a comparative assessment”, in AUST and DEMIR-GÜRSEL (eds.), *The European Court of Human Rights, Current Challenges in Historical Perspective*, London, 2021, p. 43 ff. See also *Beamtenstreikrecht*, where the German Constitutional Court held that an ECtHR judgment against another state, in this case Turkey, did not prevent Germany from prohibiting professional civil servants from striking. BVerfG, *Beamtenstreikrecht*, Decision of the 2nd Senate of 12 June 2018, 2 BvR 1738/12 - - 2 BvR 1395/13 - - 2 BvR 1068/14 - - 2 BvR 646/15; see *infra*, Section 4.2.

³⁸ ECtHR, *Zolothukin v. Russia* (Grand Chamber), Application No. 14939, Judgment of 10 February 2009; Austrian Constitutional Court (VfGH), Decision of 2 July 2009, B559/08, StGB-StVO. For details, see KREPP, “Doppelbestrafungsverbot: VfGH verweigert dem EGMR die Gefolgschaft”, JAP 22, 2009/2010, p. 213 ff. FUCHS, “Ne bis in idem: Korrespondenzen zwischen Straßburg und Wien”, Jahrbuch Öffentliches Recht, 2010, p. 181 ff. In *A and B v. Norway*, the ECtHR confirms its line of jurisprudence on *ne bis in idem* advocated in *Zolothukin*. ECtHR (Grand Chamber), *A and B v. Norway*, Application No. 30254/18, Judgment of 15 November 2016. The Austrian Constitutional Court seems to – albeit implicitly – accept this. See generally STRUTH, “‘Principled Resistance’ to ECtHR Judgments in Austria”, in BREUER (ed.), *Principled Resistance to ECtHR Judgments – A New Paradigm?*, Berlin, 2019, p. 89 ff., p. 124.

³⁹ Swiss Federal Court, *Schlumpf v. SWICA*, 7 July 2006, BGE 137 I 86; ECtHR, *Schlumpf v. Switzerland*, Application No. 29002/06, Judgment of 8 January 2009; the case concerned the reimbursement of costs for a sex change operation. See generally ALTWICKER, “Switzerland: The Substitute Constitution in Times of Popular Dissent”, in POPELIER, LAMBRECHT and LEMMENS (eds.), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-dynamics at the National and EU Level*, Amsterdam, 2016, p. 388 ff. See further PFIFFNER and BOLLINGER, “Extension of Convention-Protected Rights by the ECtHR and Problems of Domestic Implementation”, Jusletter, 21 November 2011, pp. 9-10.

ECtHR on the right of prisoners to vote, which were heavily criticized by the United Kingdom.⁴⁰ In the similar case of *Anchugov and Gladkov*,⁴¹ the Russian Constitutional Court completely rejected the judgment's execution for being unconstitutional.⁴²

In the Inter-American sphere, especially the conventionality control developed by the IACtHR has been met with resistance in some states. Through the conventionality control, the Inter-American Court also obliges domestic courts of states that were not parties to the proceedings in the case at stake to not apply laws that violate the ACHR within the framework of a decentralized conventionality control (*erga omnes* effect of the conventionality control, as developed in the *Almonacid* case of 2006).⁴³ The Brazilian Supreme Court, for example, rejects the conventionality control, as does the Chilean Constitutional Court.⁴⁴ The Colombian Constitutional Court reserves the right to deviate from the IACtHR's jurisprudence for compelling reasons. Moreover, in the Inter-American system, concrete reparation measures are met with rejection: especially if they concern politically sensitive areas (*Castro Castro Prison v. Peru*),⁴⁵ exceed state finances (*Plan de Sanchez v. Guatemala*),⁴⁶ or if the requested measure is not feasible in light of domestic legislation (for instance as regards investigations concerning the criminal prosecution of perpetrators – as in *Bulacio v. Argentina*).⁴⁷ Likewise tribunals originally open to the IACtHR are becoming more critical: for example, the Argentine Supreme Court even accused it of exceeding its jurisdiction in

⁴⁰ ECtHR (Grand Chamber), *Hirst v. United Kingdom (no. 2)*, Application No. 74025/01, Judgment of 6 October 2005; ECtHR, *Greens and M.T. v. United Kingdom*, Applications Nos. 60041/08 and 60054/08, Judgment of 23 November 2010; See LEMMENS, "The European Court of Human Rights - Can There be Too Much Success?", *Journal of Human Rights Practice* 14, 2022, p. 169 ff., p. 169 for details. See generally KUNZ, "Judging International Judgments Anew? The Human Rights Courts before Domestic Courts", *EJIL* 30, 2020, p. 1129 ff., p. 1131.

⁴¹ ECtHR, *Anchugov and Gladkov v. Russia*, Judgment of 4 July 2013, Applications Nos. 11157/04 and 15162/05.

⁴² Russian Constitutional Court, Judgment of 19 April 2016, Case No. 12-P/2016. Also, the implementation of the *Yukos* judgment was rejected. ECtHR, *Oao Neftyanaya Kompaniya Yukos v. Russia*, Application No. 14902/04, Judgment of 31 July 2014 (just satisfaction).

⁴³ IACtHR, *Almonacid Arellano y otros v. Chile*, Judgment of 26 September 2006 (Preliminary Objections, Merits, Reparations and Costs), Series C, No. 154.

⁴⁴ See BURGORGUE-LARSEN, "The Added Value of the Inter-American Human Rights System: Comparative Thoughts", in VON BOGDANDY *et al* (eds), *Transformative Constitutionalism in Latin America. The Emergence of a New Ius Commune*, Oxford University Press 2017, p. 377, p. 401ff.

⁴⁵ IACtHR, *Miguel Castro-Castro Prison v. Peru*, Judgment of 25 November 2006 (Merits, Reparations and Costs), Series C, No. 160.

⁴⁶ IACtHR, *Plan Sánchez v. Guatemala*, Judgment of 19 November 2004 (Reparations), Series C, No. 116.

⁴⁷ IACtHR, *Case of Bulacio v. Argentina*, Judgment of 18 September 2003 (Merits, Reparations and Costs), Series C, No. 100. The Argentine Supreme Court criticized the IACtHR, for example in its *Espósito* decision (2004), for failing to strike an appropriate balance in *Bulacio* between the state's duty to investigate and prosecute serious human rights violations and the rights of the accused (to defense and to be tried in a reasonable time), which would be contrary to domestic law. However, *Bulacio* was ultimately implemented, with reference to Art. 68 ACHR.

the *Fontevecchia d'Amico* decision of 2017.⁴⁸

However, despite the far-reaching and sometimes intrusive jurisprudence of the IACtHR, states' opposition is still comparatively moderate.⁴⁹ This can be explained, among others, by the implicit strengthening of domestic tribunals' position *vis-à-vis* the executive in the internal system of separation of powers and the traditionally strong ties between the Inter-American Court and civil society in the Latin American region.⁵⁰ As addressed below in more detail, this already points to a possible therapy.⁵¹

In the international human rights protection institutions, the resistance – apart from criticism against an overly broad (extra-)territorial applicability of human rights treaties according to General Comments, specifically the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵² – shows primarily in the lacking implementation; which is partly “justified” with the non-binding effect (and/or incorrect weighting or justification) of the decisions of

⁴⁸ The implementation of the IACtHR's *Fontevecchia y D'Amico* judgment (IACtHR, *Fontevecchia and D'Amico v. Argentina*, Judgment of 29 November 2011 (Merits, Reparations and Costs), Series C, No. 238) was rejected with the argument that the revocation of the conviction was not possible due to the separation of powers. Corte Suprema de Justicia de la Nación (Argentina), “Ministerio de Relaciones Exteriores y Culto s/ informe sentencia dictada en el caso ‘Fontevecchia y D'Amico v. Argentina’ por la Corte Interamericana de Derechos Humanos”, 14 February 2017. See also the similarly restrictive position of the Argentine Supreme Court in the *Muiña Case*, 3 May 2017. See generally on opposition to the IACtHR, SOLEY and STEININGER, *cit. supra* note 18, p. 14; Abramovich, “Comentarios sobre el ‘caso Fontevecchia’”, Centro de Justicia y Derechos Humanos, 17 February 2017, available at: <<http://ijdh.unla.edu.ar/advf/documentos/2017/02/58ab010a10d4c.pdf>>; Contesse, “Judicial Backlash in Inter-American Human Rights Law?”, International Journal of Constitutional Law, Blog, 2 March 2017, available at: <<http://www.iconnectblog.com/2017/03/judicial-backlash-interamerican/>>.

⁴⁹ For example, the IACtHR's far-reaching jurisprudence in the area of economic and social rights has been criticized in individual dissenting opinions; as far as can be seen, however, not by the respective states (Chile, Brazil). See, for example, the criticism by Judge Eduardo Vio Grossi in Brazilian Constitutional Court, *Case of the Workers of the Fireks Factory in Santo Anonio de Jesus and their Families v. Brazil*, Judgment of 15 July 2020, Series C No 407, paras. 99-105, concerning the interpretation of Art. 26 in conjunction with Art. 24 (equal protection of the law) ACHR; For details see Saliba and Do Valle, “The Inter-American Court of Human Rights and the Quest for Equality: the Fireworks Factory case”, EJIL: Talk!, 20 January 2021.

⁵⁰ See also RAGONE, *cit. supra* note 17, p. 311, for details. The sometimes far-reaching interpretation of the IACtHR is also cushioned by the fact that it partly ties its judgments back to national law. See *infra*, Section 4.2.

⁵¹ See especially *infra*, Section 4.3.

⁵² The General Comment No 36 of the HRC on the right to life (2019) was criticized by numerous states (Australia, Canada, France, Germany, US) as too far-reaching, especially with regard to the comprehensive extraterritorial application of the right to life. HRC, “General Comment No 36: The Right to Life” (3 September 2019) UN Doc CCPR/C/GC/36, available at: <<https://www.ohchr.org/en/hrbodies/ccpr/pages/gc36-article6righttolife.aspx>>; likewise, Norway, UK and France, among others, criticized the extraterritorial dimension of the Committee's on Economic, Social and Cultural Rights (ESCR-Committee) General Comment No 24. (ESCR-Committee, “General Comment No 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities” (10 August 2017) UN Doc E/C.12/GC/24, available at: <<https://www.ohchr.org/Documents/HRBodies/CESCR/Discussions/2017/Norway.pdf>>).

the treaty monitoring bodies.⁵³

So, resistance comes from different directions and is of varying strength. This leads to the diagnosis.

3. DIAGNOSIS

The symptoms of the illness of the systems of international human rights protection stem from various pathologies. In addition to reasons in a state's internal/domestic sphere, such as nationalism and the rise of authoritarian regimes (Section 3.1), there are also reasons that lie with the human rights protection institutions themselves (Section 3.2), or that suggest coordination problems (Section 3.3).

3.1. Nationalism and authoritarian regimes

First, criticism of human rights protection institutions is used by populist regimes in numerous states for their nationalist propaganda: The threat from outside – in the form of human rights protection institutions – is supposed to strengthen domestic/internal unity.⁵⁴

A related problem is the increasing departure from pluralistic democracy and the strengthening of authoritarian structures.⁵⁵ Current examples include Venezuela, Benin, Turkey, Hungary and Russia. The “autocratization” that can be observed this way regularly leads to shifts in the balance of separation of powers toward the executive branch, also as a result of restrictions of the independence of the judiciary.

⁵³ On the non-binding effect of the decisions and practice of UN treaty monitoring bodies, see International Law Association, *Final Report on the Domestic Implementation of Courts and Other International Bodies that Involve International Human Rights Law*, Part Two; The International Law Association, Report of the Seventy-Seventh Conference at Johannesburg, 2016, p. 284 ff. See also JELIC and MÜHREL, *cit. supra* note 26; KADELBACH, “The Human Rights Committee – Challenges and Prospects for Enhanced Effectiveness and Integration: A Comment”, *Journal of Human Rights Practice* 14, 2022, p. 44 ff.

⁵⁴ In terms of content, nationalist-populist discourse is collectivist, anti-pluralist, and exclusive: it focuses on “the people of the state” as a homogeneous group. Based on the logic of “us versus them”, it is directed against migrants, minorities, as well as opposition politicians, and is thus opposed to the pluralistic ideal of human rights. Human rights also set clear limits to the nationalist-populist agenda, for example regarding the treatment of migrants and minorities. This leads to the aforementioned portrayal of human rights protection institutions as anti-democratic and a danger to the rights of the majority population.

⁵⁵ On democratic regression in Europe, see, for example, MADSEN, “The Narrowing of the European Court of Human Rights? Legal Diplomacy, Situational Self-Restraint, and the New Vision for the Court”, *European Convention on Human Rights Law Review* 2, 2021, p. 180 ff., p.187, with further references.

Limitations of space for civic engagement and free media are likewise observable.⁵⁶ All this erodes key conditions and prerequisites for a functioning domestic human rights protection. After all, independent courts are the natural “allies” of international human rights protection institutions.

The resistance in democracies such as the United Kingdom, Denmark and Switzerland is somewhat different. Here, conflicts regularly arise over the proper allocation of powers, especially in politically sensitive areas such as security and migration. But here, too, criticism of ECtHR rulings by domestic courts is instrumentalized by certain political actors and used for populist-nationalist propaganda.⁵⁷

The backlash against human rights protection institutions thus has different political facets, but is regularly accompanied by a growing scepticism toward international cooperation and multilateralism and a greater prioritization of national concerns.

3.2. *Inefficiency of international human rights institutions*

In addition, the international/regional human rights protection institutions themselves have “their” share in the crisis and domestic resistance. True, the resistance can also be interpreted positively, as a reaction to a strengthening and the generally greater authority of human rights bodies, especially of regional courts.⁵⁸ However, (partly justified) criticism relates to the functioning of the institutions themselves, for example, with regard to efficiency deficits and length of proceedings, which also provides arguments for the critics of the human rights protection institutions.

To start with, there is a somehow unresolvable tension. The human rights bodies, which are supposed to monitor states and hold them accountable, depend on the very states in terms of their composition and functioning. States nominate and elect experts and judges and respectively have a role in monitoring implementation. The Council of Europe’s Committee of Ministers was aptly described as “foxes guarding chickens” and “foxes guarding foxes” accordingly, even if the “shadow” of the ECHR and the comparatively strong role of the Secretariat reduce the danger of political “deals” in

⁵⁶ Examples range from the arrest of journalists critical of the regime in Turkey or the banning of NGOs (e.g. Memorial) in Russia; to the elimination of independent media in, for example, Hungary, Benin, or Venezuela.

⁵⁷ Cf. BREUER, *cit. supra* note 37.

⁵⁸ The “regime costs” of human rights violations are rising. VINJAMURI, “Human Rights Backlash”, in HOPGOOD, SNYDER and VINJAMURI (eds.), *Human Rights Futures*, Cambridge, 2017, p. 114 ff. For backlash as indicators of success, see also RISSE, ROPP and SIKKINK, *The Power of Human Rights: International Norms and Domestic Change*, Cambridge, 1999. More generally, VON BOGDANDY and VENZKE, “In whose name? An investigation of international courts’ public authority and its democratic justification”, *EJIL* 23, 2012, p. 7 ff.

the Committee.⁵⁹ It is even more evident in the (Executive) Council of the AU, which also specifically influences the activities of the African Commission on Human and Peoples' Rights. For example, the Council's pressure exercised on the African Commission resulted in the latter withdrawing observer status from an NGO that advocated for lesbian women's rights claiming that they violated "African values."⁶⁰ The human rights institutions also depend on funding from states or the (regional) organization concerned: this puts a strain on their activities, especially when – as in the African or Inter-American systems – the institutions are chronically underfunded and, moreover, a relevant part of their budget is not a permanent budget item but has to be raised through voluntary contributions.⁶¹

In fact, all human rights institutions – for different reasons – are operating at the brink of their institutional capacity. This is due, on the one hand, to the organizational framework and institutional constraints, the lack of funding and inadequate secretarial resources.⁶² Moreover, with the exception of the ECtHR, all human rights protection institutions do not work continuously but meet only for limited sessions, which reduces their efficiency.⁶³ Another "home-grown" problem, which is currently particularly evident in Africa,⁶⁴ is a rivalry between the Commission and the Court, which makes institutional cooperation in the two-stage procedure more difficult and reduces the effectiveness of human rights protection: the African Commission refers *de facto* no cases to the Court.⁶⁵

The ECtHR (and some UN treaty monitoring bodies, notably the HRC) face

⁵⁹ Cf. CALI and KOCH, "Foxes guarding the Foxes – The Peer Review of Human Rights Judgments by the Committee of Ministers of the Council of Europe", *Human Rights Law Review* 14, 2014, p. 301 ff.

⁶⁰ For details, VILJOEN, "African Commission on Human and Peoples' Rights", in BINDER et al. (eds.), *Elgar Encyclopedia on Human Rights*, London, 2022, para. 9.

⁶¹ See on the inadequate funding of the African Human Rights Commission VILJOEN, *cit. supra* note 60, para. 7; VILJOEN, *International Human Rights Law in Africa*, 2nd ed., Oxford, 2012, p. 297 ff. On the inadequate funding of Inter-American human rights protection institutions, see BURGORGUE-LARSEN, "Les Systèmes Européen et Interaméricain à l'Heure des Défis", in SICILIANOS (ed.), *Les Droits de l'Homme Comparés*, Paris, 2019, p. 86 ff., pp. 94-108.

⁶² See, for instance, SEIBERT-FOHR, *Human Rights Committee*, *cit. supra* note 27, p. 134.

⁶³ The IACtHR usually meets for sessions six times a year; the African Human Rights Commission at least two times. There are general efficiency problems in the African system. For example, the African Commission on Human and Peoples' Rights has so far finalized only about 300 cases, and of these, only about 100 cases have received findings on the merits. In general, see VILJOEN, *Human Rights Law*, *cit. supra* note 28, p. 296 ff.

⁶⁴ In the Inter-American system, the similar problem of too few cases being referred to the IACtHR by the Commission was alleviated by a reform of the Commission's rules of procedure in 2001.

⁶⁵ Thus, of the – as of May 2023 – 332 contentious cases brought before the Court, only three have been referred by the African Commission. Even these did not concern the merits, but only the non-implementation of provisional measures. The remaining cases came from individuals (308) and NGOs (21). See African Court of Human Rights, "ACtHPR Cases, Statistics", available at: <<https://www.african-court.org/cpmt/statistic>>.

different problems: they are reaching quantitative limits. In particular, the ECtHR's load of applications is well known: 40,000 to 60,000 complaints are brought before the Court annually; currently, the backlog of unaddressed cases is more than 75,000.⁶⁶ Likewise the HRC is struggling with a backlog of complaints – over 1,500 in 2019.⁶⁷ The ECtHR and HRC are thus, as it were, the “victims” of their own success.

One of the problematic consequences of these capacity problems is the frequently long duration of proceedings. At the ECtHR, proceedings may exceed ten years;⁶⁸ in the two-stage procedure in the Inter-American system, they average 12 years.⁶⁹ For the international treaty monitoring bodies, it has been calculated that, in their current configuration, they would need over six years to deal with the backlog of complaints – and that is assuming that no new complaints are added.⁷⁰ All of this is problematic, first, from a rule of law perspective: with the long duration of proceedings, the institutions themselves violate the right to a fair trial that they are tasked to monitor. Moreover, the excessive length of proceedings makes access to the institutions more difficult and reduces confidence in their effectiveness. Justice delayed is justice denied. This causes a justifiable frustration even with those who generally support the human rights monitoring institutions. In addition, an excessive bureaucratization is criticized as a side effect of institutionalized human rights protection; as is the lack of self-criticism of international human rights institutions.⁷¹

The institutional critique that becomes visible this way may be embedded in the

⁶⁶ As of 31 May 2023. See ECtHR, “Pending Applications Allocated to a Judicial Formation”, available at: <www.echr.coe.int/Documents/Stats_pending_month_2023_BIL.PDF>.

⁶⁷ The HRC received an average of 130 reports annually between 2016 and 2019; 591 individual complaints in 2019; in general, 183 reports and 1,587 complaints were awaiting processing by UN treaty monitoring bodies as of October 2019. (Cf. JELIC and MÜHREL, *cit. supra* note 26).

⁶⁸ ECtHR, *Feldman and Slovayansky Bank v. Ukraine*, Application No 42758/05, Judgment of 21 December 2017: the case was brought in 2005 but decided only in 2017 – after 12 years. See NUSSBERGER, “From High Hopes to Scepticism? Human Rights Protection and Rule of Law in Europe in an Ever More Hostile Environment”, in KRIEGER, NOLTE and ZIMMERMANN (eds.), *The International Rule of Law. Rise or Decline?*, Oxford, 2019, p. 150 ff., p. 167.

⁶⁹ See Asociación Interamericana de Defensorías Públicas, “Procedimiento ante la Comisión Interamericana de Derechos Humanos”, available at: <https://www.anadep.org.br/wtksite/cms/conteudo/42066/Gu_a_DPI_Procedimiento_ante_la_CIDH_2017.pdf>; IACtHR, “ABC de la Corte Interamericana de Derechos Humanos 2019: el cómo, cuándo y porque de la Corte Interamericana de Derechos Humanos”, 2019, p. 16. Coming to even longer procedural durations, SOLEY, “The Transformative Dimension of Inter-American Jurisprudence”, in VON BOGDANDY et al. (eds.), *Transformative Constitutionalism in Latin America. The Emergence of a New Ius Commune*, Oxford, 2017, p. 337 ff., p. 351.

⁷⁰ JELIC and MÜHREL, *cit. supra* note 26.

⁷¹ TASIOLAS, “Saving Human Rights from Human Rights Law”, *Vanderbilt Journal of Transnational Law* 52/5, 2019, p. 1167 ff. See also KLABBERS, “Human Rights Bodies and the Structure of Institutional Obligation”, in FASSBENDER and TRAISBACH (eds.), *The Limits of Human Rights*, Oxford, 2019, p. 147 ff.; WUERH, “International Law in the Post-Human Rights Era”, *Texaco Law Review* 96, 2017, p. 279 ff.

– broader – reproach of an alleged misuse of genuine human rights concerns for power-politics, i.e., in the critique of human rights protection as an (imperialist) instrument for the exercise of power in international relations. This points to a larger legitimacy crisis of human rights protection.⁷²

3.3. Lack of coordination between systems at the national, regional and international levels

Finally, concrete problems relate to the coordination between the various levels, the domestic and the regional/international. In particular, frictions arise when it comes to concretizing the necessarily broad human rights standards⁷³ and adapting them to current social problems. In this context, (domestic) political reasons often intermingle with and add to coordination problems in the (international) legal sphere.

The (legal) “coordination problems” are particularly evident in the European and Inter-American human rights systems. In both systems, the parties have largely “internalized” human rights standards and made them part of their national legal systems.⁷⁴ This may be seen as positive for the effectiveness of human rights protection, especially for Latin American states, where human rights treaties usually are incorporated with high rank in the national legal order.⁷⁵ However, in view of the ensuing relatively direct effect of the jurisprudence of the regional human rights courts at the national level, it also leads to coordination problems.⁷⁶

These are particularly evident in the jurisprudence of national tribunals and the way they deal with decisions of the regional human rights courts: at first place, there are implementation difficulties when the domestic legislative framework limits the possibilities to give effect to the decisions of regional human rights courts, as in the case of certain reparation measures ordered by the IACtHR (especially regarding the

⁷² In this sense, KADELBACH, *cit. supra* note 53.

⁷³ On the necessarily broad human rights standards to be concretized in application, see KADELBACH, “Die relative Universalität der Menschenrechte”, in FORST and GÜNTHER (eds.), *Normative Ordnungen*, Berlin, 2021, p. 278 ff.

⁷⁴ See e.g., for Europe, SPANO, “The Future of the European Court of Human Rights – Subsidiarity, Process Based Review and the Rule of Law”, *Human Rights Law Review* 18, 2018, p. 473 ff. For the inter-American system, see HUNEEUS, “Constitutional Lawyers and the Inter-American Court’s Varied Authority”, *Law and Contemporary Problems* 79, 2016, p. 179 ff., p. 182.

⁷⁵ *Ibid.*, p. 182.

⁷⁶ This is discussed in detail by KUNZ (*cit. supra* note 40), who points out that the greater frictions result from the more direct effect. For reasons of space, this contribution is limited to the judiciary; of course, there are also coordination problems in the executive and legislative branches. For these, see for instance GROTE, “A dialogue with the deaf? The political branches as compliance partners”, in GROTE, MORALES ANTONIAZZI and PARIS (eds.) *cit. supra* note 28, p. 449 ff.

reopening of proceedings).⁷⁷

Coordination problems are especially evident in conflicts with the national constitution. A distinction must however be made between theoretical limits, as indicated by the German Federal Constitutional Court in *Görgülü* (of the “last word” of the German Constitution) and the blatant refusal to execute judgments, as done by the Russian Constitutional Court in *Anchugov and Gladkov* (and in *Yukos*).⁷⁸ In *Görgülü*, the German Federal Constitutional Court pointed out the possibility of an incompatibility and showed the limits of the ECtHR in the abstract (with the “last word” of the German Constitution), but did not refuse to comply with German treaty obligations under the ECHR.⁷⁹ Conversely, the Russian Constitutional Court in *Anchugov and Gladkov* (and in *Yukos*) refused to execute concrete judgments directed against Russia.⁸⁰ The Russian Constitutional Court, therewith, entered into fierce opposition to the ECtHR, resisting to comply with judgements against Russia. Accordingly, the latter’s position directly contradicts the *pacta sunt servanda* rule, viz. the obligation to perform treaties in good faith (Article 26 Vienna Convention on the Law of Treaties (VCLT)) and Article 46 ECHR.⁸¹

In general, coordination problems often involve issues of interpretation and balancing; i.e., when there are different rights/interests to be weighed and national tribunals and regional human rights courts reach different conclusions.⁸² Especially the far-reaching interpretations of the IACtHR lead to tensions here. This becomes visible when the Court recognizes, for example, a state duty to investigate and prosecute in case of most serious human rights violations, with according tensions with the rights of the accused (e.g., with the right to defense, notably with the right to criminal proceedings within a reasonable time)⁸³ or perpetrator (e.g., if impunity

⁷⁷ See, e.g., Argentine Supreme Court, *Fontevicchia and d’Amico*, Judgement of 29 November 2011, where the Court held that the implementation of the IACtHR judgment was not possible due to the domestic separation of powers.

⁷⁸ ECtHR, *Anchugov and Gladkov*, cit. supra note 41; ECtHR, *Yukos*, cit. supra note 42; BREUER, cit. supra note 36; see also PETERS, “Supremacy Lost: International Law Meets Domestic Constitutional Law”, Vienna Online Journal on International Constitutional Law 3, 2009, p. 170 ff.

⁷⁹ Indeed, such limited contestation may promote a “constructive dialogue” between national courts and the ECtHR. (See for further reference *infra*, Section 4.2).

⁸⁰ ECtHR, *Anchugov and Gladkov*, cit. supra note 41; ECtHR, *Yukos*, cit. supra note 42; BREUER, cit. supra note 36; see also PETERS, cit. supra note 78.

⁸¹ Art. 46 ECHR: “1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. [...]”.

⁸² See, for example, the von Hannover cases against Germany where the balance between freedom of expression and private and family life was at issue. (Dt BVerfG, Decision of February 26, 2008, 1 BvR 1602/-7 - von Hannover).

⁸³ The tension was raised e.g. in relation to the *Bulacio v. Argentina* case of 2004 (IACtHR, *Bulacio*, cit. supra note 47).

had previously been guaranteed or amnesties granted).⁸⁴

The appreciation of these coordination problems regularly leads to the question of the limits of the dynamic jurisprudence of the regional human rights courts and to what extent this is still covered by their mandate as guardians of the rights enshrined in the conventions. The mandate of the IACtHR is in principle broader than that of the ECtHR (see Article 2, Article 29(b) ACHR, *pro homine* interpretation) and gives the Court more room for manoeuvre.⁸⁵ Nevertheless, for both courts, the assessment in a specific case remains difficult.⁸⁶ It can also lead to the aforementioned tensions with the national level. In this context, domestic tribunals have a crucial role to play as “gateways,” “translators”, and intermediaries between the different levels. This will be discussed in more detail in the last section.

In Africa, the coordination and implementation problems lie elsewhere: they are caused by the frequent lack of “internalization” of regional human rights standards in numerous African states;⁸⁷ and the partly still deficient knowledge of domestic judges when it comes to regional African human rights standards. Although conflicts with the *pacta sunt servanda* principle/compliance with treaties also arise here, this coordination problem tends to be less obvious in view of the lacking vertical judicial dialogue.⁸⁸ It is simply not explicitly voiced.

In the case of the international human rights institutions, too, the problem lies

⁸⁴ For criticism, see in particular MALARINO, “Judicial Activism, Punitivism and Supranationalization: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights”, *International Criminal Law Review* 12, 2012, p. 665 ff. More nuanced: HUNEEUS, “International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts”, *AJIL* 107, 2013, p. 1 ff.

⁸⁵ See for details BURGORGUE-LARSEN, *cit. supra* note 44, pp. 385ff; NEGISHI, “The Pro Homine Principle’s Role in Regulating the Relationship between Conventionality Control and Constitutionality Control”, *EJIL* 28, 2017, p. 457 ff.

⁸⁶ For instance, with regard to the question of how far the mandate for progressive development of rights reaches. (Preamble ECHR: “[...] further realization of Human Rights and Fundamental Freedoms [...]”; cf. BREUER, *cit. supra* note 36).

⁸⁷ See generally VILJOEN, *cit. supra* note 28, p. 362. Note, however, that more recently, an increasing number of African states have been incorporating human rights catalogues into national constitutions. For details, LONG, “Compliance with international human rights decisions in Cameroon: mechanisms in place but a lack of transparency”, in GROTE, MORALES ANTONIAZZI and PARIS (eds.), *cit. supra* note 28, p. 391 ff; SOMÉ, “A pick and pay approach: Burkina Faso’s compliance with international human rights law”, in GROTE, MORALES ANTONIAZZI and PARIS (eds.), *cit. supra* note 28, p. 407 ff. On Kenya, see for instance ORAGO, “The 2010 Kenyan Constitution and the Hierarchical Place of International Law in the Kenyan Domestic Legal System: A Comparative Perspective”, *African Human Rights Law Journal* 13, 2013, p. 415 ff; UDOMBANA, “Interpreting Rights Globally: Courts and Constitutional Rights in Emerging Democracies”, *African Human Rights Law Journal* 5, 2005, p. 47 ff.

⁸⁸ On the absence of vertical dialogue, see also BURGORGUE-LARSEN, *Les 3 Cours Regionales. Des Droits de L’Homme in Context*, Paris, 2020, p. 273.

primarily in the deficient domestic implementation of their decisions or practices.⁸⁹ The treaty monitoring bodies, for example, are in a comparatively weak position: Their decisions are regularly accorded functions of normative orientation and guidance, but no immediate binding effect at domestic level.⁹⁰ They are also lacking instruments for enforcement. However, as will be shown, the decisions of the international human rights institutions may have an effect that should not be underestimated, even apart from their concrete implementation.⁹¹ All of this raises the question of what therapeutic means might be sought.

4. THERAPY

In the following, possible “therapies” are considered from the perspective of a human rights “*Realpolitik*”⁹²: the difficult balancing act between effective human rights protection and the goal of keeping states “in the boat” as much as possible in times of criticism and backlash.

Accordingly, this contribution will first turn to selected improvements in the institutional sphere (Section 4.1), to then make suggestions for a better coordination of human rights standards (Section 4.2) and systems (Section 4.3).

4.1. Improving the efficiency of human rights protection institutions

Due to space constraints, the following discussion will restrict itself to improving the efficiency of human rights protection institutions; options for enhancing their legitimacy will be largely spared out.

As pending and ongoing reforms of the human rights protection systems show,

⁸⁹ See SEIBERT-FOHR and WENIGER, “Compliance monitoring under the International Covenant on Civil and Political Rights”, in GROTE, MORALES ANTONIAZZI and PARIS (eds.), *cit. supra* note 28, p. 425 ff., p. 439.

⁹⁰ The HRC, for example, enjoys a high degree of authority, with its decisions being considered as quasi-judicial, but ultimately non-binding. See, for example, the International Court of Justice (ICJ) in the *Diallo* case, which refers to the HRC’s practice in individual communications and General Comments as “interpretative case law” (ICJ, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010, para. 66). In general, SEIBERT-FOHR and WENIGER, *cit. supra* note 89, pp. 430-431; SEIBERT-FOHR, “Judicial Engagement in International Human Rights Comparativism”, in REINISCH, FOOTER and BINDER (eds.), *International Law and... Select Proceedings of the European Society of International Law*, Oxford/London, 2016, p. 7 ff., p. 9.

⁹¹ For details *infra*, Section 4.2.

⁹² NUSSBERGER, “From High Hopes to Scepticism? Human Rights Protection and Rule of Law in Europe in an Ever More Hostile Environment”, in KRIEGER, NOLTE and ZIMMERMANN (eds.), *The International Rule of Law. Rise or Decline?* Oxford, 2019, p. 150 ff., p. 171.

reform initiatives are by their very nature limited and regularly involve trade-offs. For example, the reforms brought about by Protocol No. 14 to the ECHR have succeeded in somewhat reducing the backlog of cases before the ECtHR,⁹³ which shortened the unduly long duration of proceedings. At the same time, however, the stricter admissibility requirements, especially the restrictive handling of the necessary exhaustion of domestic remedies-rule, have made access to the ECtHR more difficult.⁹⁴ This can be seen, first, in complaints against Turkey after the failed *Coup d'état* of 2016, when the ECtHR initially rejected cases as inadmissible despite the generally non-functioning Turkish legal remedies. Second, the pilot judgment procedure increases the productivity of the ECtHR, but limits individuals' access to that very Court.⁹⁵ In these constellations, access to the ECtHR is made impossible.⁹⁶

Reform efforts concerning the UN treaty monitoring bodies also have limits and come with disadvantages.⁹⁷ A major reform of the state reporting procedures, among other things to reduce the reporting burden, has been awaiting implementation for some time (since 2014).⁹⁸ In the meantime, the HRC has succeeded in improving efficiency,⁹⁹ particularly through changes of its rules of procedure: states receive lists of issues in advance to enable a more focussed dialogue and the HRC meets in two chambers. Also, the follow-up for individual communications and concluding observations has been improved.¹⁰⁰ Similarly, the session time of the HRC in Geneva was moderately increased by the UN General Assembly; however, a further increase

⁹³ The single judge solution (in conjunction with limitations in the obligation to state reasons between 2010 and 2017) can, however, be criticized from the perspective of the rule of law (*Ibid*).

⁹⁴ More generally, MADSEN, *cit. supra* note 55, p. 203: "The operational logic of subsidiarity with regard to admissibility, and the proceduralism and formalism associated with it, is increasingly at odds with the actual functioning of human rights and rule of law in a number of member states and the traditional 'as if' logic appears to be becoming problematically restrictive."

⁹⁵ See *Burnych and others v. Ukraine* where *Burmych* was stalled, although the implementation of the pilot-judgment in Ukraine had been delayed. ECtHR, *Burmych and others v. Ukraine*, Application Nos. 46852/13 et al, Judgment of 12 October 2017 (striking out). Similarly, over 12,000 other cases have been put on hold. (MADSEN, *cit. supra* note 55, p. 204).

⁹⁶ For details, see Glas, "*Burmych v. Ukraine* Two Years Later: What about Restoral?", 17 September 2019, Strasbourg Observers, available at: <<https://strasbourgobservers.com/2019/09/17/burmych-v-ukraine-two-years-later-what-about-restoral/>>.

⁹⁷ SEIBERT-FOHR, *cit. supra* note 27.

⁹⁸ See UN General Assembly, "Strengthening and enhancing the effective functioning of the human rights treaty body system", UNGA Res 68/268, 2014, available at: <https://www.ohchr.org/sites/default/files/Documents/HRBodies/TB/HRTD/A-RES-68-268_E.pdf>. In general, see JELIC and MÜHREL *cit. supra* note 26.

⁹⁹ The HRC is authorized to do so under Art. 39(2) CCPR. See for details SEIBERT-FOHR, *cit. supra* note 27, p. 134. For example, the fact that the HRC now meets in two chambers entails that not all members of the committee decide on everything.

¹⁰⁰ Cf. SEIBERT-FOHR and WENIGER, *cit. supra* note 27, p. 430 f, esp. p. 436 f.

of the time-length of the HRC's sessions in Geneva meets institutional and arguably also the personal limits of the experts involved.¹⁰¹

To briefly turn to legitimacy: in addition to linking human rights protection institutions back to and opening them up to civil society, the further involvement of particularly affected persons was mentioned as a way of increasing legitimacy. The same applies to critical self-reflection on the part of human rights protection institutions. Dialogue forums, for example between members of the regional human rights courts and national constitutional judges, could be expanded, as could be the horizontal dialogue and exchange between the human rights institutions themselves.

In short, there is certainly potential in increasing efficiency (and legitimacy). Nevertheless, all these efforts have limitations or adverse effects. This raises the question whether a better coordination of substantive human rights standards as another, additional therapeutic means might help.

4.2. Better coordination of substantive standards at the three levels – national, regional, international

What seems necessary is a criteria-driven interlocking of the international or regional levels on the one hand and the national level on the other, especially for the concretization and dynamic development of the traditionally abstract/broad human rights standards.

As far as the respective human rights systems are concerned, quite different answers must be given to the question of such “ideal” interlocking of international human rights standards with national legal systems – and thus precisely to the question of how to uphold effective human rights protection in times of human rights *Realpolitik*¹⁰², including the management of states' sovereignty concerns.

To first turn to the regional human rights protection systems in the European and Inter-American regions. In relation to established pluralistic democracies, a stronger focus on the national level, for example through a principled margin of appreciation doctrine or self-restraint exercised by the regional human rights monitoring institution, appears to be a suitable means against backlash.¹⁰³ This holds true especially for relative rights (that can be restricted), provided that their essence is not

¹⁰¹ Accompanying measures are the increased use of new information technologies, for example in data management and administration.

¹⁰² See NUSSBERGER, *cit. supra* note 92.

¹⁰³ See also PAULUS, “From Implementation to Translation: Applying the ECtHR Judgments in the Domestic Legal Orders”, in SEIBERT-FOHR and VILLIGER (eds.), *Judgments of the European Court of Human Rights - Effects and Implementation*, Baden-Baden, 2014, p. 267 ff., p. 269.

impaired. A comprehensively understood cooperative subsidiarity principle may provide orientation here: it serves as a yardstick for the relation between the different (regional and national) levels and can help to normatively delimit and calibrate them.¹⁰⁴ More particularly, the regional human rights institution exercises self-restraint as long as the national level functions “good” but “kicks-in” (i.e., takes action) when domestic institutions fail.

On this basis, in Europe, the development of a procedural margin of appreciation, the “reasonable courts doctrine”, appears to be a viable means to give certain leeway of implementation to the domestic sphere; therewith mitigating frictions between the regional and national levels. As the *von Hannover v. Germany* cases in particular showed, the ECtHR grants more leeway, i.e. exercises greater restraint, when domestic institutions are functioning “well”: the Court then limits itself to reviewing the substance of the right at issue.¹⁰⁵ Therewith, a distinction between democratic states functioning under the rule of law and authoritarian regimes could bring the former “back on board”, while in the case of the latter, effective human rights protection is ensured through stricter monitoring. This is precisely what the ECtHR has demonstrated in the cases already decided against Turkey following the 2016 coup: the Court regularly established violations and, to that extent, applied a stricter standard in the face of poorly functioning national institutions (*Sahin Alpay v. Turkey* of 2018; *Mehmet Hasan Altan v. Turkey* of 2018).¹⁰⁶ So there is much potential here.

¹⁰⁴ Cf. VILA, “Subsidiarity, Margin of Appreciation and International Adjudication within a Cooperative Conception of Human Rights”, *International Journal of Constitutional Law* 15, 2017, p. 393 ff; FOLLESDAL, “Subsidiarity and International Human-Rights Courts: Respecting Self-Governance and Protecting Human Rights - or Neither”, *Law and Contemporary Problems* 79, 2016, p. 147 ff; BINDER, “The Future of Human Rights Protection in Europe and America - Or Subsidiarity Revisited”, *Zeitschrift für Öffentliches Recht* 77, 2022, p. 5 ff.

¹⁰⁵ SPANO, *cit. supra* note 74, p. 473. Thus, if everything has been properly examined at the national level and elementary principles of the rule of law, checks and balances, etc. are sufficiently anchored domestically (“embeddedness” of the ECHR in Robert Spano’s sense), greater trust will be placed in national institutions. In such a jurisprudence, the functioning of national institutions is accounted for in the margin of appreciation left to the domestic level by the ECtHR. Cf. ECtHR, *von Hannover v. Germany* (No 2), Application Nos. 40660/08 and 60641/08, Judgment of 7 February 2012, para. 107: “[...] where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court’s case law, the Court would require strong reasons to substitute its view for that of the domestic courts.” In this context, the ECtHR, noting that the German courts had taken its own case law (including *Hannover v. Germany No 1*) into account, exercised restraint and found no violation.

¹⁰⁶ See ECtHR, *Sahin Alpay v. Turkey*, Application No. 16538/17, Judgment of 20 March 2018; ECtHR, *Mehmet Hasan Altan v. Turkey*, Application No. 13237/17, Judgment of 20 March 2018, where the ECtHR found violations of Arts. 5(1) and 10 ECHR. See also ECtHR, *Matúz v. Hungary*, Application No. 73571/10, Judgment of 21 October 2014, where the ECtHR stated in the context of the dismissal of a journalist: “the fairness of proceedings and the procedural guarantees afforded [...] are factors to be taken into account when assessing the proportionality. [...] If the reasoning of the national court demonstrates a lack of sufficient

However, significant challenges remain in the operationalization of the procedural margin of appreciation doctrine: for example, what criteria are to be applied in assessing whether institutions such as national parliaments are functioning “well” with, accordingly, greater self-restraint by the ECtHR?¹⁰⁷ Assessment is more complex here, as compared to assessments of the independence of the judiciary.

In the Americas, in application of a “cooperative subsidiarity principle,” a somewhat more flexible attitude of the IACtHR and a stronger reference to domestic institutions, especially in case of relative rights in consolidated democracies,¹⁰⁸ as well as regards the often very detailed reparation orders,¹⁰⁹ seems warranted. In addition, the Inter-American Court could engage in a constructive dialogue with the state concerned when monitoring the execution process, for which the Court itself is responsible,¹¹⁰ unlike the ECtHR. Initial approaches in this regard can already be found in the IACtHR’s case law (see *Mémoli v. Argentina* on freedom of expression).¹¹¹ The Inter-American Court also starts to take national conditions into account when exercising the conventionality control; the same applies to reparations. This may contribute to a better coordination between the regional/Inter-American and domestic levels and should be further developed.

engagement with the general principles of the Court under Article 19 of the Convention, the degree of margin of appreciation afforded to the authorities will necessarily be narrower.” (ID., para. 35).

¹⁰⁷ See in this sense the interview with ECtHR President Robert Spano (MADSEN and SPANO, “Authority and Legitimacy of the European Court of Human Rights. Interview with Robert Spano, President of the European Court of Human Rights”, *The European Convention on Human Rights Law Review* 1, 2020, p. 165 p.168). The lack of clear criteria for the functioning of national parliaments - in contrast to the judiciary, where there are clear standards in human rights treaties (see, e.g., Art. 6 ECHR) - could fuel a “double-standards” debate. Interview with ECtHR President Robert Spano (ID., p. 168).

¹⁰⁸ Cf. BERTELSEN, “A Margin for the Margin of Appreciation: Deference in the Inter-American Court of Human Rights”, *International Journal of Constitutional Law* 19, 2021, p. 1 ff.

¹⁰⁹ As discussed, the IACtHR traditionally rejects an attitude of self-restraint, as the margin of appreciation, which is generally explained with the most serious human rights violations and democracies still in consolidation in the Latin American region. (TRINDADE, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI*, Santiago, 2008, p. 390).

¹¹⁰ The IACtHR monitors itself the implementation of its judgments since 2001 through relevant resolutions. Since 2007, the Court has held case-specific hearings with parties to improve implementation. (See also BURGORGUE-LARSEN, *cit. supra* note 44, p. 396).

¹¹¹ In *Mémoli v. Argentina* (2013), the IACtHR ruled with respect to the legality of a criminal sanction imposed on the complainants for statements made in the media: “in strict observance of its subsidiary competence, the Court [...] must verify whether the State authorities made a reasonable and sufficient weighing up between the two rights in conflict, without necessarily making an autonomous and independent weighing, unless the specific circumstances of the case require this” (IACtHR, *Mémoli v. Argentina*, Judgment of 22 August 2013, Series C No 56, para. 140). The Int-American Court concluded that the national courts had “examined thoroughly the characteristics of the statements [at issue]” (para. 142) and granted according leeway by stating that “domestic judicial authorities were in a better position to assess which right suffered most harm” (para. 143) without finding a violation.

The determination of the applicable regional human rights standards ideally takes place through a vertical judicial dialogue or a dialectic review.¹¹² This way, domestic courts, especially supreme courts, may contribute – in “qualified cooperation”¹¹³ – to “translating” the decisions of regional human rights courts into national law (or provide more nuance for different lines of jurisprudence).¹¹⁴ National courts become gateways (“*Einfalltore*”) for regional human rights standards.¹¹⁵ This may help to soften domestic resistance.

Note, however, that these considerations apply only to constructive/good-faith dialogue; not to unqualified resistance, as practiced by the Russian Constitutional Court in *Anchugov and Gladkov* (and especially in *Yukos*).

A prerequisite for such a vertical dialogue are consistent lines of jurisprudence of the regional human rights courts. This is necessary to stabilize the normative expectations of domestic institutions. One possible technique to reach such stability/consistency, habitually practiced by the ECtHR, is to base its dynamic development of regional human rights standards on a comparison of national laws and identify a “European consensus”.¹¹⁶ Such technique may indeed be viewed as treaty interpretation with reference to “subsequent practice” in the sense of Article 31(3)(b) VCLT. Generally, an adequate method, such interpretation must however be carried out consistently.¹¹⁷ For example, it has been criticized that the ECtHR diverges in its references to the “European consensus” and is not systematic enough in its identification of a higher protection standard. Another means – mainly of the IACtHR – to improve the acceptability of judgments at domestic level, is to refer to

¹¹² Thus, as is well known, the ECtHR was satisfied to note in *von Hannover No 2* that the German Constitutional Court had considered its reasoning of *von Hannover No 1*. (See *cit. supra* note 105). Such a dialogue, according to Armin von Bogdandy, does not necessarily have to take place harmoniously between the parties involved, nor does it presuppose the primacy of international law. It may rather be understood as a contribution to a common project based on values, principles and rights as well as human dignity.

¹¹³ Cf. GROTE, MORALES ANTONIAZZI and PARIS, *cit. supra* note 29, p. 517.

¹¹⁴ See German Constitutional Court *Beamtenstreikrecht* (*cit. supra* note 37).

¹¹⁵ Indeed, for some national supreme courts, the misalignment with the ECtHR’s case law (see *supra*, Section 3.3) may be functional to promote an, as held by the Italian Constitutional Court, “constructive dialogue between the national courts and the European Court concerning the meaning to be given to human rights”. (Italian Constitutional Court, Judgment No. 49/2015, para. 7).

¹¹⁶ The IACtHR has also begun to do so, for example in *Artavia Murillo* (IACtHR, *Artavia Murillo v. Costa Rica*, Judgment of 28 November 2012, Series C No 257) and *Atala Riffo* (IACtHR, *Atala Riffo v. Chile*, Judgment of 24 February 2012, Series C No 239). For details, see CONTESSE, “The final word? Constitutional dialogue and the Inter-American Court of Human Rights”, *International Journal of Constitutional Law* 15, 2017, p. 414 ff.

¹¹⁷ Cf. for instance ULFSTEIN, “How Should the European Court of Human Rights Respond to Criticism? Comment on Angelika Nussberger”, in KRIEGER, NOLTE and ZIMMERMANN (eds.), *The International Rule of Law. Rise or Decline?*, Oxford, 2019, p. 172 ff., p. 177 with further references.

national legislation in the state concerned in the judgment's motivation.¹¹⁸

In Europe, Protocol No. 16 could be used – and also further developed – as a means to strengthen the vertical judicial dialogue. Indeed, it establishes a right of the highest domestic courts and tribunals of the Council of Europe Member States to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the ECHR.¹¹⁹

As regards international human rights protection institutions, possible approaches for a better coordination of standards differ. This, for one, is due to the fact that they have jurisdiction over very different states (democracies as well as totalitarian regimes); in many cases, international human rights standards are also insufficiently incorporated at the domestic level. Likewise, as is well known, the decisions of UN treaty monitoring bodies do not have binding effect.¹²⁰ Therefore, in addition to domestic courts, the main actors to improve the effective implementation of international human rights standards are ministerial officials involved in state reports, social movements, and NGOs. This has been aptly described as a form of “transnational experimentalist governance”.¹²¹ Indeed, effective domestic operationalisation and the invocation of international human rights standards enables advocacy for change and according improvements in the domestic human rights situation.¹²² International human rights standards, consequently,

¹¹⁸ See e.g., IACtHR, *Awasi Tingni v. Nicaragua*, Judgment of 31 August 2001, Series C No. 79; IACtHR, *Acevedo Buendia v. Peru*, Judgment of 1 July 2009, Series C No. 198. For details, see LIXINSKI, “Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law”, EJIL 21, 2010, p. 585 ff.

¹¹⁹ However, there are numerous critical points about Protocol No. 16. See, e.g.: GERARDS, “Advisory Opinions, Preliminary Rulings and the New Protocol No 16 to the European Convention of Human Rights. A Comparative and Critical Appraisal”, Maastricht Journal of European and Comparative Law 21, 2014, p. 630 ff., p. 648. DZEHTSIAROU and O'MEARA, “Advisory jurisdiction and the European Court of Human Rights: a magic bullet for dialogue and docket-control?”, Legal Studies 34, 2014, p. 444 ff., p. 459 and p. 462. Protocol No. 16 has moreover been ratified by only 19 states so far; as of May 2023, the procedure has been used only seven times in total. See ECtHR, Advisory Opinions under Protocol No 16 (ECtHR) available at: <www.echr.coe.int/Pages/home.aspx?p=caselaw/advisoryopinions&c=>>. Thus, the Protocol's concrete utility for judicial dialogue remains questionable. Indeed, some States, e.g., Italy, decided not to ratify Protocol No. 16 out of concerns of undermining the constitutional “primacy” of their own Supreme Courts; a reflection of the growing populist/nationalist hostility towards human rights systems, and international law in general, as discussed *supra*, Section 2.1.

¹²⁰ See *supra*, Section 3.3.

¹²¹ DE BURCA, “Human Rights Experimentalism”, AJIL 111, 2017, p. 277 ff.

¹²² Cf. SHANY, “Can Strasbourg be Replicated at a Global Level? A View from Geneva”, in AUST and DEMIR-GÜRSEL (eds.), *The European Court of Human Rights - Current Challenges in Historical and Comparative Perspective*, Cheltenham, 2021, p. 71 ff., p. 88. This is aptly described by Sikkink as the “boomerang effect.” See SIKKINK, “Patterns of Dynamic Multilevel Governance and the Insider-Outsider Coalition”, in DELLA PORTA and TARROW (eds.) *Transnational Protest and Global Activism*, Lanham/Boulder/New York/Toronto/Oxford, 2004, p.151 ff.

are attributed orientation and mobilization function. They are invoked to criticise domestic human rights violations; independently of the fact whether the respective human rights standard or decision has been implemented domestically. Especially international/global human rights standards thus develop emancipatory potential.¹²³

This is precisely where the possibilities for improving the relation between international/global human rights standards and the national level reside. In addition to dialogue, it is above all the persuasive power that an international decision/the establishment of a specific standard radiates that should induce national actors to follow the jurisprudence of international treaty monitoring bodies.¹²⁴ Or at least unleashes sufficient potential to mobilize against human rights violations.¹²⁵ This also explains why in some cases – such as the prohibition of full-face veils in France (*Yaker* case) or the abortion ban in Ireland (*Mellet* case) – the HRC showed less restraint than the ECtHR and established corresponding violations.¹²⁶ It was a matter of convincingly defining the human rights standard at issue. The concretization of the human rights standards in question then takes place in form of exchange and dialogue (a “two-way cross-cultural translation”) involving various domestic actors (NGOs, social movements, state ministries, civil society).

Thus, different “methods” for an improved coordination of standards may be distinguished, depending on whether the international/global or the European or Inter-American human rights protection systems are concerned. In this context, the African human rights protection system has an intermediate position, as it were, given the little progress made in most African states as regards the domestic incorporation/”internalization” of regional human rights standards.

This leads to the final part of this contribution, broader questions of a better coordination between the different (domestic-regional/international) levels.

¹²³ In this sense. *Ibid.*

¹²⁴ Cf. SHANY, *cit. supra* note 122.

¹²⁵ With Shany: “HRC derives its legitimacy from other sources [than the ECtHR] – especially from the notion of universality of international human rights – a notion with powerful symbolic value, which exerts a considerable compliance pull on states.” (SHANY, *ID.*, p. 74).

¹²⁶ See HRC, *Hebbadj v. France* and *Yaker v. France*, Application No. 2807/2016, Decision, 17 October 2018; HRC, *Mellet v. Ireland*, Application No. 2324/2013, Decision of 31 March 2016. See, on the other hand, ECtHR, *SAS v. France*, Application No. 43835/11, Judgment of 1 July 2014 and ECtHR, *A B and C v. Ireland*, Application No. 25779/05, Judgment of 16 December 2010, where the Court did not establish violations. For further reference see Berry, “Freedom of Religion and Religious Symbols: Same Right – Different Interpretation?”, EJIL: Talk!, 10 October 2013.

4.3. *Better coordination of national, regional and international monitoring systems*

In the area of coordination of national, regional and international monitoring systems, there have already been large-scale projects. In addition to a human rights chamber at the International Court of Justice (ICJ), the idea of a worldwide human rights court that could be called upon in certain cases and adjudicate the most serious human rights violations has been raised.¹²⁷ However, such a court is hardly feasible at present;¹²⁸ moreover would it have disadvantages such as the lack of specialization in the different fields of human rights,¹²⁹ and also the problem of institutional backlash would not necessarily be solved.

Therefore, the following proposals will again be guided by human rights *Realpolitik*. This presupposes a solid anchoring of human rights protection at the national level.¹³⁰ As Louis Henkin aptly put it back in 1994:

“International Rights are rights within national society and the obligation to respect and ensure rights must fall on every society in the first instance. The international community can only observe, cajole, shame and otherwise induce governments and societies to respect and ensure those rights.”¹³¹

Indeed, in line with Henkin, effective human rights protection requires functioning domestic structures. It is based on a pluralistic democracy, the rule of law and independent courts. However, as shown, these very structures are undermined by the rise of nationalist-populist regimes. Human rights protection institutions have responded with an increased focus on domestic institutional structures.¹³² In particular the comparatively recent “bad faith jurisprudence” of the ECtHR in the context of Article 18 ECHR deserves mention:¹³³ in extreme cases, when basic rule of law principles are

¹²⁷ See KOZMA, NOWAK and SCHEININ (eds.), *A World Court of Human Rights - Consolidated Statute and Commentary*, Vienna, 2010.

¹²⁸ In particular, Philip Alston met the proposal with scepticism (ALSTON, “Against a World Court for Human Rights”, *Ethics & International Affairs* 28, 2014, p. 197 ff.).

¹²⁹ In this sense JELIC and MÜHREL, *cit. supra* note 26).

¹³⁰ Cf. CALI and KOCH, *cit. supra* note 59, p. 305 (citing Donnelly): “There is a widely held consensus in the political science literature that human rights treaty compliance is primarily driven by domestic political mechanisms.”

¹³¹ HENKIN and HARGROVE (eds.), *Human Rights: An Agenda for the Next Century*, Washington, 1994, p. xvii.

¹³² In addition to the aforementioned Art. 18 ECHR jurisprudence, the independence of national courts in particular is consistently called for. See for details BINDER, *cit. supra* note 104.

¹³³ Art. 18 ECHR: “The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.”

set aside domestically, the ECtHR establishes an abusive restriction and violation of Convention rights, as occurred in the *Demirtas v. Turkey No 2* case of 2020.¹³⁴ The IACtHR goes even further in its *Advisory Opinion OC-21/28* of June 2021,¹³⁵ when it considers the indefinite re-election of presidents in presidential systems with strong executive branches to be a violation of Inter-American human rights standards.¹³⁶ The constitutional/institutional design of states is thus increasingly under scrutiny by both regional human rights courts when serious violations of the rule of law are at stake.¹³⁷ This seems promising for a better vertical coordination between the levels.

At the same time, a tighter control by regional human rights courts comes with the risk of non-compliance by the state concerned: the regional court is now in constant use, so to speak, and with each of its rulings, they antagonize the state, which is drifting into authoritarianism. Likewise, the operationalization of international human rights by NGOs and social movements in the meaning of transnational experimental governance at the international level works primarily in pluralistic democratic regimes. A dilemma.

In these cases, only pressure from other states may help. In this sense, the consistent follow-up by the Committee of Ministers of the Council of Europe to Article 18 ECHR rulings of the ECtHR should be seen as a positive development.¹³⁸ Other types of political and economic pressure could also be considered, such as that currently being exerted by the European Union on Poland.¹³⁹

Likewise, the most comprehensive possible anchoring of human rights at the

¹³⁴ ECtHR, *Selahattin Demirtas v. Turkey (No 2)*, Application No. 14305/17, Judgment of 22 December 2020. The jurisprudence on Art. 18 ECHR dates back to ECtHR, *Gusinskiy v. Russia*, Application No. 70276/01, Judgment of 19 May 2004. On the development of jurisprudence, see CALI, "Proving Bad Faith in Int Law: Lessons from Art. 18 Case law of the ECtHR", in KAJTAR, CALI and MILANOVIC (eds.), *Secondary Rules of Primary Importance*, Oxford, 2022. See also TSAMPI, "The new doctrine on misuse of power under Article 18 ECHR: Is it about the system of contre-pouvoirs within the State after all?", NQHR 38, 2020, p. 134 ff., p. 149.

¹³⁵ IACtHR, *La Figura de la Reección Presidencial Indefinida en Sistemas Presidenciales en el contexto del Sistema Interamericano de Derechos Humanos*, Advisory Opinion OC-28/21, 7 June 2021.

¹³⁶ The IACtHR thus takes the broader institutional guarantees of a representative democracy, the rule of law, and the separation of powers into account. (ID., paras. 43ff. and 65). In general, Binder and Morales Antoniazzi, "Towards Institutional Guarantees for Democratic Rotation. The Inter-American Court's Advisory Opinion OC-28/21 on Presidential Re-election", 6 October 2021, *Verfassungsblog*, available at: <verfassungsblog.de/towards-institutional-guarantees-for-democratic-rotation/>.

¹³⁷ Also, the African Court of Human and Peoples' Rights has pushed for according standards (e.g. against Benin). However, this led to limitations of the of access of individuals/NGOs to the Court on the part of Benin.

¹³⁸ Cf. CALI, "How Loud Do the Alarm Bells Toll? Execution of 'Article 18 Judgments' of the European Court of Human Rights", *European Convention on Human Rights Law Review* 2, 2021, p. 274 ff.

¹³⁹ See e.g., Buras and Piotr, "The final countdown: The EU, Poland and the rule of law", *European Council on Foreign Relations*, 14 December 2022, available at: <<https://ecfr.eu/article/the-final-countdown-the-eu-poland-and-the-rule-of-law/>>.

national and subnational levels should be striven for.¹⁴⁰ This precisely because human rights are not a purely legal project, but are also based on political, sociological-anthropological and other factors, which makes their embedding in society as a whole all the more necessary.¹⁴¹ In addition to organized civil society, this would include national human rights and ombudsman institutions as well as the media. Municipalities, cities and federal entities must also be involved in the realization of human rights: the local and regional level is particularly important for implementation. It is often also more directly in touch with the population. The goal is to develop a “human rights culture”¹⁴² (“vernacularization” of human rights).¹⁴³ This seems even more necessary since ultimately, there are clear limits to regional and international human rights institutions: If states persistently refuse to comply with their human rights obligations, even these institutions can do little. In the words of Karen Alters:

“The primary political question of the day is whether populations are willing to trade democracy, individual rights and the rule of law for nationalist glory or economic opportunity. [...] Should the constituent people collectively cede liberal democratic values, then it would be foolish to expect international law or domestic legal systems to survive in their current form.”¹⁴⁴

The development of a “human rights culture” at the national level moreover seems important because a human rights project that is supported by the population ideally also counters backlash tendencies: It reduces the danger of a populist turn against human rights institutions, since there is little or no political benefit for a government from such a position.¹⁴⁵ Anchoring human rights in the society as a whole could thus also help to counteract the populist-nationalist tendencies mentioned earlier. This, too,

¹⁴⁰ Cf. MCGREGOR, “Looking to the Future: The Scope, Value and Operationalization of International Human Rights Law”, *Vanderbilt Journal of Transnational Law* 52, 2019, p. 1281 ff., pp. 1306-1314.

¹⁴¹ In this case, targeted outreach and communication strategies by human rights protection institutions may likewise be of help. See *supra*, Section 3.1.

¹⁴² On human rights culture see BINDER, “European Human Rights Protection in Crisis?: The COVID-19 Pandemic as Challenge and Opportunity”, *Die Friedens-Warte* 93, 2020, p. 299 ff.

¹⁴³ ENGLE MERRY and LEVITT, “The Vernacularization of Women’s Human Rights”, in HOPGOOD, SNYDER and VINJAMURI (eds.), *Human Rights Futures*, Cambridge, 2017, p. 213 ff; See generally for an anthropological perspective on human rights, GOODALE, “Human Rights”, in FASSIN (ed.), *A Companion to Moral Anthropology*, Malden/Oxford/West Sussex, 2012, p. 469 ff.

¹⁴⁴ ALTER, “Critical junctures and the future of international courts in a post-liberal word order”, in KENT, SKOUTARIS and TRINIDAD (eds.), *The Future of International Courts*, London, 2019, p. 9 ff., p. 33.

¹⁴⁵ Similarly, the “regime costs,” i.e., the domestic costs of realizing human rights protection, are reduced. SANDHOLTZ, BEI and CALDWELL, “Backlash and international human rights courts”, in BRYSK and STOHL (eds.), *Contracting Human Rights. Crisis, Accountability, and Opportunity*, London, 2019, p. 159 ff.

helps to avoid backlash and an overstretching of international human rights law.

Finally, to broaden the perspective: for sure, the global political situation is sobering. But human rights are also relied upon in relation to new challenges such as the climate crisis or transnational economic law, and international human rights protection institutions are used as a forum.¹⁴⁶ Even the criticism of human rights by populist regimes can be seen as a sign of success, confirming their relevance and importance. This gives rise to hope that human rights will remain the ultimate normative framework and guide the action of the international community.¹⁴⁷ So there are also positive signs, despite backlash tendencies.

¹⁴⁶ See, for example, the complaint brought before the ECtHR by six Portuguese youth in light of the climate crisis: ECtHR, *Duarte Agostinho and others v. Portugal and 32 other States*, Application No. 39371/20; cf. also ECtHR, *Verein Klimasenioren Schweiz and others v. Switzerland*, Application No. 53600/20; generally, EICKE, “Climate Change and the Convention: Beyond Admissibility”, *European Convention on Human Rights Law Review* 3, 2022, p. 8 ff. Regarding jurisprudence on human rights and corporate accountability, see IACtHR, *Buzos Miskitos (Lemeth Morris et al) v. Honduras*, Judgment of 31 August 2021, Series C No 432; for further reference see, Manteli, “Key take-aways from the Inter-American Court judgement on Miskito divers vs. Honduras”, *Business & Human Rights Centre*, 28 October 2021, available at: <www.business-humanrights.org/en/blog/aportes-de-la-sentencia-de-la-corte-idh-en-el-caso-de-buzos-miskitos/>.

¹⁴⁷ With regard to international organizations see, PETERS, “Constitutional Theories of International Organizations: Beyond the West”, *Chinese Journal of International Law* 20, 2021, p. 649 ff., pp. 677-698.