Enduring Practices in Changing Circumstances: A Comparison of the European Court of Human Rights and the Inter-American Court of Human Rights

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What explains the difference between court practices? This article attempts to address this question by looking at the relation between legal cultures and practices through the lenses of practice theory. In particular, it focuses on public hearings as distinct courtroom practices at the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR). I examine the *inclusiveness* of their public hearings, assessing the extent to which victims and civil society groups may actively participate in the hearings. To do so, I rely on existing literature and evidence gathered through on-site visits and a series of interviews conducted at the ECtHR and the IACtHR. I show the circular relation between legal cultures and practices with a twofold analysis. First, these courts were created in different historical contexts in response to different societal needs. The self-image that they held at their inception has since served as a creation myth. This myth has largely shaped their institutional practices to this day. Second, the persistence of these practices – despite changing circumstances – has helped keep this creation myth and self-image alive. This empirically informed analysis sheds light on public hearings, and furthers our understanding of sociology of international courts.

Key words: Practice theory, the European Court of Human Rights, the Inter-American Court of Human Rights, legal culture, legal practices, public hearings, victims, civil society organizations

Creation Myths, Identities, and Practices

Institutions are often founded upon an idea. This idea, which may have been intended to be a discursive tool only, serves as a creation myth. It is imprinted upon the DNA of the institution, shaping its identity. How does this myth affect the institutional practices? In this article, I examine the influence of creation myths and unique legal culture on institutional practices looking at the European Court of Human Rights (the ECtHR) and the Inter-American Court of Human Rights (the IACtHR). I explain how legal culture and institutional

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ethos shape judicial practices by focusing on courtroom practices, and in particular public hearings. To do so, I adopt an approach based on practice theory. Following this tradition, I define practices as routines, patterned actions, and rituals, and I consider public hearings a courtroom practice.[2]

There have been other studies looking at how these two courts' practices differ. For example, Jorge Contesse finds that unlike the ECtHR, the IACtHR does not embrace subsidiarity or leave a large room for maneuver for states.[3] This, according to Contesse, is due to the IACtHR's history of reviewing gross and large-scale human rights violations.[4] The changing legal and political landscape has not yet encouraged the IACtHR to be more deferent to national authorities even if the authorities concerned are demonstrably more democratic.[5] Similarly, studies have compared the reparation measures ordered by the ECtHR and the IACtHR. To illustrate, Gabriela Citroni finds that the IACtHR has developed innovative reparation measures that go well beyond pecuniary compensation.[6] The ECtHR, on the other hand, has been minimalist and has predominantly ordered pecuniary compensation.[7]

In essence, what these examples focus on, such as courts' style of reasoning or working methods, are all part of a larger repertoire of judicial practices. Indeed, the burgeoning literature on international courts has addressed a range of court practices, from legal interpretation to judicial dissent.[8] Yet, it has not paid enough attention to public

[2] Friedrich Kratochwil, "Making Sense of 'International Practices,'" in *International Practices*, ed. Emanuel Adler and Vincent Pouliot (New York: Cambridge University Press, 2011), 36–60.
[3] Jorge Contesse, "Contestation and Deference in the Inter-American Human Rights System," *Law and Contemporary Problems* 79, no. 2 (June 20, 2016): 124.
[4] Contesse, 127.
[5] Contesse, 145.
[6] Gabriella Citroni, "Measures of Reparation for Victims of Gross Human Rights Violations: Developments and Challenges in the Jurisprudence of Two Regional Human Rights Courts," *Inter-American and European Human Rights Journal* 5, no. 1–2 (2012): 52.
[7] Citroni, 59.
[8] See for example, Andrea Bianchi, "Game of Interpretation in International Law: The Players, the Cards, and Why the Game Is Worth the Candle," in *Interpretation in International Law* (New York: Oxford University Press, 2015), 34–57; Kanstantsin Dzehtsiarou and Conor O'Mahony, "Evolutive Interpretation of Rights Provisions: A Comparison of the European Court of Human Rights and the U.S. Supreme Court," *Columbia Human Rights Law Review* 44 (2013 2012): 309–66; Erik Voeten, "The Impartiality of International Judges: Evidence from the European Court of Human Rights," *American Political Science Review* 102, no. 4 (November 2008): 417–33, https://doi.org/10.1017/S0003055408080398; R. P. Anand, "The Role of Individual and Dissenting Opinions in International Adjudication," *The International and Comparative Law Quarterly* 14, no. 3 (1965): 788–808; Jeffrey L. Dunoff and Mark A. Pollack, "The Judicial Trilemma," *American Journal of International Law* 111, no. 2 (April 2017): 225–76, https://doi.org/10.1017/ajil.2017.23.

hearings.[9] This could be because courtroom practices do not directly concern the law or the law's influence of politics and *vice versa*. Rather, they relate to the courts' rituals and the manner in which they conduct their day-to-day work.

Although they may appear mundane, courtroom practices serve as a reflection of a given court's legal culture. These practices are particularly revealing because it is up to the courts to determine how they should be conducted. They do so through the rules of court or rules of procedures adopted by the courts themselves. Public hearings in particular are the instances where a court opens its door to the general public. This is when they welcome the outside world and allow them to get a glimpse of their inner workings. More importantly, they provide the courts with a chance to convey their self-image to the public. They reveal information not only about courts' formal procedures but also their esthetic taste. These are therefore the instances when we can glean information about courts legal culture and the influence of their creation myths thereon.

This is precisely what this comparative study aims at capturing. It revolves around a simple yet intriguing mismatch between the practices of the ECtHR and the IACtHR. We know that both the IACtHR and the ECtHR hold public hearings, yet the way they carry out these hearings is different. While one has been keen on offering the stage to victims and civil society groups during public hearings, the other has traditionally refrained from doing so. That is, while the public hearings at the IACtHR are organized in an inclusive manner, the ones at the ECtHR are not.

Principally, I compare these courts based on how *inclusive* their public hearings are. The level of inclusiveness refers to their willingness to allow active participation of all parties to the dispute at the public hearings. States and their representatives have always occupied an important space in the courtroom proceedings. Therefore, this measure specifically relates to the room given to the victims, victims' relatives, and civil society groups as third parties. Inclusive public hearings can be defined as ones where victims and civil society groups are

[9] See for example, Karen Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton and Oxford: Princeton University Press, 2014); Laurence R. Helfer and Erik Voeten, "International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe," *International Organization* 68, no. 1 (January 2014): 77–110, https://doi.org/10.1017/S0020818313000398; Alexandra Huneeus and Mikael Rask Madsen, "Between Universalism and Regional Law and Politics: A Comparative History of the American, European, and African Human Rights Systems," *International Journal of Constitutional Law* 16, no. 1 (May 12, 2018): 136–60, https://doi.org/10.1093/icon/moy011.

given opportunities to take the floor. Less inclusive public hearings are those that are closed off to the active participation of victims, their relatives, or civil society groups.

The key distinction between inclusive and less (or non) inclusive public hearings is the degree to which victims and civil society groups can provide performative testimonies or interventions. In less inclusive hearings, victims and their families cannot recount their experiences. Rather their voice is mediated through their representatives. Similarly, civil society groups are not asked to take the floor to convey the concerns of the victims or the victimized communities – albeit they are allowed to do so via written submissions. As I will show in the rest of the article, the IACtHR tend to have inclusive public hearings, the ECtHR is inclined to hold public hearings in a less (or non) inclusive manner. The question then is why these courts differ in their inclusiveness? And, equally importantly, what are the normative implications of holding more-or-less inclusive public hearings?

In an attempt to answer these questions, I provide a twofold analysis. First, these courts were created in different historical contexts in response to different societal needs.[10] The self-image that was necessary to give them an organizational identity at their inception has since served as a creation myth. This myth has provided each court with different parameters of appropriate or desired behavior patterns. These divergent courtroom practices flourished within these set parameters. Second, these practices have remained sticky, even if the reasons for these myths disappeared. The persistence of these practices has normative implications, however. It has kept these creation myths alive to this day.

The ECtHR and the IACtHR had similar starting points, although they were established two decades apart – in the late 1950s and 1970s, respectively. They were created in the same institutional blueprint. They were both designed to interpret and apply regional human rights conventions. Both courts would work with a regional human rights commission that would function as a quasi-judicial filter. In addition, they would serve as supranational courts, and they would be open to applicants who have exhausted all available domestic remedies.[11] Nevertheless, the socio-political context in which they were instituted was starkly different. One was created to fine-tune established democracies and prevent them from

[10] More on the influence of regional dynamics, see Alexandra Huneeus and Mikael Rask Madsen, "Between Universalism and Regional Law and Politics: A Comparative History of the American, European, and African Human Rights Systems," *International Journal of Constitutional Law* 16, no. 1 (May 12, 2018): 137.
[11] Cesare P. R. Romano, "A Taxonomy of International Rule of Law Institutions," *Journal of International Dispute Settlement* 2, no. 1 (February 1, 2011): 241–77.

backsliding to authoritarianism.[12] The other one was established to help countries transition to democracy.[13] This influenced their core principle, their *raison d'être*, so to speak. While the IACtHR was created upon victim-focused understanding, the ECtHR was founded upon a civilization-based understanding, as we will see in the next sections.

These creation logics may not be applicable to the contemporary circumstances in which these courts operate, however. Today, both courts are overseeing a body of states that have increasingly similar – and similarly diverse – political profiles.[14] For example, both courts have jurisdiction over strong democracies. Latin American democracies like Chile and Uruguay rank above the majority of the 47 members of the Council of Europe, according to Freedom House ranking for 2018 – a global index that rank countries based on their performance of respecting and protecting political rights and civil liberties.[15] Both courts have addressed cases involving a transition to democracy and strengthening rule of law.[16] The IACtHR did so most notably in Brazil, Peru, and Chile, particularly in the context of amnesty laws and military criminal justice.[17] As for the ECtHR, such cases revolved around access to secret information, historical justice, reparatory justice, and restitution. They predominantly came from the formerly communist countries in the Central and Eastern Europe and in the aftermath of the war in former Yugoslavia.[18]

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[12] Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford, New York: Oxford University Press, 2010); Mikael Rask Madsen, "Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence," in *The European Court of Human Rights between Law and Politics*, ed. Jonas Christoffersen and Mikael Rask Madsen (New York: Oxford University Press, 2011), 43–61.

[13] James L. Cavallaro and Stephanie Erin Brewer, "Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court," *American Journal of International Law* 102, no. 4 (October 2008): 768–827.

[14] Contesse, "Contestation and Deference in the Inter-American Human Rights System."

[15] Uruguay's aggregate score is 98, which is higher than even Western European countries such as Denmark, Portugal and Ireland. Chile's score is 94, which is higher than Germany, Spain and the United Kingdom. Freedom House, "Freedom in the World 2018," available at https://freedomhouse.org/report/freedom-world-2018-table-country-scores. See also, Andreas Follesdal, "Exporting the Margin of Appreciation: Lessons for the Inter-American Court of Human Rights," *International Journal of Constitutional Law* 15, no. 2 (April 1, 2017): 359–71.

[16] For a good account of various international courts and tribunals see, Ruti Teitel, "Transitional Justice and Judicial Activism - A Right to Accountability," *Cornell International Law Journal* 48, no. 2 (March 1, 2015): 385-422.

[17] Eleonora Mesquita Ceia, "The Contributions of the Inter-American Court of Human Rights to the Development of Transitional Justice," *The Law & Practice of International Courts and Tribunals* 14, no. 3 (December 9, 2015): 457–75, https://doi.org/10.1163/15718034-12341302.

[18] James A. Sweeney, *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition* (Routledge, 2013); James A. Sweeney, "Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era," *International & Comparative Law Quarterly* 54, no. 2 (April 2005): 459–74, https://doi.org/10.1093/iclq/lei003; Eva Brems, "Transitional Justice in the Case

More recently, both courts likewise address cases concerning regimes that are moving in anti-democratic directions. In Latin America, despite the abovementioned trends, there remained pockets of authoritarianism[19] such as Venezuela and now possibly Brazil, following the recent election of President Jair Bolsonaro.[20] Europe, on the other hand, has dealt with rising and persisting authoritarianism and illiberal democratic trends in countries like Turkey, Hungary, Poland, and Russia.[21] Moreover, both courts have heard cases involving inter- or intra-state violence. Although major inter-state wars were absent in the Americas, there have been instances of civil wars in Guatemala, El Salvador, and Nicaragua.[22] The violent episodes of organized crime and state terror in Mexico or Brazil have been almost equally disruptive for safeguarding human rights in the region.[23] Europe has not been free from conflicts either. There have been simmering conflicts within the continent, and large-scale international wars around it. Several European countries have been implicated in these conflicts – from Cyprus to Transnistria, from Former Yugoslavia to Iraq. Some of the human rights violations committed in the course of these conflicts or authoritarian crackdowns have been reflected in the ECtHR case law. However, despite a convergence in the types of cases heard, the courts' practices – particularly with respect to oral hearings – have not likewise converged.

Law of the European Court of Human Rights," *International Journal of Transitional Justice* 5, no. 2 (July 1, 2011): 282–303, https://doi.org/10.1093/ijtj/ijr010.

[19] For a comprehensive overview in developments in the region and in particular in Argentina, Mexico and Peru, see Ezequiel A. González-Ocantos, *Shifting Legal Visions: Judicial Change and Human Rights Trials in Latin America* (Cambridge University Press, 2016).

[20] Kirk A. Hawkins, "Responding to Radical Populism: Chavismo in Venezuela," *Democratization* 23, no. 2 (February 23, 2016): 242–62, https://doi.org/10.1080/13510347.2015.1058783. Wendy Hunter and Timothy J. Power, "Bolsonaro and Brazil's Illiberal Backlash," *Journal of Democracy* 30, no. 1 (January 9, 2019): 68–82, https://doi.org/10.1353/jod.2019.0005.

[21] Kerem Öktem and Karabekir Akkoyunlu, "Exit from Democracy: Illiberal Governance in Turkey and Beyond," *Southeast European and Black Sea Studies* 16, no. 4 (October 1, 2016): 469–80, https://doi.org/10.1080/14683857.2016.1253231; Mihaela Şerban, "Stemming the Tide of Illiberalism? Legal Mobilization and Adversarial Legalism in Central and Eastern Europe," *Communist and Post-Communist Studies*, Legal Change in Post-Communist States: Contradictions and Explanations, 51, no. 3 (September 1, 2018): 177–88, https://doi.org/10.1016/j.postcomstud.2018.06.001; Pierre Hassner, "Russia's Transition to Autocracy," *Journal of Democracy* 19, no. 2 (April 3, 2008): 5–15, https://doi.org/10.1353/jod.2008.0022.

[22] For more on these wars and how they were resolved see, Fabrice Lehoucq, *The Politics of Modern Central America: Civil War, Democratization, and Underdevelopment* (Cambridge University Press, 2012); Mark Peceny and William Stanley, "Liberal Social Reconstruction and the Resolution of Civil Wars in Central America," *International Organization* 55, no. 1 (2001): 149–82, https://doi.org/10.1162/002081801551441.

[23] See for example, Wil G. Pansters, "Zones of State-Making: Violence, Coercion, and Hegemony in Twentieth-Century Mexico," in *Violence, Coercion, and State-Making in Twentieth-Century Mexico: The Other Half of the Centaur*, ed. Wil G. Pansters (Stanford University Press, 2012), 3–42; José Miguel Cruz, "State and Criminal Violence in Latin America," *Crime, Law and Social Change* 66, no. 4 (November 1, 2016): 375–96, https://doi.org/10.1007/s10611-016-9631-9; John Bailey and Matthew M. Taylor, "Evade, Corrupt, or Confront? Organized Crime and the State in Brazil and Mexico," *Journal of Politics in Latin America* 1, no. 2 (August 1, 2009): 3–29, https://doi.org/10.1177/1866802X0900100201.

This article seeks to explain why this is the case. It discusses how these divergent practices are derived from and geared towards reinforcing these institutions' creation myths. This analysis can be broken into two parts. First, creation myths mold legal cultures and effectively shape judicial practices. Second, the persistence of judicial practices reinforces the very creation myths upon which legal cultures are founded.

This twofold analysis will be presented as follows. The first section will be dedicated to methods and observations. In particular, I will share my observations about the creation myths and legal cultures at the ECtHR and the IACtHR and explain how I have gathered them. I will also explain the benefits of carrying out this study using practice theory. The second section will give an account of the institutional culture and history of the ECtHR and the IACtHR relying on secondary sources. The third section will take a closer look at the divergent practices and provide explanations as to why they emerged and why they persist to this day.

1. Methods and Observations

This comparative analysis is designed as a multi-method study, which relies on primary and secondary sources. That is, I build on the scholarly works that have already made the case for the claim that these courts have different background cultures and practices.[24] I support these findings with the insights I gathered from my interviews and on-site observations to understand how legal cultures shape courtroom practices and why these practices persist.[25]

I carried out elite interviews and research visits at the ECtHR and IACtHR to better understand their inner workings and institutional cultures.[26] The first round of interviews, carried out in 2014, concerned the European human rights system. I held 36 semi-structured interviews in Strasbourg, France; Bern and Geneva, Switzerland; London and Essex, the UK; and via Skype. My interviewees included current and former judges, staff of the Registry, representatives of NGOs, and activist lawyers who brought cases before these courts. During

[24] See for example, Andrew Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe," *International Organization* 54, no. 2 (2000): 217–52; Bates, *The Evolution of the European Convention on Human Rights*; Armin von Bogdandy et al., eds., *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Oxford, New York: Oxford University Press, 2017); Thomas M. Antkowiak, "Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond," *Columbia Journal of Transnational Law* 46, no. 2 (2008): 351–419.

[25] An impressive example, is Nina-Louisa Arold's ethnographic work. Nina-Louisa Arold, *The Legal Culture of the European Court of Human Rights* (Leiden; Boston: Brill Nijhoff, 2007).

[26] For a good overview of interview based research, see Layna Mosley, ed., *Interview Research in Political Science* (Ithaca, NY: Cornell University Press, 2013).

the course of a one-month visit at the ECtHR, I attended hearings and interviewed some members of the ECtHR's staff. The staff comprises judges (elected for a non-renewable term of nine years), the legal team of the Registry (a large number of whom are employed on a permanent basis), and support services.[27] In particular, I talked to 15 out of 47 judges who were serving at the ECtHR at the time as well as two former judges. In addition, I interviewed eight members of the Registry, and 11 representatives or lawyers affiliated with civil society groups. I asked each professional group a different set of questions, allowing them to explain the Court's core functions and roles.

This exercise was repeated in 2017 for the Inter-American system. I carried out 24 interviews in Washington DC, USA; Mexico City, Mexico; and San Jose, Costa Rica with the IACtHR judges (elected for renewable six-year terms), staff at the Registry, and representatives of NGOs who have worked with the IACHR system. More specifically, I interviewed four out of seven judges as well as eight staff members of the Registry and the Commission. Furthermore, I spoke with four former judges and commissioners, as well as nine representatives and lawyers linked with civil society groups.

These interviews and observations not only helped me get a better view of the way these courts function but also their cultures and institutional ethos. This was revealed perhaps the most when I asked my interlocutors a simple question: What do you think the role of this court is? The answered I received helped me glean information about their creation myths.

In the case of the ECtHR, the sense was that system is there to enforce the European Convention and set regional standards to harmonize human rights practices of European states. For example, according to one judge, the ECtHR's role is twofold: its technical role is to interpret and apply the European Convention, and its philosophical role is "*to uphold the values of our civilization*."[28] A judge with an academic background said the ECtHR's role is "to build a Europe of rights."[29] This view was shared by another judge who described the ECtHR's role as "to be the *consciousness of Europe* (…) a *European light-house*."[30]

[27] The list of the interviewees can be found in the Annex I.
[28] Interview 8.
[29] Interview 9.
[30] Interview 13.

There were few other judges who believed the ECtHR's function is to establish and maintain "minimum common standards of protection throughout Europe,"[31] or to develop "the contents of Convention rights."[32] Others believed that ECtHR's role should be more limited. A judge from a Western European country defined the ECtHR's role as ensuring that "the High Contracting parties observe the Convention's provisions."[33] He further added the following: "I have a very traditional sense of what it is to be a judge. I am not a policy maker. I am not a politician. I am here to decide on a case by case basis whether the member states have respected the human rights as provided by the Convention."[34] Finally, another judge, who previously served as a constitutional court judge, argued that the primary role of the ECtHR is to observe whether states comply with their obligations arising from the Convention.[35] He then added:

> "the secondary or collateral role of the Court is that of standard setter. (…) a third, even perhaps more collateral – but at the same time vitally important – role is that of ensuring that the Convention remains a credible document. This credibility could be undermined if the Court were to interpret and apply the Convention in such a way that some member States would consider it as re-writing the Convention. This could happen with unnecessary forays into areas such as ethics and morality."[36]

This survey helped me understand that indeed the ECtHR carries out divergent functions. More importantly, it revealed that these functions are guided by various concerns. These concerns range from developing rights in light of European values to maintaining minimum human rights standards across the continent without antagonizing member states.

When asked the same questions, the judges and other participants in the Inter-American system presented it as pursuing similar goals but with a different emphasis. For example, a judge who was recently appointed to the IACtHR explained that the Inter-American system is "absolutely crucial for the defense of human rights in the region."[37] She added, "*victims are central to this system*."[38] One experienced judge described the main roles of the IACtHR as protecting the victims, interpreting the Inter-American Convention, and building a regional corpus juris.[39] He also emphasized that, when carrying out his duties as a judge, he has to

[31] Interview 7.
[32] Interview 4.
[33] Interview 15.
[34] Interview 15.
[35] Interview 10.
[36] Interview 10.
[37] Interview 51.
[38] Interview 51.
[39] Interview 52.

always think about the victims: "The Inter-American system was created to protect them. My role as a judge is bring this protection mechanism further through interpretation."[40]

Moreover, the question about the role of the IACtHR was linked to regional socio-political dynamics – ranging from the history of dictatorships to the adverse effects of global capitalism. For example, the recently appointed judge mentioned above explained that their unique human rights tradition was shaped by the special context in which the system was created. "The reality of the countries in the European system is different. In Latin America, we suffer from serious violations, massacres, genocides, wars… This is the context against which [the practice of providing victims with] individual and collective reparation emerged."[41] Another judge reiterated this view and explained how the characteristics of the region shaped the institutional practices. He talked about the IACtHR's transformation against the backdrop of the realities of the region. He said, "When the period of neo-colonialism and dictatorships ended, the period of financial colonialism started. It was against this context we experienced the transition."[42] A senior official at the IACtHR expressed the same sentiment:

> In Latin America, we are living in a political environment in which there were dictatorships and truth commissions in countries like Chile or Argentina. This process has an influence on the Inter-American system. For most of the problems we have here pecuniary reparations will not be a solution. (…) Here we have a more *victim-focused approach*. Victims want to tell us about their complaints. Sometimes this is more important than the decision itself for them. We also allow *amicus curiae* briefs. We allow the participants to bring in their uniqueness. Sometimes women from indigenous groups come and breastfeed in front of the Court and this is completely normal. This is their court. [43]

The accounts coming from the European and the Inter-American systems portray the role of these courts differently. The European side sees the ECtHR both as an embodiment of European values and a source to disseminate them. The Inter-American side, on the other hand, considers the system to be there to protect the victims and help countries' transition to democracy.

My observations around these courts' distinctive legal culture and judicial role conceptions fit closely with scholarly depictions of each court. According to the existing

[40] Interview 52.
[41] Interview 51.
[42] Interview 50.
[43] Interview 56.

literature, the foundational concern of the European human rights system revolved around three functions at the time of its inception: (i) serving as an "early warning system" to ring the alarm bells if/when "Europe's fledgling democracies [begin] to backslide toward totalitarianism,"[44] (ii) being the defender against the threat of a communist takeover of Europe,[45] and (iii) "fine-tuning sophisticated national democratic engines that were, on the whole, working well.[46] What the literature also shows is that the protection of individual human rights was not their primary concern.[47]

The Inter-American System was created in a more challenging region, which was dominated by military regimes by the 1990s. This regional context has influenced the way the IACtHR operated.[48] Tasked with overseeing a body of authoritarian States, the IACtHR took a more activist stand, and forged closer relations with civil society groups and the victims.[49] It carried out "overly broad standard of review," and ordered extensive reparations.[50] It showed little to no deference to national authorities.[51] Instead, it has relied on the support of civil society to bolster its authority.[52]

While these accounts allude to the distinct creation myths that can explain diverging judicial role conceptions, they overlook the question of how these judicial role conceptions shape institutional practices. To answer this question, I turn to practice theory.

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[44] Laurence R. Helfer, "Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime," *The European Journal of International Law* 19, no. 1 (2008): 129.

[45] Mikael Rask Madsen, "From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics," *Law & Social Inquiry* 32, no. 1 (2007): 137–59; Bates, *The Evolution of the European Convention on Human Rights*.

[46] Paul Mahoney, "New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership," *Penn State International Law Review* 21, no. 1 (September 1, 2002): 104. See also, Luzius Wildhaber, "'Rethinking the European Court of Human Rights,'" in *The European Court of Human Rights between Law and Politics,* ed. Jonas Christoffersen and Mikael Rask Madsen (New York: Oxford University Press, 2011).

[47] Janneke H. Gerards and Lize R. Glas, "Access to Justice in the European Convention on Human Rights System," *Netherlands Quarterly of Human Rights* 35, no. 1 (March 1, 2017): 17.

[48] Karen Alter, Laurence Helfer, and Mikael Madsen, "How Context Shapes the Authority of International Courts," *Law and Contemporary Problems* 79, no. 1 (March 1, 2016): 1–36; Gerald L. Neuman, "Import, Export, and Regional Consent in the Inter-American Court of Human Rights," *European Journal of International Law* 19, no. 1 (February 1, 2008): 101–23, https://doi.org/10.1093/ejil/chn002.

[49] Contesse, "Contestation and Deference in the Inter-American Human Rights System."

[50] Christina Binder, "The Prohibition of Amnesties by the Inter-American Court of Human Rights," *German Law Journal* 12, no. 5–6 (2011): 1203–30.

[51] Jorge Contesse, "The International Authority of the Inter-American Court of Human Rights: A Critique of the Conventionality Control Doctrine," *The International Journal of Human Rights* 22, no. 9 (October 21, 2018): 1169.

[52] Geneviève Lessard, "Civil Society Interactions within the Inter-American Institutional Framework: Two Case-Studies in Promoting the Strengthening of the Regional Human Rights System," *Revue Québécoise de Droit International* 1, no. 1 (2011): 165–82.

Why Practice Theory?

Practice theory has recently drawn unprecedented attention in International Relations (IR) scholarship particularly following Emmanuel Adler and Vincent Pouliot's initiative to study international practices in IR.[53] What followed was a flourishing scholarship focusing on practices or adopting a process-centered approach.[54] Christian Bueger and Frank Gadinger describe the main tenets of international practice theory as "emphasizing process, developing an account of knowledge as action, appreciating the collectivity of knowledge, recognizing the materiality of practice, embracing the multiplicity of orders, and working with a performative understanding of the world."[55] Federica Bicchi and Nicklas Bremberg reiterate these tenets when describing the essentials of practice theory, which includes paying attention to (i) "time (and thus to processes and the daily occurrences)," (ii) "space (and thus to localism and situatedness)," (iii) "social groups (as opposed to individuals as well as to social macro structures)," and (iv) studying "patterns of practices (instead of patterns *in* practices)."[56]

Why is this approach fitting for the purposes of this article? First and foremost, this article aims at studying a distinct judicial practice. Practice, in its specific sense, refers to performances, routines, ritualistic patterns of action, or professional activities.[57] Public hearings are a specific type of judicial practice. They are performative and ritualistic. They

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[53] Chris Brown, "The 'Practice Turn', Phronesis and Classical Realism: Towards a Phronetic International Political Theory?," *Millennium - Journal of International Studies* 40, no. 3 (2012): 404.

[54] See for example, Lene Hansen, *Security as Practice: Discourse Analysis and the Bosnian War* (Oxon; New York: Routledge, 2006); Christian Büger and Trine Villumsen, "Beyond the Gap: Relevance, Fields of Practice and the Securitizing Consequences of (Democratic Peace) Research," 2007, http://cadmus.eui.eu//handle/1814/7764; Christian Büger and Frank Gadinger, "Reassembling and Dissecting: International Relations Practice from a Science Studies Perspective," *International Studies Perspectives* 8, no. 1 (2007): 90–110; Vincent Pouliot, "'Sobjectivism': Toward a Constructivist Methodology," *International Studies Quarterly* 51, no. 2 (2007): 359–84; Vincent Pouliot, "The Logic of Practicality: A Theory of Practice of Security Communities," *International Organization* 62, no. 2 (2008): 257–88; Rebecca Adler-Nissen, "The Diplomacy of Opting Out: A Bourdieudian Approach to National Integration Strategies," *JCMS: Journal of Common Market Studies* 46, no. 3 (2008): 663–84; Cornelia Navari, "The Concept of Practice in the English School," *European Journal of International Relations* 17, no. 4 (2011): 611–30.

[55] Christian Bueger and Frank Gadinger, "The Play of International Practice," *International Studies Quarterly* 59, no. 3 (2015): 449–50.

[56] Federica Bicchi and Niklas Bremberg, "European Diplomatic Practices: Contemporary Challenges and Innovative Approaches," *European Security* 25, no. 4 (2016): 394, https://doi.org/10.1080/09662839.2016.1237941.

[57] Kratochwil, "Making Sense of 'International Practices,'" 40–41.

are organized around the routines and professional activities undertaken by the courts' staff in the run-up and during the courtroom proceedings.

Second, practice theory provides useful lenses to study practices.[58] This inclusive research agenda is composed of various approaches that take practice as the unit of analysis and examine international practices as "socially organized activities that pertain to world politics."[59] It may appear to be a heterogeneous enterprise, as it does not essentially limit what kind of practices to study.[60] However, as Andreas Reckwitz argues, it still offers harmonious theoretical lenses and a *modus operandi* to have a close-up view of practices.[61] Adler and Pouliot echo this claim and argue that international practice theory helps researchers "zoom in on the quotidian unfolding of international life."[62] The common denominator of various practice-driven approaches, including the one adopted here, is the aspiration to advance our understanding of practices.

Third, this article engages in an interesting dialogue with the emerging literature international judicial practices. Indeed, in recent years, practice theory has gained traction in interdisciplinary International Relations International Law (IR/IL) scholarship and the literature on international courts.[63] By analyzing the reasons and the implications of public hearings' inclusiveness, my empirically grounded analysis draws from and contributes to this literature.

In particular, it responds to Jens Meierhenrich's call for an "interpretive turn in the study of practices in international law" and courts.[64] He invites scholars to pay a particular attention to "a specific time, place, and concrete historical context."[65] According to

[58] The origins of this development can be traced to the larger turn to practices in social science. See for example, Theodore R. Schatzki, Karin Knorr-Cetina, and Eike von Savigny, *The Practice Turn in Contemporary Theory* (Routledge, 2001); Andreas Reckwitz, "Toward a Theory of Social Practices: A Development in Culturalist Theorizing," *European Journal of Social Theory* 5, no. 2 (2002): 243–63; Iver B. Neumann, "Returning Practice to the Linguistic Turn: The Case of Diplomacy," *Millennium: Journal of International Studie* 31, no. 3 (2002): 627–51.
[59] Emanuel Adler and Vincent Pouliot, "International Practices," *International Theory* 3, no. 1 (2011): 6.
[60] Rebecca Adler-Nissen, "Towards a Practice Turn in EU Studies: The Everyday of European Integration," *JCMS: Journal of Common Market Studies* 54, no. 1 (2016): 88.
[61] Reckwitz, "Toward a Theory of Social Practices."
[62] Adler and Pouliot, "International Practices," 1.
[63] See for example, Nikolas M. Rajkovic, Tanja E. Aalberts, and Thomas Gammeltoft-Hansen, eds., "Introduction: Legality, Interdisciplinarity, and the Study of Practices," in *The Power of Legality: Practices of International Law and Their Politics* (New York: Cambridge University Press, 2016), 15.
[64] Jens Meierhenrich, "The Practice of International Law: A Theoretical Analysis," *Law and Contemporary Problems* 76, no. 3 (2014): 4.
[65] Meierhenrich, 19.

Meierhenrich, this is a necessary step not only to examine practices, but also to discover the thought expressed in and through them.[66] Meierhenrich suggests that the practice-based approach is not only for describing practices but also unearthing the hidden meanings reproduced through these practices. This is precisely what the main purpose here is: investigating the link between legal cultures and diverging courtroom practices.

Jeffrey Dunoff and Mark Pollack present another recent addition to the practice-based approaches in IR/IL literature. They provide a first ever conceptual framework to study international courts using practice theory.[67] They show how different tasks undertaken by the international judges fit squarely with the criteria developed by Adler and Pouliot. That is, judges carry out judicial practices which could be considered *performances*, *highly patterned*, and *competent*. Their decisions are built upon *background knowledge* of treaties, jurisprudence or customary international law, among others. Finally, judicial practices have both *discursive and material* implications for the development of international law and *restitutio in integrum* for the victims, respectively.[68] They also provide an inventory of international judicial practices inside and outside of the courtroom.[69]

My analysis exemplifies how Dunoff and Pollack's conceptual framework can be taken further. I propose a legal culture-based explanation for the divergence of courtroom practices and draw attention to these practices' stickiness despite the changing circumstances. I also point out that the persistence of these practices helps keep the courts' creation myth alive. I thus show the consequences and normative implications of courtroom practices' continuity – a feature that requires further attention as Dunoff and Pollack rightly identify.[70]

Having described the main assumptions and the approach guiding this study, I now turn to the description of these courts' human rights traditions relying on secondary sources. I take a glance at the context in which these two systems were created and what changed since then. I then explain how and why these traditions have influenced courtroom practices, building upon the observations I gathered during my research visits at the ECtHR and the IACtHR.

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[66] Meierhenrich, 23.
[67] Jeffrey L. Dunoff and Mark A. Pollack, "The Judicialization of International Law: A Mixed Blessing?," in *A Typology of International Judicial Practices*, ed. Andreas Follesdal and Geir Ulfstein (Oxford: Oxford University Press, 2018), 86–108.
[68] Dunoff and Pollack, 90.
[69] Dunoff and Pollack, 92.
[70] Dunoff and Pollack, 105–6.

2. A Look at the European and the Inter-American Human Rights Systems

As noted earlier, the European human rights system was created to prevent democracies from relapsing into dictatorship.[71] The Convention, an "instrument of European public order," was written in reaction to the hostilities committed during the Second World War.[72] What propelled this process was the fear that "Europe is in danger of a communist occupation."[73] Hence, this project was a product of the political climate at the time. The Convention took legal effect in 1953, three years after its approval in Rome. The original signatories were the governments of Belgium, Denmark, France, Germany, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Saar (in the name of West Germany), Turkey, and the United Kingdom. The enactment of the Convention was the first step of launching the European human rights system.

The Convention also served a symbolic function in the eyes of the Europeans who believed that human rights were already well protected in Western Europe.[74] Luzius Wildhaber, the former President of the Court, expressed this idea in a statement. He claimed that in the early days "the most frequent justification [for not ratifying individual petition] given was that the ratification of the Convention was only an act of pan-European solidarity anyway, as the individual state concerned did not in fact need an international control mechanism, because its national courts had long fulfilled the task of protecting human rights."[75] Regardless of how it was first imagined, the Convention system soon became an authoritative forum for human rights protection, shaping "Europe's political and legal landscape."[76]

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[71] Moravcsik, "The Origins of Human Rights Regimes."
[72] Luzius Wildhaber, "'Rethinking the European Court of Human Rights,'" in *The European Court of Human Rights between Law and Politics,* ed. Jonas Christoffersen and Mikael Rask Madsen (New York: Oxford University Press, 2011), 206.
[73] Ed Bates, "The Birth of the European Convention on Human Rights - and the European Court of Human Rights," in *The European Court of Human Rights Between Law and Politics*, ed. Jonas Christoffersen and Mikael Rask Madsen (New York: Oxford University Press, 2011), 40.
[74] Heidi Nichols Haddad, "Judicial Institution Builders: NGOs and International Human Rights Courts," *Journal of Human Rights* 11, no. 1 (January 1, 2012): 136.
[75] Qtd in Bates, *The Evolution of the European Convention on Human Rights*, 11.
[76] Laurence R. Helfer, "Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime," *The European Journal of International Law* 19, no. 1 (2008): 126.

The system was originally designed to have two tiers. On the first level, the European Commission of Human Rights, established in 1954, would receive individual complaints and decide their admissibility.[77] It would then launch the cases that it deemed admissible before the Court on behalf of the individual applicants, if the responding state recognized the jurisdiction of the Court.[78] On the second level, the ECtHR, founded in 1959, would review the cases referred by either the Commission or another member state (namely inter-state cases).[79] This model gave a larger role to the Commission that functioned as a quasi-judicial filter.[80]

This two-tiered system would undercut individuals' access to the Court. As a result, only a more limited and state-centric course of action was possible during this period.[81] What is more, victims did not have a standing before the ECtHR until the 1990s.[82] Only with Protocol 9 – which entered into force in 1994 – were the individuals and the civil society organizations granted the right to have a standing before the ECtHR. This was not due to the ECtHR's own initiative. Rather, it was that of member states.

Member states were also the reason why the Court began allowing *amicus curiae* briefs in the first place. The Court did not allow third-party submissions until 1970s. This began to change with the United Kingdom's request.[83] They wished to submit written comments for the *Winterwerp v. the Netherlands* case in 1979. The Court made an exception for the United Kingdom without officially changing the Rules of Court. Then, in 1982, the ECtHR amended its procedural rules to allow individuals to represent themselves directly before the Court.[84]

Protocol 11, which entered into force in 1998, improved the individuals' access to the Court to a great extent. The protocol abolished the two-tier structure and the European Commission. Accepting the jurisdiction of the ECtHR and allowing individuals to petition

[77] Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (New York: Cambridge University Press, 2013), 230.
[78] This position was abolished with the Protocol 11, which came into force in 1998 and allowed the individuals to take cases to the Court.
[79] Madsen, "From Cold War Instrument to Supreme European Court."
[80] Bantekas and Oette, *International Human Rights Law and Practice,* 224
[81] Bates, "The Birth of the European Convention on Human Rights," 38.
[82] Gerards and Glas, "Access to Justice in the European Convention on Human Rights System."
[83] Haddad, "Judicial Institution Builders," 139.
[84] Darren Hawkins and Wade Jacoby, "Agent Permeability, Principal Delegation and the European Court of Human Rights," *The Review of International Organizations* 3, no. 1 (March 1, 2008): 14.

became compulsory for member states. In other words, the ECtHR became the sole actor to which individual applicants had direct recourse.[85]

Following these structural changes, the number of complaints brought before the Court increased. Yet, this was also due to the fact that the ECtHR has increased its visibility.[86] The Court became a much-preferred forum for human rights organizations to advocate the development and enforcement of human rights norms.[87] Before long, the European Convention system, particularly the ECtHR, came to be a success story,[88] with "reportedly high rate of compliance with its decisions."[89] The ECtHR has carved its place within the international law community with several landmark judgments that have shaped the course of international human rights law.[90] As Alec Stone Sweet and Helen Keller highlight, "Today, the Court is an important, autonomous source of authority on the nature and content of fundamental rights in Europe."[91]

[85] Protocol 9, which entered into force in 1994, had already granted direct access to the individuals before the Court, eradicating the filtering role of the Commission. Yet, this was limited to the complaints brought against the states that had already recognized the jurisdiction of the Court. Protocol 11 made it possible for any "natural legal persons, groups of individuals and to non-governmental organizations" within the jurisdiction of any of the state parties to have a direct access to the Court. European Court of Human Rights, "Annual Report 2011," 12.
[86] Alec Stone Sweet and Helen Keller, "The Reception of the ECHR in National Legal Orders," in *A Europe of Rights*, ed. Alec Stone Sweet and Helen Keller (New York: Oxford University Press, 2008), 15.
[87] For more on the civil society participation, see Rachel A. Cichowski, "Civil Society and the European Court of Human Rights," in The European Court of Human Rights between Law and Politics, ed. Jonas Christoffersen and Mikael Rask Madsen (New York: Oxford University Press, 2011); Marco Frigessi di Rattalma, "NGOs before the European Court of Human Rights: Beyond Amicus Curiae Participation," in Civil Society, International Courts and Compliance Bodies, ed. Tullio Treves et al. (The Hague: Asser Press, 2005).
[88] For example, Laurence R. Helfer calls the ECtHR as the "crown jewel of the world's most advanced international system for protecting civil and political liberties" in Laurence R. Helfer, "Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime," *European Journal of International Law* 19 (2008): 125. The Convention system is also described as the "most effective human rights regime in the world" in Helen Keller et al., *Friendly Settlements Before the European Court of Human Rights: Theory and Practice* (New York: Oxford University Press, 2010), 86.
[89] Solomon T Ebobrah, "International Human Rights Courts," in *The Oxford Handbook of International Adjudication*, ed. Cesare PR. Romano et al. (New York: Oxford University Press, 2014), 247. That is, its judgments do get translated into the domestic context much more often than, for example, those of the UN treaty bodies, which face systematic non-implementation of their decisions. For more see, Rosanne van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, Oxford Monographs in International Law (Oxford: Oxford University Press, 2008), 382.
[90] For a good account of the impact of the Court's jurisprudence, see J.G. Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester, New York: Manchester University Press, 1993); Alec Stone Sweet and Helen Keller (eds.), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (New York: Oxford University Press, 2008); Louwrens R. Kiestra, *The Impact of the European Convention on Human Rights on Private International Law* (The Hague: Asser Press, 2014).
[91] Sweet and Keller, "The Reception of the ECHR in National Legal Orders," 3.

The Inter-American system was likewise founded after the Second World War in order to stabilize the region.[92] This system has a more intricate organization composed of two subsystems.[93] The Organization of American States (OAS) adopted the American Declaration of the Rights and Duties of Man in 1948. The OAS also established the Inter-American Commission of Human Rights in 1959, which was later recognized as the primary monitoring body of the OAS Charter. Then, in 1969, the American Convention on Human Rights (the IACHR) was adopted, and in 1979 the IACtHR was created.[94] Only a subset of countries that had ratified the American Declaration ratified the American Convention. While the American Declaration is ratified by all 35 OAS members, the American Convention is ratified by 24 OAS member states. These countries are Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haití, Honduras, Jamaica, México, Nicaragua, Panamá, Paraguay, Perú, Suriname, Uruguay, and Venezuela.[95]

This double-layered structure, which exists to this day, works on the principle that the Commission is the monitoring body for all the OAS member states.[96] It is mandated to apply both the American Declaration and the American Convention. The IACtHR has only jurisdiction over the countries that have ratified the IACHR.[97] While the IACtHR is the judicial organ of the system, the Inter-American Commission is a quasi-judicial body,[98]

[92] Victor Rodriguez Rescia and Marc David Seitles, "The Development of the Inter-American Human Right System: A Historical Perspective and a Modern-Day Critique," *New York Law School Journal of Human Rights* 16 (2000): 593–634.

[93] For a good overview of the historical transformation of the Inter-American system and the role of the Inter-American Commission, see Robert Goldman, "History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights," *Human Rights Quarterly* 31 (2009), https://digitalcommons.wcl.american.edu/facsch_lawrev/27.

[94] For more on the early design of the system, see Thomas Buergenthal, "The Inter-American Court of Human Rights," *American Journal of International Law* 76, no. 2 (April 1982): 231–45.

[95] Venezuela re-acceded to the Convention on 1 July 2019. Currently, Trinidad and Tabago is the only country that had denounced the American Convention.

[96] There are 35 OAS member states: Antigua and Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, the Bahamas, Trinidad and Tobago, United States of America, Uruguay, and Venezuela.

[97] The state parties that recognized the jurisdiction of the IACtHR are as follows: Costa Rica, Peru, Venezuela, Honduras, Ecuador, Argentina, Uruguay, Colombia, Guatemala, Suriname, Panama, Chile, Nicaragua, Paraguay, Bolivia, El Salvador, Haiti, Brazil, Mexico, Dominican Republic, and Barbados.

[98] Lea Shaver, "The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?," *Washington University Global Studies Law Review* 9, no. 4 (2010): 658.

which undertakes a wide-range of tasks such writing thematic and country reports or carrying out on-site fact-finding missions.[99]

Article 61(1) of the Inter-American Convention permits only the member states and the Inter-American Commission to submit cases. Thus, as originally enacted, the Inter-American system was similar to the European system before Protocol 11 was enacted, insofar as victims and their families could not initiate cases before the Court.[100] The individuals could bring their cases before the Commission and request a referral to the Court as long as the state concerned had recognized its adjudicatory jurisdiction.[101]

The individuals began to have a larger role in the court proceedings with the introduction the new Rules of the Procedure of the Court in 1997. These rules, adopted by the IACtHR itself, granted the victims the right to participate at the court proceedings.[102] Hence, unlike the ECtHR, the initiative to have more inclusive court proceedings came from the IACtHR itself, not from the member states through an amendment to the American Convention.[103] Moreover, the IACtHR amended its Rules of Procedure in 2001 in a way to "grant the alleged victims, their next of kin or their duly accredited representatives direct participation (*locus standi in judicio)* in all stages of the Court's proceedings once an application has been presented."[104]

These changes left a mark on what has become the IACtHR's unique human rights tradition. As a result, victims and civil society began play an even more important role.[105] This was not out of the ordinary for the IACtHR. Civil society organizations have been always an integral part of the Inter-American system. For example, Center for Justice and International Law (CEJIL), one of the most important civil society organizations in the region, represents nearly 60 percent of the cases before the Court.[106] Civil society groups undertake a variety of tasks that range from bringing complaints, providing information to the

[99] Interview 41; Interview 42.
[100] For a review of different institutional reforms at the Inter-American system, see Par Engstrom and Courtney Hillebrecht, "Institutional Change and the Inter-American Human Rights System," *The International Journal of Human Rights* 22, no. 9 (October 21, 2018): 1111–22, https://doi.org/10.1080/13642987.2018.1534786.
[101] Manuel D. Vargas, "Individual Access to the Inter-American Court of Human Rights Note," *New York University Journal of International Law and Politics* 16 (1984 1983): 601–18.
[102] Ariel Dulitzky, "The Inter-American Human Rights System Fifty Years Later: Time for Changes," *Quebec Journal of International Law* (Special issue) (2011): 151.
[103] Haddad, "Judicial Institution Builders," 143.
[104] Secretariat of the IACtHR, "Basic Documents Pertaining to Human Rights in the Inter-American System" (San Jose, Costa Rica, 2012), 15, www.corteidh.or.cr/docs/libros/docsbas2012_eng.pdf.
[105] Rescia and Seitles, "The Development of the Inter-American Human Right System," 616.
[106] Haddad, "Judicial Institution Builders," 142.

Commission and the IACtHR, and advising victims to training local actors.[107] They also support the system by advocating for state compliance with the Court and the Commission's rulings.[108] The ECtHR has a different relation with the civil society groups. As Heidi Haddad shows, since the Commission and the Court were well-functioning and well-funded institutions, they did not need the vital services, information, or support that the civil society institutions could provide in the early days. This seems to be still the case today, as there are relatively few cases in which *amicus curiae* briefs are submitted to the European Court.[109]

3. Diverging Practices

As the foregoing account shows, the victims and the civil society obtained the right to participate in court proceedings around the same time: the mid-to-late 1990s. Yet, the way they could participate differed substantially. Understanding the courts' own legal culture is important to account for these diverging practices. This is because the courts themselves regulate how much they can participate in public hearings. Since both courts adopt their own rules, it is ultimately in their discretion to decide how inclusive the public hearings should be and in particular how much access to give to the victims and civil society groups.

In the case of the ECtHR, Protocol 9 granted the victims and civil society groups the right to appear before the Court. It was the member states that adopted this protocol, and therefore initiated this change. The ECtHR later regulated how much victims and civil society groups could participate in public hearings. Rule 36 (3) of the Rules of the Court states, "the applicant must be so represented at any hearing decided on by the Chamber, unless the President of the Chamber *exceptionally* grants leave to the applicant to present his or her own case, subject, if necessary, to being assisted by an advocate or other approved representative."[110] This rule explains the nature of participation that is afforded to individuals. It underlines that victims' participation circumscribed and almost at all times mediated by their representations.

As for the IACtHR, it was the Court itself that permitted the victims to participate in court proceedings in 1997 through its own Rules of Procedure. Later, the IACtHR allowed

[107] Dulitzky, "The Inter-American Human Rights System Fifty Years Later: Time for Changes," 128.
[108] Alexandra Huneeus, "Constitutional Lawyers and the Inter-American Court's Varied Authority," *Law and Contemporary Problems* 79, no. 1 (March 1, 2016): 183.
[109] Yael Ronen and Yale Naggan, "Third Parties," in *The Oxford Handbook of International Adjudication*, ed. Cesare P. R. Romano, Karen Alter, and Yuval Shany (Oxford; New York: Oxford University Press, 2013), 824.
[110] (Emphasis mine). European Court of Human Rights, *Rule of Courts,* (3 June 2019), available at https://www.echr.coe.int/Pages/home.aspx?p=basictexts/rules&c=

victims, their next of kin and representatives to "submit their requests, arguments and evidence, autonomously, throughout the proceeding" through an amendment of its own Rules of Procedure in 2001.[111] Moreover, Article 23 of the Rules of Procedure "when there are several alleged victims, next of kin or duly accredited representatives, they shall designate a common intervener who shall be the only person authorized to present requests, arguments, and evidence during the proceedings, including the *public hearings*."[112] Hence, unlike the ECtHR, the IACtHR gives victims equal chance to represent themselves.

Building upon its own Rules of Procedures, the IACtHR has developed a strong tradition of holding inclusive public hearings. It became normal to give victims the floor to recount their experience and civil society to list their legal arguments or remedies they deem fit during the public hearings – as my interlocutors revealed, and as I observed during my visit.[113] For example, in *Nelson Carvajal Carvajal and family v. Colombia* hearing, which was held on 22-23 August 2017,[114] victim's sister Judith Carvajal, gave testimony during the hearing. She did not only explain the circumstances around Nelson's murder but also recounted the pain and suffering the whole family endured. This was not out of the ordinary, according to judges and the staff interviewed at the IACtHR. They confirmed that for them, hearing the victims' side is often more important than the finding itself.[115]

The normalization of victims' active participation at public hearings effectively channels the IACtHR's affinities with the truth commission tradition.[116] It attests to the claim that the IACtHR's courtroom practices are built upon a victim-centered foundational logic. What is also interesting to note that the persistence of these normalized practices has its own normative implications. It reproduces a coherent cultural narrative and communicates a

[111] Veronica Gómez, "Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: New Rules and Recent Cases," *Human Rights Law Review* 1, no. 1 (2001): 115.
[112] Inter-American Court of Human Rights, *Rule of Procedures*, Article 23, available at https://www.cidh.oas.org/Basicos/English/Basic20.Rules%20of%20Procedure%20of%20the%20Court.htm
[113] Interview 43; Interview 44; Interview 51; Interview 54; Interview 56.
[114] A full account of the hearing can be found here. Ricardo Trotti, "Report of the Hearing at the Inter-American Court on the Nelson Carvajal Case," *Inter-American Press Association* (23 August 2017), available at https://en.sipiapa.org/notas/1211646-report-of-the-hearing-at-the-inter-american-court-on-the-nelson-carvajal-case.
[115] Interview 55; Interview 56; Interview 50; Interview 51.
[116] See for example, Jo M. Pasqualucci, "The Whole Truth and Nothing but the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System," *Boston University International Law Journal* 12, no. 2 (1994): 321–70; Klaas Dykmann, "Impunity and the Right to Truth in the Inter-American System of Human Rights," *Iberoamericana (2001-)* 7, no. 26 (2007): 45–66; Eduardo Ferrer Mac-Gregor, "The Right to the Truth as an Autonomous Right under the Inter-American Human Rights System," *Mexican Law Review* 9, no. 1 (July 1, 2016): 121–39, https://doi.org/10.1016/j.mexlaw.2016.09.007.

consistent sense of purpose. This in turn perpetuates the foundational logic, which gave rise to these practices in the first place.

Another hearing that accurately reflects the IACtHR's inclusiveness is the one held for *Advisory Opinion Requested by Ecuador for the institution of asylum, and its recognition as a human right under the Inter-American System of Protection,* which took place on 24-25 August 2017.[117] Ecuador initiated the proceedings to ask the IACtHR to interpret the extent of the right to seek and obtain asylum in a foreign state under Article 7 of the American Convention on Human Rights and Article 27 of the American Declaration of the Rights and Duties of Man.[118] In the course of two days, there were 55 oral submissions offering legal argument. States, international organizations, civil society groups, scholars, law clinic students, and individuals presented their views. A few OAS member states such as Argentina, Mexico, Panama, and Bolivia, as well as the Inter-American Commission and UN High Commissioner for Refugees intervened. The clear majority of the submissions, 46 of them to be exact, were presented by civil society organizations, individuals, and delegations from law clinics and centers based in various Latin American and European universities. That is the say, that day, the IACtHR listened to not only high-ranking officials, but also law clinic students and individuals, some of whom appeared in their own capacity.

This was an unparalleled level of inclusiveness. At the ECtHR, only high-level officials or experts may appear before the court during the public hearings. Therefore, it is hard to imagine representatives from civil society groups taking the floor, let alone university students. My interlocutors at the IACtHR considered this as a normal practice, however.[119] One high-level court staff remarked, "this is their court and, by giving them seven minutes to appear before the court, we are welcoming them to our human rights tradition and winning their support."[120] This answer reiterates the role of the IACtHR' creation myth shaping its inclusive courtroom practices. It also implies that these practices do not only derive from and maintain these courts' creation myths, but also help these courts (re)produce their own self-image.

[117] Inter-American Court of Human Rights, Advisory Opinion Requested by the Republic of Ecuador, OC-25/18 (30 May 2018).
[118] For a review of the Advisory Opinion, see Anastasia Telesetsky, *Updates and Commentary in Public International Law* (Wolters Kluwer Law & Business, 2019), 27.
[119] Interview 52, Interview 54, Interview 56; Interview 58; Interview 59.
[120] Interview 56.

The ECtHR has not cultivated a similar practice. Yet, the void of such inclusive practices is also telling. The ECtHR does not generally hold hearings for Chamber proceedings as long as there is not an immediate need to obtain more information.[121] Public hearings are mainly held for Grand Chamber proceedings.[122] These hearings are often short and technical. Victims might be in the courtroom, yet they do not take the floor. Therefore, there is no room for catharsis and performative testimonies. Similarly, civil society groups may send written observations. Yet, they are not often invited to intervene and appear before the Court. Indeed, the ECtHR hears third parties and experts such as the Commissioner for Human Rights,[123] representatives from UN organs,[124] and high-level academics.[125] In contrast to the practices of the IACtHR, the victims or civil society groups, regular people so to speak, do not figure in public hearings.

Why are their practices starkly different? I will answer this question in the next section.

Why so different?

The story conveyed in this article is that these courts' practices are different because they were created to solve different problems prevalent in their respective regions. The initial purpose given to them at their inception served as a creation myth. This myth not only gave them a sense of purpose but also shaped their unique legal cultures and thereby courtroom practices.

The IACtHR was established in a region associated with authoritarian regimes and gross human rights violations.[126] Its initial purpose was to provide justice to victims of gross human rights violations and help countries transition to democracies. As a result, it has grown to adopt a victim-focused foundational logic.[127] This outlook was imprinted on the IACtHR's legal culture. It has effectively shaped its institutional practices and particularly the way it organized public hearings. When writing its own Rules of Procedure, it came naturally to the

[121] Helen Keller and Corina Heri, "Deliberation and Drafting: European Court of Human Rights (ECtHR)," in *Max Planck Encyclopedia of International Procedural Law (EiPro)* (Oxford Public International Law, May 2018), https://opil.ouplaw.com/view/10.1093/law-mpeipro/e3210.013.3210/law-mpeipro-e3210.
[122] The European Commission used to hold hearings too.
[123] *N.D. and N.T. v. Spain*, application no. 8675/15, ECHR, Grand Chamber Hearing (26 September 2018)
[124] *Al Nashiri v. Poland* and *Husayn (Abu Zubaydah) v. Poland,* application nos. 28761/11 and. 7511/13, ECHR Chamber Hearing (03 December 2013)
[125] *Al-Dulimi and Montana Management Inc. v. Switzerland*, application no. 5809/08, ECHR, Grand Chamber Hearing (10 December 2014)
[126] Cavallaro and Brewer, "Reevaluating Regional Human Rights Litigation in the Twenty-First Century," 774.
[127] Interview 50; Interview 51; Interview 56.

IACtHR to adopt courtroom practices that are more inclusive – in line with the demands from victims and civil society groups.[128] In the absence of state initiatives to grant a more participatory role for victims or civil society, the IACtHR seized the opportunity to ensure their active participation through its own Rules of Procedure.

We observe a different trajectory in Europe. The ECtHR has never shown willingness to organize its public hearings in an inclusive manner. This is despite the fact that European societies' needs began to diversify, particularly with the Eastward expansion, from the 1990s onwards. This is when formerly communist countries acceded to the system. This meant that the number of applications brought before the ECtHR exponentially increased. What changed was not only the volume of the applications, but also their nature. Until the 1990s, the ECtHR received cases only from states with long democratic traditions.[129] After the expansion, the ECtHR had to face new challenges such as systematic violations and the unavailability or insufficiency of domestic remedies.[130]

This changing context effectively required the ECtHR to take a pedagogical role to cultivate fresh human rights traditions in newly independent states.[131] This was needed to instruct countries with poor records in the European human rights standards, and guide their transition to democracy. The docket of the ECtHR was already familiar with conflicts such 'the troubles in Northern Ireland,' the occupation of Cyprus, and the Kurdish conflict in Turkey. With the inclusion of the formerly communist countries, cases involving transitional justice dilemmas were also brought before the court.[132] However, such a change in the legal and political landscape has not encouraged the ECtHR to adopt courtroom practices centered on the victims or give a larger role to civil society groups at the hearings.

An alternative explanation for these persistently divergent practices could be pragmatism. Indeed, the ECtHR has been overburdened by its exponentially increasing caseload. There already had been a steady growth in the number of applications since the 1980s. This only escalated with the Eastward expansion. The number of applications

[128] Interview 43; Interview 44; Interview 60.
[129] Bates, *The Evolution of the European Convention on Human Rights*, 473.
[130] Aisling Reidy et al., "Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey," *Netherlands Quarterly of Human Rights* 15, no. 1 (1997): 172.
[131] Robert Harmsen, "The European Convention on Human Rights after Enlargement," *The International Journal of Human Rights* 5, no. 4 (2010): 33.
[132] Sweeney, *The European Court of Human Rights in the Post-Cold War Era*.

increased from 404 in 1981 to 4,750 in 1997, and 63,350 in 2017.[133] The dramatic rise in applications created a significant backlog at the ECtHR, as the Court was unable to process all of these applications in a timely manner. It is therefore logical to assume that the burden of caseload deterred the ECtHR from adopting courtroom practices akin to those at the IACtHR. The IACtHR receives far fewer cases than the ECtHR. The Inter-American Commission referred only 17 cases to the IACtHR in 2017, for example.[134] This number is relatively small even despite the fact that IACtHR operates as part-time body[135] on far more limited resources.[136] This could be the reason why the IACtHR can afford to give such an access to victims or civil society groups.

Even though the pragmatism argument provides explanations for the courts' capacity to have inclusive public hearings, it falls short of explaining their intention and motivation. For example, the reason the IACtHR conducts inclusive public hearings is perhaps its low caseload. Alternatively, the fact that the IACtHR receives fewer cases perhaps enabled their prior intention to give more access to victims and civil society groups during public hearings.

As for the ECtHR, it is difficult to imagine that it would change its current course and adopt practices in line with the victim-centered logic. This is especially true considering the ECtHR's recent trends of enforcing more restrictive policies on individual applications.[137] For example, in order to increase efficiency, the Court introduced unilateral declarations procedures through the Rules of Court (Rule 62A). According to this procedure, if the governments issue a declaration acknowledging that they have violated the Convention and promise to provide adequate redress, the Court "may strike it out of the list, either in whole or in part, *even if the applicant wishes the examination of the application to be continued*."[138] The pilot judgment procedure, introduced under Rule 61, may generate a similar disadvantage for victims.[139] With this procedure, the Court chooses a pilot case that includes

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[133] European Court of Human Rights, "Analysis of Statistics 2017," January 2018, https://www.echr.coe.int/Documents/Stats_analysis_2017_ENG.pdf.
[134] Inter-American Commission of Human Rights, Chapter II: Petitions, Cases and Precautionary Measures, *Annual Report 2017*, available at http://www.oas.org/en/iachr/multimedia/statistics/statistics.html, p. 69.
[135] As a part-time body, the IACtHR holds regular sessions. Alina Kaczorowska-Ireland, *Public International Law* (Routledge, 2015).
[136] Alexandra Huneeus, "Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights," *Cornell International Law Journal* 44, no. 3 (October 1, 2011): 500.
[137] For more on this, see Gerards and Glas, "Access to Justice in the European Convention on Human Rights System," 22.
[138] Rules of the Court, 62A(3).
[139] Ezgi Yildiz, "Judicial Creativity in the Making: The Pilot Judgment Procedure a Decade after Its Inception," *Interdisciplinary Journal of Human Rights Law* 8 (2015): 81–102.

a systemic problem also raised in many other complaints (i.e. repetitive complaints). While reviewing this pilot case, the Court may adjourn a large number of cases of similar nature. The expectation is that the implementation of the measures requested in pilot judgment will also resolve the issues raised in the adjourn cases.

Although these procedures may reduce the caseload, they effectively impede individuals' access to justice. These new procedures, created by the ECtHR itself, do not give the impression that the Court's central narrative revolves around a victim-focused understanding. Rather, it is geared toward ensuring efficient administration of justice, which neither requires nor leaves much room for inclusive courtroom proceedings.

Conclusion

In this paper, I have described how the historical context in which the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) created formed the *raison d'être* of these institutions and their institutional practices. I have done so relying on a practice-based approach and looking at courtroom practices. In particular, I have focused on the *inclusiveness* of their public hearings, looking at the extent to which victims and civil society groups may actively participate in the hearings.

Both the ECtHR and the IACtHR gave victims and civil society organizations the right to participate in the proceedings in the 1990s. Yet, they differed in the way they organize their public hearings. The IACtHR's trademark has been inclusive public hearings, where victims and civil society groups can take the floor. The ECtHR has not adopted a similar practice. Having taken a closer look at the history and the inner working of these two courts, I have argued that the difference in their foundational logics may explain these divergent practices. The ECtHR was founded upon a civilization-based understanding, whereas the IACtHR was created upon victim-focused understanding.

Building upon this observation, I have presented a twofold analysis: First, I have argued that their creation myth has shaped their disposition and practices even if the circumstances giving rise to these myths changed over time. Second, I have maintained that these myths are kept alive because these practices persist to this day. I have thus explained the circular relation between foundational logics and practices. Future studies may pick up from where this article leaves off. They may investigate further into how these courts

perceive the benefits of encouraging or discouraging victim testimonies and civil society inputs during public hearings.

Although the analysis is limited to the ECtHR and the IACtHR, the observations and the argument presented here are applicable to other international courts. This is because all courts have a "center of narrative gravity," as Fuad Zarbiyev claims.[140] For example, one could expect to see the International Criminal Court to be more victim-centered, while the International Court of Justice to be more state-interest-centered. These expectations would help understand not only how and why these courts adopt idiosyncratic practices but also the motivations behind their audacious or forbearing rulings. It is, therefore, imperative to carry out further studies into international courts' legal culture, routine practices, and inner workings to better understand international judicial practices and policies.

[140] Fuad Zarbiyev, "Judicial Activism in International Law—A Conceptual Framework for Analysis," *Journal of International Dispute Settlement* 3, no. 2 (July 1, 2012): 258.

Annex I: List of Interviews

Table 1: Judges Serving at the European Court of Human Rights

Judges Serving at the European Court of Human Rights[141]		
Interview 1	Current Judge	**15/09/14**
Interview 2	Current Judge	**15/09/14**
Interview 3	Current Judge	**17/09/14**
Interview 4	Current Judge	**17/09/14**
Interview 5	Current Judge	**18/09/14**
Interview 6	Current Judge	**18/09/14**
Interview 7	Current Judge	**19/09/14**
Interview 8	Current Judge	**23/09/14**
Interview 9	Current Judge	**24/09/14**
Interview 10	Current Judge	**24/09/14**
Interview 11	Current Judge	**26/09/14**
Interview 12	Current Judge	**26/09/14**
Interview 13	Current Judge	**29/09/14**
Interview 14	Current Judge	**29/09/14**
Interview 15	Current Judge	**29/09/14**

Table 2: Former Judges of the European Court of Human Rights

Former Judges of the European Court of Human rights		
Interview 16	Former Judge	**05/06/14**
Interview 17	Former Judge	**09/01/15**

Table 3: The Registry

The Registry		
Interview 18	Permanent law clerk	**04/09/14**
Interview 19	Permanent law clerk	**16/09/14**
Interview 20	Senior level official at the Registry	**17/09/14**
Interview 21	Assistant lawyer	**17/09/14**
Interview 22	Assistant lawyer	**19/09/14**
Interview 23	Assistant lawyer	**20/09/14**
Interview 24	Permanent law clerk	**23/09/14**
Interview 25	Permanent law clerk	**25/09/14**

Table 4: Human Rights NGOs Involved in Strategic Litigation

Strategic Litigation NGOs		
Interview 26	Amnesty International	**16/05/14**
Interview 27	Interights	**12/06/14**
Interview 28	The Open Society Justice Initiative	**24/06/14**
Interview 29	Truth Justice Memory Centre (Hakikat Adalet Hafiza Merkezi)	**15/08/14**
Interview 30	The International Rehabilitation Council for Torture Victims	**12/12/14**
Interview 31	The Association for the Prevention of Torture	**21/01/15**
Interview 32	REDRESS	**24/02/15**
Interview 33	The Centre for Reproductive Rights	**27/03/15**

Table 5: Academic Lawyers

Academic lawyers		
Interview 34	Academic lawyer affiliated with Kurdish Human Rights Project (KHRP) and European Human Rights Advocacy Center (EHRAC)	**09/07/14**
Interview 35	Academic lawyer affiliated with KHRP	**10/07/14**
Interview 36	Academic lawyer affiliated with KHRP and EHRAC	**11/07/14**

[141] This section includes interviewees that were serving as judges at the time of the interview with the author.

Table 6: Judges Serving at the Inter-American Court of Human Rights

Judges Serving at the Inter-American Court of Human Rights[142]		
Interview 49	Current Judge	**22/08/17**
Interview 50	Current Judge	**24/08/17**
Interview 51	Current Judge	**25/08/17**
Interview 52	Current Judge	**25/08/17**

Table 7: Former Commissioners and Judges of the Inter-American Commission and Court of Human Rights

Former Commissioners and Judges of the Inter-American Commission Court of Human Rights		
Interview 37	Former Commissioner	**05/06/17**
Interview 38	Former Commissioner	**07/06/17**
Interview 39	Former Judge	**07/06/17**
Interview 40	Former Commissioner	**12/06/17**

Table 8: Current Staff of the Inter-American Commission and Court of Human Rights

Current Staff of the Inter-American Commission and Court of Human Rights		
Interview 41	Current Staff at the Commission	**06/07/17**
Interview 42	Current Staff at the Commission	**13/07/17**
Interview 53	Current Staff at the Court	**17/08/17**
Interview 54	Current Staff at the Court	**21/08/17** **27/08/17**
Interview 55	Current Staff at the Court	**24/08/17**
Interview 56	Current Staff at the Court	**25/08/17**
Interview 57	Current Staff at the Court	**25/08/17**
Interview 58	Current Staff at the Court	**04/11/17**

Table 9: Former Staff of the Inter-American Commission and Court Now Employed by NGOS

Former Staff of the Inter-American Commission and Court Now Employed by NGOS		
Interview 59	Former Court Staff Working for an NGO	**21/08/17**
Interview 60	Former Court Staff Working for an NGO	**23/08/17**
Interview 61	Former Court Staff Working for an NGO	**23/08/17**

Table 10: Strategic Litigation NGOS, IOs and Academics

Strategic Litigation NGOs, IOs and Academics		
Interview 43	CEJIL	**08/06/17**
Interview 44	CEJIL	**08/06/17**
Interview 45	Amnesty International	**26/06/17**
Interview 46	Researcher at UNAM – Mexico City	**27/06/17**
Interview 47	Women's Global Network for Reproductive Rights	**28/06/17**
Interview 48	OHCHR	**28/06/17**

[142] This section includes interviewees that were serving as judges at the time of the interview with the author.