

**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 the 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 how legal cultures and ethos shape the way public hearings are organized and furthers our understanding of the sociology of international courts.

### TABLE OF CONTENTS

I. CREATION MYTHS, IDENTITIES, AND PRACTICES.....	310
A. <i>Methods and Observations</i> .....	315
B. <i>Why Practice Theory?</i> .....	319
C. <i>A Look at the European and the Inter-American Human Rights Systems</i> .....	322
D. <i>Diverging Practices</i> .....	328
E. <i>Why So Different?</i> .....	331
II. CONCLUSION .....	334

### I. CREATION MYTHS, IDENTITIES, AND PRACTICES

Institutions are often founded upon an idea. This idea, which may have been solely intended to be a discursive tool, serves as a creation myth. It is imprinted upon institutions' DNA, shaping their identity. How does this myth affect institutional practices? In this article, I examine the influence of creation myths and unique legal cultures on institutional practices, looking at the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR). I explain how legal culture and institutional ethos shape judicial practices by focusing on courtroom practices and, in particular, public hearings. To do so, I adopt a practice theory-based approach. Following this tradition, I define practices as routines, patterned actions, and rituals, and I consider public hearings a courtroom practice.<sup>1</sup>

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 much room for states to maneuver.<sup>2</sup> This, according to Contesse, is due to the IACtHR's history of reviewing gross and large-scale human rights violations.<sup>3</sup> The changing legal and political landscape has not yet encouraged the IACtHR to defer more to national authorities, even if the authorities

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1. See Friedrich Kratochwil, *Making Sense of "International Practices,"* in *INTERNATIONAL PRACTICES* 36, 36–60 (Emanuel Adler & Vincent Pouliot eds., 2011) (discussing international practices and pragmatism).

2. See Jorge Contesse, *Contestation and Deference in the Inter-American Human Rights System*, 79 *LAW & CONTEMP. PROBS.* 123, 143–44 (2016) (contrasting the rigidity of the ECtHR with the orders given by the IACtHR).

3. See *id.* at 127 (discussing the commitment of extensive human rights violations by Latin American dictatorships and the IACtHR's review of those human rights violations).

concerned are demonstrably more democratic.<sup>4</sup> Similarly, studies have compared the reparation measures ordered by the ECtHR and the IACtHR. To illustrate, Gabriella Citroni finds that the IACtHR has developed innovative reparation measures that go well beyond pecuniary compensation.<sup>5</sup> The ECtHR, on the other hand, has been minimalist and has predominantly ordered pecuniary compensation.<sup>6</sup>

In essence, what these examples focus on, such as 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 practices, from legal interpretation to judicial dissent.<sup>7</sup> Yet, it has not paid enough attention to public hearings.<sup>8</sup> This could be because courtroom practices do not directly concern the law or the law's influence on politics and *vice versa*. Rather, they relate to the courts' rituals and the manner in which they conduct their day-to-day work.

Although courtroom practices may appear mundane, they serve as a reflection of a given court's legal culture. They are particularly revealing because it is up to the courts to determine how courtroom practices are regulated. They do so through the rules of procedures adopted by the courts themselves. Public hearings in particular are the instances in which courts open their doors 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, public hearings 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 to capture. 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,

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4. See *id.* at 145 (arguing that the IACtHR should give more deference to states because this would allow the IACtHR to consider the context of its decisions).

5. Gabriella Citroni, *Measures of Reparation for Victims of Gross Human Rights Violations: Developments and Challenges in the Jurisprudence of Two Regional Human Rights Courts*, 5 INTER-AM. & EUR. HUM. RTS. J. 49, 52 (2012).

6. See *id.* at 59 (detailing the ECtHR's perception of "just satisfaction" to mean pecuniary compensation).

7. See generally Andrea Bianchi, *The Game of Interpretation in International Law: The Players, the Cards, and Why the Game Is Worth the Candle*, in INTERPRETATION IN INTERNATIONAL LAW 34 (Andrea Bianchi et al. eds., 2015); R. P. Anand, *The Role of Individual and Dissenting Opinions in International Adjudication*, 14 INT'L & COMP. L. Q. 788 (1965); Jeffrey L. Dunoff & Mark A. Pollack, *The Judicial Trilemma*, 111 AM. J. INT'L L. 225 (2017); Kanstantsin Dzehtsiarou & Conor O'Mahony, *Evolutive Interpretation of Rights Provisions: A Comparison of the European Court of Human Rights and the U.S. Supreme Court*, 44 COLUM. HUM. RTS. L. REV. 309 (2013); Eric Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417 (2008).

8. See generally KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS 163–331 (2014); Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT'L ORG. 77 (2014); Alexandra Huneeus & Mikael Rask Madsen, *Between Universalism and Regional Law and Politics: A Comparative History of the American, European, and African Human Rights Systems*, 16 INT'L J. CONST. L. 136 (2018).

yet the way they carry out these hearings is different. While the IACtHR has been keen to offer the stage to victims and civil society groups during public hearings, the ECtHR has traditionally refrained from doing so.<sup>9</sup> 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 Courts' willingness to allow active participation of all parties to the dispute at their 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 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 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 voices are mediated through their legal 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 may be allowed to do so via written submissions. As I will show in the rest of this article, the IACtHR tends to have inclusive public hearings, while the ECtHR is inclined to hold public hearings in a less (or non) inclusive manner. The question, then, is: Why do these Courts differ in their inclusiveness? And, equally important, 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.<sup>10</sup> 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. However, the persistence of these practices has normative implications. 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

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9. *Compare ABC of the Inter-American Court of Human Rights 2019*, INTER-AM. CT. HUM. RTS. 14–15 (2019), [http://juristadelfuturo.org/wp-content/uploads/2019/04/ABCCorteIDH\\_2019\\_eng.pdf](http://juristadelfuturo.org/wp-content/uploads/2019/04/ABCCorteIDH_2019_eng.pdf) (last visited Feb. 21, 2020) (describing the organization of IACtHR public hearings), *with European Court of Human Rights*, INT'L JUST. RESOURCE CTR., <https://ijrcenter.org/european-court-of-human-rights/> (last visited Feb. 21, 2020) (stating that the ECtHR does not often give public hearings).

10. *See generally* Huneus & Madsen, *supra* note 8.

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 bodies, and they would be open to applicants who had exhausted all available domestic remedies.<sup>11</sup> Nevertheless, the socio-political contexts in which they were instituted were starkly different. The ECtHR was created to fine-tune established democracies and prevent them from backsliding into authoritarianism.<sup>12</sup> The IACtHR was established to help countries transition to democracy.<sup>13</sup> This influenced their core principle, their *raison d'être*, so to speak. While the IACtHR was created upon a victim-focused understanding, the ECtHR was founded upon a civilization-based understanding, as we will see in the next sections.

Nevertheless, these creation logics may not be applicable to the contemporary circumstances in which these Courts operate. Today, both Courts are overseeing bodies of states that have increasingly similar—and similarly diverse—political profiles.<sup>14</sup> For example, both Courts have jurisdiction over strong democracies. Latin American democracies like Chile and Uruguay rank above the majority of the forty-seven members of the Council of Europe, according to the Freedom House ranking for 2019—a global index that ranks countries based on their performance of respecting and protecting political rights and civil liberties.<sup>15</sup> Both Courts have addressed cases concerning transition to democracy and strengthening rule of law.<sup>16</sup> The IACtHR did so most notably in Brazil, Peru, and Chile, particularly in the context of amnesty laws and military criminal justice.<sup>17</sup> As for the ECtHR, such cases revolved around access to secret information, historical justice, reparatory

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11. See Cesare P.R. Romano, *A Taxonomy of International Rule of Law Institutions*, 2 J. INT'L DISP. SETTLEMENT 241, 252, 266–67 (2011) (discussing the role of the IACtHR and ECtHR and how the jurisdiction of international courts does not decide domestic affairs).

12. See generally ED BATES, *THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: FROM ITS INCEPTION TO THE CREATION OF A PERMANENT COURT OF HUMAN RIGHTS* (2010) [hereinafter BATES, *THE EVOLUTION OF THE EUROPEAN CONVENTION*]; Mikael Rask Madsen, *The Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence*, in *THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS* 43 (Jonas Christoffersen & Mikael Rask Madsen eds., 2011).

13. See generally James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT'L L. 768 (2008).

14. See, e.g., Contesse, *supra* note 2, at 145 (describing how American states have become more sophisticated over time); see also Madsen, *supra* note 12, at 46 (describing the countries accepting jurisdiction of the ECtHR).

15. Uruguay's aggregate score is ninety-eight, which is higher than even Western European countries such as Denmark, Portugal, and Ireland. Chile's score is ninety-four, which is equal to Germany, Spain, and the United Kingdom. *Freedom in the World 2019 Table of Country Scores*, FREEDOM HOUSE, <https://freedomhouse.org/countries/freedom-world/scores> (last visited Aug. 26, 2020).

16. For a good account of various international courts and tribunals, see generally Ruti Teitel, *Transitional Justice and Judicial Activism – A Right to Accountability?*, 48 CORNELL INT'L L. J. 385 (2015).

17. See generally Eleonora Mesquita Ceia, *The Contributions of the Inter-American Court of Human Rights to the Development of Transitional Justice*, 14 LAW & PRAC. INT'L CTS. & TRIBUNALS 457 (2015).

justice, and restitution.<sup>18</sup> They predominantly came from the formerly communist countries in Central and Eastern Europe and in the aftermath of the war in former Yugoslavia.<sup>19</sup>

More recently, both Courts have reviewed cases concerning regimes that are moving in anti-democratic directions. In Latin America, despite the abovementioned trends, there remain pockets of authoritarianism,<sup>20</sup> such as in Venezuela, and in Brazil especially in the aftermath of the recent election of President Jair Bolsonaro.<sup>21</sup> Europe, on the other hand, has dealt with rising and persisting authoritarianism and illiberal democratic trends in countries like Turkey, Hungary, Poland, and Russia.<sup>22</sup> Moreover, both Courts have heard cases involving inter- or intra-state violence. Although major inter-state wars were absent in the Americas, the civil wars in Guatemala, El Salvador, and Nicaragua,<sup>23</sup> and the violent episodes of organized crime and state terror in Mexico, Colombia and Brazil were almost equally disruptive for safeguarding human rights in the region.<sup>24</sup> Europe has not been free

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18. See JAMES A. SWEENEY, *THE EUROPEAN COURT OF HUMAN RIGHTS IN THE POST-COLD WAR ERA: UNIVERSALITY IN TRANSITION* 70–124 (2013) [hereinafter SWEENEY, *THE EUROPEAN COURT OF HUMAN RIGHTS IN THE POST-COLD WAR ERA*] (discussing ECtHR cases dealing with issues of secrecy, secret information, historical justice, reparatory justice, and restitution).

19. Eva Brems, *Transitional Justice in the Case Law of the European Court of Human Rights*, 5 INT'L J. TRANSITIONAL JUST. 282, 283 (2011); James A. Sweeney, *Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era*, 54 INT'L & COMP. L. Q. 459, 459 (2005). See generally SWEENEY, *THE EUROPEAN COURT OF HUMAN RIGHTS IN THE POST-COLD WAR ERA*, *supra* note 18.

20. For a comprehensive overview of 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* (2016).

21. See Kirk A. Hawkins, *Responding to Radical Populism: Chavismo in Venezuela*, 23 DEMOCRATIZATION 242 (2015) (discussing authoritarianism in Venezuela); Wendy Hunter & Timothy J. Power, *Bolsonaro and Brazil's Illiberal Backlash*, 30 J. DEMOCRACY 68 (2019) (discussing the preconditions and subsequent election of Bolsonaro in Brazil).

22. See Kerem Öktem & Karabekir Akkoyunlu, *Exit From Democracy: Illiberal Governance in Turkey and Beyond*, 16 SOUTHEAST EUR. & BLACK SEA STUD. 469 (2016) (detailing authoritarianism in Turkey); Mihaela Șerban, *Stemming the Tide of Illiberalism? Legal Mobilization and Adversarial Legalism in Central and Eastern Europe*, 51 COMMUNIST & POST-COMMUNIST STUD. 177 (2018) (detailing the rise of authoritarianism in Hungary and Poland). See generally Pierre Hassner, *Russia's Transition to Autocracy*, 19 J. DEMOCRACY 5 (2008) (describing Russian autocracy).

23. For more on these wars and how they were resolved, see FABRICE LEHOUCQ, *THE POLITICS OF MODERN CENTRAL AMERICA: CIVIL WAR, DEMOCRATIZATION, AND UNDERDEVELOPMENT* 39–59 (2012). See generally Mark Peceny & William Stanley, *Liberal Social Reconstruction and the Resolution of Civil Wars in Central America*, 55 INT'L ORG. 149 (2001).

24. See, e.g., 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* 3–39 (Wil G. Pansters ed. 2012) (delving into violence in Mexico); see generally John Bailey & Matthew M. Taylor, *Evade, Corrupt, or Confront? Organized Crime and the State in Brazil and Mexico*, 2 J. POL. LATIN AM. 3 (2009); José Miguel Cruz, *State and Criminal Violence in Latin America*, 66 CRIME, L. & SOC. CHANGE 375 (2016) (describing violence spread across the Latin American region); see generally Sandra Hincapié, *Women's Human Rights in the Armed Conflict in Mexico: Organized Crime, Collective*

from conflicts either. There were simmering conflicts within the continent and large-scale international wars around it.<sup>25</sup> Several European countries were implicated in these conflicts—from Cyprus to Transnistria, from former Yugoslavia to Iraq.<sup>26</sup> 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 practices of the ECtHR and the IACtHR—particularly with respect to oral hearings—have not likewise converged.

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 findings 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 cultures and histories 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 in the first place and why they persist to this day.

#### A. *Methods and Observations*

This comparative analysis is designed as a multi-method study that 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.<sup>27</sup> I support these findings with the insights I gathered from

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*Action, and State Responses, in MEXICO'S HUMAN RIGHTS CRISIS* 63–85 (Alejandro Anaya-Muñoz and Barbara Frey eds., 2019).

25. See Irina Mindova, *Ukraine v. Russia: At the Stage of International Justice*, 2018 HARMONIOUS: J. LEGAL & SOC. STUD. SOUTH EAST EUR. 410 (2018) (describing the international law implications of the Russian-Ukraine crisis).

26. See Fionnuala Ní Aoláin, *Gendering the Law of Occupation: The Case of Cyprus*, 27 MINN. J. INT'L L. 107, 109–14 (2018) (outlining the conflict in Cyprus); see also Eric Engle & Tetiana Danyliuk, *Europe's Common Foreign and Security Policy: Facing Crises in Ukraine and Syria*, 25 IND. INT'L & COMP. L. REV. 148, 166–67 (2015) (noting the European foreign policy issues arising out of the Iraq War); Larisa Patlis, *The Discourse on Asymmetrical Devolution in Moldova: Gagauzia and Transnistria in Focus*, 17 J. ETHNOPOLITICS & MINORITY ISSUES EUR. 87, 93–94 (2018) (describing the conflict in Transnistria and the influence of other European countries on said conflict); see also Thomas W. Pittman, *International Justice: The International Criminal Tribunal for the Former Yugoslavia*, 55 JUDGES J. 6, 6–7 (2016) (discussing the conflict in the former Yugoslavia).

27. See ARMIN VON BOGDANDY ET AL., TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA: THE EMERGENCE OF A NEW IUS COMMUNE 255–56, 258, 408 (2017) (discussing how the IACtHR affects the domestic law of countries under its jurisdiction). See generally BATES, THE EVOLUTION OF THE EUROPEAN CONVENTION, *supra* note 12; Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*,

my interviews and on-site observations to understand how legal cultures shape courtroom practices and why these practices persist.<sup>28</sup>

I carried out elite interviews and research visits at the ECtHR and the IACtHR to better understand their inner workings and institutional cultures.<sup>29</sup> The first round of interviews, carried out in 2014 and 2015, concerned the European human rights system. I held thirty-six semi-structured interviews in Strasbourg, France; Bern and Geneva, Switzerland; London and Essex, United Kingdom; Copenhagen, Denmark; Istanbul, Turkey; and via Skype. My interviewees included current and former judges, staff of the Registry, representatives of civil society groups, and activist lawyers who brought cases before the ECtHR. An important portion of these interviews took place in the course of a one-month visit at the ECtHR. During my stay at the ECtHR, I attended hearings and interviewed 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.<sup>30</sup> In particular, I talked to fifteen out of forty-seven 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 eleven representatives or lawyers affiliated with civil society groups. I asked each professional group a different set of questions, allowing them to explain the ECtHR's core functions and roles.

I repeated this exercise in 2017 for the Inter-American system. I carried out twenty-four interviews in Washington, D.C., United States of America; Mexico City, Mexico; and San Jose, Costa Rica with the IACtHR judges (elected for renewable six-year terms) and representatives of civil society groups who have worked with the Inter-American human rights system. More specifically, I interviewed four out of seven judges as well as eight staff members of the Commission. Furthermore, I spoke with four former judges and commissioners, as well as nine representatives and lawyers linked with civil society groups that litigated before the Inter-American Court and the Commission.

These interviews and observations not only helped me get a better view of the way these Courts function but also their cultural 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 answers I received helped me glean information about the distinct legal cultures in which they operate.

In the case of the ECtHR, the sense was that the 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

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46 COLUM. J. TRANSNAT'L L. 351 (2008); Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217 (2000).

28. For an impressive example of ethnographic work, see NINA-LOUISA AROLD, *THE LEGAL CULTURE OF THE EUROPEAN COURT OF HUMAN RIGHTS* (2007).

29. For a good overview of interview-based research, see INTERVIEW RESEARCH IN POLITICAL SCIENCE (Layna Mosley ed., 2013).

30. See Appendix for a full list of the interviewees.



its philosophical role is “to uphold the values of our civilization.”<sup>31</sup> A judge with an academic background said the ECtHR’s role is “to build a Europe of rights.”<sup>32</sup> This view was shared by another judge who described the ECtHR’s role as “to be the *consciousness of Europe . . . a European light-house.*”<sup>33</sup>

There were few other judges who believed the ECtHR’s function is to establish and maintain “minimum common standards of protection throughout Europe,”<sup>34</sup> or to develop “the contents of the Convention rights.”<sup>35</sup> 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.”<sup>36</sup> He further added the following: “I have a very traditional sense of what it is to be a judge. I am not a policymaker. 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.”<sup>37</sup> 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.<sup>38</sup> He then added:

[T]he 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.<sup>39</sup>

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.”<sup>40</sup> She added that “*victims are central to this system.*”<sup>41</sup> One experienced judge described the main roles of the IACtHR as protecting victims, interpreting the Inter-American Convention, and building a regional corpus

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31. Interview 8.

32. Interview 9.

33. Interview 13.

34. Interview 7.

35. Interview 4.

36. Interview 15.

37. *Id.*

38. Interview 10.

39. *Id.*

40. Interview 51.

41. *Id.*

juris.<sup>42</sup> He particularly emphasized that, when carrying out his duties as a judge, he must always think about the victims: “The Inter-American system was created to protect them. My role as a judge is to bring this protection mechanism further through interpretation.”<sup>43</sup>

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.”<sup>44</sup> 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.”<sup>45</sup> 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.<sup>46</sup>

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 victims and help countries’ transition to democracy.

My observations around these Courts’ distinctive legal cultures and judicial role conceptions fit closely with scholarly depictions of each Court. According to the existing 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;”<sup>47</sup> (ii) being the defender

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42. Interview 52.

43. *Id.*

44. Interview 51.

45. Interview 50.

46. Interview 56.

47. Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT’L L. 125, 129

against the threat of a communist takeover of Europe;<sup>48</sup> and (iii) “fine-tuning sophisticated national democratic engines that were, on the whole, working well.”<sup>49</sup> What the literature also shows is that the protection of individual human rights was not their primary concern.<sup>50</sup>

The Inter-American system was created in a more challenging region, which was dominated by civil wars and military regimes.<sup>51</sup> This regional context has influenced the way the IACtHR operated.<sup>52</sup> 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.<sup>53</sup> It carried out an “overly broad standard of review,” and ordered extensive reparations.<sup>54</sup> It showed little to no deference to national authorities.<sup>55</sup> Instead, it has relied on the support of civil society to bolster its authority.<sup>56</sup>

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.

### B. Why Practice Theory?

Practice theory has recently drawn unprecedented attention in International

(2008).

48. See BATES, THE EVOLUTION OF THE EUROPEAN CONVENTION, *supra* note 12, at 470 (explaining that the European Court was a means to protect democratic security); 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*, 32 LAW & SOC. INQUIRY 137, 140 (2007) (explaining how the European Court of Human Rights was established as a measure to protect against the external threat of the Soviet Union).

49. Paul Mahoney, *New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership*, 21 PENN ST. INT’L L. REV. 101, 104 (2002); see Luzius Wildhaber, *Rethinking the European Court of Human Rights Between Law and Politics*, in THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS 204, 226–27 (Jonas Christoffersen & Mikael Rask Madsen eds., 2011) (discussing how the European Court of Human Rights worked as a quasi-constitutional court).

50. Janneke H. Gerards & Lize R. Glas, *Access to Justice in the European Convention on Human Rights System*, 35 NETH. Q. HUM. RTS. 11, 17 (2017); see also, Veronika Fikfak, *Non-pecuniary damages before the European Court of Human Rights: Forget the victim; it’s all about the state*, 33 LEIDEN J. INT’L L. 335, 336 (2020).

51. Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 GER. L. J. 1203, 1205–09 (2011).

52. Karen Alter, et al., *How Context Shapes the Authority of International Courts*, 79 LAW & CONTEMP. PROBS. 1, 17 (2016); Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT’L L. 101, 105–09 (2008).

53. Contesse, *supra* note 2, at 132.

54. Binder, *supra* note 51, at 1203–04.

55. Jorge Contesse, *The International Authority of the Inter-American Court of Human Rights: A Critique of the Conventionality Control Doctrine*, 22 INT’L J. HUM. RTS. 1168, 1183 (2018).

56. Geneviève Lessard, *Civil Society Interactions Within the Inter-American Institutional Framework: Two Case-Studies in Promoting the Strengthening of the Regional Human Rights System*, 1 REVUE QUÉBÉCOISE DE DROIT INTERNATIONAL [R.Q.D.I.] 165, 167–70 (2011) (Can.).

Relations (IR) literature particularly following Emmanuel Adler and Vincent Pouliot's initiative to study international practices in IR.<sup>57</sup> What followed was a flourishing scholarship focusing on practices or adopting a process-centered approach.<sup>58</sup> Christian Büger 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."<sup>59</sup> 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 especially 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)."<sup>60</sup>

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.<sup>61</sup> Public hearings are a specific type of judicial practice. They are performative and ritualistic. They are organized around the routines and professional activities undertaken by the Courts' staff in the run-up to and during the courtroom proceedings.

Second, practice theory provides useful lenses through which to study practices.<sup>62</sup> 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."<sup>63</sup> It may appear to be a

57. Chris Brown, *The 'Practice Turn', Phronesis and Classical Realism: Towards a Phronetic International Political Theory?*, 40 MILLENNIUM: J. INT'L STUD. 439, 440 (2012).

58. See generally LENE HANSEN, SECURITY AS PRACTICE: DISCOURSE ANALYSIS AND THE BOSNIAN WAR (2006); Rebecca Adler-Nissen, *The Diplomacy of Opting Out: A Bourdieudian Approach to National Integration Strategies*, 46 J. COMMON MKT. STUD. 663 (2008); Christian Büger & Trine Villumsen, *Beyond the Gap: Relevance, Fields of Practice and the Securitizing Consequences of (Democratic Peace) Research*, 10 J. INT'L REL. & DEV. 417 (2007); Christian Büger & Frank Gadinger, *Reassembling and Dissecting: International Relations Practice from a Science Studies Perspective*, 8 INT'L STUD. PERSP. 90 (2007); Cornelia Navari, *The Concept of Practice in the English School*, 17 EUR. J. INT'L REL. 611 (2010); Vincent Pouliot, *The Logic of Practicality: A Theory of Practice of Security Communities*, 62 INT'L ORG. 257 (2008); Vincent Pouliot, "Subjectivism": *Toward a Constructivist Methodology*, 51 INT'L STUD. Q. 359 (2007).

59. Christian Büger & Frank Gadinger, *The Play of International Practice*, 59 INT'L STUD. Q. 449, 449–50 (2015).

60. Federica Bicchi & Niklas Bremberg, *European Diplomatic Practices: Contemporary Challenges and Innovative Approaches*, 25 EUR. SEC. 391, 394 (2016).

61. Kratochwil, *supra* note 1, at 40–41.

62. The origins of this development can be traced to the larger turn to practices in social science. See generally THEODORE R. SCHATZKI, KARIN KNORR-CETINA & EIKE VON SAVIGNY, THE PRACTICE TURN IN CONTEMPORARY THEORY (2001); Iver B. Neumann, *Returning Practice to the Linguistic Turn: The Case of Diplomacy*, 31 MILLENNIUM: J. INT'L STUD. 627 (2002); Andreas Reckwitz, *Toward a Theory of Social Practices: A Development in Culturalist Theorizing*, 5 EUR. J. SOC. 243 (2002).

63. Emanuel Adler & Vincent Pouliot, *International Practices*, 3 INT'L THEORY 1, 6 (2011).

heterogeneous enterprise, as it does not essentially limit what kind of practices to study.<sup>64</sup> However, as Andreas Reckwitz argues, it still offers harmonious theoretical lenses and a *modus operandi* that provide a close-up view of practices.<sup>65</sup> Adler and Pouliot echo this claim and argue that international practice theory helps researchers “zoom in on the quotidian unfolding of international life.”<sup>66</sup> 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 on international judicial practices. Indeed, in recent years, practice theory has gained traction in interdisciplinary International Relations and International Law scholarship as well as the literature on international courts.<sup>67</sup> By analyzing the reasons for and the implications of public hearings’ inclusiveness, my empirically grounded analysis draws from and contributes to this literature.

In particular, this article responds to Jens Meierhenrich’s call for an “interpretive turn in the study of practices in international law” and courts.<sup>68</sup> He invites scholars to pay particular attention to “a specific time, place, and concrete historical context.”<sup>69</sup> According to Meierhenrich, this is a necessary step not only to examine practices but also to discover the thought expressed in and through them.<sup>70</sup> Meierhenrich suggests that the practice-based approach is not only useful for describing practices but also for unearthing the hidden meanings reproduced through these practices.<sup>71</sup> 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 International Relations and International Law literature. They provide a first-ever conceptual framework to study international courts using practice theory.<sup>72</sup> They show how different tasks undertaken by the international judges fit squarely with the criteria developed by Adler and Pouliot. That is, judges engage in *performances*, or practices, that are *highly patterned* and

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64. See Rebecca Adler-Nissen, *Towards a Practice Turn in EU Studies: The Everyday of European Integration*, 54 J. COMMON MKT. STUD. 87, 88 (2016) (explaining that the common denominator of all analyses employing practice theory is that they proceed from the evaluation of some type of practice).

65. See Reckwitz, *supra* note 62, at 244–45 (indicating that the various analytical frameworks that collectively comprise practice theory can be viewed as a single, unique school of thought).

66. Adler & Pouliot, *supra* note 63, at 1.

67. See, e.g., Nikolas M. Rajkovic et al., *Introduction: Legality, Interdisciplinarity, and the Study of Practices*, in *THE POWER OF LEGALITY: PRACTICES OF INTERNATIONAL LAW AND THEIR POLITICS* 1, 14–15, 19–20 (Nikolas M. Rajkovic et al. eds., 2016) (arguing on behalf of the utility of practice theory as a means of analyzing these phenomena).

68. Jens Meierhenrich, *The Practice of International Law: A Theoretical Analysis*, 76 LAW & CONTEMP. PROBS. 1, 4 (2013).

69. *Id.* at 19.

70. *Id.* at 23.

71. See *id.* at 20–23 (describing the “meaning-making” function of practices).

72. Jeffrey L. Dunoff & Mark A. Pollack, *A Typology of International Judicial Practices*, in *THE JUDICIALIZATION OF INTERNATIONAL LAW: A MIXED BLESSING?* 86, 89 (Andreas Follesdal & Geir Ulfstein eds., 2018).

*competent*. Their decisions are built upon *background knowledge* of treaties, jurisprudence, or customary international law, among other authorities. Finally, judicial practices have both *discursive* and *material* implications for the development of international law and *restitutio in integrum* for the victims, respectively.<sup>73</sup> Dunoff and Pollack also provide an inventory of international judicial practices inside and outside of the courtroom.<sup>74</sup>

My analysis exemplifies how Dunoff and Pollack's conceptual framework can be taken further. I propose a legal culture-based explanation for understanding why the courtroom practices of the ECtHR and the IACtHR diverge and why this divergence persists despite changing circumstances. I also point out that the persistence of these practices helps keep these Court's creation myths 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.<sup>75</sup>

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 has 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.

### C. 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 dictatorships.<sup>76</sup> The Convention, an “instrument of European public order,” was written in reaction to the atrocities committed during the Second World War.<sup>77</sup> What propelled this process was “the fear that Europe was in danger of being overrun by the communists.”<sup>78</sup> 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.<sup>79</sup> The original signatories were the governments of Belgium, Denmark, France, Germany, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, the Saar Protectorate, Turkey, and the United Kingdom.<sup>80</sup> The

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73. *Id.* at 90.

74. *Id.* at 92–93.

75. *Id.* at 105–06.

76. Luzius Wildhaber, *Rethinking the European Court of Human Rights*, in *THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS* 204, 206 (Jonas Christoffersen & Mikael Rask Madsen eds., 2011); *see also* Moravcsik, *supra* note 27, at 232–34 (reasoning that the establishment of European human rights guarantees is a post-authoritarian phenomenon, motivated by concerns over democratic stability and security threats in the region).

77. *See* Wildhaber, *supra* note 76, at 204–06 (indicating that the ECHR is a reaction to the atrocities committed by European dictatorships in the 1930s and 1940s).

78. BATES, *THE EVOLUTION OF THE EUROPEAN CONVENTION*, *supra* note 12, at 44.

79. *Details of Treaty No. 005*, COUNCIL OF EUR., <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005> (last visited Feb. 25, 2020).

80. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No. 005, 17–19.

enactment of the Convention was the first step in 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.<sup>81</sup> 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 the 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.”<sup>82</sup> Regardless of how it was first imagined, the European human rights system soon became an authoritative forum for human rights protection, shaping “Europe’s legal and political landscape.”<sup>83</sup>

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.<sup>84</sup> 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.<sup>85</sup> 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).<sup>86</sup> This model gave a larger role to the Commission that functioned as a quasi-judicial filter.<sup>87</sup>

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.<sup>88</sup> Although the Court began allowing individual representation as of 1982,<sup>89</sup> victims did not have standing before the ECtHR until the 1990s.<sup>90</sup> Only with Protocol 9—which was entered into force in 1994—were individuals and civil society groups granted the right to have standing before the ECtHR.<sup>91</sup> This was not

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81. Heidi Nichols Haddad, *Judicial Institution Builders: NGOs and International Human Rights Courts*, 11 J. HUM. RTS. 126, 136 (2012).

82. BATES, *THE EVOLUTION OF THE EUROPEAN CONVENTION*, *supra* note 12, at 11.

83. Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT’L L. 125, 126 (2008).

84. ILIAS BANTEKAS & LUTZ OETTE, *INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE* 224 (2013).

85. *Id.* This position was abolished with the Protocol 11, which came into force in 1998 and allowed the individuals to take cases to the Court. *Id.* at 225.

86. *Id.* at 224.

87. *Id.*

88. 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* 17, 34–35 (Jonas Christoffersen and Mikael Rask Madsen eds., 2011).

89. Darren Hawkins & Wade Jacoby, *Agent Permeability, Principal Delegation and the European Court of Human Rights*, 3 REV. INT’L ORG. 1, 14 (2008).

90. Gerards & Glas, *supra* note 50, at 18.

91. See Protocol 9 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 6, 1990, E.T.S. No. 140 (amending the ECHR to provide for

due to the ECtHR's own initiative but member state prerogatives. They extended this right to individuals and civil society groups through a formal amendment procedure.<sup>92</sup>

Member states were also the reason why the Court began allowing *amicus curiae* briefs in the first place.<sup>93</sup> The Court did not allow third-party submissions until the 1970s.<sup>94</sup> This began to change with the United Kingdom's request to submit written comments for the *Winterwerp v. Netherlands* case in 1979. The Court made an exception for the United Kingdom without officially changing the Rules of Court.<sup>95</sup>

Protocol 11, which was entered into force in 1998, improved individuals' access to the Court to a great extent.<sup>96</sup> The Protocol abolished the two-tier structure and the European Commission. Accepting the jurisdiction of the ECtHR and allowing individuals to petition became compulsory for member states. In other words, the ECtHR became the sole actor to which individual applicants had direct access.<sup>97</sup>

Following these structural changes, the number of complaints brought before the Court increased.<sup>98</sup> Yet this was also due to the fact that the ECtHR had increased its visibility.<sup>99</sup> The Court became a much-preferred forum for human rights organizations to advocate for the development and enforcement of human rights

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the right of persons, groups of individuals and non-governmental organizations to bring a case before the ECtHR) [hereinafter Protocol 9].

92. See BATES, THE EVOLUTION OF THE EUROPEAN CONVENTION, *supra* note 12, at 8–9 (explaining that, when the ECHR first came into force, states opposing the individual petition had succeeded in ensuring that it would not be mandatory).

93. See Haddad, *supra* note 81, at 138–39 (indicating that the interests of third-party member states not initially involved in ECtHR litigation resulted in the Court allowing the submission of those documents).

94. *Id.*; see *Winterwerp v. Netherlands*, App. No. 6301/73, 2 Eur. H.R. Rep. 445 ¶ 7 (1979) (indicating that the Court had accepted a written statement from the United Kingdom regarding London's position on the interpretation of a provision of the ECHR at issue in the case).

95. Haddad, *supra* note 81, at 139.

96. See Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, art. 1, May 11, 1994, E.T.S. No. 155 (amending Article 34 of the ECHR to provide that the ECtHR may accept applications from persons, groups of persons, and non-governmental organizations, and that ECHR member states may not impede the exercise of that right).

97. 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. *Id.* at 8–9. Yet this was limited to the complaints brought against the states that had already recognized the jurisdiction of the Court. *Id.* at 8 (referring to the fact that the petition was subject to the ratification of the respondent State). Protocol 11 made it possible for “any person, non-governmental organization or group of individuals” within the jurisdiction of any of the state parties to have direct access to the Court. Protocol 11, *supra* note 96, at art. 1.

98. Alec Stone Sweet & Helen Keller, *The Reception of the ECHR in National Legal Orders*, in *A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS* 3, 12 (Alec Stone Sweet & Helen Keller eds., 2008).

99. See *id.* at 15 (explaining that the ECtHR now exercises de facto dominance over the ECHR regime).



norms.<sup>100</sup> Before long, the European human rights system, particularly the ECtHR, came to be a success story,<sup>101</sup> with a “reportedly high rate of compliance with its decisions.”<sup>102</sup> The ECtHR has carved out its place within the international law community with several landmark judgments that have shaped the course of international human rights law.<sup>103</sup> 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.”<sup>104</sup>

The Inter-American system was likewise founded after the Second World War in order to stabilize the region.<sup>105</sup> This system has a more intricate organization composed of two subsystems.<sup>106</sup> The Organization of American States (OAS) adopted the American Declaration of the Rights and Duties of Man in 1948.<sup>107</sup> The OAS also established the Inter-American Commission of Human Rights in 1959,

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100. See Rachel A. Cichowski, *Civil Society and the European Court of Human Rights*, in *THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS* 77, 78 (Jonas Christoffersen & Mikael Rask Madsen eds., 2011) (explaining that NGOs have become central participants in ECtHR jurisprudence since the enactment of Protocol 11). For more information on the participation of civil society groups in the ECHR regime, see *id.* at 77–97; Marco Frigessi di Rattalma, *NGOs before the European Court of Human Rights: Beyond Amicus Curiae Participation*, in *CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES* 57 (Tullio Treves et al. eds., 2005).

101. For example, Laurence R. Helfer calls the ECtHR individual complaints mechanism “the crown jewel of the world’s most advanced international system for protecting civil and political liberties.” Helfer, *supra* note 83, at 159. 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* 86 (2010).

102. Solomon T. Ebobrah, *International Human Rights Courts*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION* 247 (Cesare P.R. Romano et al. eds., 2014). That is, its judgments do get translated into the domestic context much more often than, for example, those of the U.N. treaty bodies, which face systematic non-implementation of their decisions. See *id.* (noting the relative effectiveness of the ECtHR compared to other international human rights courts); see also Alexandra Huneus, *Compliance with Judgments and Decisions*, in *THE OXFORD INTERNATIONAL HANDBOOK OF INTERNATIONAL ADJUDICATION* 437, 442 (Cesare P. R. Romano et al. eds., 2014) (defining compliance). For more, see ROSANNE VAN ALEBEEK, *THE IMMUNITY OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW* 382 (2008) (commenting on applicability of court decisions).

103. For a good account of the impact of the Court’s jurisprudence, see LOUWRENS R. KIESTRA, *THE IMPACT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ON PRIVATE INTERNATIONAL LAW* (2014); J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* (1993); A EUROPE OF RIGHTS: *THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS* (Alec Stone Sweet & Helen Keller eds., 2008).

104. Sweet & Keller, *supra* note 98, at 3.

105. See Victor Rodriguez Rescia & Marc David Seitles, *The Development of the Inter-American Human Rights System: A Historical Perspective and a Modern-Day Critique*, 16 N.Y.L. SCH. J. HUM. RTS. 593, 596–98 (2000) (discussing how the Inter-American Conference on Problems of War and Peace strove to promote and protect human rights post-WWII).

106. See *id.* at 599 (noting that the Inter-American system operates as a dual system). For a good overview of the historical transformation of the Inter-American system and the role of the Inter-American Commission, see Robert K. Goldman, *History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights*, 31 HUM. RTS. Q. 856 (2009).

107. *Id.* at 859.

which was later recognized as the primary monitoring body of the OAS Charter.<sup>108</sup> Then, in 1969, the American Convention on Human Rights was adopted.<sup>109</sup> This Convention recommended the creation of the Inter-American Court of Human Rights, which came to fruition in 1979.<sup>110</sup> Only a subset of OAS member states ratified the American Convention. While all thirty-five OAS members are parties to the American Declaration,<sup>111</sup> only twenty-four OAS member states ratified the American Convention. These countries are Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haití, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela.<sup>112</sup>

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.<sup>113</sup> Under its mandate, it applies both the American Declaration and the American Convention; whereas the IACtHR only has jurisdiction over the countries that have ratified the American Convention.<sup>114</sup> While the IACtHR is the judicial organ of the system, the Inter-American Commission is a quasi-judicial body.<sup>115</sup> It undertakes a wide range of tasks such as writing thematic and country reports or carrying out on-site fact-finding missions.<sup>116</sup>

Article 61(1) of the American Convention on Human Rights permits only the

108. *Id.* at 861–62.

109. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

110. For more on the early design of the system, see Thomas Buergenthal, *The Inter-American Court of Human Rights*, 76 AM. J. INT'L L. 231, 231 (1982).

111. See Christina M. Cerna, *Reflections on the Normative Status of the American Declaration of the Rights and Duties of Man*, 30 U. PA. J. INT'L L. 1211, 1213 (2009) (noting that the OAS member states have in effect ratified the American Declaration).

112. Venezuela re-acceded to the Convention on July 1, 2019. Currently, Trinidad and Tobago is the only country that has denounced the American Convention. *Id.*; *American Convention on Human Rights "Pact of San José, Costa Rica" (B-32)*, OAS, [https://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights\\_sign.htm](https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm) (last visited Feb. 1, 2020).

113. Cerna, *supra* note 111, at 1213. There are thirty-five 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. *Member States*, OAS, [http://www.oas.org/en/member\\_states/default.asp](http://www.oas.org/en/member_states/default.asp) (last visited Feb. 1, 2020).

114. The state parties that recognize 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. Secretariat of the Inter-American Court of Human Rights (IACtHR), *Status of Signature and Ratifications, American Convention on Human Rights: "Pact of San José, Costa Rica," in Basic Documents Pertaining to Human Rights in the Inter-American System*, at 57–58 (February 2012), [http://www.corteidh.or.cr/docs/libros/docsbas2012\\_eng.pdf](http://www.corteidh.or.cr/docs/libros/docsbas2012_eng.pdf).

115. See Lea Shaver, *The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?*, 9 WASH. U. GLOBAL STUD. L. REV. 639, 658 (2010) (discussing the activities of the IACHR in comparison to the judicial responsibilities of the IACtHR).

116. Interview 41; Interview 42.

member states and the Inter-American Commission to submit cases.<sup>117</sup> Thus, the original design of the Inter-American system was similar to that of the European system before Protocol 11 was enacted, insofar as victims and their families could not initiate cases before the Court.<sup>118</sup> The individuals could bring their cases before the Commission and request a referral to the Court as long as the state concerned had recognized the Court's adjudicatory jurisdiction.<sup>119</sup>

Individuals began to have a larger role in the court proceedings with the introduction of the new Rules of Procedure of the Court in 1997. These rules, adopted by the IACtHR itself, granted victims the right to participate at the court proceedings.<sup>120</sup> 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.<sup>121</sup> 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."<sup>122</sup>

These changes left a mark on what has become the IACtHR's unique human rights tradition. As a result, victims and civil society began to play an even more important role.<sup>123</sup> This was not out of the ordinary for the IACtHR. Civil society groups have always been an integral part of the Inter-American system. For example, the Center for Justice and International Law, one of the most important civil society groups in the region, represents nearly sixty percent of the cases before the Court.<sup>124</sup> Civil society groups undertake a variety of tasks that range from advising victims and training local actors to bringing complaints and providing information to the Commission and the Court.<sup>125</sup> They also support the system by advocating for state compliance with the Court and the Commission's rulings.<sup>126</sup> The ECtHR has a different relationship with the civil society groups. As Heidi Haddad shows, since

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117. Organization of American States, American Convention on Human Rights art. 61(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

118. For a review of different institutional reforms at the Inter-American system, see Par Engstrom & Courtney Hillebrecht, *Institutional Change and the Inter-American Human Rights System*, 22 INT'L J. HUM. RTS. 1111 (2008).

119. Manuel D. Vargas, *Individual Access to the Inter-American Court of Human Rights*, 16 N.Y.U. J. INT'L L. & POL. 601, 604–05 (1984).

120. Inter-American Court of Human Rights [IACtHR], Rules of Procedure, arts. 22, 23 (Nov. 24, 2009) [hereinafter IACtHR Rules of Procedure], available at <https://www.cidh.oas.org/Basicos/English/Basic20.Rules%20of%20Procedure%20of%20the%20Court.htm>; Ariel Dulitzky, *The Inter-American Human Rights System Fifty Years Later: Time for Changes*, QUE. J. INT'L L. 127, 151 (2011).

121. See Haddad, *supra* note 81, at 143 (discussing the willingness of the IACtHR to accept influence from *amicus curiae* briefs).

122. Secretariat of the Inter-American Court of Human Rights [IACtHR], *Basic Documents Pertaining to Human Rights in the Inter-American System*, at 15 (2012), [www.corteidh.or.cr/docs/libros/docsbas2012\\_eng.pdf](http://www.corteidh.or.cr/docs/libros/docsbas2012_eng.pdf).

123. Rodriguez Rescia & Seitles, *supra* note 105, at 616.

124. Haddad, *supra* note 81, at 142.

125. Dulitzky, *supra* note 120, at 128 n.4.

126. Alexandra Huneeus, *Constitutional Lawyers and the Inter-American Court's Varied Authority*, 79 LAW & CONTEMP. PROBS. 179, 183 (2016).

the European 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.<sup>127</sup> This picture still seems to be relevant today, as there are relatively few cases in which *amicus curiae* briefs are submitted to the European Court.<sup>128</sup>

#### ***D. Diverging Practices***

As the foregoing account shows, victims and civil society groups 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 these two Courts' own legal culture is important to account for these diverging practices. Since both Courts adopt their own rules of procedure, it is ultimately in their discretion to decide how inclusive the public hearings should be and in particular how much access to give to victims and civil society groups.

In the case of the ECtHR, Protocol 9 granted victims and civil society groups the right to appear before the Court.<sup>129</sup> It was the member states that adopted the Protocol and therefore initiated this change.<sup>130</sup> The ECtHR later regulated how much victims and civil society groups could participate in its 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."<sup>131</sup> This rule explains the nature of participation that is afforded to individuals. It underlines that victims' participation is circumscribed and must, at almost all times, be mediated by their legal representatives.

As for the IACtHR, it was the Court itself that permitted the victims to participate in the proceedings as early as 1997. Later, in 2001, the IACtHR amended its own Rules of Procedure and allowed victims, their next of kin, and representatives to "submit their brief containing pleadings, motions, and evidence autonomously and shall continue to act autonomously throughout the proceedings."<sup>132</sup> Moreover, Article 25 of the Rules of Procedure provides: "when there are several alleged victims or representatives, these shall designate a common intervener, who shall be the only person authorized to present pleadings, motions,

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127. See Haddad, *supra* note 81, at 143–44 (commenting on ECtHR ability to function without NGO influence because of its resources and funding).

128. Yaël Ronen & Yael Naggan, *Third Parties*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 807, 824 (2013).

129. Protocol 9, *supra* note 91, art. 3.

130. *Id.* at 2.

131. European Court of Human Rights, Rules of Court, Rule 36(3) (Jan. 1, 2020) [hereinafter ECtHR Rules of Court], available at [https://www.echr.coe.int/Documents/Rules\\_Court\\_ENG.pdf](https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf) (emphasis added).

132. IACtHR Rules of Procedure, *supra* note 120, art. 25(1); see Verónica Gómez, *Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: New Rules and Recent Cases*, 1 HUM. RTS. L. REV. 111, 116 (2001) (discussing revisions to IACtHR's rules of procedure).

and evidence during the proceedings, including the *public hearings*.”<sup>133</sup> Hence, unlike the ECtHR, the IACtHR gives victims an 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 for civil society groups to list the legal arguments or remedies they deem fit at the hearings—as my interlocutors revealed, and as I observed during my visit.<sup>134</sup> For example, at the hearing for *Nelson Carvajal Carvajal and Family v. Colombia*, which was held on August 22 and 23 of 2017, the victim’s sister, Judith Carvajal, gave testimony during the hearing. She not only explained the circumstances around Nelson’s murder but also recounted the pain and suffering the whole family endured.<sup>135</sup> This was not out of the ordinary, according to judges and staff interviewed at the IACtHR. They confirmed that for them, hearing the victim’s side is often more important than the finding itself.<sup>136</sup>

The normalization of victims’ active participation at public hearings effectively channels the IACtHR’s affinities with the truth commission tradition.<sup>137</sup> It attests to the claim that the IACtHR’s courtroom practices are built upon a victim-centered foundational logic. It 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 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 the 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 August 24 and 25 of 2017.<sup>138</sup> Ecuador initiated the proceedings to ask the IACtHR to interpret the extent of the right to seek and obtain

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133. IACtHR Rules of Procedure, *supra* note 120, art. 25(2) (emphasis added).

134. Interview 43; Interview 44; Interview 51; Interview 54; Interview 56.

135. For a full account of the hearing, see Ricardo Trotti, *Report of the Hearing at the Inter-American Court on the Nelson Carvajal Case*, INTER-AM. PRESS ASS’N (Aug. 24, 2017), <https://en.sipiapa.org/notas/1211646-report-of-the-hearing-at-the-inter-american-court-on-the-nelson-carvajal-case>.

136. Interview 55; Interview 56; Interview 50; Interview 51.

137. See, e.g., Klaas Dykmann, *Impunity and the Right to Truth in the Inter-American System of Human Rights*, 26 IBEROAMERICANA 45, 48–51 (2007) (discussing the development of the “right to truth” in the Inter-American Court system); Eduardo Ferrer Mac-Gregor, *The Right to the Truth as an Autonomous Right under the Inter-American Human Rights System*, 9 MEX. L. REV. 121, 126–131 (2016) (discussing the development of “the right to truth” in Inter-American case law); Jo M. Pasqualucci, *The Whole Truth and Nothing but the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System*, 12 B.U. INT’L L. J. 321, 330–336 (1994) (discussing the development of human rights investigative bodies functioning as “truth commissions” in international law).

138. The Institution of Asylum and Its Recognition as a Human Right in the Inter-American System of Protection (Interpretation and Scope of Articles 5, 22.7 and 22.8 in Relation to Article 1(1) of the American Convention on Human Rights), Advisory Opinion OC-25/18, Inter-Am. Ct. H.R. (ser. A) No. 25, ¶ 8 (May 30, 2018) [hereinafter Advisory Opinion].

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.<sup>139</sup> In the course of two days, there were fifty-five written submissions and twenty-six oral submissions offering legal arguments.<sup>140</sup> States, international organizations, civil society groups, scholars, law clinic students, and individuals all presented their views.<sup>141</sup> A few OAS member states, such as Argentina, Mexico, Panama, and Bolivia, as well as the Inter-American Commission and U.N. High Commissioner for Refugees participated.<sup>142</sup> The clear majority of the submissions, forty-six of them to be exact, were presented by civil society groups, individuals, and delegations from law clinics and centers based in various Latin American and European universities.<sup>143</sup> That is to 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.<sup>144</sup>

This was an unparalleled level of inclusiveness. At the ECtHR, only experts or high-level international public servants may appear before the Court at the hearings.<sup>145</sup> 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 normal practice, however.<sup>146</sup> One high-level official explained the logic behind it. He remarked that “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.”<sup>147</sup> This answer, yet again, attests to how the IACtHR’s creation myth has shaped its inclusive courtroom practices. It also implies that these practices do not only derive from and maintain creation myths, but they also help these Courts (re)produce their own self-image.

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.<sup>148</sup>

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139. *Id.* ¶¶ 1–2; see ANASTASIA TELESETSKY, UPDATES AND COMMENTARY IN PUBLIC INTERNATIONAL LAW, 26–27 (2019) (discussing Ecuador’s request for an opinion on diplomatic asylum, particularly related to the case against Julian Assange).

140. Advisory Opinion, *supra* note 138, ¶ 11.

141. *Id.*

142. *Id.* ¶ 6.

143. See *id.* ¶¶ 1–12.

144. *Id.* ¶ 9 (listing the individuals and law students who gave oral submissions, which include: students from the Law School of EAFIT University Medellín; students from Tijuana Law School of the Autonomous University of Baja California; students from the University College London ‘Public International Law Pro Bono Project’; Bernardo de Souza Dantas Fico; Sergio Armando Villa Ramos; Manuel Fernando García Barrios; et al.).

145. European Convention on Human Rights art. 36(3), Nov. 4, 1950, E.T.S. No. 005 [hereinafter European Convention on Human Rights].

146. Interview 52; Interview 54; Interview 56; Interview 58; Interview 59.

147. Interview 56.

148. Helen Keller & Corina Heri, *Deliberation and Drafting: European Court of Human Rights (ECtHR)*, MAX PLANCK ENCYCLOPEDIA INT’L PROC. L., ¶ 41 (May 2018), <https://opil.ouplaw.com/view/10.1093/law-mpeipro/e3210.013.3210/law-mpeipro-e3210>.

Public hearings are mainly held for Grand Chamber proceedings.<sup>149</sup> 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 cathartic and performative testimonies. Similarly, civil society groups may send written observations, but they are not often invited to intervene and appear before the Court.<sup>150</sup> Indeed, the ECtHR hears third parties such as the Commissioner for Human Rights,<sup>151</sup> representatives from U.N. organs,<sup>152</sup> and high-level academics.<sup>153</sup> In contrast to the practices of the IACtHR, 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.

### *E. 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.<sup>154</sup> Its initial purpose was to provide justice to victims of gross human rights violations and help countries transition to democracies.<sup>155</sup> As a result, it has grown to adopt a victim-focused foundational logic.<sup>156</sup> This outlook was imprinted on the IACtHR's legal culture. It has effectively shaped its institutional practices—particularly the way it organized public hearings. When writing its own Rules of Procedure, it came naturally to the IACtHR to adopt courtroom practices that were more inclusive—in line with the demands from

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149. *Id.* ¶ 49. The European Commission used to hold hearings too.

150. See Laura Van den Eynde, *An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights*, 31 NETH. Q. HUM. RTS. 271, 277 (2013) (noting that it is up to the Court's discretion to accept or invite third party written submissions in grand chamber hearings and that their participation is only allowed in exceptional cases).

151. European Convention on Human Rights, *supra* note 145. See generally *N.D. v. Spain*, App. No. 8675/15, Eur. Ct. H.R. (2017) available at <http://hudoc.echr.coe.int/eng?i=001-177683>.

152. See, e.g., *Al Nashiri v. Poland*, App. No. 28761/11, Eur. Ct. H.R. ¶ 10 (2014), available at <http://hudoc.echr.coe.int/eng?i=001-146044> (inviting the United Nations Special Rapporteur to participate in the hearing); *Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13, Eur. Ct. H.R. ¶ 8 (2014), available at <http://hudoc.echr.coe.int/eng?i=001-146047> (inviting the United Nations Special Rapporteur to participate in the hearing).

153. See, e.g., *Al-Dulimi and Montana Management Inc. v. Switzerland*, App. No. 5809/08, Eur. Ct. H.R. ¶ 9 (2016), available at <http://hudoc.echr.coe.int/eng?i=001-164515> (allowing Professor A. Bianchi, a professor of international law from the Institut de Hautes Études Internationales et du Développement in Geneva, to testify for the applicants).

154. Cavallaro & Brewer, *supra* note 13, at 774.

155. *Id.*; see Goldman, *supra* note 106, at 86–62 (discussing the interrelatedness of human rights and democracy as a founding motivation for the establishment of the Inter-American Commission on Human Rights).

156. Interview 50; Interview 51; Interview 56.

victims and civil society groups.<sup>157</sup> In the absence of state initiatives to grant a more participatory role for victims or civil society groups, 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 the needs of European societies began to diversify from the 1990s onward with the Eastward Expansion—when formerly communist countries acceded to the European system. Accordingly, the number of applications brought before the ECtHR increased exponentially. 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.<sup>158</sup> After the expansion, the ECtHR had to face new challenges such as systematic human rights violations and the unavailability or insufficiency of domestic remedies.<sup>159</sup>

This changing context effectively required the ECtHR to take a pedagogical role to cultivate fresh human rights traditions in newly independent states.<sup>160</sup> This was needed to impart European standards to countries with poor human rights records and guide their transitions to democracy. The ECtHR was already familiar with conflicts such as “the Troubles” in Northern Ireland,<sup>161</sup> the occupation of Cyprus,<sup>162</sup> and the Kurdish conflict in Turkey.<sup>163</sup> With the inclusion of the formerly communist countries, cases involving transitional justice dilemmas were also brought before the ECtHR.<sup>164</sup> However, such a change in the legal and political landscape has not encouraged the ECtHR to adopt courtroom practices centered on victims or give a larger role to civil society groups at its hearings.

An alternative explanation for these persistently divergent practices could be pragmatism. Indeed, the ECtHR has been overburdened by its exponentially increasing caseload.<sup>165</sup> There had already been a steady growth in the number of applications since the 1980s. This only escalated with the Eastward Expansion. The number of applications increased from 404 in 1981 to 4,750 in 1997,<sup>166</sup> and 63,350

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157. Interview 43; Interview 44; Interview 60.

158. BATES, THE EVOLUTION OF THE EUROPEAN CONVENTION, *supra* note 12, at 473.

159. Aisling Reidy et al., *Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey*, 15 NETH. Q. HUM. RTS. 161, 165, 172 (1997).

160. *Id.*

161. *See generally* Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) (1978).

162. *See generally* Cyprus v. Turkey, 2001-IV Eur. Ct. H.R. (2001).

163. *See generally* Selahattin Demirtas v. Turkey (No.2), App. No. 14305/17, Eur. Ct. H.R. (2018), available at <http://hudoc.echr.coe.int/eng?i=001-187961>.

164. *See* SWEENEY, THE EUROPEAN COURT OF HUMAN RIGHTS IN THE POST-COLD WAR ERA, *supra* note 18, at 18–30 (discussing how the ECtHR dealt with transitional justice in democratizing countries).

165. BATES, THE EVOLUTION OF THE EUROPEAN CONVENTION, *supra* note 12, at 470. *See* Ezgi Yildiz, *A Court with Many Faces: Judicial Characters and Modes of Norm Development in the European Court of Human Rights*, 31 EUR. J. INT'L L. 79, 96–99 (2020) (explaining how the Court's increased workload influenced its interpretive preferences in the post-1998 period).

166. European Court of Human Rights, *Annual Report 2001*, at 9 (2002), available at [https://www.echr.coe.int/Documents/Annual\\_report\\_2001\\_ENG.pdf](https://www.echr.coe.int/Documents/Annual_report_2001_ENG.pdf).



in 2017.<sup>167</sup> The dramatic rise in applications created a significant backlog at the ECtHR, as the Court was unable to process all of those applications in a timely manner.<sup>168</sup> It is therefore logical to assume that the burden of the caseload deterred the ECtHR from adopting courtroom practices akin to those at the IACtHR. The IACtHR receives far fewer cases than the ECtHR. In 2017, for example, the Inter-American Commission referred only seventeen cases to the IACtHR.<sup>169</sup> This number is relatively small even despite the fact that IACtHR operates as a part-time body<sup>170</sup> on far more limited resources.<sup>171</sup> This could be the reason why the IACtHR is able to give such extensive access to victims and civil society groups.

Even though the pragmatism argument provides an explanation for the Courts' respective capacities to have inclusive public hearings, it falls short of explaining their intentions and motivations. For example, the reason the IACtHR conducts inclusive public hearings could be 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 victim-centered logic. This is especially true considering the ECtHR's recent trends of enforcing more restrictive policies on individual applications.<sup>172</sup> For example, in order to increase efficiency, the Court introduced unilateral declaration procedures through its Rules of Court.<sup>173</sup> According to this procedure, if a government issues a declaration acknowledging that they have violated the Convention and promises to provide adequate redress, the Court "may strike [the complaint] out of the list, either in whole or in part, *even if the applicant wishes the examination of the application to be continued.*"<sup>174</sup> The pilot judgment procedure, introduced under Rule 61,<sup>175</sup> may generate a similar disadvantage for victims.<sup>176</sup> With this procedure, the Court chooses a pilot case that

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167. European Court of Human Rights, *Analysis of Statistics 2017*, at 4 (2018), available at [https://www.echr.coe.int/Documents/Stats\\_analysis\\_2017\\_ENG.pdf](https://www.echr.coe.int/Documents/Stats_analysis_2017_ENG.pdf).

168. See BATES, *THE EVOLUTION OF THE EUROPEAN CONVENTION*, *supra* note 12, at 512–13 (discussing how the Court's allowance of individual applications overwhelmed its system).

169. Inter-American Commission of Human Rights, *Annual Report 2017: Chapter II: Petitions, Cases and Precautionary Measures*, at 69 (2017), available at <http://www.oas.org/en/iachr/docs/annual/2017/docs/IA2017cap.2-en.pdf>.

170. Dinah Shelton, *The Rules and the Reality of Petition Procedures in the Inter-American Human Rights System*, 5 NOTRE DAME J. INT'L & COMP. L. 1, 6 (2015).

171. See Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L. J. 493, 500 (Oct. 1, 2011) (noting that the IACtHR's low budget is a challenge for the Court).

172. See Gerards & Glas, *supra* note 50, at 22–23 (discussing how stricter requirements on individual applications to the ECtHR may affect individuals' access to justice).

173. ECtHR Rules of Court, *supra* note 131, Rule 62A.

174. *Id.*

175. *Id.* Rule 61.

176. See Ezgi Yildiz, *Judicial Creativity in the Making: The Pilot Judgment Procedure a Decade After Its Inception*, 8 INTERDISC. J. HUM. RTS. L. 81, 86–88 (Jan. 2014–2015) (discussing how the ECtHR's pilot procedure has potential negative consequences for individual applicants who are not a part of the pilot case).

includes a systemic problem that has been raised in many other complaints (i.e., repetitive complaints).<sup>177</sup> While reviewing the pilot case, the Court may adjourn a large number of cases of similar nature.<sup>178</sup> The expectation is that the implementation of the measures requested in the pilot judgment will also resolve the issues raised in the adjourned cases.<sup>179</sup>

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.

## II. CONCLUSION

In this paper, I have described how the historical context in which the ECtHR and the IACtHR were created formed the *raison d'être* of these institutions and their practices. I have done so by relying on a practice-based approach and looking at courtroom practices. In particular, I have compared them based on the *inclusiveness* of their public hearings and examined the extent to which they allow victims and civil society groups to actively participate.

Both the ECtHR and the IACtHR gave victims and civil society groups the right to participate in proceedings during the 1990s. Yet, they differed in the way they organized 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 workings of these two Courts, I have argued that the difference in their foundational logics may explain their divergent practices. The ECtHR was founded upon a civilization-based understanding, whereas the IACtHR was created upon a victim-focused understanding.

Building upon this observation, I have presented a twofold analysis. First, I have argued that their creation myths have shaped their disposition and practices. Second, I have maintained that these practices persisted—despite the changing circumstances—and kept these myths alive to this day. I have thus explained the circular relation between the Courts' foundational logic 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 testimony and civil society input during their public hearings.

Although the analysis is limited to the ECtHR and the IACtHR, the observations and arguments presented here are applicable to other international courts. This is because all courts have a “center of narrative gravity,” as Fuad Zarbiyev observes.<sup>180</sup> For example, one could expect to see the International

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177. *Id.* at 82.

178. *Id.* at 86.

179. *Id.* at 84–85.

180. Fuad Zarbiyev, *Judicial Activism in International Law—A Conceptual Framework for Analysis*, 3 J. INT'L DISP. SETTLEMENT 247, 258 (July 1, 2012).

Criminal Court to be more victim-centered, while the International Court of Justice to be more state-interest-centered. These expectations would help explain not only how and why international 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 cultures, routine practices, and inner workings to better understand international judicial practices and policies.

## APPENDIX

### LIST OF INTERVIEWS

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

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

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

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

Table 3: The Registry

<b>The Registry</b>		
Interview 18	Permanent Law Clerk	09/04/14
Interview 19	Permanent Law Clerk	09/16/14
Interview 20	Senior Level Official at the Registry	09/17/14
Interview 21	Assistant Lawyer	09/17/14
Interview 22	Assistant Lawyer	09/19/14
Interview 23	Assistant Lawyer	09/20/14
Interview 24	Permanent Law Clerk	09/23/14
Interview 25	Permanent Law Clerk	09/25/14

Table 4: Human Rights Non-Governmental Organizations (NGOs) Involved in Strategic Litigation

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

Table 5: Academic Lawyers

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

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

<b>Judges Serving at the Inter-American Court of Human Rights</b>		
Interview 49	Current Judge	08/22/17
Interview 50	Current Judge	08/24/17
Interview 51	Current Judge	08/25/17
Interview 52	Current Judge	08/25/17

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

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

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

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

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

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

Table 10: Strategic Litigation NGOs, IOs and Academics

<b>Strategic Litigation NGOs, IOs and Academics</b>		
Interview 43	Center for Justice and International Law (CEJIL)	06/08/17
Interview 44	CEJIL	06/08/17
Interview 45	Amnesty International	06/26/17
Interview 46	Researcher at UNAM – Mexico City	06/27/17
Interview 47	Women's Global Network for Reproductive Rights	06/28/17
Interview 48	Office of the High Commissioner for Human Rights	06/28/17