Deference and Divergence in Regional Human Rights Courts

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By

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Chapter 1

Introduction

In her remarks opening the 63rd Ordinary Session of the African Court on Human and Peoples' Rights (ACtHPR) in November 2021, Lady Justice Imani Aboud, President of the Court, struck a resolute tone while addressing her colleagues: "I assure all Judges and staff of the Registry that the Court is and will remain alive; that the Court is here to stay; and that we have made the right decision to undergo the path of self-reform".[1] This declaration reflects the precarious moment in which the ACtHPR finds itself, as an onslaught of government backlash has cast a shadow over the future of the world's youngest regional human rights court. Four states, including Tanzania, where the ACtHPR is located, have recently withdrawn the right of their citizens to submit cases to the Court. Each of these withdrawals has stemmed from government accusations that the ACtHPR has overstepped its authority when ruling against member states and issuing remedial mandates to address human rights violations. The incipient "self-reform" process to which Lady Justice Aboud referred represents a last-ditch effort by ACtHPR judges to address member state grievances while still retaining autonomy over the Court's operations. There are promising signs that the ACtHPR can successfully navigate this challenge, as the Court has achieved record levels of productivity during the Covid-19 pandemic, recently patched up frayed relations with Benin, and welcomed the

[1] Opening Remarks by Lady Justice Imani D. Aboud, 63rd Ordinary Session of the African Court on Human and Peoples' Rights. Available at: https://www.african-court.org/wpafc/63rd-ordinary-session-of-the-african-court-on-human-and-peoples-rights-opening-remarks-by-he-lady-justice-imani-d-aboud-president-of-the-court/

accessions of Niger and Guinea Bissau last year. Still, the Court must tread carefully on the road ahead.

In an era of growing national backlash against international institutions, it is important to understand the causes and consequences of human rights courts' approaches to delineating appropriate deference to domestic sovereignty. The European Court of Human Rights (ECtHR), Inter-American Court of Human Rights (IACtHR), and African Court on Human and People's Rights carry out similar judicial mandates to enforce similar rights human rights provisions. However, these courts have developed very different approaches to interpreting the boundaries of their authority over member state governments. For example, scholars have argued that the European Court's narrow interpretation of the temporal range of its jurisdiction relative to the Inter-American Court has blocked victims of human rights violations in post-conflict European states from accessing international legal recourse that is available to victims of similar crimes in Latin America (Álvarez 2014; Moynihan 2016). The European Court also takes a more deferential approach to mandating remedial measures, preferring to order states to pay financial reparations to individual victims of rights violations but not requiring domestic policy reforms. The Inter-American and African Courts, on the other hand, have repeatedly asserted their authority to issue intensive remedial measures, including political and legal reforms that target the underlying social conditions that facilitate human rights abuses. To address this puzzling cross-court divergence, I investigate two main questions in this project: Where do regional human rights courts' interpretations of

the extent of their authority originate, and under what conditions do those interpretations change?

Regional human rights courts are increasingly recognized as the vanguards of international human rights law. Their rulings have consequential implications not only for the citizens and governments involved in specific cases, but for evolving contemporary legal understandings of what "justice" for state-sponsored repression looks like. For example, the Inter-American Court has pioneered a "right to the truth" in international law requiring governments to investigate and prosecute crimes committed against civilians during civil conflict. More generally, these courts are profoundly influential in defining what compliance with international law means in practice, as regional human rights systems have become more deeply embedded in domestic legal institutions than the global United Nations system (Huneeus and Madsen 2018).

However, not all international courts (ICs) interpret their judicial authority in the same way. International judges can adopt varying perspectives on the boundaries of their authority relative to national institutions, driving divergence across when and how regional courts intervene in domestic affairs. This variation is consequential, first of all for victims of human rights violations and their families. More broadly, regional courts' different approaches to interpreting the boundaries of their authority over governments can result in uneven regional application of purportedly global human rights principles, potentially posing issues for the coherence and legitimacy of international law. On an empirical level, differences across ICs' approaches to ordering remedies in cases of established rights violations raise serious measurement issues for assessing compliance

with court rulings. Take, for example, one court that tends to mandate fewer remedies or types of remedies that are easier for a state to comply with, and another court that tends or order more remedies or remedies that involve significant domestic policy changes that are more difficult to comply with. We cannot meaningfully compare rates of state compliance across those two courts without taking into account the fact that those varying approaches to mandating remedies result in different definitions of what compliance means across those two contexts. Scholars have proposed that compliance rates with IACtHR rulings are generally lower than compliance rates in the ECtHR (Hawkins and Jacoby, 2010; Hillebrecht, 2014). But the fundamentally different nature of how those two courts interpret their authority to order remedial measures raises doubts about whether it is productive to quantitatively compare compliance rates across those two courts in the first place.

Even more fundamentally, ICs' varying approaches to ruling on the admissibility of cases impose selection effects on whether compliance with IC judgements translates to actual improvements in domestic human rights practices. For example, one IC may admit a category of cases involving violations for which it is difficult to get states to implement remedies. This widens the IC's jurisdiction but ultimately lowers the overall rate of compliance with that IC's judgements. Another IC may tend to not admit that same category of cases, which limits that IC's jurisdiction but results in better compliance rates. Without attention to how courts' different approaches to determining admissibility impact which cases receive rulings, it is difficult to infer anything about the relative effectiveness of these courts based on compliance rates alone.

Admissibility decisions provide unique opportunities for IC judges to express their interpretations of the boundaries of their court's authority. The administrative nature of admissibility decisions renders them less visible and thus less likely to attract outside criticism compared to substantive judgements made in the final stages of cases. For example, Odermatt (2018) finds that ICs use procedural rules to subtly avoid ruling on politically sensitive cases. IC judges can use admissibility rulings to express normatively and strategically-motivated interpretations of their authority while maintaining the optics of impartiality and thus preserving the IC's legitimacy. Consequently, admissibility decisions provide a useful outlet for ICs to express how they interpret their authority. These processes have important implications for the extent to which ICs encroach on state sovereignty.

Variation across how ICs' interpret the extent of their authority relative to member governments implicates broader issues of power in international institutions beyond the realm of human rights. International institutions' failure to strike an amenable balance between exerting authority and respecting domestic sovereignty can have disastrous consequences, as has been seen with several governments withdrawing their citizens' right to submit petitions to the Inter-American and African human rights courts in recent years following critiques of judicial overreach. This challenge of exerting authority without causing governments to revolt is endemic to all sorts of international institutions. This project speaks to how regional human rights courts have (successfully and unsuccessfully) navigated that challenge.

This work contains two parts, structured around the two questions it seeks answer:

1) Where do regional human rights courts' interpretations of the extent of their authority originate?

2) Under what conditions do those interpretations change?

In Part I, I demonstrate that regional courts' interpretations of their authority are dependent on those courts' founding senses of social purpose, or in other words, the normative missions that drive court officials' perceptions of their institution's legitimacy. The historical contexts in which the European, Inter-American, and African courts emerged, in conjunction with the professional incentives of the actors who drafted the treaties that those courts enforce, led each court to perceive its legitimacy as arising from different sources. Relying on analysis of primary source documents from negotiations to establish each court as well as early case law, I show how each court developed divergent founding interpretations of judges' authority. The European Court was founded on a "deferential" approach to interpreting its jurisdiction that prioritized respect for national sovereignty. The early Inter-American Court, on the other hand, adopted a distinctly "interventionist" approach that has empowered the Court to assert broader authority in domestic affairs. The African Court, which was founded much more recently and thus benefited from observing the example of the other two courts, initially adopted a middle-ground position on the deferential-interventionist continuum of judicial authority. However, the African Court quickly aligned itself more closely with the Inter-American example, pushing the boundaries of its authority and igniting government ire in the process.

Part II investigates the conditions under which regional courts' interpretations of their authority *change*. What factors can cause international judges to expand or contract their interpretations of their authority over governments? Using primarily qualitative case law analysis, supplemented by insights from interview with court officials, I explore how each court has approached three central areas within international human rights law: freedom of expression, personal integrity rights (which include the right to life and the prohibition of torture), and anti-LGBT discrimination. I find that each court's founding interpretation of its authority has been generally durable. Still, shifts have occurred that have important implications for domestic human rights protections as well as the global coherence of international human rights law. First, the European Court has been uniquely deferential in response to government criticism relative to the Inter-American and African Courts. However, there is evidence that the European Court's deference has been tempered by two factors, particularly in recent years: 1) the severity of the rights violations in question, and 2) evolving social understandings of human rights norms, even without government consensus. The Inter-American Court has largely ignored accusations of judicial overreach, continuing to expand its jurisdiction and power to issue intensive remedial mandates even in the face of state backlash. But, as is particularly observable through the Inter-American Court's freedom of expression jurisprudence, the Court has demonstrated self-restraint and closer attention to emulating the European example in areas where the European Court has relatively more experience. As a much younger court with a comparatively small body of case law, the African Court is still charting its path. However, recent jurisprudence indicates that the African Court is

following the Inter-American Court's lead, shrugging off government criticism and expansively interpreting its jurisdiction and remedial powers. It remains to be seen whether the ACtHPR's interventionism will be politically sustainable.

This project highlights the importance of institutional founding context in shaping the limitations and frontiers of international law. Beyond human rights, my hope is that this research can contribute to better understanding how international institutions define their missions, interact with governments, and learn from one another. In this age of increasing isolationism and resistance to international governance, it is imperative that actors working within international institutions figure out how to calibrate commitment to their normative agendas with the practical exigencies of sensitivity to sovereignty. Doing so requires awareness of how historically-entrenched institutional norms impact actors' formulation of the menu of options they have to confront contemporary challenges.

To offer some context for the following chapters, the paragraphs below will review some basic background information on each of the three regional human rights courts. The establishment, history, organizational structure, and rules of procedure of each court will be discussed in much greater detail later-on.

The European Court of Human Rights

The ECtHR is housed within the Council of Europe (CoE), a political organization founded in May 1949 to advance the cause of European unity following the devastating intra-continental conflicts of the first half of the 20th century. As the judicial arm of the CoE, the ECtHR is charged with enforcing the European Convention on Human Rights. The Convention was adopted in 1950 and has been amended and

supplemented with additional protocols several times throughout the Court's history. The ECtHR is the oldest regional court in the world, and also the busiest by far. The Court has issued over 24,000 judgements in its 63-year history. Accession to the ECtHR has been compulsory for CoE membership since 1998. The Court today possesses jurisdiction over 47 member states.

The original version of the European Convention that was adopted in 1950 established a two-tier framework for settling human rights disputes. First, the Convention established a Commission of Human Rights made up of an equal number of Commissioners to that of member states. The Commission could receive petitions alleging breaches of Convention obligations from any member government or from individuals or NGOs from states that had accepted the right to individual petition. The Commission assisted petitioners and government representatives in reaching friendly settlements to human rights disputes and issued non-binding recommendations for states to address established violations of the Convention. In cases where a friendly settlement could not be reached, the Commission could decide to refer the case to the ECtHR. The ECtHR as it was originally established could only receive cases from the Commission or member governments. The number of judges on the court was equal to the number of CoE member states, with no two nationals of the same state permitted to serve on the Court. Judges served nine-year terms and could be re-elected once.

The Protocol 11 reforms of 1998 eliminated the European Commission as a separate entity from the Court. The Commission's case processing responsibilities, and many of its personnel, were absorbed into the administrative apparatus of the Court

known as the ECtHR Registry. Concomitant with this re-structuring, all CoE member states were required to permit individuals and NGOs to submit petitions directly to the Court. Protocol 11 also reduced ECtHR judge terms from nine years to six years, still permitting judges to be re-elected once. Judge terms were again revised by Protocol 14 in 2010, which restored nine-year terms but eliminated the ability for judges to be re-elected. These and other reforms of the ECtHR's structure and rules of procedure will be discussed in Chapter 6.

The Inter-American Court of Human Rights

The IACtHR is housed within the Organization of American States (OAS). The OAS is the world's oldest regional organization, with a spiderweb of subsidiary organizations devoted to wide-ranging mandates encompassing security issues, economic cooperation, human rights, public health, and sustainable development. The IACtHR is responsible for enforcing the American Convention on Human Rights, which was adopted in 1969 and entered into force in 1978. The IACtHR can also adjudicate the compatibility of state practice with all other OAS-sponsored human rights treaties (for example, the Convention of Belem do Pará, the Convention to Abolish the Death Penalty, and the Convention on Enforced Disappearance).[2] However, any case before the Court must involve a legal question concerning at least one of the rights enshrined in the American Convention.

The drafters of the American Convention largely adhered to the Europeans' two-level model when devising procedures for admitting cases to the IACtHR. Petitions

[2] See a full list of human rights agreements within the Inter-American system at: http://www.oas.org/en/iachr/mandate/basic_documents.asp

alleging violations of the American Convention have to first be submitted to the Inter-American Commission, with no direct individual access to the Court. The Commission investigates admissible petitions and issues opinions on whether respondent states have violated the Convention. In cases where the Commission determines that a violation occurred, it issues non-binding recommendations for the state to address the violation and attempts to guide the disputing parties to a friendly settlement. According to the original terms of the American Convention, if a friendly settlement is not reached or if the state refuses to implement the Commission's recommendations, the case could be forwarded to the IACtHR at the Commission's discretion (Art. 51). This process was later amended in the 2001 reform of the Commission's rules of procedure, which limited the Commission's discretion and established procedures for automatically forwarding cases to the IACtHR. Cases can only be referred to the IACtHR when the relevant state government has acceded to the court's jurisdiction by depositing a declaration under the American Convention. Depositing that declaration is not required to ratify the Convention or for OAS membership.

The IACtHR is composed of seven judges who serve six-year terms. Judges can be re-elected only once. No two judges of the same nationality can serve on the Court. The judicial election process functions similarly to that of the ECtHR. State parties who have accepted the jurisdiction of the IACtHR can propose up to three candidates for consideration to fill judicial vacancies. The candidates must be "jurists of the highest moral authority and of recognized competence in the field of human rights" (Art. 52). Candidates must be nationals of OAS member states, and at least one of each state's three

proposed candidates must be a national of a state other than the proposing state.[3] Judges are elected by absolute majority vote in the OAS General Assembly.

As of January 2022, the IACtHR possess jurisdiction over the 24 OAS member states (out of 35 total member states) that have ratified the American Convention.[4] The IACtHR can only admit cases submitted by individuals and NGOs from the 20 states that have deposited declarations under the American Convention recognizing the right to individual petition. Four states have ratified the American Convention but do not currently recognize the right to individual petition: Dominica, Grenada, Jamaica, and the Dominican Republic.

The African Court on Human and Peoples' Rights

The ACtHPR is charged with enforcing the African Charter on Human and Peoples' Rights as well as all other human rights agreements adopted under the auspices of the African Union (formerly the Organization of African Unity). The African Charter came into force in 1986, but the ACtHPR was not established until the entry into force of the 1st Protocol to the Charter in 2004. The ACtHPR officially began operations at its temporary headquarters in Addis Ababa, Ethiopia, in November 2006. In August 2007, the Court moved to its permanent headquarters in Arusha, Tanzania, where the Court remains today. The ACtHPR issued its first admissibility decision on a case in 2009 and its first final judgement on the merits of a case in 2013. As the world's newest regional

[3] Candidates are not required to be nationals of states that have accepted the jurisdiction of the IACtHR.
[4] The 24 OAS member states that are currently parties to the American Convention are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela.

human rights court[5], the ACtHPR has a much smaller body of case law and fewer member states than its European and Latin American counterparts. However, reflecting on the origins and recent growth of the ACtHPR in comparative context is productive for anticipating how that court will define the boundaries of its authority as its jurisprudence continues to expand. The ACtHPR has issued final judgements on 130 cases in its 18-year history. 195 petitions submitted remain pending before the Court as of January 2022.[6] The ACtHPR's output has drastically increased since 2017. Notably, the COVID-19 pandemic does not seem to have slowed the ACtHPR's operations. The Court issued its highest-ever annual number of finalized judgements in 2021, even while most Court activities (including hearings) had to be conducted virtually.[7]

The African system's case processing procedures are largely similar to the two-level system in the Americas and the pre-1998 European system. The African Commission on Human and Peoples' Rights can receive petitions alleging breaches of human rights obligations from any member government or from individuals or NGOs submitting disputes against governments that have accepted the right to individual petition. Cases submitted to the Commission by NGOs and individuals can only be referred to the ACtHPR when the relevant state has deposited a declaration under the 1st

[5] The Economic Community of West African States (ECOWAS) Community Court of Justice, while founded to adjudicate economic disputes, has gradually expanded its jurisdiction over human rights-related complaints since the early-2000s. Due to the fundamentally different types of treaties that the ECOWAS Court enforces compared to the ECtHR, IACtHR, and ACtHPR, the ECOWAS Court is not considered in this analysis. However, future work could evaluate findings from this study in light of the ECOWAS Court's unique and evolving mandate. For more on how the ECOWAS Court acquired authority to litigate human rights disputes, see Alter et al. (2013).

[6] For a current list of all finalized and pending ACtHPR cases, see: https://www.african-court.org/cpmt/pending

[7] See Figure 7.4, pg. 198.

Protocol to the African Charter consenting to this competence. Depositing this declaration is not required for a state to ratify the Protocol and accede to the ACtHPR. NGOs with observer status before the Commission and individuals submitting petitions against states that have deposited the requisite declaration are permitted to bypass the Commission and submit petitions directly to the Court (Art. 5 (3)). This procedure is unique to the African system.

The ACtHPR's bench consists of eleven judges. All judges must be nationals of AU member states, and no two judges can be nationals of the same state. The judicial election process is similar to that of the other two regional courts. State parties to the Protocol can nominate up to three candidates to fill judicial vacancies on the ACtHPR. At least two of these candidates must be nationals of the proposing state. Unlike the European and American Conventions, the ACtHPR Protocol stipulates that "due consideration shall be given to adequate gender representation" in the judicial nomination process (Art. 12).[8] ACtHPR judges are elected by secret ballot by the AU Assembly. The Protocol imposes two qualifications on this voting procedure: 1) "The Assembly shall ensure that in the court as a whole there is representation of the main regions of Africa and of their principal legal traditions," and 2) "In the election of the judges, the Assembly shall ensure that there is adequate gender representation." (Art. 14). ACtHPR judges serve six-year terms and can be re-elected only once (Art. 15). Currently, 32 AU member

[8] The Council of Europe took a step toward gender equality within the ECtHR in 2004, when the Parliamentary Assembly adopted Resolution 1366. The Resolution stated that the Assembly would not consider a state's submitted lists of judicial candidates if "the list does not include at least one candidate of each sex".

states are parties to the Protocol.[9] In November 2021, Guinea Bissau became the 32nd state to ratify the Protocol accepting the Court's jurisdiction. Only eight state parties to the Protocol also have currently-active declarations accepting the competence of the Court to receive case petitions from NGOs and individuals. These states are: Burkina Faso, The Gambia, Ghana, Guinea Bissau, Mali, Malawi, Niger, and Tunisia.

[9] The 32 States which have ratified the Protocol are: Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Côte d'Ivoire, Comoros, Congo, Democratic Republic of the Congo, Gabon, The Gambia, Ghana, Guinea-Bissau, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, Sahrawi Arab Democratic Republic, South Africa, Senegal, Tanzania, Togo, Tunisia and Uganda.

Chapter 2

Theorizing International Judicial Authority

In 2011, the Inter-American Court of Human Rights (IACtHR) ruled that Argentina had violated the freedom of expression of two magazine editors, Jorge Fonteveccia and Hector D'Amico, who had published details of an affair between former Argentine president Carlos Menem and a congresswoman. Argentina's Supreme Court had previously convicted the two men of violating Menem's right to privacy under the American Convention on Human Rights. The IACtHR, however, decided that the published information was of public interest. Thus, in convicting the men, Argentina had violated their right to freedom of expression.[10] This ruling ignited widespread accusations of inappropriate IACtHR meddling in domestic politics.

In 2017, Argentina's Supreme Court struck back at the IACtHR, ruling that the state did not have to comply with the IACtHR's 2011 decision. The Supreme Court's open defiance of the IACtHR sent "shock waves into the field of regional human rights law" (Contesse 2017). While the IACtHR has routinely faced criticism from states contesting the Court's heavy-handed interpretation of its authority (Neuman 2008; Soley and Steininger 2017), Argentina has stood out amongst its peers in recent decades as one of the Inter-American system's strongest allies. The Supreme Court justified Argentina's non-compliance with the IACtHR by citing case law from the IACtHR's counterpart across the Atlantic, the European Court of Human Rights (ECtHR). The Supreme Court pointed towards the ECtHR's use of a legal doctrine called the *margin of appreciation*,

[10] *Fonteveccia and D'Amico v. Argentina,* Judgement of November 29, 2011 (Merits, Reparations, and Costs) IACtHR.

which the ECtHR applies to determine areas in which it defers the implementation of international obligations to the discretion of state governments. Based on its own interpretation of the margin of appreciation, the Supreme Court argued that the IACtHR had overstepped the boundaries of its jurisdiction.

To be clear, legal scholars have argued that the Supreme Court's citation of the ECtHR in this case was a strategic mis-interpretation of the margin of appreciation doctrine (Arnaiz 2018). However, the Supreme Court ruling demonstrates that domestic judiciaries are picking up on a puzzling disconnect between the IACtHR and ECtHR's interpretations of their respective authorities to intervene in domestic affairs. Several scholars have noted the ECtHR's general tendency to grant broader deference to member states relative to the IACtHR when ruling on alleged rights violations and mandating remedies for violations (Antkowiak 2007; Cavallaro and Brewer 2008; Contreras 2012; Anagnostou and Mungui-Pippidi 2014). However, existing scholarship lacks attention to the underlying mechanisms that drive variation across how regional human rights courts interpret the boundaries of their authority. Where do courts' interpretations of the extent of their authority originate, and under what conditions do those interpretations change? Answering these questions is crucial for anticipating the consequences of inter-court doctrinal disagreement in the increasingly globalized arena of regional human rights litigation.

Variation across how regional courts interpret the extent of their authority has pervasive implications for the role that those courts play in influencing domestic human rights practices. For example, scholars have argued that the ECtHR's narrow

interpretation of its temporal jurisdiction and rigid evidentiary standards in cases of enforced disappearances relative to the IACtHR have limited the ECtHR's ability to facilitate transitional justice in post-conflict states (Claude 2010; Álvarez 2014; Heri 2014; Moynihan 2016). On the other hand, the IACtHR's lack of flexibility in allowing member states discretion to implement certain rights obligations may undermine the Court's mission to strengthen domestic democratic institutions (Neuman 2008). For example, Torrijo (2002) argues that the IACtHR's refusal to allow governments discretion to restrict the right to freedom of expression prevents governments from taking measures such as breaking up media monopolies or limiting the influence of corporate money in politics (237). These studies shed light on some of the consequences of variation across how the ECtHR and IACtHR interpret their judicial authority. However, the causes of this variation and the conditions under which these courts' interpretations change remain unclear.

This chapter will first introduce my argument for where international courts' interpretations of the extent of their authority originate, as well as the conditions under which those interpretations may change. I describe my research design in Section II, including case selection rationale and the indicators I have developed to evaluate deferential and interventionist judicial behavior in ICs. In Section III, I elaborate on the theoretical motivations supporting my argument and speak to the position of this study within relevant extant scholarship. Section IV summarizes the hypotheses I will evaluate throughout this work. The final section offers a brief guide to the chapters ahead.

I. Theory

I propose that regional courts' interpretations of their authority are dependent on those courts' founding sources of legitimacy. The historical context in which a court is founded influences how the judges who serve on that court perceive the sources of the court's legitimacy. Specifically, the level of democratization and regime stability amongst a court's founding member states fundamentally conditions how a court derives internal legitimacy. Regime type and stability can drive the level of influence of legal bureaucrats relative to political advisors in the institutional design process, with implications for the delegation of authority to the court. Additionally, these regime factors can influence the types of human rights issues that judges confront in the early years of the court. These early cases are crucial for establishing precedent, with long-term influence on how judges and lawyers working within the court interpret the reach of the court's jurisdiction. Based on the court's formal mandate (as written into its constitutive documents) and the primary challenges confronted by a court in its early years of operation, court officials will self-define their legitimacy as more or less tied to cooperation with member state governments and respect for state consent to jurisdiction. Court officials will reference this legitimation narrative to define the appropriate exercise of court authority, establishing a durable framework for when and where the court will intervene in domestic affairs.

Consistent with scholarship on delegation to international organizations (IOs), the ECtHR's legitimacy was initially forged from strong mechanisms of state consent to jurisdiction. The ECtHR's prioritization of state consent arose from a foundation of trust in domestic judiciaries and the need for unprecedented multilateral cooperation to support

the fledgling European integration project. Consequently, the ECtHR has adopted a "deferential" approach to interpreting its jurisdiction that prioritizes non-intervention in domestic sovereignty. The IACtHR, on the other hand, has from its inception relied on a unique sense of moral legitimacy to interpret its judicial authority. In an era in which military dictatorships and civil unrest plagued much of Latin America, the founders of the IACtHR lacked trust in domestic institutions. Founding IACtHR judges perceived the Court's legitimacy to rest on a normative imperative to protect vulnerable individuals from their governments. This manifested in the Court adopting an "interventionist" conceptualization of its authority.

An expansive literature analyzes how legitimacy empowers IOs to wield political authority. An IO is "legitimate" when its exercise of authority is perceived by member states as inherently justified rather than imposed through persuasion or force (Bodansky 2008). Legitimacy in IOs is often understood as grounded in state consent (Meltzer 2005). States consider an IO to be legitimate because they have previously consented to delegate specific powers to that organization, including, in the case of international courts (ICs), the power to resolve legal disputes. Codified rules governing an IC's procedures provide mutually-agreeable guidelines directing the court's exercise of its authority. But these rules often leave substantial room for interpretation, and ICs vary considerably in their prioritization of state consent when interpreting the reach of their mandates. For example, the IACtHR has been criticized for insufficiently considering state consent in its evolutive interpretation of the American Convention (Neuman 2008). Helfer and Alter (2013) find that "expansive" judicial lawmaking in ICs- lawmaking that extends the

court's "jurisdiction or review powers beyond the boundaries imposed by states"- does not automatically provoke a court's constituents to challenge its legitimacy (484-5). In other words, the powers formally delegated to an IC do not fully exhaust that court's legitimate authority. Rather, courts may develop *de facto* authority, meaning that member states feel obligated to comply with the court's decisions and take purposeful action to do so (Grossman 2013; Alter et al. 2016).

Existing scholarship largely assumes that legitimacy is conferred by a court's constituents, namely states and citizens. Little is known about how actors working *within* ICs interpret the sources of their court's legitimacy. This interpretive process is fundamentally guided by an IC's sense of mission to adhere to certain normative principles, what John Ruggie (1982) refers to as "social purpose." Ruggie proposes that international regimes fuse power and social purpose to project political authority (382). Building on this, I argue that the geopolitical contexts in which ICs are founded permanently condition their normative commitments, creating a court's social purpose. Judges and lawyers within ICs reference these normative commitments to identify the sources of their institution's legitimacy. This process shapes how judges and lawyers interpret the extent of their authority, establishing a durable framework that guides when and how the IC will intervene in domestic political affairs.

I hypothesize that, while regional courts' founding interpretations of their authority are generally durable, there are conditions under which those interpretations can shift to become more or less deferential or interventionist. First, courts that were founded on deferential interpretations of their authority will be more responsive to member state

criticism than interventionist courts. When faced with backlash from member states, deferential courts will further constrict their interpretations of the reach of their authority to better fit vocalized state preferences. Interventionist courts, on the other hand, will resist similar calls to scale back the exercise of their authority. Second, inter-regional court interaction (for example, cross-court citation, staff exchanges, and meetings between representatives of different regional courts) can also drive changes in how ICs interpret their authority. Greater exposure to other courts' jurisprudence can lead judges to re-examine how they conceptualize their own court's interpretation of its authority. This cross-regional engagement may shift judges' perspectives on the legitimate reach of a court's jurisdiction and the role of the court in domestic politics. Third, changes in the types of rights violations that dominate a court's docket can prompt the court to reinterpret the extent of its authority. These changes may be provoked by the accession of new member states to the court. For example, if a group of member states that are experiencing widespread human rights violations accedes to a regional court, that court may adopt a more interventionist interpretation of its authority to respond to these urgent concerns.

An alternative explanation for variance across regional courts' interpretations of their authority might posit that these interpretations are not derived from a court's founding social purpose, but rather from logistical conditions. A given court may have a relatively homogenous group of member states, primarily receive cases raising similar complaints, and/or have a smaller caseload. As a consequence of these material conditions, that court may be less restrictive about admitting cases, have the time to be

closely involved in enforcing compliance with its judgements, and be less willing to grant deference to states that deviate from status-quo expectations. A different court may have an overloaded docket, member states with diverse legal systems and geopolitical conditions, and/or routinely hear cases along a vast range of issue areas. For the sake of efficiency, this court may be more restrictive about admitting cases, defer responsibility for enforcing judgements to domestic authorities, and more willingly grant states discretion to as to how to implement their human rights obligations. If an IC's interpretation of the extent of its authority is determined by logistical constraints, shifts towards more or less interventionist or deferential behavior will occur around the same time periods in which 1) the IC is facing an overwhelming docket, 2) the IC has admitted new member states, and/or 3) the IC has recently undergone institutional reforms oriented towards making the IC more efficient.

II. Research design

I propose that ICs fall under two broad categories in terms of how they interpret the extent of their authority- "deferential" and "interventionist". In order to establish this qualitative differentiation in how courts interpret their authority, we need clear definitions of what "deferential" and "interventionist" courts respectively look like. In very general terms, "deferential" courts predominantly derive their legitimacy from state consent to explicit boundaries of the Court's jurisdiction. These courts are hesitant to push for extensions in the court's mandate beyond what states have consented to through ratification of the Court's constitutive documents. "Interventionist" courts, on the other hand, base their legitimacy on self-interpreted mandates not directly conferred on those

courts by state parties. Interventionist courts seek to expand their mandate even in the absence of explicit state consent to do so.

These definitions are, admittedly, vague. To more specifically delineate the differences between deferential and interventionist courts, I use a series of indicators to evaluate whether a court employs a deferential or interventionist interpretation of its authority. These indicators are observable at the three main stages of case processing within ICs: 1) the admissibility stage, when a court decides whether it possesses jurisdiction to hear a case that an applicant has submitted; 2) the merits stage, during which the court evaluates the substantive claims made in an admitted case and rules on whether an applicant's rights have been violated; and 3) the remedial stage, when the court determines what reparations or others compensatory actions a state must implement to address an established rights violation. An IC's conceptualization of its own authority can be measured by assessing which cases the court takes on, how the court decides whether a state has violated its human rights obligations, and the characteristics of court-mandated remedial measures. In my measurement of court behavioral indicators across these three phases of case processing, "deferential" and "interventionist" are not necessarily mutually-exclusive categories. In theory, a court can simultaneously exhibit deferential characteristics in one stage of case processing and interventionist characteristics in another stage, or even within the same stage.

Indicators of "deferential" vs. "interventionist" judicial behavior

In the case admissibility stage, I evaluate two indicators: whether the court 1) adopts a narrow or flexible interpretation of its temporal jurisdiction, and 2) adopts a

narrow or flexible interpretation of its procedural admissibility criteria. A court can be categorized as deferential if it adopts narrow interpretations of its temporal jurisdiction and procedural admissibility criteria. A court can be categorized as interventionist if it adopts flexible interpretations of its temporal jurisdiction and procedural admissibility criteria.

In the merits stage, I evaluate three indicators: whether the court 1) applies a "margin of appreciation" or similar doctrine to grant states discretion to implement their international legal obligations, 2) routinely selects to rule only on the *core* allegations in a petition, rather than all allegations, and 3) allocates the burden of proof to the state as opposed to the applicant. A deferential court will employ a margin of appreciation to grant states discretion to implement human rights obligations, routinely rule only on the core allegations in a petition, and maintain evidentiary standards that allocate the burden of proof to the applicant. An interventionist court will not employ a margin of appreciation doctrine, will rule on all of the allegations in a petition, and will routinely adjust evidentiary standards to shift the burden of proof to the state.

In the remedial stage, I evaluate two indicators: whether the court 1) mandates remedial measures that focus on individual victims as opposed to targeting underlying societal conditions, and 2) maintains the authority to abrogate domestic legislation. A deferential court will mandate remedies focused on individual reparative measures and not assert that the court has the authority to abrogate domestic legislation. An interventionist court will routinely mandate remedies that go beyond individual measures and target broader societal conditions and will assert that the court has the authority to

abrogate domestic legislation. Additionally, a key indicator that a court's founders intended for the court to be deferential or interventionist is the mechanism by which compliance with court judgements is monitored and enforced. In a deferential court, monitoring and enforcement responsibilities will be delegated to a political body, as is the case in the European system. The Committee of Ministers is responsible for monitoring and enforcing ECtHR judgements, in coordination with judges. An interventionist court will be given singular authority to monitor and enforce compliance with its own judgements, as is the case in the Inter-American system. For more precise specification and examples of each indicator I evaluate in this study, see Tables I and II in the Appendix to this chapter (pg. 385).

Case selection

Due to the breadth of each court's case law and my resource constraints, I focus my analysis on cases involving specific rights protections. In order to take into account how the human rights challenges faced by each court have evolved over time, I have collected data from cases involving three types of substantive rights: 1) freedom of expression, an issue that was prevalent in each court's early years, 2) personal integrity rights protections (including the right to life and prohibition of torture), which dominated the Inter-American Court's caseload during its early years but were not routinely confronted by the European Court until much later in that court's life, and 3) protections against anti-LGBT discrimination, an issue that was not a concern of any court early-on but later received greater focus as international standards evolved.

III. Theoretical motivations and relevant literatures

Delegation to International Organizations

International courts, like all international organizations (IOs), are first and foremost created to serve state interests. The powers that founding member state governments *ex ante* delegate to an IC form a menu of options that constrain how that court can exercise its authority moving forward. The literature on state delegation to IOs provides a starting point for investigating the origins of regional courts' interpretations of their authorities. Beginning from the assumption that states are rational actors seeking to maximize their self-interest, the delegation literature theorizes the conditions under which states can be incentivized to sacrifice their sovereignty to transfer certain powers to IOs. In principal-agent (P-A) theories, states are conceptualized as "principal" actors who create IOs to serve as "agents" for the fulfillment of collective objectives. IOs help states achieve common goals by lowering the transaction costs associated with policy-making, assuaging information asymmetries between state and non-state actors, and providing forums in which states can make credible commitments to one another (Pollack 2007, Guzman 2008).

States must weigh the benefits of delegating authority to an IO against the costs of weakened policy autonomy. P-A theories assume that, when mechanisms of state control over an IO's autonomy are strong, the commitment embodied by delegation to that IO will be less credible, and vice versa. Following from this logic, if the barriers for commitment between member states are high, those states will delegate more authority to the IO to enhance the credibility of their commitments to the collective. In other words, when states suspect that others will cheat on agreements, or when uncertainty abounds

about state behavior and/or future developments in the world, states will derive greater benefits from delegating authority to an IO to make enforcement of an agreement more likely. If the barriers to commitment between member states are lower, meaning that states expect that they will generally uphold their commitments to one another, those states will prefer to keep the IO's decision-making powers limited to preserve their own sovereignty. (Leeds 1999, Abbot and Snidal 2000, Mansfield and Pevehouse 2006, Stone Sweet and Brunell 2013). States use delegation to IOs not only to make credible commitments to other states, but to their domestic publics as well. For example, Milner (2006) finds that democracies are more likely to delegate the distribution of foreign aid to IOs when voters lack trust in their government to distribute aid according to public preferences.

Principals generally seek to constrain agents' exercise of independent discretion to ensure that agents act in accordance with principals' preferences. Through codifying rules of procedure that govern how agents can act and incentivizing adherence to those rules, principals can *ex ante* constrain agents' actions (McCubbins et al., 1987). But agents' preferences often diverge from that of their principals, for reasons anticipated and unanticipated by principals. *Ex ante* efforts to control agents may prove ineffective when circumstances arise that principals did not anticipate or when the contracted rules governing the principal-agent relationship are sufficiently vague as to allow the agent to develop its own interpretation of its mandate (Hawkins et al. 2006). In such circumstances, principals may seek to mitigate these "hidden action" problems by imposing *ex post* constraints on agents through monitoring requirements, judicial review,

or other "policing" mechanisms (Nielson and Tierney 2003, Bertelli 2006). Principals may also deliberately grant agents discretion to formulate and execute their own preferences for the sake of increasing policy effectiveness or making commitments more credible (Martin 2006, Pollack 2007). The high value that states place on judicial independence in ICs exemplifies one avenue through which principals constrain their own authority to enhance the credibility of commitments made through delegation (Helfer and Slaughter 2005).

Some scholars have argued that P-A theorists' tendency to assume that principals and agents have *a priori* divergent preferences is unfounded. After all, as Barnett and Finnemore (1999) note, principal states create IOs and write their founding documents. Therefore, it seems not at all unlikely that IO agents would adopt similar preferences to those of their principal states (705-6). In their analysis of when IOs engage in slack, Cortell and Peterson (2006) push back against the assumption that an IO will necessarily take independent action undesired by its principals if given sufficient autonomy to do so. The authors argue that independent action is not driven by the presence of autonomy alone, but by the existence of divergent preferences between an IO and its principals. Any effort to test how the convergence of preferences between IOs and principals impacts IO predilection to independence is complicated by the fact that, of course, state principals themselves often do not share coherent preferences. Indeed, the logic that states delegate to IOs in order to make credible commitments to each other inherently assumes some level of discoordination across principals.

Existing scholarship finds evidence that regime type influences the barriers to commitment between states and consequently drives levels of delegation to IOs. For example, Koremenos (2008) finds that established democracies are less inclined to delegate power to IOs. She suggests that states with more tumultuous recent political histories may face internal commitment problems that make it difficult for them to credibly commit to future cooperation. Thus, such states will be more open to delegating authority to an IO (154). This logic is supported in Simmons and Danner (2010)'s study of delegation to the International Criminal Court (ICC), in which the authors find that the least democratic states with the weakest reputations for respecting the rule of law were the most likely to ratify the Rome Statute (the constitutive document of the ICC) the quickest, despite the Statute's high "sovereignty costs". The authors propose that the states that most severely lack dependable domestic mechanisms for holding government agents accountable are the most likely to seek out international mechanisms for doing so. Transitional democracies might be particularly eager to commit to supranational accountability mechanisms. There is evidence that transitional democracies are more likely to seek membership in international human rights organizations than both autocracies and established democracies (Moravcsik 2000), and furthermore that transitional democracies are particularly likely to seek membership in international human rights courts (Hafner-Burton et. al 2015). This phenomenon may be a result of the relatively high sovereignty costs that human rights courts are theorized to impose on member states, which boost the credibility of commitments signaled through delegation to such courts (2).

These findings suggest that the regime types present among an IO's founding member states influence the extent of the powers that are initially delegated to that IO. These findings may also have implications for whether and how IOs act independently of their principals once in operation. For example, an IO comprised of a variety of regime types may exhibit greater variation in member state preferences as opposed to an IO comprised of more similar regimes. Consequently, while an IO with a homogenous membership body may be able to pick up on coherent signals indicating its principals' preferences, another IO with a relatively more heterogenous membership body may observe more disjointed preferences across its member states. Lacking coherent signals of principal states' preferences, an IO with relatively more heterogenous membership may come to adopt its own preferences to fill that void and bolster its own sense of mission. Thus, even if homogenous and heterogenous IOs were imbued with similar potential to exercise discretion during the institutional design process, the heterogenous IO would be more likely to actually engage in slack and act independently.

A two-step process could also occur in which regime type influences both the potential for discretion written into an IO's constitutive documents and the probability that the IO will actually use that discretion to act independently of its member states' preferences. First, variation in regime type and/or regime instability within a group of IO founding member states could increase the barriers to commitment between those states relative to a group of more homogenous states. As a result, the heterogenous group of states will create an IO with more discretionary authority in order to enhance the credibility of those states' collective commitment to delegation. Second, because of a

lack of preference clarity among its principal states, the IO with a heterogenous membership body may be more likely to actually utilize that discretionary authority and formulate independent preferences. Importantly, this theory cannot tell us anything about 1) why states seek to impose specific boundaries on an IO's authority during the institutional design process or 2) whether any given IO is more or less likely to take independent action that expands its authority as opposed to contracting that authority. To address these issues, we must move beyond P-A theory to better understand the incentives that an IO has to develop more or less expansive interpretations of its authority.

De-constructing "the state" to explain delegation to ICs

Two significant limitations of P-A theories of delegation are that 1) these theories "black box" both state principals and IO agents, ignoring internal characteristics of the various actors who comprise states and IOs and 2) these theories lack attention to third-party interventions in the principal-actor relationship, for example, the role of non-governmental organizations (NGOs) or other non-state actors in mediating between state governments and IOs (Pollack 2007). Third parties can provide exclusive information to principals which structure the alternatives that principals choose between when deciding whether and how to delegate power to an agent. Through monitoring and reporting activities, third-parties can ameliorate information asymmetries between states, IOs, and relevant constituencies (Lake and McCubbins 2006). Third parties also often engage in activism to interject new policy incentives into the principal-agent relationship. For example, "transnational advocacy networks" comprised of NGOs and transnational

activists serve as consequential sources of pressure on states and IOs to uphold the interests of marginalized constituencies (Keck and Sikkink 1998, Zippel 2004, Novak 2020).

P-A theories' simplifying assumptions are helpful in that they allow scholars to construct generalizable, mid-level theoretical models of state-IO relationships. However, these assumptions render P-A theories insufficient for explaining particular delegation behaviors and the mechanisms linking those behaviors to specific legal and political outcomes. For example, domestic obstacles to committing to respect human rights may compel a state to join or help found an international human rights court. While informative, this explanation tells us little about why certain limits to an IC's jurisdiction are written into that court's constitutive documents or why states agree to specific procedures to appoint judges to that IC. These institutional design features fundamentally influence how an IC comes to interpret the extent of its authority over member state governments. P-A theory may be more helpfully employed as a "building block" upon which finer-grained theories can be layered (Pollack 2007). For example, Voeten (2008) proposes devising a theory in which the initial act of delegation to an IC is driven by states' rational desire to make credible commitments, while subsequent dynamics of that IC's operations are explained through a neofunctionalist lens that emphasizes the normative influence of non-state and sub-state actors (429-30).

Designing an IC requires the participation of legal professionals who have specific expertise in international law and may or may not be concerned with accommodating states' political interests. These legal professionals occupy a unique

position of power mediating the principal-agent relationship that cannot be accounted for in theories that assume that states as unitary actors determine the powers delegated to an IC. The role of judges as IC "founders" is similarly overlooked in the delegation literature. An IC's founding judges establish the court's first precedents and, in most cases, are responsible for drafting the court's rules of procedure. As such, founding judges have significant influence over how ICs implement certain delegated powers. This is particularly true when the language of an IC's constitutive documents leaves room for interpretation regarding the precise boundaries of the court's jurisdiction. This study addresses the delegation literature's disproportionate state-centrism by incorporating analysis of the various sub-state and non-state actors who participate in negotiations to found regional courts and draft those courts' constitutive documents.

Deitelhoff's (2009) study of the negotiations to draft the Rome Statute establishing the International Criminal Court (ICC) reveals how the interests of the most powerful of the negotiating states were eventually subverted through normative appeals made by small and middling powers, assisted by NGOs, to delegate greater authority to the Court. Due to the level of legal expertise required to draft the Rome Statute, the majority of delegates that states sent to the ICC negotiations were legal advisors, while political advisors made up the minority in most delegations (54-5). Initially, the negotiations were dominated by a major power coalition that favored strong requirements for state consent to jurisdiction and extensive Security Council oversight of the Court. However, Dietelhoff identifies a turning point when a lesser-power coalition rapidly gained support by consolidating a normative "public interest" narrative that framed the

ICC negotiations as an unprecedented opportunity to create a highly autonomous court capable of overriding dominant power interests. In spite of contradictory pressure applied by the U.S., the lesser-power coalition persuaded a sufficient number of previously uncommitted states, and the majority of the coalition's demands were incorporated into the Rome Statute. This previously uncommitted group primarily comprised transitional states in Africa, Latin America, and Central and Eastern Europe. These states' delegations lacked the resources to be fully present during drafting conferences and consequently had low rates of participation in the earlier stages of negotiations before they were targeted for greater involvement by the lesser-power coalition (50-55).

Dietelhoff's study indicates that the final level of delegation to the ICC was not merely a function of barriers to commitment between states of diverse regime types, or a result of unstable regimes seeking to signal enhanced commitments to human rights in order to bolster their international reputations. Rather, the high level of delegation incorporated into the ICC's institutional design came about because particular actors, mostly legal professionals in delegations from less-powerful states, sought to create a highly legalized regime whose authority could transcend dominant state political interests.

The role of the international bureaucracy in constructing IO authority

The legal professionals who participate in designing international courts can be considered "international bureaucrats," a group of actors whose participation in global politics has emerged as an important but understudied area in the field of international relations. International bureaucrats are distinguished from political actors who represent

states in international settings by the fact that international bureaucrats derive their legitimacy not from their ability to execute state interests but from their technical expertise and independence from political forces. Steffek (2003) claims that the international bureaucracy is the "perfect" representation of what Max Weber conceptualized as "rational-legal" bureaucratic rule:

> Maximum neutrality is achieved by cutting the last ligaments between the civil servant and his local background, once he serves in another country, even on another continent. The international bureaucrat has less stakes in the decision than her colleague in a national bureaucracy. Thus, international bureaucracy fulfils the criteria of a legal-rational legitimation more than any other; not in terms of efficiency, to be sure, but with regard to personal detachment and neutrality. (261)

If the international bureaucracy is the perfect example of rational-legal bureaucratic rule, then ICs are examples of ideal rational-legal bureaucracies. After all, the legitimacy of judicial institutions is primarily evaluated based on their independence from the actors subject to their jurisdiction and on the legal expertise of the people who work in those institutions. Yet, aside from a limited literature on the independence of international judges from their home countries[11], little scholarly work has focused on how legal bureaucrats influence the IC design process and the long-term development of ICs' roles in global and domestic politics.

The "objective" exercise of expert knowledge by bureaucrats creates depoliticization (or, at least, an appearance of depoliticization) within bureaucracies that bolsters those institutions' claims to legitimate authority. However, "bureaucracies are

[11] Existing evidence from the European Court does not indicate that judges are inherently biased in favor of their home states (Voeten 2008). The issue of judicial independence has not, to my knowledge, been systematically evaluated in the IACtHR or the ACtHPR.

always created to defend or promote values," and bureaucracies' claims to authority also hinge on their ability to embody those values. In their interactions with the constituencies they were created to serve, bureaucracies must constantly balance these competing narratives from which they derive authority and legitimacy: depoliticization and adherence to normative principles. (Barnett and Finnemore 2005: 174). These principles, and particularly how they are articulated by the various actors who participate in the institutional design process, are critical for guiding the establishment, embedding, and subsequent development of any IO's interpretation of its authority. Bureaucracies are often compared to machines in that every action that bureaucrats take must align with clearly-defined procedures and rules that result in consistent and predictable outcomes. However, "people will only accept the workings of the machinery if they accept its aims and the principles according to which it functions" (Steffek 2003: 261). ICs exemplify this delicate balancing act. IC judges must carry out the normative mandate that prompted the creation of their court while eschewing political influence, deciding cases originating from often wildly disparate domestic contexts in a manner that is objective, consistent, transparent, and equitable. In this sense, we can consider IC judges as belonging to the community of international bureaucrats.

Several scholars have argued that international bureaucrats play an integral role in IO design and development that is often more independent from state interests than rationalist theories of international delegation predict (Barnett and Finnemore 1999, Reinalda and Verbeek 2004, Vaubel 2006). Tana Johnson (2014) documents how international bureaucrats working in pre-existing IOs often use the institutional design

process to insulate new IOs from states' interference. This has resulted in international bureaucrats' increasing influence in IOs since the mid-20th century. Johnson notes that this phenomenon may not extend to IO design negotiations that involve a highly capable group of states that do not face challenges such as a lack of resources or severe collective action problems. In other words, negotiation delegations from technically capable, wealthier states are less likely to lose control over the negotiations and cede power to international bureaucrats (13).

Aforementioned scholarship has proposed that high delegation to IOs amongst transitional and unstable states is driven by a desire to signal credible commitments to the international community. Dietelhoff and Johnson's findings suggest another explanation: transitional and unstable states may tend to delegate greater power to IOs because international legal bureaucrats can exploit openings created by those states' lack of resources and internal disorganization to capture control over designing IOs and negotiating state accession.

Building on this logic, I propose that IC design negotiation delegations from transitional states will be more likely to push for imbuing the court with wide-reaching authority relative to delegations from established democracies. This is because legal bureaucrats have greater opportunity to capture control over delegations from transitional states whose political advisors lack the resources, organizational capacity, and perhaps even the political will to fully participate in design negotiations. Legal bureaucrats who participate in founding an IC, by virtue of their professional backgrounds and expertise in international law, are likely more inclined than state executives and political advisors to

favor creating an IC with broad legal authority. Thus, I anticipate that the written mandates of courts whose founding membership consists primarily of transitional states will be relatively more expansive compared to the written mandates of courts whose founding membership consists primarily of established democracies.

The predominant regime types within a court's founding membership will also condition that court's exercise of its authority by influencing how judges navigate their relationships with governments. Established democracies that already largely respect human rights will be less inclined to sacrifice sovereignty to the IC because they have less to gain from joining. In this context, IC judges will need to tread carefully and demonstrate respect for domestic sovereignty in order to gain legitimacy. Member state regime type will also impact judges' relationships with domestic institutions by influencing the types of cases that judges confront in the early years of the court. A court whose membership consists primarily of established democracies is likely to face cases involving isolated instances of human rights shortcomings rather than systemic state-sponsored abuses. These conditions are more likely to foster trust in domestic judiciaries among IC judges, guiding the IC towards a deferential interpretation of its authority. Due to the unique signaling incentives that membership in an IC affords transitional regimes, judges within ICs whose membership consists of mostly transitional regimes may not have to behave as deferentially towards national institutions in the early years of the court. Such courts are also likely to face markedly different caseloads compared to majority-established democracy ICs. Recent systemic (and potentially ongoing) human rights abuses in transitional regimes will lead IC judges to be less inclined to trust

domestic judiciaries and more inclined to interpret the IC's power expansively. These dynamics will push the court towards a more interventionist interpretation of its authority.

IV. Changing interpretations of IC authority: 3 hypotheses

The types of governments that make up an IC's founding membership and the nature of the cases faced by judges in the early years of the court are crucial contextual factors that condition how a court interprets its authority. While I propose that ICs' founding interpretations of their authority are generally durable, these interpretations are by no means "locked-in" throughout the life of a court. Bureaucracies are not generally known for their dynamism. Institutionalized norms and routinized adherence to established rules and procedures foster bureaucratic tendencies to maintain the status-quo. This resistance to change may be particularly acute in ICs. Stringent legal procedures and doctrines foster entrenched organizational cultures in ICs. International judges often value adherence to widely-shared legal norms as markers of their professional legitimacy (Goldberg, 1984; Arold, 2007). Even so, factors such as the legalization of new norms, exterior political influence, the rotation of judges serving on a court, and the accession and withdrawal of member states can prompt changes in how a court interprets its social purpose.

I hypothesize three conditions under which regional courts' founding interpretations of their authority can shift along the deferential-interventionist continuum. First, if a regional court has a "deferential" interpretation of its authority, we should expect the court to respond to member state backlash by further constraining its

interpretation of its authority to align with vocalized state preferences. This expectation is due to deferential courts' prioritization of state consent in determining the legitimate exercise of their judicial authority. We should not expect an "interventionist" court to be similarly responsive to state backlash. Interventionist courts rely on internally-conceived normative interpretations of their authority that are independent from state consent. Consequently, interventionist courts will be less likely to scale back their mandate due to vocalized state opposition.

Second, as inter-court interaction increases between deferential and interventionist courts, I hypothesize that a given court will be more receptive to emulating another court's interpretation of its authority within areas of case law in which that other court has more experience. This hypothesis is based on a recent trend indicating that the regional human rights courts are increasingly seeking to collaborate with one another and reach greater convergence in legal understandings across the three systems. The ECtHR, IACtHR, and ACtHPR have increasingly cited one another's judgments in recent years (Voeten 2010, Hamilton and Buyse 2018, Sandholtz and Feldman 2019). In October 2019, representatives from the three regional courts signed the Kampala Declaration, an agreement that committed to strengthening inter-court coordination through jurisprudential dialogue, joint conferences, staff exchanges, and determination of common best practices.[12] On March 25, 2021, judges and lawyers from the three regional courts participated in the 2nd International Human Rights Forum (held virtually due to the pandemic) to discuss pressing human rights issues in their respective

[12] *Kampala Declaration*, First International Human Rights Forum, Kampala, Uganda, 28-29 October 2019.

regions, recent case law developments, and potential avenues for achieving greater cooperation and cross-court jurisprudential coherence.

Rising convergence in the types of cases brought before regional courts is a crucial catalyst of inter-court dialogue. Sandholtz and Feldman (2019) find that the IACtHR and ECtHR have turned towards one another's case laws when faced with issues with which one court has more experience than the other. The IACtHR has been particularly likely to cite the ECtHR in cases involving civil rights issues (for example, rights to privacy, gender and sexual orientation discrimination, and reproductive rights). While these issues have long been featured in the ECtHR's case law, they are relatively new to the IACtHR, whose early case law was largely monopolized by personal integrity rights violations. Similarly, the ECtHR began to cite the IACtHR more frequently in the late-1990s and 2000s as the ECtHR faced an uptick in personal integrity rights complaints, an area in which the ECtHR lacked jurisprudence. In both courts, cross-court citation gradually expanded to include issue areas for which each court already had established case law (113-19). This indicates that judges perceive benefits to importing external jurisprudence beyond simply filling gaps in existing case law.

According to Voeten (2010), another benefit of "borrowing" jurisprudence from another court is that it legitimizes judges' decisions by signaling that their legal reasoning is shared by peers. This signaling benefit may be particularly useful for "activist" judges who favor an expansive interpretation of their court's authority. Activist ECtHR judges are more likely to cite external sources of law, suggesting that judges who broadly interpret their mandate may find it helpful to lean on jurisprudence from other courts to

justify that interpretation. In that vein, ECtHR Justice Laffranque (2008) has noted that inter-court citation can support legitimate and non-arbitrary "judicial creativity." (1291-92).

Finally, I hypothesize that changes in the types of rights violations that dominate a court's docket can prompt the court to reinterpret the extent of its authority. Shifts in the types of cases that are submitted to an IC may accompany changes in IC membership as states accede to and/or withdraw from the court. As discussed above, cases involving different substantive issues have dominated each regional court's docket at varying times in those courts' histories. The types of cases routinely heard by an IC may impact how the court interprets the boundaries of its jurisdiction. For example, if a deferential IC faces a deluge of cases involving grave human rights crimes (such as torture or other personal integrity rights violations), judges may lose trust in domestic authorities' will and/or ability to uphold rights protections. Consequently, the IC may adopt a more interventionist interpretation of its authority in an effort to reel in governments who are routinely failing to guarantee their citizens' most fundamental rights. Alternatively, an interventionist IC may at some point observe that most of the cases it is receiving involve relatively less severe rights violations, for example property rights or privacy disputes. Observing that governments are generally exhibiting willful compliance with human rights law, the IC may scale back its interpretation of its authority to allow states greater deference. In this way, fluctuations in the types of rights violations that are prevalent within an IC's membership may induce changes in how the IC interprets its role in securing human rights domestically.

V. Conclusion

International courts, like all international organizations, are founded by states to advance those states' collective goals and preferences. ICs are unique, however, in that their legitimacy as judicial institutions intrinsically hinges on independence from political actors. This paradox creates openings for ICs to variably prioritize adherence to state consent when delineating appropriate deference to national authorities. As international bureaucracies, international courts do not merely apply law as it is written, but evaluate the compatibility of state behavior with the law through the lens of the court's mission to uphold certain normative principles. These principles, in other words, the court's founding social purpose, drive judges' interpretations of the legitimate boundaries of their court's intervention in domestic affairs. I propose that founding social purpose in ICs is driven by two interrelated factors: the types of regimes that comprise a court's founding membership and the professional backgrounds of the people who draft the court's constitutive documents. By prying open the black box of the state and examining the dynamics of negotiations to found international courts, we can see that the ability of legal bureaucrats to exert influence in those negotiations varies across states and has important implications for the level of authority ultimately delegated to the IC. Furthermore, the types of cases an IC hears in its early years impacts the level of deference that international judges are willing to afford to domestic authorities. As a result, somewhat counterintuitively, the ICs that are founded in the most inhospitable environments for human rights end up asserting broader authority over governments.

Chapters 3, 4, and 5 describe the founding of each of the three regional human rights courts, with special attention to the political contexts surrounding their establishment and the unique priorities of the actors who were involved in drafting their constitutive documents. Chapter 6 investigates how each court articulated its social purpose through its early judgements on cases involving the right to freedom of expression and personal integrity rights. Chapter 7 provides a framework for evaluating how each court's interpretation of its authority has (or has not) changed over time, based on the hypotheses proposed above. Chapters 8, 9, and 10 assess the validity of those hypotheses through in-depth analysis of the evolution of each court's case law with respect to freedom of expression, personal integrity rights violations, and, finally, anti-LGBT discrimination, an area in which international human rights standards have rapidly evolved in recent decades. The final chapter discusses the implications of this work's findings for future international legal developments within and beyond human rights.

PART I

Chapter 3

The European Court of Human Rights: A Court to (Re)Build Europe

The geopolitical contexts in which international courts are founded fundamentally condition how those courts come to perceive their social purpose. The level of democratization among the court's founding member states, the relative involvement of legal bureaucrats compared to political advisors in designing the court, and the types of substantive issues that emerge in the court's early case law all influence how judges interpret the sources of their court's legitimacy. These interpretations guide when and to what extent that court exerts authority over member governments while deciding which cases to admit for litigation, when to find governments in violation of international law, and how governments must address established violations. The following chapters investigate the origins of each regional human rights court's interpretation of its authority by examining each court's "foundational period". For the purposes of this analysis, that period encompasses the time span from the first proposals for the creation of each court through the selection of the court's first judges. Particular attention is devoted to how each court's designers and founding judges envisioned the reach of the court's authority as they delineated the substantive and temporal limits of the court's jurisdiction.

I. The ECtHR: an institutional "safety valve" or a European Constitutional Court?

The Council of Europe (CoE) was founded in 1949 to push forward European integration and cultivate intra-continental ties that would bolster the region against future

external threats.[13] The CoE was pitched to European publics as a vital "soft power" complement to the newly-established North Atlantic Treaty Organization (NATO) (Bond 2012: 1). The European Movement, a non-governmental organization founded in 1947 to promote Pan-European solidarity, played a leading role in designing the institutional framework of the CoE. The Movement's primary aim was for European democracies to establish "a system of collective security against tyranny and oppression"- referring to the spread of communism. (Bates 2010: 2-5). The Movement sought to establish political organizations that could foster shared understandings of identity amongst citizens of European states. This identity would be rooted in liberal democratic ideals, providing an ideological defense against encroachment from the East.

The CoE's first major endeavor was to draft an international convention to define and enforce shared standards for human rights protection amongst the Council's member states. The resultant treaty, the European Convention on Human Rights, was opened for signature by the end of 1950 and entered into force in 1953. Included in the final draft of the Convention was a mandate for CoE member states to promptly establish the European Court of Human Rights. The Court finally began operations in 1959.

The road to the Convention was marked by squabbles between state representatives suspicious of international governance and a small but vocal group of legal experts and integrationist visionaries with ambitions for a robust supranational

[13] The founding members of the CoE were: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom. Greece and Turkey joined later in 1949, followed by Iceland and Germany in 1950. While Turkey is the obvious outlier here, its early inclusion in the CoE made more sense at the time than it might today. Turkey held its first free elections in 1950, which were won by the opposition Democratic Party. As such, Turkey's status as a promising transitional democracy geographically surrounded by communist and other non-democratic regimes made it an attractive candidate for inclusion in the CoE. (Reynolds 2012: 4).

human rights regime. The first draft of what would become the European Convention was written under the auspices of the European Movement by three primary authors: French lawyer and statesman Pierre-Henri Teitgen, renowned British prosecutor Sir David Maxwell-Fyfe, and Belgian politician and legal academic Fernand Dehousse (Ibid.: 53). These authors were assisted by a consultative committee comprised primarily of British lawyers, led by John Harcourt Barrington (Simpson 2004: 650-2). This group proposed what became known as the European Movement Convention, which enumerated (but refrained from defining) the following rights:

> (a) Security of life and limb.
> (b) Freedom from arbitrary arrest, detention and exile.
> (c) Freedom from slavery and servitude and from compulsory labour of a discriminatory kind.
> (d) Freedom of speech and of expression of opinion generally.
> (e) Freedom of religious belief, practice and teaching.
> (f) Freedom of association and assembly.
> (g) The natural rights deriving from marriage and paternity and those pertaining to the family.
> (h) The sanctity of the home.
> (i) Equality before the law.
> (j) Freedom from discrimination on account of religion, race, national origin or political or other opinion.
> (k) Freedom from arbitrary deprivation of property.[14]

The European Movement Convention also sketched out a two-level institutional framework for enforcing human rights protections amongst CoE member states, made up of a Commission and Court of Human Rights. The proposed Commission would monitor domestic adherence to rights guarantees as well as accept individual complaints by citizens alleging state-sponsored rights violations. These complaints would subsequently

[14] *The European Movement Convention*, Article 1. Original draft reproduced in Simpson (2004), pg. 660.

be transferred to the Court if a friendly resolution to the dispute could not be reached (Simpson 2004, 654-5).

The drafting committee, led by Teitgen, submitted its proposed Convention to the Consultative Assembly of the CoE in the fall of 1949.[15] The Consultative Assembly largely approved of the committee's proposal and set to work on hammering out finer details of the document. Animated by the hopeful rhetoric of Teitgen and Maxwell-Fyfe, who held seats in the Consultative Assembly during the 1949 session, the Assembly crafted a recommendation to the CoE's Committee of Ministers endorsing the adoption of a European Convention on Human Rights. This "Recommendation 38" retained the European Movement draft convention's proposed substantive rights, with the exception of the protection against arbitrary deprivation of property. Recommendation 38 also retained proposals for a Commission and Court to enforce the Convention's guarantees (Bates 2010: 58-63).

Upon receipt of Recommendation 38, the Committee of Ministers quickly squashed any delusions that a group of idealistic lawyers and functionally powerless Assembly members would dictate binding rights guarantees to governments. The Committee, comprised of the Foreign Affairs Ministers of each CoE member state, was deeply suspicious of any proposed institutions that could limit governments' authority to handle human rights issues. Public pressure and concern for the CoE's faltering

[15] The Consultative Assembly was the institutional predecessor to the modern Parliamentary Assembly of the CoE. However, the Consultative Assembly did not have any of the decision-making powers that the Parliamentary Assembly now possesses. The Consultative Assembly was merely a deliberative body made up of parliamentarians from each member state. The Assembly's primary function was to hold debates and present policy proposals to the Committee of Ministers, which held all substantive decision-making authority.

international standing ultimately pushed the Ministers to consider the Assembly's recommendations. But the Committee did not accept these recommendations outright, and instead insisted on creating its own committee of legal experts to evaluate the potentiality of a European human rights convention (Ibid.: 80-82). It was during this expert committee's deliberations with national government representatives in late 1949-1950 that the European Convention as we know it today was created.

Fear of what lurked beyond the other side of the Iron Curtain pervaded government deliberations on drafting the European Convention, which was initially conceived as "a collective insurance policy against the relapse of democracies into dictatorships" (Wildhaber 2007: 523). In line with the goals of the European Movement, most founding architects of the European Convention on Human Rights intended for the document to primarily function as a pact against totalitarianism. But some prominent founding fathers of the Convention, notably Teitgen, envisioned a more expansive role for the Convention as a constitutional instrument with the potential to evolve into a "European Bill of Rights" (Bates 2010: 104-5).

Teitgen and his supporters sought to equip the ECtHR with the institutional tools to fulfill that vision, including, importantly, the right of individuals to petition the Court. The right of individual petition was one of the most fiercely contested issues among Convention drafters, whose positions on the matter fell largely along the lines of the debate about whether the Convention should be a collective pact against totalitarianism or, more ambitiously, the starting point for a European Bill of Rights with the ECtHR acting as a sort of continental constitutional court. Proponents of the former perspective,

suspicious of the necessity of an international court in the first place, resisted recognizing the right of individual petition. Recognizing this right entailed a substantial shift in sovereignty out of the hands of national governments and into those of the Court, an unprecedented development in modern international law. Getting states to accept the right of individual petition was especially contentious in the 1950s given the fact that several CoE members still maintained overseas colonies whose residents could potentially drag their colonizers in front of the Court for human rights abuses. (Simpson 2004: 294-9).[16]

Several governments argued that individual access to the Court was unnecessary given the high level of existing human rights protections within Europe. Luzius Wildhaber, the first president of the ECtHR after its reformulation as a permanent court in 1998, has noted that, during the 1950s and 1960s,

> [t]he most frequent justification given [for refusing to accept individual petition] 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. (*quoted in* Bates 2010: 12).

For founding drafters with broader goals of European integration, "pan-European solidarity" was more than a symbolic platitude. Giving individual citizens the right to petition the Court was essential for creating a European identity that would legitimate the broader integration project. (Bates 2010: 104-5). At the time, however, the majority of the founding governments of the CoE prioritized maximizing state sovereignty. Accepting the jurisdiction of the ECtHR and the right to individual petition were written into optional clauses in the final draft of the Convention.

[16] To relieve this point of tension, the draft Convention was eventually amended to preclude the right of individual petition from residents of colonial possessions.

Figure 3.1

CoE Member State V-Dem Liberal Democracy Scores in 1949



There are three central takeaways from the debate over incorporating the right to individual petition that shed light on how the ECtHR developed its social purpose. First, everyone involved recognized the fundamental importance of establishing and strengthening a shared sense of European identity based in liberal democratic values. By enforcing shared human rights guarantees, the ECtHR was designed to serve as an institutional catalyst of European integration. Second, CoE members prioritized deference to state sovereignty in the early years of the organization. Respect for sovereignty has facilitated collective decision making processes within the CoE that are rooted in compromise and consensus. Third, the founding member states of the CoE felt

that their domestic human rights protections were already largely satisfactory. Thus, the ECtHR's founders believed that most human rights issues in Europe would not necessitate supranational intervention. The Court was conceived as a "safety valve" to deal with isolated human rights problems that might arise within member states, not to be a forum for addressing systemic rights violations. (Bates 2010: 14). The founders trusted that domestic judicial systems could uphold European rights standards, and anticipated that circumstances necessitating ECtHR litigation would be rare:

> … doubts as to whether Europe needed a Court of Human Rights reflected a general view that the authorities in Western Europe had already proved themselves to be 'the faithful trustees of the rights of man'… the chief merit of the Convention, therefore, was as a safety valve for when things went wrong (Hersch Lauterpacht, *quoted in* Bates 2010: 105).

The ECtHR was designed to act as a partner to member state governments and judiciaries that would respect their sovereignty while remaining available as an "insurance policy" to prevent democratic backsliding in discrete cases where these institutions failed (Ibid.: 14).[17] The Court's founders espoused a high level of trust in domestic judiciaries and strove to legitimize the Court through demonstrated respect for state consent to jurisdiction. The low number of cases admitted by the Court in its early years and the fact that the Court was not formally made into a permanent body until 1998 reflects this deference to domestic authorities.

[17] See also *Travaux Préparatoires to the European Convention on Human Rights* (hereafter, *Travaux Préparatoires*), CDH (72) 27, pg. 2. The *Travaux* is available at: https://www.echr.coe.int/documents/library_travPrep_table_eng.pdf.

This notion that the Court fulfills a subsidiary role relative to member states persists to the present day. Writing in 2018, current ECtHR President Robert Spano re-invoked the "safety valve" concept when reflecting on the objectives of the Convention:

> … the Convention directly calls for a system of shared responsibilities and defined roles between the primary system of protection, the States Parties themselves, and the international system of adjudication at Strasbourg which is subsidiary to primary protection, a safety valve. It is at the outset for the State Party to decide whether a limitation of a Convention right is necessary in a democratic society, and not just in any democratic society, but specifically its own (490).

Spano's comments evidence the enduring legacy of the founders' belief in flexible relationships with state governments as the basis for an effective human rights regime. As the founders envisioned in the 1950s, the Court today still prioritizes the right of state parties to decide how best to implement the Convention's principles within their own unique domestic contexts.

The linchpin of this culture of cooperation is the ECtHR's embrace of the *margin of appreciation* (MOA) doctrine. The MOA guides the extent to which the Court will defer to a member state's authority regarding a complained-of practice. When the MOA is wide "there is an initial presumption in favor of the defendant state; when narrow, a close scrutiny will be made" (O'Donnell 1982: 475). The width of the margin applied depends on the level of consensus that the Court observes on a given issue among its member governments (Gerards 2011). This consideration of existing practices when deciding how to apply the MOA reflects the ECtHR's respect for the competence of national judiciaries. These values are rooted in the founders' vision of the ECtHR as a mechanism for fostering a shared European identity: by defining what constitutes

consensus among member states, the ECtHR articulates what it means to be "European." Subsequent chapters will examine how this dynamic has fundamentally guided the Court's decision-making throughout its history.

II. Substantive Jurisdiction of the Court

An IC's interpretation of its authority is directed by the written mandate outlined in that court's constitutive documents. During negotiations amongst the Committee of Ministers and national governments, the rights guarantees originally outlined in the European Movement draft convention were largely accepted with little debate. Historians of the Convention have noted a lack of evidence of opposition to any of the rights proposed within Recommendation 38 (Bates 2010: 80-1). The *travaux préparatoires* (which detail the conferences at which the Convention was negotiated) indicate that most debate among the Convention drafters centered on specification and elaboration of the rights originally proposed by the European Movement rather than whether to incorporate those rights.

The final Convention draft opened for signature in November 1950 codified thirteen distinct rights. These rights included ten of the original eleven rights proposed in the European Movement draft convention.[18] The right to "equality before the law" was reformulated as the "right to a fair trial" (Art. 6). The drafters also added a prohibition of punishment without legal basis and the retroactive application of law (Art. 7), a prohibition of the use of torture (Art. 3), and a "right to an effective remedy before a national authority" for established rights violations (Art. 13). One notable point of

[18] Property rights protections, including protection from the arbitrary deprivation of property, ended up being added to the Convention shortly afterwards in Article 1 of Protocol 1, adopted in 1952.

contention was raised during discussion of the "right to a fair trial", centered on concerns that the ECtHR could utilize that provision to act as a sort of "court of appeals" for national courts.[19] Teitgen quickly moved to dispel that notion, emphasizing existing custom that international courts cannot review the decisions of national courts. The ECtHR could only accept a dispute contesting a national ruling if that ruling was delivered under conditions in which the applicant's fundamental rights were violated. It would not be within the jurisdiction of the ECtHR to review cases disputing legal facts or alleging errors in domestic legal interpretation. This reassurance appeared to satisfy the concerned parties, and the right to fair trial was accepted through consensus.[20]

The wording of Article 13 guaranteeing the right to an effective remedy is particularly revealing of the limitations that the Convention's founders sought to impose on the authority of the ECtHR. The drafters first looked to the Universal Declaration of Human Rights (UDHR) for insight as to how to word Article 13. Article 8 of the UDHR states:

> "Everyone has the right to an effective remedy by the competent **national tribunals** for acts violating the fundamental rights granted to him by the constitution or by law."

During negotiations to draft Article 13 of the European Convention, debate arose about whether it was necessary or practically advisable to guarantee citizens the right to an effective remedy before a national tribunal. Codifying such a right would imply that remedies must be *judicial*, in other words, dispensed through national courts rather than political or administrative institutions.

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[19] *Travaux Préparatoires*, DH (56) 11, pg. 3-5.
[20] Ibid., pg. 6-8.

While the *travaux* unfortunately do not offer clear evidence of which delegates objected to adopting the UDHR's wording in Article 13, the negotiation records indicate that some faction argued that it might not be legally possible to impose an obligation on states to provide judicial remedies.[21] Others expressed that it was simply not necessary to impel states to provide specific remedies to address rights violations. The form that these remedies should take would be best determined by the states themselves on a case-by-case basis.[22] This opinion reflects the pervasive attitude among drafting delegates that CoE member states already exhibited exemplary respect for human rights. Any potential for international micromanaging thus signified an unnecessary sacrifice of national sovereignty. This disposition is reflected in remarks by a British delegate in discussions before the Consultative Assembly in September 1949: "Indeed, the remedies that we have are not remedies which take effect in any particular way. We have no jurisdiction to go into a particular country and rectify any injustices that have been done."[23] The Court can order member states to provide "just satisfaction" to injured parties when judges deem appropriate. Although not stipulated in the Convention, the Court has historically interpreted "just satisfaction" to be restricted to monetary reparations.[24] While the Consultative Assembly ultimately endorsed defining national tribunals as the source of effective remedies, this wording was altered at some point during deliberations with the Committee of Ministers. The final wording of Article 13 established the right to an

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[21] *Travaux préparatoires,* DH (57) (5) pg. 18, para. 16.
[22] *Travaux préparatoires,* DH (57) (5) pg. 18, para. 14.
[23] *Travaux préparatoires,* CDH (72) (27) pg. 6.
[24] With the introduction of the "pilot judgment procedure" in 2004, the Court gradually began to expand its definition of "just satisfaction" to include non-monetary reparations. This development is discussed at length later in this work.

effective remedy "before a national authority", without stipulating that said authority be judicial.

The *travaux* indicate universal consensus that petitions to the European Commission and ECtHR could only be admissible when the applicants had exhausted all measures of domestic recourse. This accorded with customary international standards.[25] Still, several delegations voiced fears that the Court might attempt to infringe upon the power of national judiciaries and prematurely admit cases. The European Movement had anticipated these concerns, and even included a sub-section entitled "A European Court of Human Rights might, it is feared, encroach upon the jurisdiction of national courts," in an "examination of criticisms" submitted to the Committee of Ministers in July 1949.[26] But the European Movement's preemptive rebuttal did little to assuage state representatives' fears, and the issue of whether the Court could overstep its mandate was deliberated extensively throughout the Convention drafting process.[27] Ultimately, the implementation of the Commission as a "filter" or "sieve" to gatekeep petitions before the Court and verify the exhaustion of domestic remedies was a satisfactory solution.[28]

III. Temporal jurisdiction of the Court

When examining the founders' intentions for the reach of the ECtHR's authority, it is necessary not only to investigate the delineation of the Court's substantive jurisdiction, but also its temporal jurisdiction (*ratione temporis*). "Temporal jurisdiction"

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[25] *Travaux préparatoires*, CDH (70) 30, pg. 10-11

[26] Ibid., pg. 3.
[27] Ibid., pg. 4-13.
[28] Ibid., pg. 6.

refers to the time period during which an alleged action must have occurred in order for a court to be able to consider if that action breached a treaty obligation. Drawing from the Geneva General Act for the Settlement of Disputes, the European Convention drafters unanimously decided that applicants to the Commission must submit their petition within six months of the date of the final domestic decision regarding their complaint.[29] The *travaux* contain no evidence that the drafters discussed the possibility that the Commission or Court would have to consider petitions alleging rights violations that originated prior to state accession.[30] Neither did they consider that ongoing violations across an extended period of time might complicate application of the six-month rule. This is not surprising. The non-retroactivity of treaties was already an established principle of international law in 1950.[31] The concept of "transitional justice" as a mechanism of recourse for human rights atrocities committed by previous regimes had only recently begun to emerge within international criminal law with the Nuremburg and Tokyo Trials of 1946. The Convention's founders did not design the European human rights institutions to impel states to grapple with lingering demons from their pasts.

In investigating the formulation of the ECtHR's temporal jurisdiction, it is helpful to recall that a central intended function of the Court was to foster states' collective

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[29] *Travaux préparatoires*, CDH (70) 30, pg. 29.
[30] The Commission did declare several cases inadmissible *ratione temporis* during the first decade of its tenure on the grounds that the alleged violations occurred prior to state accession. See X. v. Sweden (App. no. 172/56), Nielsen v. Denmark (App. no. 343/57), X. v. Germany (App. no. 2038/63), X. v. Austria (App. no. 913/60).
[31] Treaty of Berlin (1878) Art. 29; Havana Convention on Treaties (1928) Art. 8; Harvard Draft Convention on the Law of Treaties (1928) Art. 11. See also Vienna Convention on the Law of Treaties (1969) Art. 28.

commitment to the new European integration project. The European human rights system was designed to be forward-looking, constructing a new regional identity that would pave the way for a more secure and prosperous future following the trauma of the first half of the 20th century. The ECtHR was established to create a break with the past, not litigate it. The following chapters will examine how this tenet of the Court's founding mission has impacted judges' interpretation of the reach of the Court's temporal jurisdiction in a variety of human rights disputes.

IV. Execution of judgments

The *travaux* indicate that the legal experts and political representatives alike who negotiated the Convention were not particularly concerned about the potential for state non-compliance with ECtHR. This further reflects the basis of trust in the competence of national authorities that informed the design of the Court. As articulated in a pitch by European Movement delegates to the Committee of Ministers:

> The success of the European Court of Human Rights, like that of the International Court of Justice at the Hague, will depend not **so much upon the powers it wields, as upon the moral prestige that it enjoys**. In most cases the pressure of public opinion will be quite sufficient to secure respect for its decisions. Governments will be reluctant to be regarded as violators of their people's liberties and will usually prefer to comply with the judgements of the Court, even if they do not always agree with them, rather than face the loss of popularity and electoral support which refusal would probably involve.[32]

It is clear that the founders of the Convention did not intend to for the Court to amass authority through particularly strong delegated powers, but rather through its constituents' respect for the *idea* that the Court represented: an institutional beacon of

[32] *Travaux préparatoires*, CDH (72) 27, pg. 2.

liberal-democratic values from which Europeans could derive a united source of pride and moral commitment.

Perhaps due to confidence that non-compliance would be rare, as well as entrenched resistance to empowering the Court with more authority than strictly necessary, the drafters decided that execution of the ECtHR's judgements would be delegated to the Committee of Ministers. Execution of judgements is not an issue of jurisdiction *per se*. Still, it is important to consider in the context of this analysis because judgement execution implicates the reach of the Court's authority. While state representatives persistently objected to sacrificing sovereignty to an international judicial authority, there was broad support for leveraging the Convention to strengthen the powers of the Committee of Ministers. The ECtHR was created not only to fulfill its written judicial mandate, but to act as a vital piece in a much larger institutional puzzle designed to bind the countries of Europe together economically, socially, and culturally, as well as legally. This mission required prioritizing cooperation and consensus as opposed to rigid supranational authority. Any authority that could be legitimately wielded had to be rooted in political power emanating from the governments themselves. According to available evidence in the *travaux*, there were no substantive objections to granting the Committee of Ministers authority over the execution of ECtHR judgements. Consequently, the Ministers adopted responsibility for monitoring compliance with Court judgements and deciding what obligations, if any, to impose on non-compliant states on a case-by-case basis.[33]

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[33] *Travaux préparatoires*, CDH (72) 27.

V. Election of the ECtHR's first judicial bench

ECtHR judges are elected by a majority vote of the Consultative Assembly (which in 1974 was converted to the Parliamentary Assembly). Each CoE member state is entitled to appoint one judge to the Court. In the event of a vacancy on the Court due to the end of a judge's term or unforeseen circumstances, the relevant member state must nominate three candidates to fill the vacant seat. At least two of those candidates must be nationals of that member state. The Assembly then elects one of those three candidates through a majority vote. If no one candidate achieves a majority during the first vote, the candidate who received the fewest votes is eliminated, and the Assembly votes again on the two remaining candidates.[34]

The first election for ECtHR judges was held on January 21, 1959. In accordance with Convention Articles 46 and 58, the formal establishment of the Court could not occur until eight CoE member states submitted declarations recognizing the Court's compulsory jurisdiction. When this threshold was reached, judicial elections could finally take place. Unfortunately, transcripts of the 1959 Assembly session at which the inaugural ECtHR judges were elected are not available. The following judges were elected during that session, representing the CoE's sixteen member states at the time:

Lord Arnold McNair, *President of the Court*	United Kingdom
René Cassin, *Vice-president of the Court*	France
Frederick Mari Van Asbeck	The Netherlands
Ake Ernst Vilhelm Holmbäck	Sweden
Alfred Verdross	Austria
Georges S. Maridakis	Greece
Henri Rolin	Belgium
Eugéne Rodenbourg	Luxembourg

[34] *European Convention on Human Rights* (1950), Article 39.

Alf Niels Christian Ross	Denmark
Terje Wold	Norway
Richard McGonigal	Ireland
Giorgio Balladore-Pallieri	Italy
Einar Arnalds	Iceland
Hermann Mosler	Federal Republic of Germany
Kemal Fikret Arik	Turkey

(Council of Europe 1960: 129)

These inaugural judges represented the most accomplished legal professionals in Europe. Several had previous experience in international arbitration: Lord McNair, first president of the ECtHR, previously served as the President of the International Court of Justice. René Cassin, first vice-president of the ECtHR, was a former French representative to the League of Nations, co-founder of UNESCO, former president of the UN Commission on Human Rights, and a principal author of the UDHR. Frederik Van Asbeck, Alfred Verdross, Georges Maridakis, Hermann Mosler, and Henri Rolin were all former members of the Hague Permanent Court of Arbitration. Many of the ECtHR's first judges had previously served on their nations' high courts and/or held political positions as legislators or government ministers. Ake Holmbäck, for example, was a former member of the Swedish Riksdag and government delegate to the UN Assembly. Henri Rolin was a Minister of State and President of the Belgian Senate. Eugéne Rodenbourg and Terje Wold served on their countries' Supreme Courts and held high-level political appointments as government ministers. Kemal Arik and Georges Maridakis had represented their governments in several international negotiations and played significant roles in drafting their countries' civil codes. Mosler represented Germany at the Conference on the Schuman Plan and Balladore-Pallieri advised the formation of

Euratom, both crucial processes for the eventual establishment of the European Union. (Council of Europe 1960: 137-51). The election of judges with diverse backgrounds in academic, political, and legal institutions speaks to the early professionalism of the Court and a commitment to careful calibration of domestic and international interests.

VI. Conclusion

The Committee of Ministers and government representatives guided the Convention drafting process with careful attention to the potential for supranational incursion on domestic sovereignty. A foundation of trust undergirded the relationship between national authorities and Convention drafters. This trust evident in the drafters' predominant belief that the Court would serve as an institutional "safety value" in isolated circumstances when domestic human rights safeguards failed, not as a forum for litigating systemic rights violations. In order to achieve governments' cooperation with the broader European integration project, the Convention's founders knew that they had to tread carefully to avoid backlash against international governance. By siphoning petitions through the Commission and delegating the power to enforce Court judgments to the Committee of Ministers, the drafters established buffers to the ECtHR's authority that would encourage a cooperative relationship with governments. The diverse professional backgrounds of the Court's inaugural judicial bench demonstrate a shared commitment to balancing domestic political priorities and scrupulous human rights standards. Throughout its history, the ECtHR has endeavored to bring states into closer compliance with European human rights standards by fostering collaborative relationships with governments based on deference towards national institutions. This

mandate, forged in the Court's founding moments, continues to inform the development of the ECtHR's case law today.

Chapter 4:

The Inter-American Court of Human Rights: confronting militarism through judicial creativity

Unlike the CoE, whose founding was inextricably linked to the post-WWII rise of human rights legalization, the groundwork for the Organization of American States was established well before the emergence of the international human rights regime. This context is essential for understanding the markedly different relationship that the modern OAS has with the IACtHR compared to the relationship between the CoE and the ECtHR. Latin America's road to multilateral human rights cooperation is a much longer and more complicated story than that of Europe, with important implications for the IACtHR's authority.

I. A new human rights model for the Americas

The OAS's origins can be traced to Latin America's decolonialization struggle. After a wave of successful independence revolutions swept the region in the 1820s, the new American states sought out regional collaboration as a mechanism to protect themselves from further European intervention. Under the direction of Simón Bolivar, then-president of Gran Colombia, delegations from several newly-independent states convened at the 1826 Congress of Panama to draft the region's first collective security and economic cooperation pacts. While Bolivar's ambitions to establish a military and economic union among the former Spanish colonies ultimately floundered, this meeting laid crucial groundwork for future multilateral cooperation. Building on the commitments made in Panama, a series of conferences over subsequent decades produced treaties

committing Latin American governments to the principles of non-intervention, pan-American solidarity, and collective defense against foreign aggression (Herz 2011: 8). These treaties contributed to the development of unique diplomatic norms in Latin America that simultaneously prioritized multilateral coordination in the "high politics" defense arena and eschewed any further integration that could impede on states' internal affairs. These values reflect the post-colonial anxieties of the new American states, who recognized the mutual benefits of coordination for deterring outside intervention while jealously guarding their own hard-won sovereignty.

The geopolitics of the region shifted in the late-1800s, when the U.S. began to emerge as an international power. Seeking a more prominent role for the U.S. in developing regional ties, Secretary of State James Blaine proposed that Washington host an inter-American conference to pitch closer economic and diplomatic cooperation between the U.S. and its southern neighbors. This proposal resulted in the First International Conference of American States, held October 1889-April 1890 in Washington D.C. Attendees included delegates from Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Paraguay, Peru, the U.S., Uruguay, and Venezuela. The conference discussions centered around economic issues, including proposals for an American customs union and a common currency (Carnegie Endowment 1940: 3-4). While nothing approximating these ambitious goals came to fruition, the conference marked a pivotal point in inter-American relations. The attending delegations established the International Union of American Republics, an organization dedicated to encouraging commercial

interchange within the Western Hemisphere. The Union became the first institutional predecessor of the modern OAS.

The U.S.'s increasing involvement in regional relations brought about a shift in the focus of American multilateralism from security issues to strengthening transnational economic ties. To this end, three more meetings of the International Union of American Republics were held, in 1901, 1906, and 1910. The Union added Cuba and the Dominican Republic to its ranks during this period. It was at the fourth conference in 1910 that the organization was re-named to the Pan American Union (Herz 2011: 9). By this point, the Union had spawned several new institutions that represented unprecedented developments in modern international law and regulation. One notable example is the International Commission of Jurists, established at the second inter-American conference in 1906. This body, comprised of one judicial representative from each Union member state, was charged with drafting codes of public and private international law and issuing guidelines for the interpretation of treaties.[35] The Pan-American Sanitary Bureau was established in 1902 to respond to a yellow fever outbreak. Now known as the Pan-American Health Organization, this institution is the oldest international health agency in the world. Similarly, the Inter-American Commission for Women, established under the Pan-American Union in 1928, was the world's first intergovernmental agency dedicated to ensuring the civil and political rights of women. (Herz 2011: 10).

[35] *Convention on International Law*. 1906. International Commission of Jurists (Inter-American). 37 Stat. 1544; Treaty Series 565.

With the onset of World War II, the U.S. re-focused on security issues within the Pan-American Union. Harkening back to the priorities that initially propelled American multilateralism in the 1800s, the 1933 Convention on Duties and Rights of States re-affirmed the Union's inviolable commitment to non-interventionism. The 1930s-early 40s saw a wave of democratization in Latin America along with new collective defense pacts and mechanisms for peaceful dispute settlement within the Pan-American Union. (Ibid.: 10-11). These developments led to the re-configuration of the Union as the Organization of American States at the ninth international conference of American states in Bogotá in 1948. The OAS Charter was drafted with a primary motivation to establish mechanisms for enforcing Article VIII of the UN Charter on regional arrangements (Henrikson 1996: 46). Thus, the "nature and purposes" detailed in Article 1 of the OAS Charter include pledges to ensure the pacific settlement of disputes, promote representative democracy, and provide "common action" in the event of aggression against member states.

Here we see an important distinction between the founding purposes of the OAS and the CoE. The CoE, under NATO's protection, was unburdened by a security mandate. The organization thus had unique flexibility to expand its competencies in political, legal, and cultural issues in support of European regional integration. The OAS, on the other hand, was first and foremost created to be a mutual defense pact. Consequently, the institutional bandwidth of the OAS spreads across a much wider range of issue areas than the CoE. As will be discussed in subsequent chapters, this might help explain the unique relationships between the OAS and its human rights institutions, which have historically been more strained than the relationship between the CoE and the

ECtHR. This dynamic might also help explain the lack of focus on political and economic integration within the OAS compared to the CoE.

Human rights protections were integrated into the inter-American mandate for the first time during the 1948 Bogotá conference that established the OAS. The American Declaration of the Rights and Duties of Man, adopted alongside the OAS Charter, was the first inter-governmental recognition of detailed human rights provisions in modern history (Sikkink 2017: 74-9). The Declaration marks the first formal codification of many of the rights guarantees that the IACtHR would eventually be charged with enforcing. The American Convention, which created the IACtHR twenty years after the Declaration's adoption, is largely based on the rights framework established in the Declaration.

Latin American diplomats, jurists, and NGOs were at the forefront of campaigns to develop international human rights protections in the post-war period. Indeed, Latin American delegations have been credited with successfully convincing reluctant great powers to include human rights language in the draft UN Charter at the 1945 San Francisco Conference (Glendon 2003). The Inter-American Juridical Committee, a sub-organ of the OAS, provided crucial legal analysis that informed the inclusion of human rights language in the UN Charter, the American Declaration, and the UDHR. It is important to note that the American Declaration was drafted concomitantly with the UDHR, but on a faster timeline. Several Latin American government delegations and legal professionals were predominant contributors to both the American Declaration and the UDHR. The UDHR was ultimately adopted eight months after the OAS adopted the

American Declaration (Sikkink 2015). Thus, the American Declaration has been recognized as having a "heavy influence" on the UDHR drafting process (Morsink 1999: 130). While the concept of human rights is often traced back to European Enlightenment roots, it is Latin American diplomats and jurists who are primarily responsible for the incorporation of human rights into the UN's mandate. The UDHR provisions that provided the framework for the modern international human rights regime, including the European human rights system, are directly rooted in Latin American legal innovations.

To accompany its newly-articulated human rights mandate, the OAS Charter called for the establishment of an Inter-American Commission on Human Rights. Chapter XV of the Charter casts the Commission's function in vague terms, stating only that the Commission "shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters."[36] The Charter delegates further stipulation of the Commission's structure and competence to an "inter-American convention," implying state willingness to draft such a convention in the future. As such, the Commission was not actually constituted at that time, likely due to lack of political will. The Commission proposal languished as an abstract idea for over a decade. Finally, at the Fifth Meeting of Consultation of Ministers of Foreign Affairs in Santiago, Chile, in 1959, the Ministers brought the Commission into reality. At this meeting, a proposal was floated to give the Commission the authority to consider

[36] *Charter of the Organization of American States,* Adopted at the ninth International Conference of American States in Bogotá, 1948. Art. 106.

complaints of alleged rights violations filed by private individuals and organizations.[37] This proposal was ultimately quashed by a coalition led by the U.S, with support from Argentina, Brazil, and Uruguay.[38] A resolution of the Fifth Meeting formally constituted the Commission, stipulating that the body should consist of seven members elected by Council of the OAS.[39] The Commission's first statute, which imbued the body with limited capacities to promote human rights education and monitor and report on domestic practices, was adopted by the Council in 1960 (Cabranes 1968: 894).

Noting recent developments in the Council of Europe and the United Nations, the ministers at the Fifth Meeting resolved to embark on creating a binding regional human rights treaty. The ministers adopted a resolution directing the Inter-American Council of Jurists (IACJ) to prepare a draft convention for state consideration. This resolution also directed the Jurists to explore the possible creation of an Inter-American Court, the first such formal proposal for a judicial body within the OAS.[40]

Drawing heavily from existing UN Conventions as well as the European Convention on Human Rights, the IACJ draft convention incorporated provisions on an expansive range of economic, social, and cultural rights, as well as political and civil

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[37] *Memorandum from the Assistant Secretary of State for International Organization Affairs (Wilcox) to the Assistant Secretary of State for Inter-American Affairs (Rubottom).* April 22, 1960. Published in *Foreign Relations of the United States, 1958-1960: American Republics.* pg. 350-2.

[38] *Circular Telegram From the Department of State to Diplomatic Missions in the American Republics.* May 5, 1960. Published in *Foreign Relations of the United States, 1958-1960: American Republics.* pg. 354.

[39] *Fifth Meeting of Consultation of Ministers of Foreign Affairs, Final Act.* 1960. Resolution VIII, Art. 2; Note: The Council of the OAS is one of the two main political bodies of the OAS, the other being the General Assembly. The Council is an intergovernmental body comprised of one representative appointed by each member state. Typically, these representatives are national foreign affairs ministers or secretaries of state.

[40] *Fifth Meeting of Consultation of Ministers of Foreign Affairs, Final Act.* 1960. Resolution VIII, Art. 1.

rights. The IACJ draft marked the first time in history that these varied rights categories were combined in a single binding agreement. The IACJ modeled their draft's implementation mechanisms after the European system, with the Inter-American Commission assuming responsibility for accepting individual petitions and guiding parties towards friendly settlements, and an Inter-American Court with the authority to issue legally-binding decisions in contentious cases. (Cabranes 1968: 897-9). The IACJ worked at breakneck pace, completing the draft Convention by September 1959.

II. A mandate shaped by authoritarianism and apathy

Despite the IACJ's urgency, its proposals floundered for years due to OAS obstruction. Some of this obstruction can be attributed to lack of interest and preoccupation with other issue areas. The OAS's focus largely pivoted to security issues amongst rising Cold War tensions, leaving little bandwidth for following through on the Santiago resolutions. Increasing backlash against U.S. interventionism in Latin America threw the OAS into a legitimacy crisis during the 1960s. The OAS largely devolved into a forum for political clashes between the U.S.'s anti-Communist crusade and Latin American governments' escalating resentment towards U.S. interference (Herz 2011: 14-15). During this period, the OAS was also busy navigating the accession of new member states following decolonization in the Caribbean. Former British colonies Trinidad and Tobago, Jamaica, and Barbados acceded to the OAS in the late-1960s.

Other sources of obstruction were more deliberate. Following a Special Inter-American Conference in 1965 that revived the idea of a regional human rights convention, the OAS Council was charged with considering revisions to the IACJ draft.

The Inter-American Commission at this point expressed doubts as to the appropriateness of including economic, social, and cultural rights in the draft convention (Cabranes 1968: 901). These concerns were based on established norms within the UN and the CoE that held that economic, social and cultural rights should be adjudicated separately from political and civil rights. After several rounds of revisions between the Commission and the OAS Council, the Council sent a new draft convention to OAS member governments requesting their feedback. Two major powers in the region, Argentina and Brazil, responded by calling for the discontinuation of discussion on a regional convention altogether. Eight other states voiced tepid acceptance of continued work on a convention, but did not affirmatively support any specific formulation of rights principles. This faction included the U.S., Chile, Uruguay, and Venezuela, who argued that any potential convention should merely provide regional mechanisms for implementing existing UN Covenants, not construct an independent regional human rights regime (Ibid.: 902-3).

Ultimately, out of the OAS's 23 member states at the time, only ten governments replied to the OAS's request for feedback by the January 1968 deadline.[41] In the contemporaneous words of renowned American judge and legal historian, José Cabranes, this lack of response "would seem to indicate that if the non-responding governments are not in fact opposed to the continued elaboration of a regional convention on human rights, they accord little or no priority to the idea" (Cabranes 1968: 904). Here we see some initial indications of deep-seated apathy to the emerging Inter-American human rights system amongst OAS member governments.

[41] Cuba's OAS membership was suspended in 1962.

Despite member states' prolonged foot-dragging, a conference was convened in San José, Costa Rica in November 1969 to draft the American Convention on Human Rights. It was this Convention that finally established the IACtHR. The fact that the San José conference even occurred is somewhat of a miracle. 1969 was marked by widespread domestic instability and state-sponsored repression across Latin America. Exemplifying these challenges, the date of the San José conference had to be pushed from September to November 1969 due to a brief war between El Salvador and Honduras.[42] This conflict killed nearly 3,000 civilians before the OAS intervened to broker a ceasefire (Rouquié and Vale 1973). During an episode of the drafting conference that provoked applause, the delegates from Honduras and El Salvador voiced support for an article prohibiting war and nationalistic hate.[43] The IACtHR was created against this backdrop of fragile peace and creeping militarism.

In order to convey the unique geopolitical context that surrounded the drafting of the American Convention, it is worthwhile to briefly summarize here the status of the national governments who participated in the San José conference. While the states who founded the ECtHR were all functioning electoral democracies, the OAS members who created the American Convention and founded IACtHR represented a much wider range of regime types. Of the OAS's 23 member states in 1969, only eight could be considered stable electoral democracies: Barbados, Chile, Costa Rica, the Dominican Republic, Jamaica, Trinidad and Tobago, the U.S, and Venezuela. Of these states, several were new

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[42] *Travaux Préparatoires to the Inter-American Convention on Human Rights,* OEA/Ser.K/XVI/1.2*,* pg. 3
[43] *Travaux Préparatoires to the Inter-American Convention on Human Rights,* OEA/Ser.K/XVI/1.2*,* pg. 215, 299.

democracies. Barbados, Jamaica, and Trinidad and Tobago had become democracies in 1962 following their independence from Britain. The Dominican Republic had only been democratic since the conclusion of the 1965-6 Civil War.

Several other member states were governed by democratically-elected officials but were experiencing high levels of political violence and state-sponsored human rights abuses in 1969. Among these, Uruguay was still an electoral republic in 1969 but rapidly backsliding due to civil unrest brought on by economic instability and fighting between the government and the Tupamaros guerilla movement. President Jorge Pacheco had declared a state of emergency in 1968 and limited various civil liberties. Increasing government use of torture was reported during this period, as the U.S. Office of Public Safety (OPS) began operations in Uruguay to instruct police on torture techniques (McSherry 2007: 21). This escalating authoritarianism eventually culminated in the military seizing power in 1973. Mexico, in the middle of the Partido Revolucionario Institucional (PRI)'s 71-year stretch of power, was similarly dominated by militarism. The late-1960s were marked by the "Mexican Dirty War", a low-level conflict between the government, backed by the U.S., and left-wing student and guerilla groups. One of the most violent instances of state repression during the PRI's rule, the Tlatelolco massacre, occurred just a year before the San José conference. State forces killed an unconfirmed number of civilians at a student rally in Mexico City, now estimated by human rights organizations to have been around 300 people (Malkin 2018). Torture was also frequently employed by Mexican state entities during this period (Forero 2006).

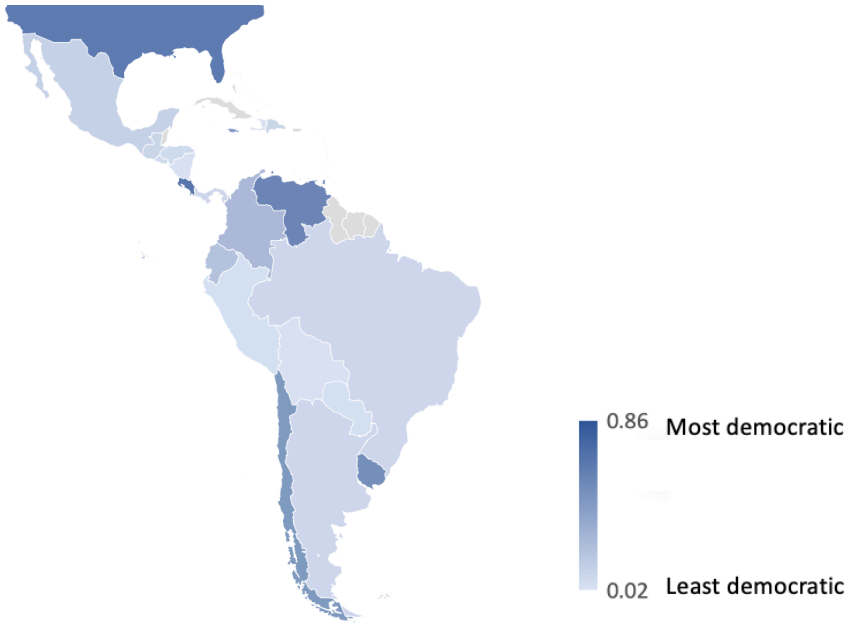
Colombia had a democratically-elected government in 1969, but was five years into a civil war between the government, far-right paramilitaries, organized crime, and leftist guerillas. Ecuadorian President José María Ibarra was democratically elected in 1968 during a fragile transition from a military junta that had seized power in 1963. However, Ibarra's democratic intentions turned out to be no more sincere than his predecessors. Through an *autogolpe* in June 1970, Ibarra dismissed the Congress and Supreme Court, returning Ecuador back to dictatorship. There was some hope for democracy in El Salvador in the late-1960s. An unusually wide range of candidates competed in the 1967 presidential elections, including a leftist candidate who prevailed over a campaign to remove his name from the ballot. However, the military maintained a tight hold on government. Colonel Fidel Sánchez Hernández won the 1967 election, whose legitimacy has been widely contested (Ginger 1967).

Ten of the states represented at the San José conference were fully authoritarian in 1969. Severe state-sponsored human rights abuses, including politically-motivated killings, disappearances, and torture were pervasive within each of these countries. Haiti was a totalitarian state under the brutal rule of François "Papa Doc" Duvalier. Paraguay was under the thumb of autocrat Alfredo Stroessner, whose 35-year-long reign was the longest dictatorial tenure in modern South American history. Nicaragua was similarly entrenched in authoritarianism under the Somoza family military dynasty. In addition to these established regimes, several of the OAS's authoritarian members in 1969 were still shaky following recent military coups. The governments of Honduras and Guatemala had been toppled in 1963. By 1969, Guatemala was a decade into a civil war between the

government and various leftist rebel groups that persisted through 1990. Lieutenant General Juan Carlos Onganía led a military junta governing Argentina following a 1966 coup. Peru and Panama also fell victim to coups in 1968. Brazil's military dictatorship, which had been installed in 1964, was in crisis in the months leading up to the San José conference. From August to October 1969, Brazilian President Costa e Silva's ultimately fatal bout with cerebral thrombosis created a power vacuum filled by a provisional military junta. Finally, in Bolivia, the civilian government was overthrown in a bloodless coup by General Alfredo Ovando Candia just two months before the San José conference.

Figure 4.1

OAS Member State V-Dem Liberal Democracy Scores in 1969



Given the prevalence of authoritarianism and the fractious nature of inter-state relations within the OAS during the late-1960s, it seems incredible that states adopted a

binding human rights convention at San José. Not only that, they established an international court that grew to wield an unprecedentedly expansive interpretation of its judicial authority. As it turns out, perhaps the explanation for this puzzling outcome is that state governments themselves were not all that involved in developing the project they signed off on. In particular, the most authoritarian governments, which one might think would be the most likely to oppose binding human rights obligations, may have been too preoccupied with beating back domestic opposition to invest much energy into molding the American Convention. Governments do not have unlimited bandwidth. Drained resources from fighting civil wars (or, for Honduras and El Salvador, recovering from an interstate one), repressing political opposition, and consolidating power after a regime transition may have limited some states' diplomatic capacity to participate in treaty negotiations. Lack of involvement in and/or opposition to the American Convention amongst transitional and authoritarian governments might thus be explained by a lack of resources, or, perhaps more simply, a lack of interest. Given the tremendous obstacles to establishing an international human rights court in such an inhospitable political climate, some state leaders may have doubted that the IACtHR would ever actually exist, let alone amass enough power to restrict state actions. This could have led to complacency at San José, creating an opening for interested actors to design a human rights court with a wide-ranging jurisdiction.

If such an opening existed, who filled it? The absence of resistance to a robust human rights regime obviously does not guarantee the creation of such a regime. According to my theory, legal bureaucrats will seek greater influence over negotiations to

found an international court in the event that political advisors are insufficiently able or willing to wield control over those negotiations. These legal bureaucrats, due to their expertise and professional interests, will be more likely than political advisors to push for a treaty with a high degree of legalization, including specific binding obligations imposed on states and strong enforcement mechanisms. Consequently, where there are a greater number of legal bureaucrats relative to political advisors present during negotiations to found a IC, we should expect the resulting court to have a broader jurisdiction and greater authority to intervene in domestic affairs. The following paragraphs will evaluate that argument, looking to the *travaux préparatoires* of the American Convention for clues as to how the IACtHR developed an unprecedentedly wide-reaching judicial mandate.

While the *travaux* of the European Convention unfortunately do not provide a full manifest of all negotiation delegations, the *travaux* of the American Convention include a detailed list of participants. This list sheds light on the relative involvement of legal professionals and political appointees at the San José conference. The professional backgrounds of the lead delegates from each state represented at San José are briefly summarized below:[44]

Raúl A. Quijano (Argentina): lawyer, ambassador, and member of the National Foreign Service. Quijano was appointed as the Argentine ambassador to the OAS in 1968 during the Onganía dictatorship and later served as democratic President Isabel Perón's foreign minister in the final months before her government was overthrown in by the military junta 1976. During that time, Quijano also served as the president of the UN Commission on Public International Administration (*La Nación* 2006).

[44] For the purposes of this analysis, I only describe the backgrounds of the presidents of each state delegation, not any other subordinate delegates. Some states sent larger delegations than others (Paraguay, Perú, the Dominican Republic, and Trinidad and Tobago only sent one delegate each), but the delegation president was generally responsible for directing negotiation discussions. For a complete manifest of the members of all delegations, see the *Travaux Préparatoires,* OEA/Ser.K/XVI/1.2, "Lista de Participantes," (Doc. 22 Rev 2), pgs. 525-34.

Carlos Alberto Dunshee de Abranches (Brazil): distinguished jurist, professor, and human rights advocate who served on the Inter-American Commission of Human Rights from 1964-83 (IACHR 1983: Chapter 5).

Carlos Holguín (Colombia): renowned jurist and professor who dedicated his career to a "conciliatory vocation," serving as a reconciliation negotiator in several high-profile armed and commercial international disputes (*El Tiempo* 1998).

Fernando Lara Bustamante (Costa Rica): congressman and lawyer. A fervent defender of democratic principles and pacifism, Bustamente is credited with proposing the legislation that abolished the Costa Rican military in 1948 (Gonzalez and Obando 2021).

Alejandro Magnet Pagueguy (Chile): journalist, lawyer, novelist, and ambassador. When Chilean democracy fell to Pinochet in 1973, Magnet helped lead efforts to organize religious groups to assist victims of political violence (Cavallo et al. 2008: 118). Tragically, Magnet's daughter, Cecilia, fled the dictatorship only to be disappeared in Argentina under Operation Condor (Martínez, 2019).

Juan Isaac Lovato Vargas (Ecuador): lawyer, professor, Socialist politician, and labor rights activist (CJILV 2021).

Francisco Jose Guerrero (El Salvador): lawyer and prominent right-wing politician, known for close ties with the military establishment. Guerrero went on to become Chief Justice of El Salvador's Supreme Court, where he was infamous for orchestrating a ruling that blocked an investigation into the 1980 assassination of Archbishop Oscar Romero. Guerrero himself was assassinated in 1989, likely by leftist guerillas (Gruson 1989).

Carlos García Bauer (Guatemala): lawyer, jurist, ambassador, and human rights advocate. Bauer wrote one of the first comprehensive volumes on international human rights law that compared the UN, European, and Inter-American systems, in which he argued passionately for the international institutionalization of human rights in the Americas.[45]

Eliseo Pérez Cadalso (Honduras): lawyer, poet, politician, professor, and diplomat. During his time in Congress, Cadalso championed legislation that advanced the political rights of women (Discua 2003).

Antonio Martínez Báez (Mexico): lawyer, jurist, professor, politician, and diplomat. Báez served on the Permanent Court of Arbitration at the Hague in 1965. He represented Mexico in many international organizations, and served as a member of the UN Sub-

[45] Bauer's book: *Los Derechos Humanos—Preocupación Universal*. 1960. Editorial Universitaria: Guatemala City.

commission for the Prevention of Discrimination and Protection of Minorities from 1966-83 (UNAM 2001).

Lorenzo Guerrero (Nicaragua): politician with close ties to the Somoza family, which exercised military rule over Nicaragua through a series of dynastic presidencies from the 1930s-70s. Guerrero himself was president of the country from 1966-7.

Juan Materno Vásquez (Panama): lawyer, professor, public speaker, and prolific writer of legal commentary (Órango Judicial de Panamá 2009).

Juan Alberto Llanes (Paraguay): diplomat and ambassador. Llanes went on to become the president of the Permanent Council of the OAS in the 1980s.

Víctor Fernández Dávila (Peru): Background unknown.

Alfredo Fernández Simó (Dominican Republic): novelist, poet, and ambassador. In 1959, the Trujillo regime ordered that Simó be killed due to his connections with political resistance to the dictatorship. Simó fled the country and spent several years in hiding in the Andes, often seeking shelter within indigenous communities. Following Trujillo's assassination, Simó returned to the Dominican Republic and fulfilled various diplomatic roles while writing award-winning poetry (IDJ 2021).

George Collymore (Trinidad and Tobago): Background unknown.

Richard D. Kearney (United States): lawyer and ambassador. Kearney was a prominent legal advisor for the Department of State and directed U.S. involvement in the UN Commission for International Trade law from 1966-78 (Wallace 1984).

Julio César Lupinacci (Uruguay): lawyer, professor, and diplomat. Lupinacci served in the Uruguayan Foreign Service and represented Uruguay in various capacities before the UN. Lupinacci is notable for his contributions to developing international maritime law.[46]

Gonzalo García Bustillos (Venezuela): lawyer, national security advisor, and diplomat. García served as Venezuela's permanent representative to the OAS from 1969-74.

[46] *See* Lupinacci Julio César. 1984. *La plataforma continental como instituto del derecho del mar*. Instituto de Estudios Internacionales, Universidad de Chile.

Of the 19 delegation presidents who attended the San José conference, at least 14 were lawyers and/or judges.[47] Several of these individuals had careers centered on participation in international governance and human rights institutions. Raúl Quijano's career at the UN indicates support for international governance at least in the area of trade. His diplomatic positions under the Onganía dictatorship and Isabel Perón's administration, however, cast doubt on his support for international human rights oversight.[48] Quijano's appointment is thus not surprising from a government that had recently called for the abandonment of the regional convention project. Carlos Abranches, who by 1969 had an established career at the Inter-American Commission and was a well-known human rights advocate, seems a rather more perplexing choice by Brazil's military government, which had joined Argentina in calling for an end to convention development. The delegates from Colombia, Guatemala, and Uruguay were professional legal bureaucrats and academics who dedicated their careers to the development of international law, with Carlos Bauer in particular advocating for deeper international human rights legalization.

The delegation presidents from Costa Rica, Ecuador, El Salvador, Honduras, Mexico, and Nicaragua all held domestic political offices at some point, perhaps indicating a greater proclivity to promoting state interests in the international realm. The choice to appoint Fernando Bustamante to lead the Costa Rican delegation aligns with the interests of President José Trejos Fernández, who was strongly supportive of human

[47] I was unfortunately not able to locate credible background information on the delegation presidents from Peru and Trinidad and Tobago. Bolivia is not listed as having representatives present at the San José conference.

[48] Perón was arrested in 2007 on charges of human rights abuses stemming from her connections to right-wing death squads during her 1974-6 presidency (Carroll 2007).

rights institutions that could temper the regional trend of democratic backsliding. Juan Vargas' history as a labor rights activist makes him a curious choice for Ecuador's right-wing government on the brink of a relapse into military dictatorship. The appointment of Elisio Cadalso, known for his advancement of women's rights legislation, similarly does not appear to align with the conservative authoritarian agenda of the Honduran government. In Mexico's case, Antonio Baéz's resumé suggests that his political ambitions took a backseat to his professional identity as a jurist, with a particular interest in the human rights of minorities. El Salvador and Nicaragua are the only cases where the delegation presidents' political careers suggest opposition to international human rights legalization in line with domestic executives' interests. Of the delegation presidents with political backgrounds, only Lorenzo Guerrero of Nicaragua was not also a lawyer.

Two delegation presidents, Alejandro Magnet of Chile and Alfredo Simó of the Dominican Republic, personally experienced repression under military dictatorships.[49] Coincidentally, both men are today more well-known for their contributions to the literary world than their political or diplomatic endeavors. As is detailed above, these men's actions while living under oppressive regimes indicate clear support for human rights. Overall, the majority of delegation presidents at San José were legal bureaucrats whose professional backgrounds suggest, at the very least, an openness to international human rights legalization, if not outright support. Argentina, El Salvador, and Nicaragua

[49] In Magnet's case, this repression occurred after San José, under the Pinochet dictatorship.

are the only cases where the delegation presidents' political allegiances, aligned with that of their domestic executives, indicate a proclivity to *oppose* human rights legalization.[50]

It is puzzling that several governments that had horrific human rights records and vocally opposed a regional human rights regime appointed delegates with demonstrated expertise in and support for international human rights institutions. I propose that this outcome indicates a lack of strategic deliberation on the part of those governments regarding how to effectively represent their interests at San José. It is possible that these governments sought out potential delegates with the necessary expertise in international law to participate in the conference, while not fully appreciating that those experts might be more likely to push for higher levels of legalization in the American Convention. Alternatively, perhaps some of these delegates volunteered to go to San José and were granted permission without thorough vetting due to their governments' preoccupation with domestic crises. Another potential explanation is that these governments did not anticipate the success of the Inter-American human rights regime, and thus simply did not think that the San José conference was worth any substantive political investment. Due to the classified status of relevant domestic documents, it is not possible to know for sure how so many proponents of human rights legalization from repressive regimes ended up at San José. But the ideological incongruity between leading Convention drafters and the governments who appointed them indicate that miscommunication, misinformed political

[50] Richard Kearney of the U.S. delegation could potentially be included in this category. Given that the U.S. never ratified the Convention or acceded to the Court, it is not clear how much influence Kearney's professional background had on Convention negotiations.

strategizing, and/or simple lack of government attention occurred somewhere along the line.

The drafters of the American Convention drew upon the European Convention as a model, but deliberately did not replicate the European Convention. Drafting delegates argued that Latin America's unique history of human rights development and the contemporary challenges facing the region precluded copying the European model.[51] Shortly after the inception of the Court, founding judge Thomas Buergenthal wrote that "the problems of our Hemisphere are more unique to the Americas than they are universal or European. They can only be solved within the framework of our own legal, cultural, political, and social traditions" (1980: 166). The rights enshrined in the American Convention, which imbued the IACtHR with a more expansive jurisdiction than any existing international court, reflect the drafters' careful attention to the distinct geopolitical realities of the region.

III. Substantive Jurisdiction of the Court

The American Convention protects 23 distinct rights, compared to the 13 rights protected by the original European Convention.[52] The rights codified in the American Convention that were not included in the European Convention include the right to juridical personality, right to compensation in the case of miscarriage of justice,

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[51] *Travaux préparatoires* de la Conferencia Especializada Interamericana sobre Derechos Humanos, San José, Costa Rica. OEA/Ser.K/XVI/1.2, pg. 432-4. Buergenthal et al. (1982), pg. 67-71.

[52] The protection of property, codified in the original American Convention, was not codified in the original European Convention but incorporated through Protocol 1 shortly afterwards, in 1952. The freedom of movement, similarly included in the American Convention but not the original European Convention, was incorporated in the European Convention through Protocol 4 in 1963. These amendments to the European Convention narrowed the substantive rights differential between the two systems to 23-15 at the time of the IACtHR's founding.

protection of honor and reputation, right to a name, rights of the child, right to nationality, right to property, freedom of movement and residence, right to participate in government, and the right to judicial protection.[53]

Among the San José delegates, the right to compensation in the case of miscarriage of justice raised surprisingly little debate. In the first discussion of this provision, delegates from the U.S., Honduras, Nicaragua, and, Mexico, and Argentina opposed its inclusion, while Costa Rica, Colombia, and El Salvador vocalized support.[54] A working group consisting of delegates from the U.S., Chile, Costa Rica, Guatemala, and Ecuador removed language from an earlier draft specifying the right to compensation for "wrongly imprisoned" people and instead inserted more ambiguous language stipulating that the right applies in the event of a "miscarriage of justice."[55] This motion passed, illustrating a more amenable disposition toward international authority over compensation for human rights violations than was the case in Europe.

The American Convention includes all 13 rights guarantees stipulated in the European Convention. The American reformulation of one such right, the right to an effective remedy, has had profoundly influential consequences for the IACtHR's interpretation of its authority. The counterpart of the right to an effective remedy within the American Convention is the "right to judicial protection". Recall that the UDHR, heavily influenced by the Inter-American Juridical Committee, codified the right to

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[53] The "right to equal protection before the law" is also codified in the American Convention but not the European Convention. I did not include the right to equal protection in this list of rights unique to the American Convention because I think it can be argued that the right is sufficiently implied in the European Convention, while not explicitly designated as a distinct "right."

[54] *Travaux préparatoires* de la Conferencia Especializada Interamericana sobre Derechos Humanos, San José, Costa Rica. OEA/Ser.K/XVI/1.2, pg. 208.

[55] Ibid., pg. 60, 298.

"effective remedies by competent national tribunals" in the event of state-sponsored human rights violations. Recall as well that the European Convention drafters, after a debate littered with preoccupation about infringement on domestic sovereignty, decided to amend the wording of that provision to instead provide for the right to an "effective remedy before a national authority" in Article 13. The European Convention drafters deliberately did not guarantee the right to an effective *judicial* remedy. Thus, the right to judicial protection adopted in the American Convention exemplifies the drafters' innovation of the European model (or, perhaps more accurately, the San José delegates' refusal to water down emerging Latin American legal norms to align with the European model). Article 25 of the final draft of the American Convention mandates that individuals must have recourse to "a competent court or tribunal". In other words, effective remedies in the American system must be *judicial*, whereas this is not mandated in the European system. The right to judicial protection can be traced to the rights to "justice" and "juridical personality" enumerated in the 1948 American Declaration.

The original proposal for the right to judicial protection, drawing from the IAJC draft, guarantees persons the right to "simple, prompt, and effective recourse before judges and competent national tribunals, for protection against acts that violate their fundamental rights recognized by the Constitution or by the law."[56] This provision, modeled from the *recurso de amparo* common in Spanish-speaking legal systems, protects persons from violations of their *constitutional* rights. During the course of the negotiations at San José, the Chilean delegation led a motion to amend the wording of the

[56] Ibid., pg. 22.

provision to apply not only to national constitutional rights, but also to all rights codified within the American Convention itself.[57] This motion, which passed without substantive objections from any delegation, is critical in that it standardized and broadened the scope of the circumstances in which injured parties could claim a right to judicial protection in international *as well as* domestic litigation. This innovation provided "broader system of protection" through which the IACtHR could build claims to authority.[58]

One crucial area in which the American Convention expanded on the European model is that of advisory jurisdiction. The European Convention only granted the ECtHR contentious jurisdiction, meaning the authority to rule on cases involving specific disputes between states or between individuals and state governments. The ECtHR was not granted advisory jurisdiction, which allows a court to answer general questions regarding the interpretation of international law submitted by states or individuals.[59] The American Convention, however, did give the IACtHR the power to issue advisory opinions on interpretation of the American Convention as well as any other OAS-sponsored agreements concerning the protection of human rights (Art. 64). The purpose of advisory opinions in international courts is often to clarify ambiguous areas of law or provide direction for governments who are concerned about the legality of certain domestic practices. Advisory opinions can expand an international court's authority by allowing the court to "fill in" any gaps in existing treaties or case law. This process can widen the court's reach into the domestic realm to encompass new issue areas not

[57] Ibid., pg. 41 para. 13.
[58] Ibid., pg. 263
[59] The ECtHR eventually was granted the authority to issue advisory opinions, but not until the implementation of Protocol 16 in 2018.

explicitly codified in the court's constitutive documents. Chapter 6 discusses how the IACtHR's power to issue advisory opinions was crucial for boosting the court's legitimacy in its early years as it struggled with governments who were antagonistic to human rights legalization.

IV. Temporal Jurisdiction of the Court

On paper, the temporal jurisdiction of the Inter-American human rights institutions is identical to that of the European system. The Inter-American Commission can only accept cases in which the alleged violation occurred after the relevant member state ratified the American Convention. This admissibility criterion also applies to the IACtHR, with the added stipulation that the alleged violation must have occurred after the relevant state acceded to the Court (keeping in mind that accession to the Court is not required to ratify the American Convention). Applicants are required to submit their petitions to the Commission within six months of the exhaustion of domestic remedies. When a case reaches the IACtHR, the Court conducts its own evaluation of that case's admissibility that is independent of the Commission's admissibility decision. These criteria for establishing temporal jurisdiction in the American Convention match those in the European Convention.

In practice, however, the IACtHR has developed a uniquely flexible approach to temporal jurisdiction relative to the ECtHR. This divergence across the two courts is particularly visible in their respective approaches to alleged personal integrity rights violations. IACtHR judges have leveraged expansive interpretations of the right to judicial protection to strengthen the Court's authority to admit cases of "continuing

violations" that originated prior to a state's accession to the Court. Continuing violations are legally classified as such due to their unique ongoing effects that extend beyond the date on which the action that gave rise to the violation occurred. The IACtHR's position that enforced disappearances violate the right to judicial protection marks a stark divergence from the ECtHR's approach to disappearance cases. This maneuver has enabled the IACtHR to be "more generous with temporal jurisdiction in enforced disappearance cases."[60]

In general, the IACtHR will interpret its temporal jurisdiction more broadly in cases where the violation in question is permanent (for example, involving a death or disappearance) and requires implementing measures to ensure that the violation is not repeated.[61] This position illustrates the Court's distinct consideration of the gravity of continuing violations when rendering admissibility decisions as well as the Court's hesitance to assume that regime change is sufficient to preclude the re-emergence of past atrocities. Unlike the drafters of the European Convention (and a majority of ECtHR judges through the present day), IACtHR judges have not subscribed to the idea that the creation of the IACtHR or a given state's accession to the court constitutes a "break" with the past. Rather, the IACtHR sees itself as an agent for securing closure for victims of past atrocities and ensuring that similar abuses are not repeated.

V. Execution of judgments

Unlike in the European system, the IACtHR is charged with monitoring and enforcing state compliance with its own judgements. Not delegating the execution of

[60] Interview Q (ECtHR lawyer), June 2019.
[61] Interview M (IACtHR lawyer), Skype, May 2020.

judgements to a political body empowers the IACtHR with exclusive control over the remedial mandates that it can impose on states. The IACtHR has broadly interpreted its authority to issue diverse reparative measures as well as measures of non-repetition to prevent future reoccurrence of rights violations. These remedies have included, but are not limited to, financial compensation for the victims and/or the victims' surviving family, the abrogation of domestic legislation, public investigation into the circumstances of the case, the exhumation and identification of missing persons' bodies, public statements condemning the rights violations, public memorialization of the victims, the prosecution of the perpetrators, the provision of medical and psychological treatment to victims and/or their next of kin, the provision of infrastructural aid to affected communities, and, particularly in cases where indigenous people were victims of rights violations, national cultural education programs.[62] The IACtHR's in-house authority to monitor and enforce (or, at least, attempt to enforce) state compliance with judgements has contributed to the Court's innovative approach to legal remedies.

VI. Election of the IACtHR's first judicial bench

The American Convention entered into force in 1978 after the requisite eleventh OAS member state deposited its instrument of ratification (Art. 74(2)). [63] The following

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[62] For examples, see *Velásquez-Rodríguez v. Honduras* (July 21, 1989), *Plan de Sánchez Massacre v. Guatemala* (November 19, 2004), *Serrano-Cruz Sisters v. El Salvador* (March 2005), *Gelman v. Uruguay* (February 24, 2011), *Río Negro Massacres v. Guatemala* (September 4, 2012).

[63] Between the adoption of the American Convention in 1969 and the IACtHR's establishment in 1979, four more states joined the OAS: Grenada, Suriname, Dominica, and Saint Lucia.

judges were elected by the OAS General Assembly to serve on the IACtHR's founding bench in 1979:

Rodolfo E. Piza Escalante, *President of the Court*	Costa Rica
Pedro Nikken, *Vice-president of the Court*	Venezuela
Thomas Buergenthal,	United States
Carlos Roberto Reina	Honduras
Huntley Eugene Monroe	Jamaica
Máximo Cisneros Sánchez	Peru
César Ordóñez	Colombia

The IACtHR's first president, Rodolfo Piza Escalante, was an accomplished professor and international legal academic who held positions at universities spanning Latin America, the U.S., Europe, and Asia prior to his nomination to the court. He was also a diplomat and ambassador, representing Costa Rica in several international forums including as a vice-president of the UN General Assembly from 1979-80. Escalante went on to serve as the president of Costa Rica's Supreme Court following the conclusion of his term at the IACtHR (Segado 2002). Pedro Nikken of Venezuela was only 34 years old when elected to the IACtHR. Nikken came from a legal academic background with little experience in international law or governance. After the conclusion of his IACtHR term in 1989, Nikken became a prominent figure in international human rights. He served as an Independent Expert on the post-war Human Rights Commission for El Salvador, worked to establish a truth commission as UN Special Envoy to Burundi in 1995, presided over the International Commission of Jurists from 2011-12, and held a number of other high-profile international positions (Pinto 2019).

Thomas Buergenthal, a U.S. national who was born in Czechoslovakia, was nominated to the IACtHR's founding bench by the Costa Rican government. Prior to his

emigration to the U.S. as a child, Buergenthal was one of the youngest known holocaust victims to survive the Auschwitz and Sachsenhausen concentration camps. Buergenthal was a professor at the University of Texas Law School in 1979 when he received what he has claimed was an entirely unexpected phone call informing him that the Costa Rican government intended to nominate him for the IACtHR.[64] Buergenthal specialized in the study of international human rights law during his legal education and taught seminars on the topic, but beyond that had no formal experience in international organizations or domestic legal practice (Buergenthal 2005: 4). Carlos Roberto Reina was a lawyer with a long history of anti-dictatorial political activism prior to his nomination to the IACtHR. Reina was a member of Honduras's Liberal Party, which has been a frequent target of oppression due to the party's opposition to military governance. Reina had been imprisoned in 1944 after he publicly criticized dictator Tiburcio Carías Andino. After serving on the IACtHR, Reina was elected president of Honduras in 1993. His administration is notable for its progress in reducing corruption and the role of the military in politics, including the elimination of mandatory military service for Honduran citizens (AP 2003).

Huntley Eugene Monroe was a British-educated lawyer who held numerous positions within the Jamaican government from the 1930s through the 1960s. He served as Jamaica's Attorney General from 1964-67, and interrupted his retirement from public

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[64] "Convinced that this was a hoax and that the caller was a student in my seminar, I thanked the caller and asked him for his phone number, ostensibly to enable me to call him back after I had had a chance to discuss the matter with my wife." (Buergenthal 2005: 4).

service to join the IACtHR. Máximo Cisneros Sánchez was a Peruvian law professor and ambassador. He served as President of the Executive Committee of the Inter-American Federation of Attorneys and participated in numerous other professional associations for international lawyers. A specialist in aeronautical law, Sánchez served in the Legal Corps of the Peruvian Navy as well as the Attorney General of the Republic in Navy Affairs. Finally, César Ordóñez, of Colombia, was an academic and social democratic politician famous for his skills as an orator. In his academic career, he specialized in criminal law and public international law. During the early years of the IACtHR, Ordóñez also served as the President of the Free University of Colombia. (IACtHR Biografías de los Jueces 2021).

From these biographies, there are some clear points of differentiation between the professional backgrounds of the IACtHR's founding judges and those of the ECtHR. Five of the seven founding IACtHR judges came from predominantly academic backgrounds. Remarkably, none held a domestic judicial position prior to nomination to the Court. Reina and Ordóñez were the only founding judges with political backgrounds, both of whom had centered human rights concerns in their domestic agendas. Overall, the founding IACtHR judges had significantly less international and domestic legal experience than their ECtHR counterparts. While serving on the ECtHR was the capstone on an already prolific career for many founding ECtHR judges, serving on the IACtHR was instead a launching pad for several founding judges who went on to work in other international organizations, domestic courts, diplomacy, politics, and human rights activism. Importantly, two of the founding IACtHR judges, Buergenthal and Reina, had

personally experienced human rights violations at the hands of repressive regimes prior to their election to the Court. These experiences undoubtedly informed their judicial philosophies.

As in the European system, the IACtHR's founding judges were charged with drafting the Statute of the Court as well as the Court's first rules of procedure. Buergenthal's written recollections of this process, which occurred in Costa Rica shortly after the formal constitution of the Court in 1979, illuminate the motivations of the founding judges. These writings also shed light on the resource limitations and increasingly hostile political situation that the judges faced at the time. The first obstacle that the judges had to overcome was that they had nowhere they could do their work. While the Costa Rican government had offered San José as the official seat of the Court, it had not provided any physical court headquarters, or even office space. As a result, the founding IACtHR judges drafted the Statute of the Court in the "bathhouse of the Costa Rican Bar association":

> Here the voices of children swimming and jumping into the association's pool often drowned out our early drafting efforts, hardly an auspicious beginning for those of us who thought of ourselves as modern-day John Marshalls. (Buergenthal 2005: 5).

The Court was eventually able to move to temporary offices in Costa Rica's Supreme Court Building, and, some years later, to a separate permanent headquarters in San José. The issue of funding has plagued the IACtHR throughout its history, and the early years were no exception. When OAS General Assembly voted on the adoption of IACtHR's first budget, the final count was one vote short of the two-thirds majority needed to fund the Court. (The Nicaraguan delegate, who had previously assured the judges that he

would support the budget, later claimed to have "fallen asleep" during the vote). After the budget adoption failed, the IACtHR had to rely on ad-hoc bankrolling from the Costa Rican government to start operations. (Ibid.: 6).

Getting the Court off the ground was also complicated by the deteriorating status of democracy in the region. By 1979, Chile, Argentina, and Uruguay had all fallen to brutal military dictatorships. Democracy in the Dominican Republic was on rocky soil due to creeping militarism. Haiti, Panama, and Brazil were still entrenched in long-standing dictatorships. The civil wars in Colombia and Guatemala had intensified, and El Salvador was on the brink of a conflict that would see some of the most egregious human rights abuses in modern history. During the 1979 General Assembly Session where states voted to approve the IACtHR's Statute, Bolivia, the host country for the Session, had three different presidents. In Buergenthal's words:

> That left basically only Costa Rica, Venezuela , and Colombia- Peru was just emerging from a leftist dictatorship- among the Latin American countries, in addition to the small Commonwealth Caribbean nations, willing in 1979 to see the Inter-American Commission on Human Rights and Court become effective institutions for the protection of human rights. (Ibid.: 5-6).

The political conditions in the region made founding IACtHR judges fearful for their safety. The judges collectively petitioned the Costa Rican government for a promise of protection in the event that their own governments targeted them for their involvement in the IACtHR. Once again, Costa Rica stepped up, and agreed to grant any IACtHR judge a Costa Rican diplomatic passport "whenever his/her country of nationality failed to provide it" (Ibid.: 7). These developments reflect the precarity of the Court during its early years. Still, the founding judges persevered with hope and ambition. According to

Buergenthal, "Believing that the draft Statute to be submitted to the OAS General Assembly provided a rare opportunity to enlarge the Court's powers, we drafted it accordingly (Ibid.: 5)". The founding judges of the IACtHR saw themselves as embodying a mission to stifle authoritarianism and militarism and protect individuals from their governments against all odds. As such, the judges sought out avenues for expanding their power to intervene in domestic affairs. While the ECtHR was constructed on an assumed faith in national judiciaries, the founders of the IACtHR did not make similar assumptions.

VII. Conclusion

The selection of delegates to the San José Conference and the selection of founding IACtHR judges were ultimately up to the discretion of state governments. However, the professional and personal backgrounds of the individuals chosen to fulfill those roles indicate that perhaps political officials were not allocating sufficient strategic attention to these appointments. The selections of individuals whose demonstrated goals and values appeared antithetical to those of their governments may be attributed to those governments' lack of material or intellectual resources and/or preoccupation with domestic crises. The result was a cohort of individuals committed to pioneering an unprecedentedly robust human rights protection regime in a region in which state-sponsored abuses were tragically common.

The *travaux* of the American Convention do not indicate that regional integration was a widely-held goal of the drafters.[65] There is little evidence that the OAS has made

[65] "Regional integration" is only mentioned once in the *travaux*, by a Brazilian delegate. OEA/Ser.K/XVI/1.2, pg. 375.

substantive efforts to instill a shared "American" identity in its member states (Bermúdez 2018). Judge Cançado Trindade has attributed the IACtHR's rejection of a margin of appreciation doctrine to the lack of fully democratic states in the Court's membership (Contreras 2012: 64). This again demonstrates that the Inter-American system has long been undergirded by mistrust in the ability of domestic institutions to uphold human rights. While the Court is still working on building this trust, creating a coherent regional identity is a peripheral concern. This could explain why negotiations to draft the American Convention were not marked by the same constant anxiety about incursions on state sovereignty that are observable in the *travaux* of the European Convention. The drafters of the American Convention and founding judges of the IACtHR did not have to tread as carefully to placate state interests because, arguably, they had less to lose. The human rights situation in the region was deteriorating rapidly, and IACtHR founders saw themselves as the last resort to stall the downward spiral. As such, they felt liberated to craft an ambitious regime that protected a broad range of rights and supported a Court that would have extensive authority to intervene in domestic affairs.

Chapter 5

The African Court on Human and Peoples' Rights: pioneering a post-colonial human rights framework

The first proposal for an African human rights court emerged during the 1961 African Conference on the Rule of Law in Lagos, organized by the International Commission of Jurists. The conference was attended by 194 judges, lawyers, and legal scholars from 23 African countries and nine other states. The "Law of Lagos," a declaration passed during the conference, implored African governments to adopt a regional treaty on human rights and create a court to enforce that treaty.[66] Conference records indicate support amongst the attendees for an African human rights system that would be inspired by, but not replicate, the European and Inter-American human rights systems.[67] Most of the African lawyers who first envisioned a regional human rights system hailed from nations that had only recently achieved independence from European colonizers.[68] These lawyers were acutely aware of the challenges that the continent's colonial legacy posed for creating a regional human rights system. Proposing that governments abdicate any level of newly-won sovereignty to a supranational organization was deeply controversial (Ouguergouz 2003: 82-3). Still, the post-independence era was

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[66] *African Conference on the Rule of Law, Lagos (Nigeria), 3-7 January 1961 - Report on the Work of the Conference*, "Law of Lagos." 1961. Geneva International Commission of Jurists (ICJ), pg. 11.

[68] In fact, Nigeria, the state in which the conference took place, officially achieved independence only three months before the conference!

marked by eagerness on the part of African statesmen to join the international legal community on their own terms.

I. Reclaiming human rights in post-colonial context

Discussions at the African Conference centered around how to enter this community while navigating the "juxtaposition of an indigenous and a European law of persons".[69] Conference attendees asserted the imperative for African countries to reform their inherited colonial legal systems to incorporate local traditions and achieve representative democracy.[70] Conference attendees did not advocate abandoning those inherited systems as colonial relics. Rather, these lawyers emphasized the philosophical compatibility of so-called Western "rule of law" values with "African ideas of law and justice".[71] Debates focused on how to foster a coherent conceptualization of the rule of law, rooted in individual human rights protections, that could be translated across the diverse legal systems and political structures of African states. Records of those conversations indicate support for a proposal that would draw from the European and Inter-American models to create regional human rights systems. [72]

The establishment of the Organization of African Unity (OAU) by 32 states in 1963 created an opportunity to implement a regional human rights system under the auspices of that organization. However, OAU governments showed little interest in such a project. Rather, discussions on drafting an African human rights treaty continued to be

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[69] *African Conference on the Rule of Law*, "Introductory Report to the Third Committee- The Responsibility of the Judiciary and of the Bar for the Protection of the Rights of the Individual in Society." 1961. Herbert W. Chitepo, Geneva ICJ, pg. 71.
[70] Ibid., "Introductory Report to the First Committee- Human Rights and Government Security- The Legislature, Executive, and Judiciary." 1961. Abdoulaye Wade, Geneva ICJ, pg. 56-68.
[71] Ibid., "General Report." 1961. T.O. Elias, Geneva ICJ, pg. 54.
[72] Ibid., "Foreward." 1961. Jean-Flavien LaLive, Geneva ICJ, pg. 5-6.

primarily instigated by the UN, international human rights organizations, and African jurists. At a 1966 UN conference in Dakar primarily attended by African judges, members of ministries of justice, law professors, and international legal advocacy groups, participants proposed creating a two-tier regional human rights system within the OAU mirroring the European Commission and Court of Human Rights.[73] Conference records indicate a consensus among attendees supporting this proposal in theory. However, several participants voiced skepticism about the proposal's feasibility, emphasizing that African governments, "so recently freed from the colonial yoke, were particularly jealous of their sovereignty."[74]

This conversation continued at a second UN conference in Cairo in 1969. Participation at the Cairo conference was more evenly split between African jurists and low-level government diplomats.[75] The general idea of an African human rights commission enjoyed broad support among conference attendees, who concluded that such an institution "could greatly enhance Africa's international and moral image".[76] However, attendees disagreed regarding the specific responsibilities states should delegate to the commission. Most attendees agreed that the commission should perform educational outreach, conduct research studies on domestic human rights conditions, and offer general recommendations to states as to how to promote respect for human rights.[77]

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[73] *Seminar on Human Rights in Developing Countries,* Dakar (Senegal), 8 to 22 February 1966, United Nations, UNDOC ST/TAO/HR/25, paras. 239-41. See pgs. 1-6 for a full list of conference participants.
[74] Ibid., para. 241
[75] *Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa*, Cairo (Egypt), 2 to 15 September 1969, UNDOC ST/TAO/HE/38. See pgs. 20-5 for a full list of conference participants.
[76] Ibid. para. 39(e).
[77] Ibid. para. 19(a-c); para. 25, para. 37

Several attendees argued that it was "essential" that the commission also possess the authority to investigate specific cases of alleged human rights violations and issue decisions on member states' compliance with human rights law.[78] Others objected that fact-finding and dispute-resolution powers encroached on national sovereignty and risked making African governments even more averse to international cooperation.[79] A compromise was proposed wherein fact-finding and dispute resolution powers could be written into the commission's constitutive document as optional provisions.[80] This proposal was similar to the European and Inter-American systems at the time, where states could choose to opt-in to allowing individual citizens to submit petitions to the Commission. However, conference attendees were unable to come to an agreement on this matter, rending discussion of a regional court out of the question. The Cairo conference ended with few concrete results aside from vague pledges to appeal to OAU governments to support a human rights commission.[81] Those appeals fell on deaf ears, and the fledgling regional human rights project stalled for almost a decade.

In response to growing pressure from African and international human rights organizations, stemming in-part from unchecked rights abuses in newly-independent states, the OAU convened a "meeting of experts" in Dakar in 1979 to compose a preliminary draft of an African human rights treaty (Heyns 2004: 685). This meeting was attended by African legal experts, with no participation from government diplomats or

[78] Ibid. para. 31-3
[79] Ibid. para. 33
[80] Ibid. para. 36
[81] Ibid. para. 65(a-f).

politicians.[82] While the legal experts charged with drafting the charter sought inspiration from the European and Inter-American human rights conventions, meeting records indicate a collective sentiment among these drafters that the European and American models were insufficient for the African context. The hypocrisy of Europeans' purporting to pioneer the concept of global human rights in the 1940-50s while still holding African colonies featured prominently among discussions at the Dakar conference. In his address opening the conference, Senegalese president Léopold Sédar Senghor recounted his personal experience with the hypocrisy of the European human rights project. Senghor had been a member of the French parliament when the European Convention on Human Rights was drafted and adopted. Senghor recalled advocating for the automatic application of the Convention to CoE member states' colonized territories, only to be met with rejection by his French colleagues.[83] From the very first words uttered at the Dakar conference, the African human rights treaty was framed as an explicit rejection of the European model that had historically denied the humanity of Africans.

Still, Senghor was careful not to exclusively blame the legacy of European colonialism for the ongoing repression of human rights in the continent. "Unfortunately, independent Africa can hardly teach a thing or two on human rights. Let us admit our weakness. It is the best method of getting over it."[84] Senghor set the stage for discussions

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[82] *Report of the Secretary-General on the Draft African Charter on Human and Peoples' Rights.* Reprinted in Heyns (2002): 92.
[83] *Address delivered by Léopold Sédar Senghor, President of the Republic of Senegal.* Meeting of African Experts preparing the draft African Charter in Dakar, Senegal, 28 November to 8 December 1979. Reprinted in Heyns (2002): 78-9.
[84] Ibid.

that would prioritize the African states' unique needs while incorporating elements of the two existing regional human rights systems:

> You have therefore to be careful that your Charter may not be a Charter of the right of the "African Man"… There is neither frontier, nor race when the freedoms and the rights attached to the human beings are to be protected. That does not mean that we have to give up thinking by ourselves and for ourselves. Europe and America built up their system of rights and freedoms by referring to a common civilization: to their respective peoples and to specific aspirations… As Africans we shall neither copy, nor strive for originality, for the sake of originality...Therefore, you must keep constantly in mind our values of civilization and the real needs of Africa.[85]

The African Charter on Human and Peoples' Rights is an unprecedented instrument of international law in that it not only codifies "rights" that governments must guarantee, but also "duties" that individuals have to their families, communities, and nations. Senghor's speech indicates that this innovation was the result of reflection on how the African human rights system could be grounded in local traditions and philosophies:

> In Europe, human rights are considered as a body of principles and rules placed in the hands of the individual, as a weapon, thus enabling him to defend himself against the group or entity representing it. In Africa, the individual and his rights are wrapped in the protection the family and other communities ensure everyone... Therefore, contrary to what has been done so far in other regions of the world, provision must be made for a system of "Duties of Individuals," adding harmoniously to the rights recognized in them by the society to which they belong and by other men.[86]

The Dakar conference institutionalized a conceptualization of human rights as shared responsibilities, in contrast to a "Western" view of human rights as a contract between the state and individuals. In doing so, the experts at Dakar made a seminal contribution to

[85] Ibid.
[86] Ibid.

international law, illustrating the possibilities for alternative, post-colonial human rights frameworks.

Another innovation of the African Charter is that the agreement that includes an unprecedentedly broad range of civil and political as well as social, economic, and cultural rights provisions. The Europeans had rejected the inclusion of social, economic, and cultural rights in their Convention. These rights featured prominently in the original IAJC draft of the Inter-American Convention, but were ultimately watered-down substantially to make the agreement more palatable for governments. The drafters of the African Charter thus accomplished what the Americans attempted but could not quite pull off: getting governments to sign an agreement that placed civil, political, social, economic, and cultural rights under a single monitoring and enforcement system. It is this focus on economic, social, and cultural rights that motivated the drafters to include the phrase "Peoples' Rights" in the title of the Charter. Here again, President Senghor's words are illuminative: "We simply meant… to show our attachment to economic, social and cultural rights, to collective rights, in general, rights which have a particular importance in our situation of a developing country… Our overall conception of human rights is marked by the right to development."[87] Particularly given that negotiations to adopt a convention on the right to development at the UN level have been ongoing since the 1970s and are still ongoing today without any finalized agreement, it is remarkable

[87] Ibid.

that the drafters of the African Charter were able to successfully foreground this right in 1979.[88]

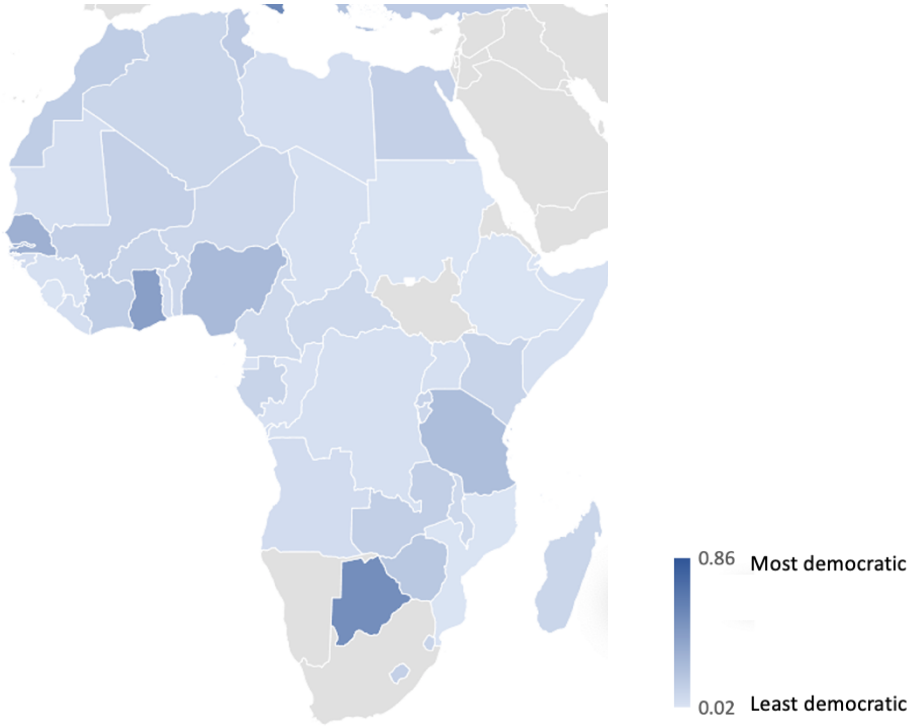
Very unfortunately, no *travaux préparatoires* of the African Charter exist (Akinyemi 1985: 223). As such, it is impossible to know the compositions, interests, and contributions of specific delegations to the Charter. The draft of the Charter produced during the Dakar conference was taken up during discussion at the OAU Ministerial Meeting in Banjul, The Gambia, in 1980. The draft was finalized at Banjul with only minor language amendments (Heyns 2002: 94-105). The African Charter on Human and Peoples' Rights was formally adopted by the OAU Assembly in 1981 in Nairobi, Kenya. The adopted Charter felt short of previously-articulated aspirations for establishing an African human rights court. The African Charter did establish an African Commission on Human and Peoples' Rights, which had a vague mandate to "promote human and peoples' rights… collect documents, undertake studies.. organize seminars, symposia, and conferences… to formulae and lay down, principles and rules aimed at solving legal problems related to human and peoples' rights… [and] Interpret all the provisions of the present Charter at the request of a State Party, an institution of the OAU or an African Organisation recognized by the OAU" (Art. 45). Without the *travaux*, it is unclear why either the drafters at Dakar or the ministers at Banjul did not choose to establish a corresponding human rights court. Christof Heyns, a historian of African regional institutions, notes two proposed explanations for the lack of provisions for a regional

[88] See the most recent UN draft convention on the Right to Development, from May 2020: https://www.ohchr.org/Documents/Issues/Development/Session21/3_A_HRC_WG.2_21_2_AdvanceEditedVersion.pdf

court in the finalized African Charter: first, an "idealistic explanation" rooted in "traditional" African conceptualizations of dispute resolution as best achieved through mediation and conciliation, as opposed to through adversarial legal processes.[89] Second, there was a perception that, bearing the scars of colonialization, OAU member states were fiercely protective of their sovereignty and not prepared to subject that sovereignty in any fashion to a supranational court (Heyns 2004: 686). The African Charter finally came into force in 1986, following the requisite ratification by a simple majority of OAU member states. The African Commission on Human and Peoples' rights was established shortly thereafter.

Figure 5.1

OAU Member State V-Dem Liberal Democracy Scores in 1980



II. The crucial role of legal bureaucrats in reviving the court project

Proposals for the creation of a court to complement the work of the African Commission languished for over a decade after the adoption of the African Charter. Finally, a post-1989 wave of democratization and increasing international attention to human rights concerns in the region contributed to the revival of the court project in the early 1990s. In 1994, the Assembly of the Heads of State and Government of the OAU adopted Resolution 230, which called for a Meeting of Experts to once again explore the possibility of a regional human rights court. The resolution text indicates that the primary factors motivating renewed interest in the court project were a collective awareness of the institutional weaknesses of the African Commission and deteriorating human rights conditions in OAU member states.[90] "It was the ineffectiveness of the Commission in protecting human rights in Africa that led to the creation of the Court" (Wright 2006: 473). The International Commission of Jurists (ICJ) can largely be credited for raising the necessary awareness and political will amongst OAU governments to greenlight further exploration of a regional court. The ICJ, which had written the very first proposal for an African court back in 1961, renewed its efforts in the early 1990s, partnering with the African Commission and human rights-oriented NGOs to build a coalition of actors who could pressure OAU governments to support the court project (Ouguergouz 2003: 85).

In accordance with Resolution 230, legal experts appointed by OAU governments met in Cape Town in September 1995 to deliberate a draft of a protocol to the African

[90] Assembly of the Heads of State and Government of the OAU. 1994. AHG/Res.230 (XXX): pg. 2.

Charter that would establish a regional court. African legal professionals, in cooperation with the ICJ, the African Commission, and the OAU Secretary-General, composed the draft discussed at Cape Town. The Cape Town conference was attended by 56 legal experts from 23 OAU member states, along with observers from NGOs and various international organizations (Ibid.). The draft protocol adopted by at Cape Town was then submitted to OAU member states, with the intention that governments would submit comments to be discussed at a June 1996 Assembly meeting. By the time this meeting occurred, however, only three states (Burkina Faso, Lesotho, and Mauritius) had responded to the request for comments. The OAU Council of Ministers decided to defer the discussion and re-circulate the draft to member state governments in the hope of receiving more feedback. This cycle repeated once more with minimal responses from OAU governments (Ibid.: 86). Finally, it was agreed that a second meeting of legal experts should take place to discuss the further development of the draft in April 1997 in Nouakchott, Mauritania. The revised draft, named the "Nouakchott Protocol," was then circulated to governments for commentary. Once again, the OAU Council of Ministers decided to defer discussion of the draft due to a lack of government response. At that point, only 20 of the OAU's 54 member states had responded to the request for comments on the draft Protocol. (Ibid.: 87).

Here we observe echoes of the apathy that characterized member state engagement with the early drafting process of the American Convention. Given the proliferation of democratic transitions across the continent in the early 1990s, it is possible that domestic preoccupations and stretched-thin resources precluded sufficient

member state involvement in the negotiations to establish an African regional court. Given that the question of the Court had been debated within various OAU organs for over thirty years at that point with no tangible results, perhaps governments did not feel that it was worth investing diplomatic resources to either support or oppose a project that looked unlikely to come to fruition.

The OAU Council of Ministers eventually deduced that government representatives had to be directly looped into the drafting process in order to secure any substantive state engagement with the proposed protocol. To that end, the Ministers arranged for a third meeting of legal experts in Addis Ababa, Ethiopia, in December 1997. The Addis Ababa meeting marked the first time since the revival of the court project in 1994 that government diplomats were invited to participate in negotiations on the draft Protocol. Only twelve OAU governments (Namibia, South Africa, Egypt, Senegal, Burkina Faso, Swaziland, The Gambia, Tanzania, Algeria, Burundi, Niger, and Togo) submitted prepared commentary on the Nouakchott Protocol for discussion at the Addis Ababa conference. I have only been able to find commentary texts from seven of those governments.[91] Delegates from 45 of the OAU's 54 member states attended the conference, marking an unprecedented level of government participation.[92] The seven governments whose submitted commentary is accessible all vocalized general support for creating the court. There were three central points of debate among their proposed amendments: 1) the need to formalize case processing procedures, particularly to ensure

[91] I have not been able to locate records of the submitted comments from Senegal, Algeria, Burundi, Niger, and Togo.
[92] *Third Government Legal Experts Meeting (Enlarged to Include Diplomats).* Reprinted in Heyns (2002): 287.

that the Commission and Court had distinct roles and would not interfere with each other's mandates, 2) the Court's power to issue legally-binding judgements and reparations orders, and 3) the issue of which actors could submit petitions directly to the Court. Five governments vocalized support for a two-level system similar to those in Europe and America, where the Commission would receive all petitions first and only refer cases to the Court when governments did not adequately address instances of probable rights violations. Egypt argued that states should be able to refer petitions directly to the Court without first going through the Commission.[93] Egypt also raised concerns that there was no provision in the Nouakchott Protocol that clarified the Court's authority to declare binding judgements and mandate the dispensation of reparations to injured parties. South Africa, which submitted only a brief comment indicating cautious support for the Court, took no position on either of these matters.

The Nouakchott Protocol draft included provisions permitting individuals and NGOs direct access to petition the Court only in cases of "urgent, serious, systematic, or massive violations of human rights" (El-Sheikh 1997: 947). In its comments submitted for consideration at Addis Ababa, Tanzania endorsed this approach.[94] Namibia advocated for the right of individual petition in all cases: "Since states do not suffer from inhuman treatment, human beings should have been granted ordinary access to the Court. Let us hope that the Commission shall effectively take individuals' cases to the Court."[95] Burkina Faso stopped short of endorsing direct access for individuals, instead proposing

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[93] *Comments and Observations Received From Member States on the Draft Protocol on the Establishment of An African Court on Human and Peoples' Rights.* Reprinted in Heyns (2002): 275.
[94] Ibid.: 278.
[95] Ibid.: 272.

that NGOs be able to submit petitions to the Court on behalf of individuals. Swaziland and The Gambia argued that both individuals and NGOS should be permitted to directly petition the Court. Egypt and South Africa took no position on individual access to the Court in their prepared commentaries.

Due to the lack of *travaux préparatoires*, it is not possible to infer the positions of the various legal experts and diplomats present at the Addis Ababa conference beyond what was articulated in the comments submitted by the aforementioned seven governments. Nor is it possible to know the identities of all of the delegates who attended the conference and how their professional backgrounds may have influenced their participation in the negotiations. Based on what little information is available, however, there does not appear to have been significant debate or pushback against the draft Protocol from the 45 states represented at Addis Ababa. The following recommendation was adopted at the end of the conference:

> The meeting noted the work undertaken by the Legal Experts and the African Commission from Cape Town to Nouakchott and finally to Addis Ababa and expressed its total satisfaction with the Draft Protocol as presently formulated. It, therefore, unanimously recommended the Draft Protocol for adoption by the Conference of Ministers of Justice/Attorneys-General.[96]

Shortly thereafter, the OAU Council of Ministers adopted the draft Protocol without objection. Finally, in June 1998, the OAU Assembly, "*without any discussion*," formally approved the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights. On that very day, 30 OAU member states signed the Protocol. The Protocol came into force in January 2004,

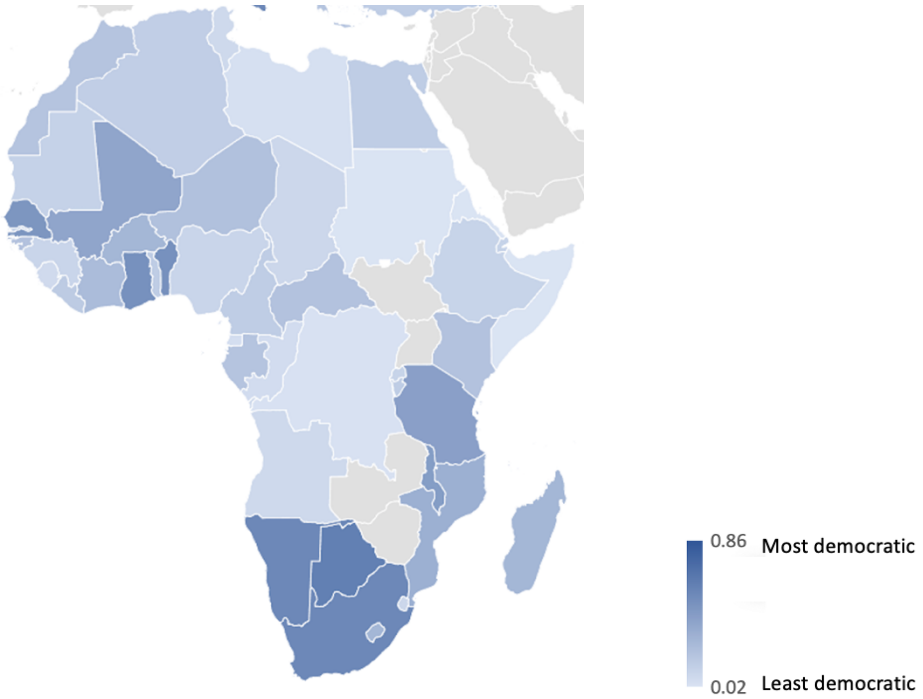
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[96] *Third Government Legal Experts Meeting (Enlarged to Include Diplomats).* Reprinted in Heyns (2002): 287.

following its requisite ratification by 15 member states (Ouguergouz 2003: 88-9). At that point, over forty years after the first proposal for a African human rights court at Lagos in 1961, the ACtHPR was finally established.[97]

Figure 5.2

OAU Member State V-Dem Liberal Democracy Scores in 1998



III.

Substantive Jurisdiction of the Court

The ACtHPR has a notably expansive substantive jurisdiction, at least on some levels. Several unique features of the Court's design contribute to this broad jurisdiction. First, according to the Protocol that established the Court, "the jurisdiction of the court shall extend to all cases and disputes submitted to it concerning the interpretation and

[97] In 2002, between the adoption and the entry into force of the Protocol, the OAU was re-constituted as the African Union (AU), the name under which the organization operates today.

application of the [African] Charter, this protocol, and any other relevant Human Rights instrument ratified by the States concerned" (Art. 3). This is a remarkable provision that indefinitely extends the authority of the ACtHPR to rule on the compatibility of state practice not only with the African Charter, but also with *any other relevant Human Rights instrument*, regional or global. As will be discussed in subsequent chapters, the ACtHPR has leveraged this Article to expand the issue areas in which it can develop jurisprudence. This Article also provides opportunities for the Court to incorporate legal interpretations from other human rights systems into its own case law. The ACtHPR possesses advisory jurisdiction to issue opinions on "any legal matter relating to the Charter or any other relevant human rights instruments," at the request of the AU, any member state, or any African organization recognized by the AU (Art. 4).

Second, the African Charter guarantees the following rights that are not included in either the American or European Conventions:

- The right to work "under equitable and satisfactory conditions," including "equal pay for equal work" (Art. 15).
- The right to "enjoy the best attainable state of physical and mental health," which obligates state parties to "take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick" (Art. 16).
- The right to an education, which includes a controversial provision that "The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State" (Art. 17).
- The right of the "aged and disabled" to "special measures of protection in keeping with their physical or moral needs" (Art. 18 (4)).
- The "right to existence," which encompasses "the unquestionable and inalienable right to self- determination" (Art. 20 (1)).
- The right of all people to "their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. States shall have the duty, individually or collectively, to ensure the exercise of the right to development" (Art. 22).

Here, the "right to self-determination" is particularly worthy of discussion. This right is rooted in the OAU/AU's post-colonial founding mandate to promote pan-African cooperation while defending national and cultural groups' right to self-governance. The right to self-determination is more fully specified in the African Charter relative to any other international agreement on the topic.[98] Article 20's wording creates room for the ACtHPR to engage in uniquely expansive interpretations of its authority in this area. For example, Article 20 states that "Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community." The Charter does not indicate what might constitute sufficient international recognition in such circumstances. Because the Charter also does not specify legally-legitimate mechanisms for liberation, Article 20 potentially leaves the door open for the ACtHPR to endorse the use of force by groups seeking self-determination. Additionally, the Article states that "All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural" (Art. 20 (3)). This clause could be interpreted to indicate a legal basis for foreign intervention for the purpose of assisting peoples seeking self-determination. Placing adjudication of this right within the jurisdiction of the ACtHPR imbues the court with the authority to intervene in particularly sensitive issues of domestic security, a power not shared by the IACtHR or the ECtHR.

[98] See Chapter 1 of the UN Charter and Article 1 of the UN Covenant on Civil and Political Rights.

There are a few curious omissions in the African Charter of substantive rights guaranteed by the other two regional systems. Somewhat bizarrely, there is no mention of an individual's right to privacy in the African Charter, despite the fact that this right is included in the European and American Conventions and has been widely-recognized as a fundamental human right since the mid-20th century. The African Charter also does not codify the right to compensation in the event of miscarriage of justice or the right of reply (protection of honor and reputation), both of which are found in the American Convention (but not in the European Convention). The African Charter also does not explicitly guarantee an effective remedy for rights violations, only "the right to an appeal to competent national organs…" (Art. 7 (a)). The American Convention is the only regional instrument that guarantees the right to a *judicial* remedy for rights violations.

While the African Charter guarantees a broader range of rights than the other regional conventions, the authority of the ACtHPR is arguably diluted by "claw-back clauses" littered throughout the Charter. These claw-back clauses impose limitations on the exercise of specific rights, limiting the scope of those rights to what is permissible under domestic law. It is common among international human rights instruments for certain rights, particularly the rights of association, assembly, and expression, to be subject to limitations for the sake of national security and/or public safety. However, the claw-back clauses in the African Charter permit limitations on a wider range of rights and do not specify that those limitations can only be applied in emergent circumstances. For example, the Charter states that "every individual shall have the right to express and disseminate his opinions *within the law*," potentially legitimating legal government

censorship of the right to expression even in the absence of emergency conditions (Art. 9 (2)). Further examples include provisions that "Every individual shall have the right to free association *provided that he abides by the law*" (Art. 10 (1)), Every individual shall have the right to freedom of movement and residence within the borders of a state *provided he abides by the law"* (Art. 12 (1)), and "Every citizens shall have the right to participate freely in the government of his country… *in accordance with the provisions of the law"* (Art. 13 (1)).

The African Charter is unique among international human rights agreements in that it not only codifies rights that states are obligated to guarantee to individuals and certain collective groups, but also duties that states and individuals have to one another. In addition to states' duties referenced above, the African Charter also requires governments to "promote and ensure through teaching, education, and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood" (Art. 25). This provision imposes a positive obligation on states to foster domestic cultures of human rights. The Charter also specifies duties imposed on individuals, including "duties towards his family and society, the State, and other legally recognized communities," "the duty to respect and consider his fellow beings without discrimination," "to preserve the harmonious development of the family," "to respect his parents at all times," "to serve his national community by placing his physical and intellectual abilities at its service," "to preserve and strengthen positive African cultural

values," and several others.[99] These duties have deeply personal implications, representing an unprecedented (and controversial) attempt to regulate individual conduct through international human rights law.

IV. Temporal Jurisdiction of the Court

The African Charter and its Protocol are remarkable in that they impose no temporal limitations on the ACtHPR's jurisdiction. Unlike in the American and European Conventions, there are no provisions within African Charter or Protocol that stipulate that the ACtHPR can only admit petitions in which the alleged violation occurred after the relevant state party's accession to the Court. This omission invokes obvious concerns regarding the principle of non-retroactivity within international law. Additionally, there is no equivalent to the "six-month rule" in the African Charter. Applicants thus do not have a specific time limit following the exhaustion of domestic remedies by which they must submit petitions to the African Commission or the ACtHPR. The African Charter only states that petitions must be received by the Commission "within a reasonable period from the time local remedies are exhausted" (Art. 56 (6)), and the Protocol is entirely silent on temporal jurisdiction. It is puzzling that state governments would ratify an agreement that contained no specification of the time period during which they could be held legally accountable for their human rights obligations before an international court.

V. Execution of Judgements

In cases where the ACtHPR finds that there has been a rights violation, the Court has the authority to order guilty parties to provide remedies, including "fair compensation

[99] See Articles 27-29 of the African Charter on Human and Peoples' Rights for the full list of duties.

or reparation" (Art. 27 (1)). This wording allows the court to mandate a wide range of monetary and non-monetary remedies. The ACtHPR is charged with monitoring state compliance with its own judgements. If a state has not complied with a judgement within the span of time designated by the Court, the Court's only concrete method of recourse is to submit a report detailing the state's non-compliance to the AU Assembly. It is then up to the members of the Assembly to decide what, if any, enforcement measures might be appropriate to induce state compliance.

VI. Election of the ACtHPR's first judicial bench

The ACtHPR's inaugural judicial bench was elected in January 2006. The bench comprised the following judges:

Gérard Niyungeko, *President of the Court*	Burundi
Modibo Tounty Guindo, *Vice-president of the Court*	Mali
El Hadji Guissé	Senegal
Fatsah Ouguergouz	Algeria
Jean Mutsinzi	Rwanda
Bernard Makgabo Ngoepe	South Africa
Kelello Justina Mafoso-Guni	Lesotho
Hamdi Faraj Fanoush	Libya
George W. Kanyeihamba	Uganda
Jean Emile Somda	Burkina Faso
Sophia A.B. Akuffo	Ghana

Gérard Niyungeko had a diverse career in academia, domestic courts, and international organizations prior to his election as the first President of the ACtHPR. From 1992-96, Niyungeko served as the President of the Constitutional Court of Burundi. Niyungeko held law professorships at universities across Africa and Europe, and served as the UNESCO Chair in Education for Peace and Conflict Resolution at the University of Burundi from 1999-2003. He served as a panel member and legal counsel within several

international tribunals, specializing primarily in international trade law. In his years prior to joining the ACtHPR, Niyungeko served as legal counsel within the African Commission. The ACtHPR's first Vice-President, Modibo Tounty Guindo, had a 29-year domestic judicial career before joining the ACtHPR. Guido served on courts at all levels of the Malian judicial system. In his capacity as a designated human rights advisor within the Ministry of Justice, Guindo directed Mali's presentation of its second Periodic Report before the UN Human Rights Committee.

Six of the ACtHPR's eleven founding judges came professional academic backgrounds, where they held professorships in law at universities traversing the globe. Bernard Makgabo had been the Chancellor of the University of South Africa since 2000, a position he held until 2016. Ten of the ACtHPR's founding judges had prior experiences as domestic judges. Jean Mutsinzi, Bernard Makgabo Ngoepe, Kelello Justina Mafoso-Guni, George W. Kanyeihamba, and Sophia A.B. Akuffo had all served as judges on their nations' highest courts. Justina Mafoso-Guni was the first female justice to serve on Lesotho's High Court. Jean Mutsinzi had also held various administrative and diplomatic positions within the OAU, and served as a judge on the Court of Justice of the Common Market for Eastern and Southern Africa from 2001-2003. George W. Kanyeihamba was the only founding judge with a political background, having served in the Ugandan National Legislature. Kanyeihamba also held domestic positions as Cabinet Minister, Minister of Justice, Attorney-General, and Senior Advisor to the President on Human Rights and International Affairs. Jean Emile Somda held numerous governmental and judicial appointments prior to joining the ACtHPR,

including Minister of Public Service, President of the Bobo-Dioulasso Court of Appeal, and Legal Adviser to the Minister of Justice. Hamdi Faraj Fanoush is a Libyan judge and ambassador who is known for his work conducting trainings on human rights issues within the Libyan judiciary and promoting other domestic human rights initiatives.

In addition to a legal career in Senegal, El Hadji Guissé served as the Secretary General of the International Organization for the Realization of Cultural, Social, and Economic Rights. He also worked with the UN in various capacities, including as President of the UN Sub-Commission on the Fight against Discriminatory Practices and the Protection of Minorities, and as President of the Working Group on the Consequences of Activities of Transnational Corporations on Human Rights. Fatsah Ouguergouz, the only inaugural ACtHPR judge without prior experience in a domestic judiciary, had a prolific career in international adjudication, human rights promotion, and legal education prior to joining the Court. Ouguergouz served as the Secretary of the International Court of Justice for 12 years and held various posts within the UN, including as a Human Rights Officer in Rwanda. Following the conclusion of his tenure at the ACtHPR, during which he was re-elected, Ouguergouz was appointed by the UN Human Right Council to serve as an Independent Expert on the Situation of Human Rights in Burundi. Ouguergouz has held professorships in universities across Africa, Europe, and North America, and continues to teach and publish in the field of international law.[100]

The ACtHPR's founding judges were highly-accomplished professors, jurists, and national and international diplomats. Many had spent their entire careers cultivating

[100] All of the above information on the judges' professional profiles can be found on the ACtHPR's website: https://www.african-court.org/en/index.php/judges/former-judges

expertise in human rights and international law. Only one judge had held domestic political office. Overall, the founding judges of the ACtHPR were notably more experienced than the founding judges of the IACtHR, although it must be kept in mind that professional opportunities related to international human rights law were much more prevalent in the early-2000s than they had been in the late-1970s. The backgrounds of the ACtHPR's founding judges indicate that they were an ambitious group devoted to advancing human rights, but also aware of domestic legal realities. Their extensive experience in domestic litigation no doubt informed how the ACtHPR began to forge relationships with national judiciaries in the Court's early years.

VII. Conclusion

The story of the ACtHPR's founding is full of fascinating innovations and contradictions. On the one hand, the African Charter and its Protocol are radically progressive documents that extended the scope of the rights protected under the African system well beyond what the architects of the American and European systems ever envisioned. On the other hand, claw-back provisions and the puzzling omission of certain rights from the Charter dilute the *de jure* authority of the Court. The OAU's history reveals a pervasive norm of non-intervention among African governments, stemming from the scars of colonization. Perhaps the more deferential elements of the Charter, as well as the fact that only a handful of governments have permitted their citizens to directly petition the Court, can be traced back to this historical suspicion of any encroachment on national sovereignty. Still, this group of governments that political scientists are often quick to characterize as resistant to international governance, or

fixated on "traditional" methods of dispute resolution outside of legal institutions, ultimately created a functioning international court and imposed comparatively few limits on its authority.

One of the biggest questions that emerges from the founding of the ACtHPR is why this group of governments would agree to create a regional court with an unprecedentedly wide-ranging substantive jurisdiction and virtually no limits on its temporal jurisdiction. Unfortunately, due to the lack of adequate record-keeping during the drafting of the Charter and the Protocol, it is more difficult to get a sense of particular drafters' and state parties' interests in the African case compared to the European and American cases. What we do know, however, is that it was legal experts, and not politicians, who created the first proposals for an African human rights charter and regional court. And it was legal experts from within and outside of Africa who were responsible for continuously attempting to revive the court project from the 1960s through the 1990s, even in the face of decades of government intransigence. Recall that states continually failed to provide requested feedback on the court project throughout the 1990s, and that government diplomats were only involved in the eleventh hour of the drafting of the Protocol, at the Addis Ababa conference. And recall that, following the completion of a draft Protocol at that conference, the OAU Assembly adopted the Protocol as it was presented and *without discussion.*

It seems bizarre that states would adopt such a consequential agreement without discussion or debate. Unless, that is, they just were not paying attention. The tumultuous wave of democratization that swept the continent in the early 1990s may have

preoccupied governments whose resources were stretched thin and for whom international affairs were not a top priority. Or, perhaps underestimating the potential authority of a regional human rights court, governments did not think it was worth their energy to squabble over legal jurisdictional issues. The ACtHPR is a very young court with a relatively underdeveloped case law compared to its European and American counterparts. Still, the first decade of the ACtHPR's jurisprudence has revealed how the Court's unique mandate has shaped domestic engagement with international law. The following chapters will explore the evolution of each regional court's case law, with particular attention to how judges reference their courts' founding mandates to guide interpretations of the legitimate reach of their authority.

Chapter 6

Bloom Where You Are Planted: each court's early years

I. Introduction

The unique geopolitical contexts and actors involved in drafting each of the regional courts' constitutive documents drove consequential variation across the substance and scope of those courts' formal mandates. The ECtHR's founding by stable post-war democracies whose political advisors retained tight control over drafting negotiations resulted in that court's relatively constrained jurisdiction. The IACtHR, on the other hand, was founded amidst widespread regime instability and state-sponsored repression. While embattled anti-democratic governments afforded little strategic attention to the court project, legal bureaucrats were able to leverage greater control over the negotiations to draft the American Convention. As a result, the Inter-American system was ultimately empowered with a mandate to protect a broader scope of human rights guarantees. The leadership of African jurists in drafting the African Charter and its Protocol contributed to the ACtHPR's unprecedentedly wide-ranging jurisdiction. However, the Court's mandate is arguably diluted by "clawback" provisions littered throughout the Charter that reflect suspicion of international governance among regimes that had only recently gained independence from their colonizers.

This chapter investigates how the first judges who served on the regional courts interpreted the authority that had been delegated to them. Each court confronted very different types of human rights violations during its early years of operation. Judges calibrated their projection of authority based on the exigencies of their respective political

environments. The precedents set in each court's early years are crucial for understanding how these courts navigate their relationships with national authorities today. For ease of reference, an appendix that briefly describes each case that is discussed in this chapter can be found at the end of this work. There are corresponding appendices for Chapters 8, 9, and 10, as these chapters are similarly focused on case law analysis.

An IC's founding interpretation of its authority is guided by the formal mandate set forth in its constitutive documents. But no judge on any court simply applies the law as it written. Law has inherent subjectivities, and it is impossible for those who write laws to anticipate every dispute that might emerge between legal subjects. As judges are charged with interpreting the law, they possess a great deal of agency in molding a court's authority. The judges that comprise a court's founding bench are in a unique position to pioneer their own interpretations of their court's social purpose. In order to understand why an IC exercises power in particular ways, it is essential to analyze how that court's early case law contributed to judges' interpretations of the legitimate extent of the court's authority.

Based on the challenges confronted by a court in its early years, court officials will self-define their legitimacy as more or less tied to cooperation with member state governments and respect for state consent to jurisdiction. Court officials will reference this legitimation narrative to define the appropriate exercise of court authority relative to national authority, establishing a durable framework for when and where the court will intervene in domestic affairs. For example, if a regional court faces a high number of cases involving systemic, fundamental rights violations in its early years, indicating

widespread disrespect for human rights among member governments, that court will likely feel the need to wield more heavy-handed authority. Judges will legitimize this exercise of authority through internal narratives that emphasize the imperative to keep repressive governments in check. On the other hand, if the cases that a regional court faces in its early years primarily reflect isolated human rights shortcomings, that court might be more willing to trust governments to generally uphold their obligations. The court may not perceive legitimate grounds to adopt a domineering interpretation of its authority, and may instead opt for a more deferential approach to resolving disputes.

II. Case selection

The following chapter investigates the validity of this argument through analysis of the early years of each regional court's case law. Because it is impossible to evaluate the entirety of each court's case law within a project of this length, I focus on three categories of rights: 1) the freedom of expression, which was integral to each Court's founding case law, 2) personal integrity rights violations[101], which dominated the IACtHR's early case law but were not routinely confronted by the ECtHR until the 1990s, and 3) protections against anti-LGBT discrimination, an issue that was not addressed by any court early-on but received more attention as international norms evolved. While this chapter, which focuses on each court's early years, will only address LGBT rights in the context of the ECtHR (as no relevant cases reached the other two courts until later), chapter 10 will discuss the evolution of each court's jurisprudence in this area. The ACtHPR is still a young court and has a comparatively underdeveloped

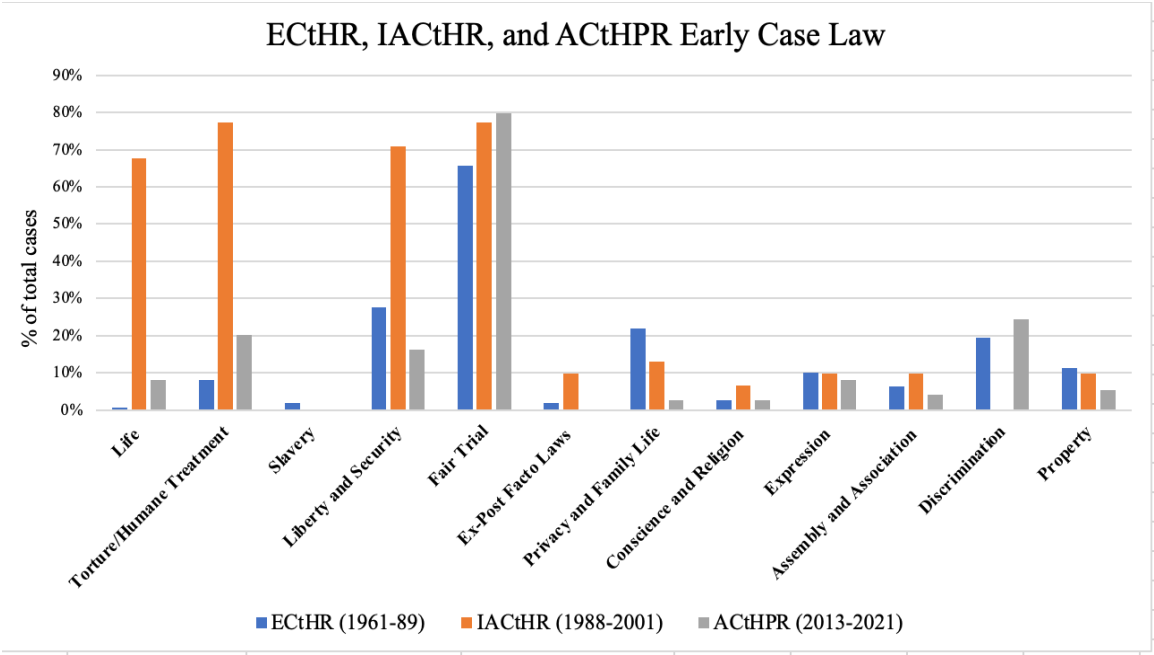
[101] These include violations of the right to life as well as the right to humane treatment/prohibition of torture.

case law. As such, this chapter will evaluate critical developments in the ACtHPR's early case law with a focus on, but not exclusive attention to, the above rights categories.

Each regional court was founded during a different decade and developed jurisprudence at a different pace. For the purposes of this chapter, I constrain my analysis of each court's "foundational case law" to judgements rendered between 1961-89 for the ECtHR, 1988-2001 for the IACtHR, and 2009-2016 for the ACtHPR. The ECtHR issued its first merits judgement in 1961, and its jurisprudence grew quite slowly through the mid-1980s. I have chosen 1989 as the cut-off for the ECtHR's foundational period because 1990 marked the first major shift in the Court's membership. The CoE admitted a wave of new, Eastern European member states throughout the 1990s. This eastward expansion dramatically shifted the political context in which the ECtHR operated. The IACtHR issued its first merits judgment in 1988. This chapter follows the Court's jurisprudence through 2001, up until the point when the Inter-American system underwent its first round of major procedural reforms. Finally, this chapter evaluates the ACtHPR's jurisprudence between 2009, the year of the court's first admissibility decision, and 2016, the year before a sharp uptick in judgements rendered annually. We are likely still within the ACtHPR's foundational period today. As such, my temporal definition of this period is hampered by lack of retrospect. Still, the 2009-16 period marked a formative era for the Court before the rapid increase in caseload it has experienced post-2016. The following review of case law is not exhaustive. I have elected to discuss particular cases based on their importance for establishing precedent and assessing each court's exercise of its authority.

Figure 6.1 illustrates variation across the types of rights violations confronted by the ECtHR and IACtHR during each court's foundational period, as well as the ACtHPR's jurisprudence from its first merits judgement (2013) through 2021. Each rights violation category is depicted as percentage of each court's overall case law output. The twelve substantive rights violations on the x-axis are the rights that are shared across the European Convention, American Convention, and African Charter.[102,103,104]

Figure 6.1



[102] Figure 6.1 only includes cases that were declared admissible, and includes cases where the respective violation was alleged, not necessarily established. One might reasonably ask why, given the frequency of fair trial violations, I have not selected this right as a primary area of analysis. I have not done so because the IACtHR found a violation of the right to free trial in 77% of cases from 1998-2001 (100% of the instances that violation was alleged), while the ECtHR found a violation of the right to free trial in 40% of cases from 1961-89 (60% of the instances that violation was alleged). These disparate proportions suggest significantly different standards for establishing a violation of the right to free trial across the IACtHR and ECtHR, complicating the ability to draw meaningful comparisons.

[103] The right to privacy is not included in the African Charter, but the right to family life is (Art. 18). The ACtHPR does have jurisdiction over the right to privacy as codified in other human rights treaties ratified by members states.

[104] Freedom from ex-post facto laws is included within the right to fair trial in the African Charter, so alleged violations of those rights are combined under the fair trial column for the ACtHPR in this chart.

The IACtHR was by far the most active court in its early years, with a case law that was dominated by personal integrity rights violations. Each court heard a high proportion of cases alleging violations of the right to fair trial. Assessing the case law of the ACtHPR is hindered by the fact that the court is still so young, but the trajectory of its current output indicates that the ACtHPR is on track to rule on just as many (if not more) cases in its first twenty years as the IACtHR did in its first twenty years. The fact that 68% of IACtHR cases from 1988-2001 involved alleged violations of the right to life reflects the severity of the human rights crisis that the Court was tasked with confronting. 77% of IACtHR cases during that period involved alleged violations of the prohibition of torture/right to human treatment, further illustrating the abuse wrought by militaristic regimes throughout the region. The ECtHR, meanwhile, only heard one case involving an alleged violation of the right to life between 1961-89, and 13 cases in which torture or inhumane treatment was alleged (8% of total cases during that period). 28% of ECtHR cases heard during this period involved alleged violations of the right to liberty and security, but these cases primarily resulted from isolated instances of prolonged pre-trial detention, not systemic state-sponsored violence.[105] While the ACtHPR has encountered personal integrity violations less often than the IACtHR in its early years, the ACtHPR has still heard more cases alleging such violations in the past eight years than the ECtHR did in its first 28 years in operation. These figures illustrate the very different challenges that faced each court as they sought to gain footing in their respective regions.

[105] The exception to this statement is a pair of cases originating in the Northern Irish conflict, *Lawless v. Ireland* (1961) and *Ireland v. United Kingdom* (1978), which are discussed below.

III. The European Court of Human Rights

The ECtHR's early case law demonstrates a tendency to broadly interpret the circumstances in which states can legally restrict certain rights guarantees. These circumstances ranged from the need to protect public "morals" to the use of derogation clauses to suspend rights protections during emergencies. The Court's deference to state parties was rooted in general respect for the competence of national authorities. ECtHR judges developed a novel legal doctrine, called the "margin of appreciation," to calibrate this deference. Cases involving alleged violations of the right to freedom of expression and anti-LGBT discrimination were particularly important for developing the initial contours of the margin of appreciation. The doctrine's application was closely tied to what the Court saw as regional consensus surrounding given human rights norms, with less deference afforded to states who deviated from that consensus. The early ECtHR lacked experience with personal integrity rights violations, a reflection of the region's general democratic stability. This context likely contributed to the Court's tendency to defer to states in cases implicating national security, with controversial implications for the Court's handling of cases stemming from the Northern Irish conflict.

Personal integrity rights case law

The prohibition of torture, codified in Article 3 of the European Convention, is among the most fundamental human rights. As a *jus cogens* principle of international law, no derogation from this right is ever permissible, even under conditions of public emergency during which other rights can be validly restricted. Article 3 reads: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". The

ECtHR established an Article 3 violation for the first time in *Ireland v. the United Kingdom* (1978), an example of rare inter-state disputes within the European system. The Irish government called on the Court to determine whether British security forces had engaged in a systematic practice of torturing suspected IRA members in Northern Ireland. The Court was not tasked with ruling on whether specific individuals had been tortured, as the Court can only rule on violations suffered by applicants. When the applicant is a state party, as in this case, that state can only ask the ECtHR to determine whether another state's pattern of behavior has breached the Convention.[106]

At issue in *Ireland* was the question of whether specific interrogation practices employed by British security forces, known as the "five techniques", constituted torture. These techniques included wall-standing in a "stress position", hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink.[107] In this case, the ECtHR interpreted Article 3 to indicate that a distinction exists between "torture", on the one hand, and "inhuman or degrading treatment or punishment", on the other. This distinction "derives principally from a difference in the intensity of the suffering inflicted". [108] The judgement did not elaborate on what might constitute a minimum level of suffering for an act to be deemed torture. The Court ruled that the "five techniques" qualified as inhuman and degrading treatment, and thus violated Article 3. However, despite acknowledging that the techniques caused "intense physical and mental suffering…and also led to acute

[106] Case of *Ireland v. the United Kingdom* (App. no. 5310/71), Judgement of 18 January 1978, ECtHR (Chamber). para. 157-59.
[107] Ibid., para. 96.
[108] Ibid., para. 167.

psychiatric disturbances", the Court ruled they "did not occasion suffering of the particular intensity and cruelty implied by the word torture…".[109]

The ECtHR's ruling in *Ireland* has been extensively critiqued as an inappropriately narrow application of Article 3 (Spjut 1979; Cullen 2003). The Court's ruling is especially puzzling because the European Commission had unanimously declared the five techniques to constitute torture in its independent consideration of the *Ireland* case.[110] Due to the lack of reasoning offered by the Court, it is unclear why the judges decided to reject the opinion of the Commission in this case. One might reasonably wonder if the ECtHR's lack of experience ruling on personal integrity rights violations in the 1970s contributed to the judges' decision. However, when the Court was given a rare chance for a re-do, it declined. In 2014, the Irish government submitted a "request for revision" of *Ireland* to the ECtHR on the grounds that newly-discovered documents contained facts relevant to the severity of the interrogation techniques. The ECtHR dismissed this request, citing that these documents would not have a "decisive influence" on its decision.[111] Even after forty years, the ECtHR's reasoning remained firm.

One way in which ICs can exhibit deference to national authorities is by allowing states to temporarily derogate from their international obligations. Article 15 of the European Convention permits derogations in times of "war or other public emergency."

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[109] Ibid.
[110] Case of *Ireland v. the United Kingdom* (App. no. 5310/71). Report of the European Commission, adopted 25 January 1976, pg. 402.
[111] Case of *Ireland v. the United Kingdom* (App. no. 5310/71), Judgement (Revision) of 20 March 2018, ECtHR (Third Section).

Given the drafters' faith that mass violence in Europe was a thing of the past, it is ironic that the first case ever heard by the ECtHR centered on a simmering civil conflict. Decided on the eve of The Troubles, *Lawless v. Ireland* (1961) concerned the arbitrary detention of a suspected IRA member. Ireland had submitted a derogation to restrict the right to liberty and security (Art. 5) during civil unrest. The ECtHR determined that Ireland applied the derogation appropriately, and no violation was found.[112] This decision instigated a long-term trend in the Court's case law granting state authorities a wide margin to derogate from the Convention in times of civil conflict (Gross and Ní Aoláin 2001). Allowing states to derogate implies a level of trust in domestic authorities to only restrict rights to the extent that is required by an acute situation. Outside of a handful of cases stemming from the Northern Ireland conflict, the European system did not routinely confront cases of conflict-era rights abuses until the late-1990s. Consequently, the ECtHR's case law on personal integrity rights remained underdeveloped for decades.

The ECtHR found a violation of Article 3 in only one other case during the 1970s: *Tyrer v. the United Kingdom* (1978). The applicant was a teenager who had been convicted of assault for beating his classmate. The boy was sentenced to three lashes with a birch stick, administered by a policeman. The ECtHR determined that this punishment constituted degrading treatment in violation of Article 3, but did not indicate torture.[113] *Tyrer* and *Ireland* established that a broad span of behavior that could constitute

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[112] Case of *Lawless v. Ireland* (No. 3) (App. no. 332/57). Judgement of 1 July 1961. ECtHR (Chamber).

[113] Case of *Tyrer v. the United Kingdom* (App. no. 5856/72), Judgement of 25 April 1978, ECtHR (Chamber). para. 35.

degrading treatment- from three birch lashes to prolonged interrogation techniques aimed at inducing physical and mental breakdown. However, it was not until the 1990s that the ECtHR would develop clearer definitions of what actions could be distinctly considered "torture".

States' obligations to refrain from actions that constitute inhuman or degrading treatment were well-established in international law by the 1980s. However, the extent to which states have positive obligations to prevent and respond to such treatment inflicted by private citizens on others was a much murkier legal area. Indeed, the scope of governments' positive obligations to prevent and provide legal remedies for bodily harm committed by non-state actors is still an evolving area within international law today. The ECtHR first grappled with this issue in *X and Y v. the Netherlands*, and incredibly tragic case involving a mentally-disabled teenage girl who was raped by an employee's relative at the privately-owned care facility where the girl lived. When the girl's father went to the police to file a criminal complaint against the alleged rapist, he was informed that he could not sign the complaint on behalf of his daughter because she was over 16 years of age. However, the police also made a determination that the girl was not mentally capable of filing a complaint herself. The public prosecutor's office decided not to pursue criminal proceedings against the alleged rapist on the grounds that no one had legal standing to file a complaint. This decision was upheld by a Court of Appeals, which found that there was a "gap in the law… that could not be filled by means of a broad interpretation to the detriment of [the alleged rapist]".[114]

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[114] Case of *X and Y v. the Netherlands* (App. no. 8978/80), Judgement of 26 March 1985, ECtHR (Chamber), paras. 7-13.

The case eventually made it to the ECtHR, where the girl's father argued that the "gap in the law" that prevented Dutch parents from launching criminal proceedings against their teenage children's abusers violated the right to private and family life (Article 8), the right to an effective remedy (Article 13), discriminated against the mentally disabled in contravention of Article 14, and constituted inhuman and degrading treatment under Article 3. ECtHR judges unanimously ruled that the lack of legal protection for the applicants violated Article 8, but, having established that violation, the Court "did not have to examine" the complaints under Articles 3, 13, and 14.[115] This judgement is an example of ECtHR judges' tendency to rule only on what they deem to be the core violation(s) in a case petition, and not on allegations that are considered to be peripheral or redundant. The judges' decision not to consider whether the applicants' lack of legal recourse for rape constituted inhuman or degrading treatment is revelatory of their stance on states' positive obligations to prevent bodily harm. The ECtHR held the Netherlands accountable for the circumstances that blocked the girl and her father from accessing domestic legal recourse. However, the Court did not find it appropriate to consider whether, by permitting a gap in the law, the state had failed to uphold any positive obligation under Article 3 to prevent and/or respond differently to the assault itself.

The ECtHR first confronted an alleged violation of the right to life (Article 2) in *Soering v. the United Kingdom* (1989), a landmark case that established influential precedent regarding states' human rights obligations to individuals subject to extradition.

[115] Ibid., paras. 31-36.

The applicant, Jens Soering, was a German national who was at the time detained in England pending extradition to the United States to face capital murder charges. Mr. Soering had admitted to investigators that he and his girlfriend had murdered his girlfriend's parents in Virginia before fleeing to Europe. Mr. Soering argued before the ECtHR that, by sending him to stand trial in a country where he was at risk of receiving the death penalty, the U.K. would violate Articles 2 and 3 of the European Convention. The ECtHR majority rejected the applicant's claim under Article 2, pointing out that the Convention does not explicitly prohibit capital punishment.[116] Judge De Meyer rejected this conclusion, writing in a separate opinion that "there can be no doubt whatsoever that the applicant's extradition to the United States would violate his right to life". Emphasizing that social tolerance of the death penalty had diminished since the Convention's drafting in 19050, Judge De Meyer argued that extradition to any country where an individual would be susceptible to the death penalty would, in fact, violate Article 2: "Such a punishment is not consistent with the present state of European civilization".[117] ECtHR judges did unanimously rule that, based on prison conditions and average length of pre-execution detention for death row inmates in the U.S., the U.K. government would violate Article 3 should it proceed with the Mr. Soering's extradition.[118] This case was pivotal in that it broadened the scope of states' responsibilities under the Convention to encompass the consequences of transferring

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[116] Case of *Soering v. United Kingdom* (App. No. 14038/88), Judgement of 7 July 1989, ECtHR (Plenary), paras. 101-4.
[117] Ibid., Concurring Opinion of Judge De Meyer.
[118] Ibid., paras. 106-11. Ultimately, after receiving assurances that Mr. Soering would not be sentenced to death, the U.K. fulfilled the U.S.'s extradition request. Mr. Soering was found guilty on two charges of capital murder (Blackston 1991:1478). He was released on parole in 2019.

individuals to outside jurisdictions. This decision would have important ramifications for later deportation cases.

The ECtHR did not face any other cases involving potential violations of the right to life until the mid-1990s. Overall, the ECtHR developed very little case law on personal integrity rights violations during the its early years. The early ECtHR's lack of cases involving fundamental rights violations illustrates how the types of regimes that comprise an IC's membership influence the court's relationships with member governments. In the absence of systemic rights abuses, ICs can have more confidence in domestic institutions, and consequently defer greater authority to those entities to determine how best to implement their international obligations. Perhaps this explains the Court's hesitance to label the UK's treatment of Northern Irish prisoners as torture. The ECtHR found the interrogation techniques to be "degrading" but felt that condemning the UK for practicing torture, with all the loaded connotations of that term, was a bridge too far.

Freedom of expression case law

The right to freedom of expression, codified in Article 10 of the European Convention, consistently featured in the ECtHR's early case law. Violation of this right was central to *De Becker v. Belgium* (1962), the second case the ECtHR ever heard. In *De Becker,* the ECtHR was faced with interpreting its temporal jurisdiction (*ratione temporis*) in the context of an alleged "continuing violation." A continuing violation entails "the breach of an international obligation by an act of a subject of international law extending in time and causing a duration or continuance in the time of that breach" (Pauwelyn 1996: 415). Unlike for instantaneous actions that take place in a definable

moment, it can be tricky to ascertain when an alleged continuing violation starts or ends. This poses a challenge for judges, as the timing of an action implicates its admissibility for judicial consideration. ICs can only admit cases when the complained-of action occurred after the state acceded to the court. In cases alleging continuing violations that originated pre-accession, the court must decide whether justification exists for the Court to possess temporal jurisdiction over the complaint.

Raymond De Becker was a journalist who had collaborated with the Nazis during the occupation of Belgium. De Becker was condemned to death by a Belgian war crimes tribunal in 1946, but his sentence was later reduced to life imprisonment and the forfeiture of his civil and political rights. Following his conditional release in 1951, De Becker petitioned the European Commission alleging violation of his right to freedom of expression. The case was forwarded to the ECtHR, which admitted the part of De Becker's application that disputed the international legality of the penal code under which he was sentenced. The Court recognized that the ongoing impact of his sentencing had placed De Becker in a "continuing situation".[119] *De Becker* was ultimately struck from the ECtHR's docket after a domestic legislative reform resolved the applicant's complaints. Still, this case set a precedent for acknowledging continuing situations, and started to delineate conditions for admitting alleged violations that originated prior to state accession to the Court.

The ECtHR's case law on freedom of expression has been integral in shaping the Court's broader relationships with national authorities. *Engel and Others v. the*

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[119] Case of *De Becker v. Belgium* (App. no. 214/5), Judgement of 27 March 1962, ECtHR (Chamber). para. 8

Netherlands (1976), the second case in the ECtHR's history to deal with freedom of expression, involved several applicants who were conscripted members of the Dutch military. Two of these applicants had published a journal that their superiors deemed "inconsistent with military discipline". As punishment, they were assigned to a disciplinary unit and banned from publishing articles with similar content. When the applicants continued publishing articles, they were arrested and detained for three months.[120] The ECtHR found no violation of Article 10 in this case. The Court accepted the government's argument that the actions taken were "necessary in a democratic society…for the prevention of disorder." This argument draws from the acceptable restrictions of the right to freedom of expression outlined in Article 10 (2) of the Convention. The ECtHR elaborated that expression can be restricted not only if the general "public order" is threatened, but also if order is threatened "within the confines of a specific social group" when "disorder in that group can have repercussions on order in society as a whole."[121] Thus, domestic authorities can restrict expression in groups whose activities affect the general public, such as the military (even amongst conscripted service members).

The applicants in *Engel* had argued that the Convention permits restrictions on expression for the "prevention of disorder" only *in combination* with the "prevention of crime." As the applicants did not incite criminal activity, they argued that their Article 10 rights had indeed been violated. Here, a discrepancy across the Convention's official

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[120] Case of *Engel and Others v. The Netherlands* (App. nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72), Judgement of 8 June 1976. ECtHR (Chamber). para. 43-51.
[121] Ibid., para. 97-98.

translations forced ECtHR judges to make an interpretive choice. The French translation of Article 10 (2) states that expression can be restricted for the prevention of disorder **and** crime, while the English translation permits restriction for the prevention of disorder **or** crime. The Court majority found the English version to provide "a surer guide on the point".[122] This decision established crucial precedent widening the circumstances under which states can validly restrict expression. *Engel* was foundational to a strong trend in the ECtHR's jurisprudence of deferring to national authorities in situations implicating public emergency or security concerns, broadly defined.

It was within the context of a freedom of expression dispute in *Handyside v. The United Kingdom* (1976) that the Court first referenced the margin of appreciation doctrine (hereafter, MOA). This doctrine, while having no textual basis in the original Convention, is a primary instrument through which the Court exercises a deferential interpretation of its authority. The MOA guides the extent to which the Court will defer to a member state regarding a complained-of practice. Judges will apply a wider or narrower MOA depending on the level of consensus the Court observes on a given issue among member governments. This consideration of existing practices when applying the MOA reflects the ECtHR's respect for sovereignty and trust in the competence of national judiciaries. The MOA is rooted in the founders' vision of the ECtHR as a mechanism for fostering a shared European identity: by defining what constitutes consensus among member states, the ECtHR articulates what it means to be "European".

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[122] Ibid.

At issue in *Handyside* was the publication of a "reference book" on various topics surrounding sex and sexuality with an adolescent target audience. British authorities had charged the book's publisher with violating the Obscene Publications Acts. The publisher was convicted and fined, and over a thousand copies of the book were seized and destroyed. The ECtHR found that British officials had acted reasonably under the provision of Article 10 (2) that permits expression to be restricted when "necessary in a democratic society… for the protection of health or morals."[123] This interpretation upheld the judgement of the domestic court, which had determined that the book could "deprave and corrupt" minors. The domestic court had emphasized concerns regarding the book's lack of discussion of marriage and passages that implied that homosexual relationships could be "something permanent", as well as the author's suggestion that "every school should have at least one contraceptive vending machine".[124]

In *Handyside*, the ECtHR emphasized that "the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights" and "it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in [Article 10 (2)]." Consequently, Article 10 (2) "leaves to the Contracting States a margin of appreciation".[125] This marked the first use of the term "margin of appreciation" by the ECtHR. Reiterating the Court's confidence in domestic authorities, the judgement declared that "it

[123] Case of *Handyside v. The United Kingdom* (App. no. 5493/72). Judgement of 7 December 1976. ECtHR (Chamber). para. 46.
[124] Ibid., para. 31, 34.
[125] Ibid., para. 48.

is in no way the Court's task to take the place of the competent national courts."[126] Thus, the ECtHR determined that British officials had acted within the MOA, and there had been no breach of the publisher's freedom of expression. The ECtHR again upheld that states can legally seize materials for the sake of "public morals" in *Müller and Others v. Switzerland* (1988), where authorities had confiscated sexually-explicit paintings that a group of artists were displaying in a private gallery. The artists were subsequently convicted of publishing obscene materials under the Swiss Criminal Code and fined. The ECtHR majority ruled that neither the artists' conviction or the confiscation of their paintings violated Article 10.[127]

The ECtHR established a violation of freedom of expression for the first time in *The Sunday Times v. The United Kingdom* (1979). At issue was an injunction issued against the Times intended to block coverage of the "thalidomide children" scandal. Thalidomide was a sedative drug marketed to pregnant women that was found to have caused severe birth defects in hundreds of children born in Britain in 1961. The Times regularly reported on the plight of these children and the drug manufacturer's attempts to evade accountability throughout the late-1960s and early-1970s. In 1972, a British court granted an injunction against the Times to block the publication of a forthcoming article that authorities feared could corrupt ongoing settlement negotiations between the drug manufacturer and the families of the affected children.

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[126] Ibid., para. 50.
[127] Case of *Müller and Others v. Switzerland* (App. No. 10737/84), Judgement of 24 May 1988, ECtHR (Chamber), paras. 36-44.

The ECtHR observed that the Convention guarantees "not only the freedom of the press to inform the public but also the right of the public to be properly informed".[128] In light of this, the Court emphasized that "the public interest aspect of the case" must be taken into account.[129] As the thalidomide issue was of great public concern, the injunction "did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression."[130] Thus, the UK had violated Article 10. This case contributed to developing the contours of the MOA in freedom of expression cases, namely clarifying that a state's right to determine when social needs justify restriction of expression is not unlimited. The Convention does not permit states to suppress information of significant public interest, for example, as in this case, involving public health concerns. It is curious that adolescents' access to sex education, arguably also a public health concern, was not determined to meet this threshold in *Handyside.*

Overall, early ECtHR judges applied a wide margin of appreciation in cases where applicants' expression was restricted for reasons pertaining to public order and morality. The Court even went so far as to permit the confiscation of art and criminal prosecution of artists for violating domestic obscenity laws. However, this deference to governments had limits. ECtHR judges were more inclined to rule against states when restricted information interfered with the right of the public to be informed about matters of widespread societal interest, for example, the thalidomide scandal.

Protections against Anti-LGBT discrimination

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[128] Case of *The Sunday Times v. The United Kingdom* (App. no. 6538/74), Judgement of 26 April 1979. ECtHR (Chamber). para. 66.
[129] Ibid., para. 65.
[130] Ibid., para. 67.

Cases involving marginalized gender identities and sexual orientation discrimination did not emerge within the ECtHRs case law until the 1980s.[131] The first of these cases, *Dudgeon v. the United Kingdom* (1981), concerned now-defunct laws in Northern Ireland that criminalized sex between two men, but not between two women. The applicant in this case, a gay man, argued that these laws not only interfered with his right to private life (Article 8), but discriminated on the basis of gender (in contravention of Article 14). Citing Article 8 (2), the government argued that the laws in question qualified as "necessary in a democratic society… for the protection of morals".[132] Emphasizing that restrictions of Article 8 must be proportionate to social needs, the Court pointed to changing regional norms regarding homosexuality:

> As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied....[133]

The Court also noted that the recent lack of enforcement of laws criminalizing homosexuality in Northern Ireland did not appear to have any detrimental impact on public life:

> "…the authorities [had] refrained in recent years from enforcing the law in respect of private homosexual acts between consenting [adult] males ... capable of valid consent". There was no evidence to show that this "[had] been injurious to

[131] The European Commission's role in gatekeeping cases is primarily responsible for the fact that no cases concerning gay rights reached the ECtHR until the 1980s. The Commission had dismissed at least six petitions involving complaints of sexual orientation discrimination prior to the *Dudgeon* case.
[132] Case of *Dudgeon v. the United Kingdom* (App. no. 7525/76), Judgment of 22 October 1981. ECtHR (Plenary). para. 42-5.
[133] Ibid., para. 60.

> moral standards in Northern Ireland or that there [had] been any public demand for stricter enforcement of the law".[134]

The ECtHR found the U.K. in violation of Article 8 in *Dudgeon*, but declined to consider the applicant's second complaint of gender discrimination. Here, we observe the Court looking to predominant member state practice to determine when to push back against certain states' legislation. Furthermore, the Court indicated sensitivity to "public demand" for the enforcement of law, a clear sign of the Court's attention to social consensus when evaluating whether to defer to national authority.

The ECtHR again confronted the criminalization of homosexuality in *Norris v. Ireland* (1988). The applicant, a prominent gay rights activist, asserted that his physical and mental health were negatively impacted by Irish laws criminalizing homosexuality, as the threat of prosecution induced extreme stress. Again pointing to shifting social norms, the ECtHR established that Ireland's laws criminalizing homosexuality violated Article 8 on the grounds that such laws could not be reasonably interpreted as "necessary in a democratic society…for the protection of morals". Quoting from the judgement in the *Dudgeon* case, the majority noted that "... not only the nature of the aim of the restriction but also the nature of the activities involved will affect the scope of the margin of appreciation".[135] Given that the case at hand impacted "a most intimate aspect of private life", the Court determined that the government's arguments in favor of criminalizing homosexuality were insufficient to justify such extensive interference in individuals' rights to privacy.

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[134] Ibid., paras. 23-4.
[135] Case of *Norris v. Ireland* (App. no. 10581/83), Judgment of 26 October 1988. ECtHR (Plenary). para. 46.

Despite condemning British and Irish laws criminalizing homosexuality in *Dudgeon* and *Norris*, the ECtHR declined to order those states to repeal the laws in question. This was typical of the ECtHR's remedial practice, at that time as well as today. While the Court routinely orders states to pay monetary reparations to victims of rights violations, asking states to overturn legislation has always been seen as far outside of the ECtHR's jurisdiction. The Court has recently begun to mandate non-monetary remedies in select circumstances, but overturning domestic legislation remains out of the question. Still, the ECtHR's rulings in *Dudgeon* and *Norris* played an integral role in the eventual legalization of homosexuality in Northern Ireland and the Republic of Ireland.[136]

The fight for marriage equality for same-sex couples has represented one of most contested human rights struggles of the past half-century. When the ECtHR was founded, no founding member state recognized same sex-marriage or any form of legalized same-sex partnership. Article 12 of the European Convention specifically guarantees the right to marry only to heterosexual couples, and asserts the supremacy of domestic authority on this issue: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right". Much has changed since Article 12 was drafted. As of 2021, same-sex marriage is now legal in sixteen Council of Europe member states[137], while a further fourteen states recognize

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[136] A June 2021 article in the *Irish Post* commemorating the 28th anniversary of the decriminalization of homosexuality in Ireland specifically named the ECtHR's *Norris* judgement as a "significant victory" in the long fight for gay and lesbian liberation: https://www.irishpost.com/news/homosexuality-was-decriminalised-in-ireland-28-years-ago-today-187564

[137] These states are: Austria, Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom.

some other form of same-sex partnership (for example, civil unions)[138]. The ECtHR has been a central actor in domestic debates surrounding marriage equality across Europe. Investigating how the ECtHR has responded to evolving social norms in this area provides a unique opportunity to assess how the Court interprets appropriate deference to national governments in the context of an issue which the Court's founders likely did not anticipate.

The ECtHR's first experiences adjudicating same-sex marriage rights occurred in cases involving transgender applicants. These cases, in which transgender applicants sought a range of legal protections including the right to marry, established precedent that guided the ECtHR's broader approach to same-sex marriage legalization (Johnson 2011: 361). It is essential to foreground the issue of transgender rights when analyzing the development of same-sex marriage jurisprudence within the ECtHR. The case of *Rees v. the United Kingdom* (1986) marked the first time in the ECtHR's history that the Court confronted both transgender rights and same-sex marriage. The applicant in this case was a transgender man who argued that the U.K. government's refusal to amend the sex listed on his birth certificate constituted a violation of his right to private life under Article 8. Additionally, Mr. Rees alleged that this refusal violated his right to marry under Article 12, as U.K. law prohibiting same-sex marriage dictated that he could not marry a woman so long as his birth certificate listed his sex as "female". With regard to whether states had a positive obligation under Article 8 to give transgender individuals "the option of

[138] These states are: Andorra, Croatia, the Czech Republic, Cyprus, Estonia, Greece, Hungary, Italy, Liechtenstein, Monaco, Montenegro, San Marino, Slovenia, and Switzerland.

changing their personal status to fit their newly-gained identity", the ECtHR majority noted that existing state practice on this matter varied considerably:

> …there is at present little common ground between the Contracting States in this area and that, generally speaking, the law appears to be in a transitional stage. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation.[139]

The ECtHR majority ruled that the refusal to amend the applicant's birth certificate did not violate Article 8.[140] Still, the judgement emphasized the judges' sympathy for the challenges faced by transgender individuals:

> … it must for the time being be left to the respondent State to determine to what extent it can meet the remaining demands of transsexuals. However, the Court is conscious of the seriousness of the problems affecting these persons and the distress they suffer. The Convention has always to be interpreted and applied in light of current circumstances. The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments.[141]

The majority's statement deferring to domestic authority "for the time being" left the door open for the Court to assume greater authority over adjudicating transgender rights in the future.

While the majority noted changing social norms regarding transgender rights, its decision indicated that the ECtHR was not yet prepared to push those developments forward. The Court's decision contradicted the recommendation of the European Commission, which had unanimously agreed that depriving the applicant of an updated birth certificate violated Article 8 guarantees.[142] The ECtHR's rejection of a unanimous

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[139] Case of *Rees v. the United Kingdom* (App. no. 9532/81), Judgment of 17 October 1986. ECtHR (Plenary). para. 37.
[140] Ibid., paras. 41-46.
[141] Ibid., para. 47.
[142] Ibid., para. 31.

Commission recommendation indicates a strong preference among ECtHR judges to pump the brakes on incursion into domestic authority on this issue. Still, three out of the fifteen judges who presided over the case dissented to the majority's finding of no Article 8 violation. These three judges proposed that a middle-ground solution could be reached where the U.K. could notate changes to the sex listed on transgender individuals' birth certificates while still maintaining the original certificate. For judges to offer proposals for specific domestic policy changes is rare within the ECtHR. This dissenting opinion offered a preliminary indication that ECtHR judges were posed to exert greater authority over transgender rights in the future as social norms continued to evolve.

The applicant's second complaint in *Rees v. the U.K.,* the alleged violation of the right to marry (Article 12), forced the ECtHR to interpret the Convention's disposition towards same-sex marriage for the first time. The judgement's discussion of this element of the case was much shorter than its consideration of the applicant's Article 8 complaints. The Court concluded that there had been no Article 12 violation in this case, offering terse and decisive reasoning:

> In the Court's opinion, the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family. Furthermore, Article 12 lays down that the exercise of this right shall be subject to the national laws of the Contracting States.[143]

This interpretation of Article 12 in *Rees* was fundamentally significant for driving future ECtHR case law on LGBT rights. First, it clearly articulated that the Convention's protection of the right to marry did not extend to same-sex couples. Second, the judges

[143] Ibid., paras. 49-51.

defined heterosexual marriage as "the basis of the family", precluding the legal legitimacy of families that fall outside of the heteronormative, nuclear family structure. Finally, this interpretation reflected a distinctly originalist approach to interpreting the Convention (in other words, a belief that the text of the Convention should be objectively interpreted as it was written, without attention to contemporary contextual factors). The judges called attention to the clause asserting that marriage rights "shall be subject to the national laws of the Contracting States". This clause, which bears resemblance to the African Charter's "claw-back" clauses limiting the application of rights to what is compatible with domestic law, reflects the deferential founding social purpose of the ECtHR.

The *Rees* judgement is puzzling in that the majority judgement at times depicts the Convention as a living instrument whose interpretation should reflect existing social realities, but at other points calls for objective attention to Convention language while eschewing consideration of the contemporary sociolegal climate. While discussing whether Article 8 required states to allow transgender individuals to alter the sex listed on their official identification, the judges in the majority emphasized that the Convention should be "interpreted and applied in light of current circumstances" and left the door open for future revision of the legal status quo "based on scientific and social judgements". When it came to Article 12 and the question of same-sex marriage, however, that rhetoric disappeared. The majority judgement unequivocally quashed the notion that the right to marry applied to same-sex couples, setting a definitive precedent that would prove arduous to wear down. The ongoing fight for transgender rights and

marriage equality within the ECtHR will be further discussed in chapter 10, which investigates how the regional courts are interpreting their authority in these new and rapidly evolving areas of international human rights law.

IV. The Inter-American Court of Human Rights

The IACtHR faced a deluge of cases involving personal integrity rights violations in its early years, reflecting ongoing and compounding human rights crises in the region. In particular, the Court confronted an epidemic of enforced disappearances and extrajudicial executions. Because the ECtHR lacked case law in these areas, the IACtHR was largely flying blind. Given the emergency conditions that early IACtHR judges faced, building collaborative relationships with national authorities was a secondary concern to interrupting systematic rights abuses. Judges sought out ways to expand the IACtHR's authority through broad interpretations of its advisory jurisdiction, temporal jurisdiction, and power to issue diverse remedial mandates. The Court also pioneered expanded conceptualizations of who can be considered a "victim" of grave human rights abuses, and elaborated interpretations of the burden of proof that favored applicants. Still, the IACtHR was attentive to ECtHR jurisprudence and borrowed from it in areas where the ECtHR already had established case law, for example, freedom of expression.

Personal integrity rights case law

The IACtHR's early years were marked by widespread state-sponsored violence and civil conflict in Latin America. Personal integrity rights violations unfortunately dominated the Court's docket. These rights as codified in the American Convention

include the right to life (Article 4) and the right to humane treatment (Article 5). Article 5 includes prohibitions on torture as well as inhuman and degrading treatment.

Unlike in the European system, American states do not automatically accede to the IACtHR's contentious jurisdiction upon ratifying the Convention. However, the Court possess advisory jurisdiction over all OAS member states that have ratified the Convention. Founding IACtHR judges engaged in creative use of advisory jurisdiction to influence state practice and expand the Court's authority in the early 1980s, even in dealing with states that had not yet acceded to the Court.[144] One example of this is the Court's effort to end summary executions carried out by the Guatemalan government. The Inter-American Commission had declared that these executions violated Article 4 of the Convention, which prohibits the reestablishment of the death penalty in states that have abolished it. Furthermore, Article 4 prohibits states from applying the death penalty to any crimes for which it was not sanctioned under domestic law when the Convention entered into force in that state. Guatemala ratified the American Convention in 1978, and subsequently executed individuals for crimes to which the death penalty was not applicable at that time. Guatemala argued that these executions were legally permissible due to a reservation the state had submitted to Article 4 (4), exempting itself from the prohibition on applying the death penalty to "political offenses or related common crimes."[145]

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[144] The ECtHR was not granted the authority to exercise advisory jurisdiction until 2018. The ACtHPR has always possessed advisory jurisdiction in accordance with Protocol 1 to the African Charter.
[145] Opinión Consultiva OC-3/83 del 8 de Septiembre de 1983. *Restricciones a la Pena de Muerte (Arts. 4.2 y 4.4 Convención Americana sobre Derechos Humanos).* IACtHR. para. 10.

In response, the Commission requested that the Court issue an advisory opinion on whether governments could validly impose the death penalty for crimes to which it did not apply when the Convention entered into force. Guatemala objected that this was an insincere attempt to "disguise" a contentious case targeted against Guatemala as an advisory opinion.[146] Despite these protests, the Court admitted the Commission's request and ruled that reservations to Article 4 do not allow states to extend the death penalty to additional crimes after ratifying the Convention.[147] Following the ruling, Guatemala did stop the executions. This was one of the first instances where the IACtHR successfully stretched the boundaries of its jurisdiction to wield authority over repressive governments. Interestingly, Pope John Paul II had appealed to Guatemalan authorities to end the executions during his visit to Central America a year before the IACtHR ruling, to no avail. Where even the Pope failed, Judge Buergenthal later recalled proudly, "we had succeeded with a mere advisory opinion. It was quite a morale booster for the Court" (Buergenthal 2005: 8). This statement sheds light on how founding IACtHR judges interpreted the Court's social purpose. Judges were willing to push the prescribed limits of the Court's authority to intervene in abusive domestic practices.

The IACtHR ruled on its first ever contentious case, *Velásquez-Rodríguez v. Honduras*, in 1988. The case concerned the enforced disappearance of a college student perpetrated by the Honduran Armed Forces. In retrospect, it is quite incredible that IACtHR judges took on such a grievous instance of state-sponsored violence as their first case. This fact reflects those judges' ambitious intentions for the Court's role in the

[146] Ibid., para. 28.
[147] Ibid., para. 76.

region as well as their sense of urgency to intervene in ongoing atrocities. Particularly given the importance of precedent for driving subsequent case law, it makes sense that a court whose very first case concerned crimes against humanity would develop a distinctly interventionist judicial culture guiding its relationship with national authorities.

In *Velásquez*, the Court considered whether Honduras had violated the Convention's guarantees under Articles 4 and 5. The judges unanimously interpreted the right to life to impose substantive obligations on states to protect life as well as procedural obligations to investigate violations of that right. These obligations are not extinguished until an investigation is conducted in good faith, and persist through regime changes.[148] Furthermore, enforced disappearances may constitute violations of the right to life even when the victim's death cannot be confirmed (for example, when remains have not been discovered). Disappearances are considered "continuing violations" because they create prolonged uncertainty regarding the whereabouts and fate of victims.[149] Consequently, disappearances trigger procedural obligations to investigate violations of the right to life that can only be discharged through a good-faith investigation and, where possible, punishment of the perpetrators. By establishing a procedural duty to investigate alleged violations of the right to life, the IACtHR set itself up to flexibly interpret its temporal jurisdiction in future enforced disappearance cases.

Unlike ECtHR judges in early cases concerning personal integrity rights violations, the IACtHR did not attempt to split hairs regarding the difference between inhuman and degrading treatment and torture in *Velásquez.* While several individuals

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[148] Case of *Velásquez-Rodríguez v. Honduras*, Judgment of 29 July 1988 (Merits). IACtHR. para. 174, 184.
[149] Ibid., para. 55.

provided secondhand testimonies that suggested Mr. Velásquez had been tortured and killed by Honduran security forces, no physical evidence or eyewitnesses confirmed this. Mr. Velásquez's remains were never found. In the absence of evidence, the Court relied on testimony from over twenty witnesses to determine that Honduran security forces routinely tortured and murdered detainees during the period in which Mr. Velásquez was disappeared. This context was sufficient for the Court to rule that Honduras had violated Mr. Velásquez's rights to life and humane treatment.[150] This case exemplifies the Court's application of a "dynamic burden of proof" (*carga dinámica de la prueba*) that shifts the burden of proof from the applicant to the respondent state in cases where, due the nature and context of the alleged violation, it is impossible for the applicant to furnish evidence. Rather, it is incumbent on the state to prove that the allegations against it are unsubstantiated (García Chavarría 2019: 314-17).

Blake v. Guatemala (1998) was the first case in which the IACtHR was called to rule on an enforced disappearance that occurred before the state's accession to the Court. Mr. Blake was an American journalist who had been disappeared by Guatemalan civil patrol officers two years before Guatemala accepted the IACtHR's contentious jurisdiction. Relying on the *Velásquez-Rodríguez* precedent, the IACtHR found Mr. Blake's disappearance to be a continuing situation that triggered the state's duty to investigate.[151] The Court acknowledged that it could not rule on Guatemala's responsibility for Mr. Blake's detention and death. Mr. Blake's remains had been discovered in 1992, and evidence established that he was killed in 1985. Unlike enforced

[150] Ibid., paras. 187-8.
[151] Case of *Blake v. Guatemala*, Judgement of 24 January 1998 (Merits). IACtHR. para. 65-7.

disappearance, death is an instantaneous act that occurs within a definable time span. As this death occurred prior to Guatemala's accession, the Court could not evaluate potential violations of Article 4.[152]

However, the Court found that it did maintain temporal jurisdiction over the continuing effects of Mr. Blake's disappearance, namely the harm incurred by the lack of an official investigation.[153] The Court found Guatemala in violation of Article 5 due to the mental and emotional trauma suffered by Mr. Blake's family as a result of his disappearance. This suffering was exacerbated by Guatemala's refusal to investigate or provide information regarding Mr. Blake's fate.[154] Here, the IACtHR took a decisive step towards broadly interpreting its temporal jurisdiction. This expanded the Court's power to rule on continuing situations that originated prior to state accession. The Court also extended its conceptualization of who can be considered a "victim" of violations of the right to humane treatment. This category includes the loved ones of the dead and disappeared whose mental integrity is violated when a state refuses to investigate an enforced disappearance or extrajudicial killing. Their anguish can in and of itself constitute a continuing situation that expands the Court's temporal jurisdiction.

The IACtHR is notable for its contributions to international jurisprudence establishing that amnesty laws applicable to crimes against humanity violate international law. The Court's first case challenging a domestic amnesty law was *Barrios Altos v. Peru* (2001), concerning the massacre of 15 civilians at the hands of a government death squad

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[152] Ibid., para. 86.
[153] Case of *Blake v. Guatemala*, Judgement of 2 July 1996 (Preliminary Objections). IACtHR. para. 24.
[154] Case of *Blake v. Guatemala* (Merits). para. 109-116.

in 1991. The military denied its role in the massacre for a decade, and the perpetrators were protected from prosecution by Fujimori's amnesty laws even after Peru returned to democracy. When the case finally reached the IACtHR in 2001, the Court declared Peru in violation of Articles 4 and 5, and furthermore established that Peru's amnesty laws violated the right to judicial protection (Article 25) by precluding victims from seeking legal recourse. The Court ordered Peru to pay reparations to the survivors of the massacre and the victims' families, as well as conduct an official investigation and punish those responsible. In a bold move that illustrated the IACtHR's interventionist interpretation of its authority, the Court then declared Peru's amnesty laws to be null and void.[155] The IACtHR's self-interpreted power to unilaterally abrogate domestic legislation marks a sharp divergence from the ECtHR's more conservative approach to mandating remedies.

The implications of pioneering regional jurisprudence under conditions of mass state-sponsored violence are plainly visible in the IACtHR's early case law. The Court consistently adopted broad interpretations of its temporal jurisdiction, flexible evidentiary standards for establishing violations in cases against states with track records of human rights abuse, inclusive definitions of victimhood, and an intensive approach to mandating remedies. In doing so, IACtHR judges exercised an interventionist interpretation of their authority that significantly diverged from the ECtHR's attention to deference to national authorities in its early years.

Freedom of expression case law

[155] Case of *Barrios Altos v. Peru.* Judgment of 14 March 2001 (Merits). IACtHR. para. 51.

While the IACtHR's early case law was dominated by personal integrity rights violations, cases involving other civil and political rights began to appear before the Court more frequently in the late-1990s and early-2000s. Even so, many of these other rights violations were connected to instances of enforced disappearance, extrajudicial execution, and torture. For example, the IACtHR first confronted an alleged violation of the right to freedom of expression (Article 13) in the aforementioned *Blake v. Guatemala* case. The Inter-American Commission recommended that the Court find an Article 13 violation on the basis that Mr. Blake was targeted by Guatemalan security forces for his work as a journalist.[156] However, unlike the Commission, the Court's jurisdiction was constrained by the date of Guatemala's accession to the Court. The Court could not evaluate the motivations for Blake's disappearance that occurred prior to Guatemala's accession, and thus could not establish an Article 13 violation.[157]

"The Last Temptation of Christ" v. Chile, decided in 2001, was only the second case alleging a freedom of expression violation in the IACtHR's history. The applicants, Chilean human rights lawyers, objected to a Chilean Supreme Court decision that permitted censorship of a film deemed religiously offensive.[158] The government of Chile stated before the IACtHR its own opposition to the Chilean Supreme Court decision. In fact, in response to that decision, the government had proposed a constitutional reform to eliminate cinematographic censorship.[159] Reinforcing the necessity of this reform, the

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[156] Caso de Nicholas Chapman Blake (Demanda no. 11.219). Decisión de 3 de Agosto de 1995. Comisión Interamericana de Derechos Humanos.
[157] Case of *Blake v. Guatemala* (Merits). para. 109-116.
[158] Case of *"The Last Temptation of Christ" v. Chile.* Judgment of February 5, 2001 (Merits, Reparations and Costs). IACtHR. para. 45.
[159] Ibid., para. 65, 89.

IACtHR found Chile in violation of Article 13 and ordered the state to amend its domestic censorship legislation. The Court referenced ECtHR jurisprudence in *Handyside* and *Sunday Times* to underscore the importance of freedom of expression not only for protecting individual speech, but for promoting a well-informed populace that is "the cornerstone of democratic society".[160]

IACtHR judges again leaned on ECtHR precedent in *Ivcher-Bronstein v. Peru* (2001), which the Court admitted shortly after the fall of the Fujimori dictatorship. The applicant, Mr. Bronstein, was a media channel owner who had immigrated to Peru and become a naturalized citizen. Throughout the late-1990s, a news program produced by Mr. Bronstein's channel broadcasted investigative journalism critical of the Peruvian Armed Forces. These reports uncovered abuses committed by the military, including torture, assassination, and collaboration with drug-traffickers.[161] Following these broadcasts, Mr. Bronstein and his family were repeatedly intimidated and threatened by government officials.[162] In 1997, the government issued a "directorial resolution" stripping Mr. Bronstein of his nationality. Shortly thereafter, Mr. Bronstein was removed as the majority shareholder of his channel in accordance with legislation requiring that media companies be owned by Peruvian citizens.[163]

The IACtHR's judgement on this case discussed ECtHR jurisprudence on freedom of expression at length, emphasizing that the ECtHR established a narrow

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[160] Ibid., paras. 68-69.
[161] Case of *Ivcher-Bronstein v. Peru.* Judgement of 6 February 2001 (Merits, Reparations and Costs). para. 62(a).
[162] Ibid., para. 62(b).
[163] Ibid., para. 76.

margin for the valid restriction of information pertinent to public interest.[164] Given that Mr. Bronstein was targeted for his channel's criticism of the military and deprived of his company as a direct result of his nationality being illegally annulled, the Court established that his freedom of expression had been violated. The Court ordered Peru to pay Mr. Bronstein reparations, restore his ownership of the media channel, and punish those responsible for the rights violations.[165]

Particularly because the IACtHR's case law on freedom of expression was severely underdeveloped in the early-2000s, it makes sense that judges would look to the ECtHR for guidance in interpreting the substantive qualities of that right. IACtHR judges demonstrated agreement with the precedent set by the ECtHR, especially with regard to the narrow(er) margin for restricting speech regarding matters of public interest. The IACtHR did mandate more comprehensive remedies for violations of the freedom of expression relative to the ECtHR, including ordering domestic prosecutions and legislative reforms. This practice aligns with the IACtHR's generally more invasive approach to mandating remedies for rights violations.

V. The African Court on Human and Peoples' Rights

While the ACtHPR was officially established in 2006, the Court did not issue its first decision on the admissibility of a case until December 2009. Its first judgment on the merits of a case was not issued until June 2013.[166] Overall, the ACtHPR's output was low

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[164] Ibid., para. 155.
[165] Ibid., para. 191.
[166] The ACtHPR issued four judgments between December 2009 and March 2013. All of these were admissibility decisions in which the case was declared inadmissible because the ACtHPR lacked jurisdiction over the respondent party. See: App. nos. 001/2008; 012/2011; 001/2008; and 001/2008.

in its early years. This is not unusual. It simply takes a while for a regional court to get off the ground, as evidenced by the experiences of both the ECtHR and the IACtHR. The number of judgements issued annually by the ACtHPR has risen sharply in recent years, indicating that the Court's capacity to process cases as well as public awareness of the Court is growing. Because the ACtHPR is a relatively new institution that is still coming into its own, we do not have the same benefit of retrospect when it comes to assessing the foundational period of the ACtHPR that we do with the ECtHR and the IACtHR. As more states ratify the African Charter's Protocol and allow individuals to petition the ACtHPR, the Court's jurisprudence will develop more rapidly.

Despite analytical constraints imposed by the ACtHPR's relatively limited case law, its early decisions shed important light on how judges are forging the contours of the Court's authority. The ACtHPR issued its first ever judgement on the merits of a case in *The Tanganyika Law Society, Legal and Human Rights Center, and Rev. Christopher Mtikila v. Tanzania* (2013).[167] This case challenged an amendment to the Tanzanian Constitution that barred independent candidates from seeking political office. The applicants alleged that this amendment violated the African Charter's protections of freedom of association (Article 10) and freedom to participate in governance (Article 13). As the amendment in question had come into effect prior to Tanzania ratifying the Protocol to the Charter (thereby accepting the jurisdiction of the ACtHPR), the government argued that the Court lacked temporal jurisdiction to accept the case. The ACtHPR threw out this argument on two grounds. First, at the time of the alleged

[167] App. nos. 009/2011 and 011/2011. Judgement of 13 June 2013. ACtHPR.

violations, Tanzania "had already ratified the Charter and was therefore bound by it".[168] Second, the amendment imposed a "continuing situation" that persisted beyond the dates that Tanzania ratified the Protocol. Therefore, the ACtHPR maintained temporal jurisdiction.

Additionally, the Tanzanian government argued that the case was inadmissible because the applicants had failed to exhaust all domestic remedies. The applicants had indeed exhausted all possible challenges to the amendment through the domestic court system. However, the government argued that the applicants neglected to launch a legislative challenge, and thus still had available domestic remedies that would preclude the ACtHPR's jurisdiction. The ACtHPR cited both ECtHR and IACtHR jurisprudence to overrule this objection, establishing that applicants need only exhaust domestic *judicial* remedies, as legislative avenues are often not freely accessible, are not intended to remedy individual disputes, and are subject to repeal.[169] This dialogue indicates the ACtHPR's openness to utilizing ECtHR and IACtHR jurisprudence from its very first case.

The Court found Tanzania in violation of Articles 10 and 13, and ordered Tanzania to take "constitutional, legislative, and all other necessary measures within a reasonable time to remedy the violations".[170] While this mandate stopped short of explicitly ordering Tanzania to repeal the complained-of amendment, it demonstrated ACtHPR judges' willingness to demand domestic legislative change. This precedent was

[168] Ibid., para. 84.
[169] Ibid., para. 82.
[170] Ibid., para. 126 (3).

further expanded in *The African Commission v. Libya* (2016), in which the Court ordered Libya to terminate criminal proceedings against former president Muammar Gaddafi's son.[171] In that case, the ACtHPR moved to directly usurp the power of national courts.

The ACtHPR faced allegations of the right to life (Article 4) and freedom of expression (Article 9) for the first time in *Zongo et al. v. Burkina Faso* (2015). The applicants in this case were the families of journalist Norbert Zongo, two of his colleagues, and Zongo's younger brother. The four men had been murdered, allegedly as retaliation for an investigation that Zongo was conducting on political scandals.[172] These murders occurred in 1998, well before Burkina Faso ratified the African Charter or the Protocol. Still, the ACtHPR overruled the state's objection to the Court's temporal jurisdiction on the grounds that national-level legal proceedings pertaining to this case occurred *after* Burkina Faso ratified the Charter and the Protocol. Thus, certain allegations within the *Zongo* case fell within the ACtHPR's temporal jurisdiction. These included alleged violations of the rights to freedom of expression and fair trial. The alleged violations of the right to life, however, remained outside of the Court's temporal jurisdiction.[173]

It is worth noting that the continuing effects of the unsolved murders on the victims' families' mental and emotional health are not mentioned in the ACtHPR's judgement in *Zongo*, let alone formulated as justiciable violations of the Charter. This

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[171] *The African Commission on Human and Peoples' Rights v. Libya* (App. no. 002/2013). Judgement of 2 June 2016. ACtHPR. para. 97(v).
[172] *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema (Ablassé), Ernest Zongo, and Blaise Ilboudo and The Burkinabé Human and Peoples' Rights Movement v. Burkina Faso* (App. no. 013/2011). Judgement of 4 June 2015. ACtHPR. paras. 2-4.
[173] Ibid., para. 32.

marks a divergence from the standard practice of the IACtHR in cases of state-sponsored killings, and could indicate the ACtHPR's hesitance to adopt a similarly flexible interpretation of its temporal jurisdiction and definition of legal victimhood. Still, by admitting a case of pre-accession political violence, the judges in *Zongo* laid crucial groundwork for the ACtHPR to serve as a legitimate forum for securing state accountability for past rights abuses.

Regarding alleged violations of the right to freedom of expression in *Zongo*, the applicants argued that the murders created an atmosphere of fear and intimidation that impinged on public access to information and the truth.[174] The ACtHPR narrowly accepted this argument, ruling 5-4 that Burkina Faso had violated Article 9.[175] Dissenting judges objected that the applicants failed to provide any evidence that there was an "intimidating effect" on journalists following the Zongo murders.[176] This ruling suggests that ACtHPR judges may be willing to accept a lower burden of proof on applicants in freedom of expression cases that are connected to particularly egregious circumstances, but this flexibility is limited.

The *Zongo* case also set importance precedent regarding the ACtHPR's interpretation of effective remedies for rights violations. The Court established that Burkina Faso had violated the applicants' right to fair trial (Article 7) by denying them the opportunity to "have their cause heard by competent national courts".[177] Interestingly,

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[174] Ibid., para. 174-6.
[175] Ibid., para. 203 (5).
[176] *Joint Declaration of Judges Gérard Niyungeko, Fatsah Ouguergouz, El Hadji Guisse, and Kimelabalou Aba* (App. no. 013/2011), para. 6.
[177] (App. no. 013/2011), para. 156.

Article 7 does not explicitly provide for the right to appeal to national judicial institutions in cases of alleged human rights violations. Rather, it establishes "the right to an appeal to competent national organs", without specifying that those organs must be judicial. In this respect, the African Charter's right to fair trial is written more similarly to the European Convention's "right to an effective remedy" (Article 13), which provides for the right to appeal to a "national authority" while also not specifying that that authority must be judicial. In *Zongo,* however, the judges interpreted Article 7 as if it required access to judicial recourse.[178] As such, the ACtHPR's interpretation more closely approximates the American Convention's "right to judicial protection" (Article 25), which requires "effective recourse to a competent court or tribunal". ACtHPR judges unanimously agreed that there had been a violation of Article 7 in *Zongo*, indicating strong support of taking this judicial liberty to establish the right to be heard by a court.[179] Taking a page from the IACtHR's book, this decision positions the ACtHPR to flexibly interpret its temporal jurisdiction in cases of continuing and unremedied rights violations.

ACtHPR judges again looked to ECtHR and IACtHR precedent when evaluating the circumstances in which states can validly restrict the right to freedom of expression. In *Lohé Issa Konaté vs. Republic of Burkina Faso,* the applicant was a journalist who had been convicted of defamation after publishing articles that accused a state prosecutor of corruption and miscarriage of justice. The Ouagadougou High Court sentenced the applicant to a year in prison and assessed a large fine. Additionally, the magazine that

[178] Ibid., para. 117.
[179] Ibid., para. 203(3).

had published the articles was ordered to cease operations for six months.[180] The applicant argued that the provisions of Burkina Faso's Penal Code relating to defamation and freedom of the press lacked clarity and thus violated international standards pertaining to the rule of law. The ACtHPR considered whether the provisions in question accorded with modern international jurisprudence on freedom of expression, as well as whether the applicant's lengthy prison sentence was proportional to the crime for which he was convicted. On both fronts, judges invoked the jurisprudence of the other regional courts. First, the majority opinion pointed to predominant norms maintaining that the right to freedom of expression can only be restricted a) to respect the rights and reputation of others, and b) to safeguard national security, public order, health, or public morality.[181] Second, the judges cited several ECtHR and IACtHR decisions that found that excessive penalties for defamation, including imprisonment and heavy fines, constituted violations of the right to freedom of expression.[182] By this point, both the ECtHR and IACtHR had established that criminal defamation laws should be used only as a "last resort". The IACtHR had outright rejected imprisonment for defamation offences, considering imprisonment "disproportionate and in violation of freedom of expression".[183]

The ACtHPR majority found Burkina Faso in violation of Article 9 in *Konaté*, signaling the judges' attention to alignment with predominant cross-regional

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[180] *Lohé Issa Konaté vs. Republic of Burkina Faso* (App. no. 004/2013). Judgment of 2 June 2016. ACtHPR. paras. 3-6.
[181] Ibid., para. 146-7.
[182] Ibid., para. 154.
[183] Ibid., paras. 158-9.

jurisprudence. Further illustrating the ACtHPR's self-interpreted authority to prescribe intensive remedial mandates, the majority ordered Burkina Faso to amend its Penal Code to repeal custodial sentences for defamation.[184] For Judges Thompson, Akuffo, Ngoepe, and Tambala, this remedial mandate did not go far enough. They argued that the ACtHPR had missed an opportunity eliminate the criminalization of speech of any kind:

> Access to civil action, civil sanction, together with specifically defined crimes for safeguarding national security, public peace, and the common interest, should be sufficient. For this Court to hold otherwise would not only be a step backward in the evolution of human rights in Africa, but also out of consonance with the letter and spirit of the Charter, which it is established to uphold.[185]

This separate opinion paved the way for a broader interpretation of freedom of expression in Africa, going beyond the jurisprudence of the ECtHR and the IACtHR to argue that the African Charter uniquely precludes the criminalization of expression in any form. These four judges went even further by declaring that majority should have simply declared the relevant provisions of Burkina Faso's Penal Code to be invalid, rather than asking the government to legislatively amend the provisions.[186] This marked the first time that ACtHPR judges claimed the Court's authority to unilaterally invalidate domestic legislation. This declaration was bold move for such a young court, clearly following the example of the IACtHR.

VI. Conclusion

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[184] Ibid., para. 176
[185] *Lohé Issa Konaté vs. Republic of Burkina Faso* (App. no. 004/2013). Judgment of 2 June 2016. ACtHPR. Separate Opinion of Justices Elsie N. Thompson, Sophia A. B. Akuffo, Bernard M. Ngoepe, and Duncan Tambala. para. 4.
[186] Ibid., para. 5.

The varying types of rights violations faced by each regional court in its early case law significantly shaped how founding judges interpreted their authority. In the absence of widespread fundamental rights abuses, ECtHR judges were generally confident in the competence of national authorities. These conditions favored a deferential interpretation of the Court's authority. This interpretation was most directly expressed through broad application of the margin of appreciation doctrine, flexible applications of rights restriction clauses, and remedial mandates that did not require domestic legal change. The ECtHR was more inclined to denounce state practices that diverged from emerging regional normative consensus, in keeping with the Court's mission to foster shared human rights standards across CoE member states. The IACtHR, on the other hand, faced extensive state-sponsored rights abuses in a region plagued by political violence. These atrocities undermined the Court's trust in national authorities and encouraged judges to expand the Court's mandate to intervene in domestic affairs. The judges did so by pushing the boundaries of the Court's advisory jurisdiction, broadly interpreting the Court's temporal jurisdiction, adopting flexible evidentiary standards to shift the burden of proof away from applicants, extending legal definitions of victimhood, and mandating intensive remedies- even going so far as to declare the Court's authority to abrogate domestic legislation.

The ACtHPR's early case law indicates that judges are adopting somewhat of a "middle ground" interpretation of the Court's authority that is less interventionist than that of the IACtHR, but not nearly as deferential as the ECtHR. This could be anticipated due to the political dynamics surrounding the drafting of the African Charter and

Protocol, which empowered the Court with a broad formal mandate but also promoted judicial restraint through “clawback clauses”. ACtHPR judges have adopted a flexible interpretation of the Court’s temporal jurisdiction, stretching back to state ratification of the African Charter. However, the Court’s application of this jurisdiction has been limited by a narrower conceptualization of continuing situations that are triggered by violations of the right to life relative to the IACtHR. Likewise, ACtHPR judges have exhibited cautious moderation in evaluating the balance of the burden of proof. Still, the judges have demonstrated proclivity to judicial activism in their interpretation of state obligations under the right to fair trial as well as remedial mandates that intervene in domestic legal proceedings. The ACtPHR is still developing foundational jurisprudence in key areas that will shape the contours of the Court’s authority. The following chapters will evaluate the durability of each court’s founding interpretation of its authority, with particular attention to how judges navigate institutional reforms and react to member state backlash.

PART II

Chapter 7

The More Things Change, The More They Stay The Same?: international justice in an evolving world

I. Introduction

The geopolitical context surrounding an IC's founding influences the interests represented in that court's constitutive documents as well as the challenges that the court faces in its early years. These factors drive how international judges interpret their court's social purpose, with crucial implications for when and how the IC exercises authority to intervene in domestic affairs. However, those early interpretations are not necessarily "locked in" throughout the institutional life of the court. It is important to understand when and why ICs adjust their interpretation of their authority relative to national governments and judiciaries. These adjustments can impact which cases ICs admit, the circumstances in which ICs find states in violation of international law, and the types of obligations that ICs impose on states to address established violations. Shifts in these areas re-define what constitutes state compliance with international law, and fundamentally shape the opportunity structure for citizens pursuing recourse for state-sponsored human rights abuses.

More broadly, evolutions in an IC's interpretation of its authority illuminate complicated and understudied relationships between ICs and their member states. For example, if a group of member states publicly criticizes an IC in response to a ruling on a given case, and we subsequently observe that IC declining to admit, find violations, or

mandate extensive remedial measures in similar cases, does this indicate a lack of judicial independence? Or, alternatively, does this indicate that the court is simply adopting a more deferential interpretation of its authority to better align with its strategic objectives for improving domestic human rights practices? Are judges in some ICs more responsive to state preferences (or pressure) than others? How durable are ICs' founding interpretations of their authority? These are all important questions that probe the potential limits and frontiers of international human rights adjudication. To shed light on these questions, we need to ascertain the conditions under which ICs might exhibit more interventionist or deferential behavior towards state governments.

In Chapter 2, I hypothesized three conditions under which ICs' interpretations of their authority are likely to change: First, if a regional court has a "deferential" interpretation of its authority, we should expect the court to respond to member state backlash by further constraining its interpretation of its authority to align with vocalized state preferences. We should not expect an "interventionist" court to be similarly responsive to state backlash. Second, as inter-court interaction increases, I hypothesize that a court will be more receptive to emulating another court's interpretation of its authority within areas of case law in which that other court has more experience. For example, if a deferential court that does not have a well-established case law on freedom of religion relies on jurisprudence from an interventionist court that does have extensive case law in that area, the deferential court will be more likely to adopt interventionist behaviors in its own freedom of religion jurisprudence. Third, changes in the types of rights violations that dominate an IC's docket can prompt the court to reinterpret the

extent of its authority. Such changes often (but not always) follow from the accession of new member states. The logic underlying this third hypothesis is that international judges are more likely to see expanding their court's authority as legitimate when there are pervasive occurrences of fundamental rights violations within the court's member states. On the other hand, when judges observe that member states generally comply with their human rights obligations in good faith, they might be more willing to defer to the authority of national institutions.

An alternative explanation proposed in Chapter 2 is that interventionist or deferential behaviors in ICs are not primarily driven by some internal sense of social purpose, but rather by practical exigencies. For example, a court that is overburdened by an excessive caseload might be forced to be highly selective when admitting cases and issuing detailed remedial mandates. This selectivity is driven by institutional capacity limitations rather than a deferential interpretation of the boundaries of the IC's authority. Similarly, an IC with a lighter caseload may be less restrictive about admitting cases, have the time to be closely involved in enforcing compliance with its judgements, and be less willing to grant deference to states that deviate from status-quo expectations. If an IC's interpretation of the extent of its jurisdiction is determined by logistical constraints, shifts towards more or less interventionist or deferential behavior will likely occur around the same time periods in which the IC is facing an overwhelming docket, has admitted new member states, or is facing external pressure to process cases more efficiently.

This chapter aims to establish a framework for testing the validity of these explanations for the conditions under which ICs' interpretations of their authority change.

To do so, I identify specific time periods in each court's history during which we might expect these interpretations to change based on the hypotheses summarized above. To evaluate the durability of each court's founding interpretation of its authority, I analyze the development of each court's case law during periods when the court is experiencing the accession of new members as well as periods of member state backlash and/or threats of withdrawal. To determine whether logistical constraints are, alternatively, the primary drivers of shifting interpretations of court authority, I evaluate periods during which each court has faced case processing backlogs and/or has recently undergone institutional reforms aimed at promoting greater efficiency.

Based on these criteria, I focus my analysis on the following periods in each court's history. I examine the ECtHR's case law from 1990-2003, when the Court admitted a wave of new Eastern European member states and underwent institutional restructuring, and 2010-15, when the Court faced a case backlog crisis, implemented new case processing reforms, and faced unprecedented member state criticism. I examine the IACtHR's case law from 2002-5, when reforms were implemented that limited the role of the Commission in case processing and increased the role of victim participation in Court hearings, and from 2012-2020, when the Court grappled with several withdrawals and attempted withdrawals while simultaneously managing a growing caseload. Finally, I examine the ACtHPR's case law from 2016-2020. Usage of the ACtHPR rapidly increased in that time. Meanwhile, four ACtHPR member states withdrew the right of their citizens to petition the court during those four years. The following sections discuss each of these pivotal time periods. Courts do not interpret law in a vacuum. It is

important to have a sense of how the political environments surrounding each court have evolved over time.

II. The European Court of Human Rights

In the following chapters, I devote particular attention to two periods during the ECtHR's history: First, the 1990-2003 period, during which the CoE admitted most of Eastern Europe and Russia, the European Commission was dissolved and subsumed into the ECtHR Registry, and the ECtHR was converted into a full-time, permanent court. Second, the 2010-15 period, during which Protocol 14 streamlined case admissibility procedures and the ECtHR faced the most vociferous backlash from member states its history in the form of the Brighton Declaration.

As is typical for international courts, the ECtHR was slow to get off the ground. In its first decade of existence, the Court issued a mere ten decisions on seven discrete cases. The Court only found a violation of the Convention in three of those cases.[187] This limited use of the ECtHR reflects the founding member states' apprehensive stance towards the Court, the discretionary power of the Commission[188], and the non-compulsory nature of the right to individual petition[189]. Unlike the IACtHR, the ECtHR did not possess advisory jurisdiction powers that could help build relationships with national authorities and bolster the Court's public profile. Usage of the ECtHR expanded

[187] HUDOC database. https://hudoc.echr.coe.int/
[188] The Commission only admitted 18 cases during the first decade of the Court's existence, between 1959-69. The vast majority of petitions submitted to the Commission during this time were declared inadmissible, often for incompatibility with basic admissibility requirements (for example, the exhaustion of domestic remedies).
[189] By 1969, the Council of Europe had 18 member states, 11 of which had recognized the right of individuals to petition the ECtHR. (These were the Netherlands, Belgium, Luxembourg, Denmark, Norway, Sweden, the U.K., Ireland, Iceland, West Germany, and Austria).

in the 1970s and 1980s, driven by increasing public awareness of the Court and the admission of Portugal and Spain following their emergence from military dictatorships. Still, the ECtHR only issued an average of 2.6 judgements per year in the 1970s and 17 judgements per year in the 1980s.[190]

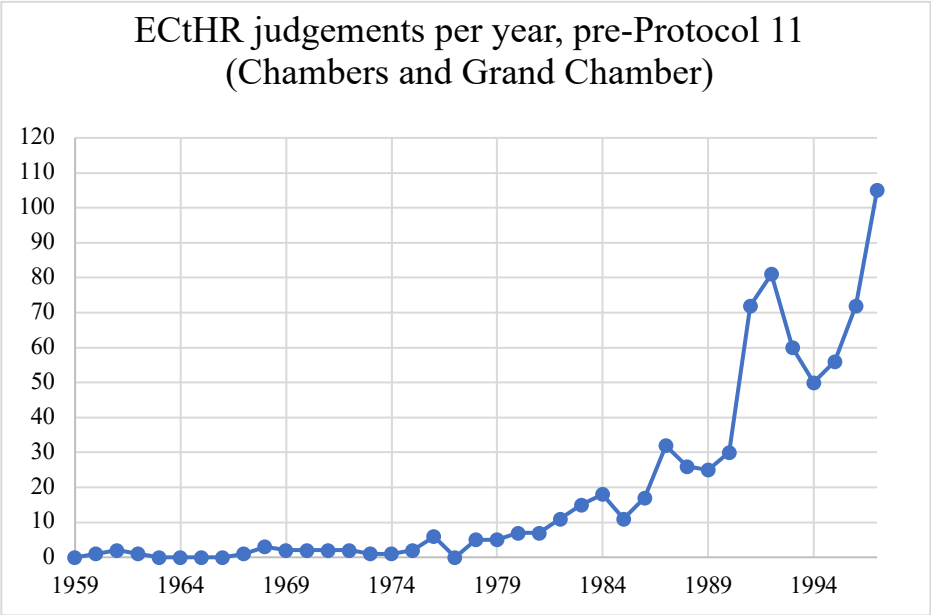
The 1990s marked a period of monumental change (and growing pains) for the ECtHR. The Soviet Union's dissolution and the breakup of Yugoslavia gave rise to a flurry of newly-independent states eager to join Western international institutions. Between 1990 and 2003, the CoE admitted 22 new member states, including most of Eastern Europe and Russia.[191] The institutional hangover from communist governance in the new cohort of CoE members presented unique human rights challenges. The European Commission and ECtHR were suddenly confronted with a deluge of cases from countries with weak judiciaries and very recent histories of authoritarianism. Exacerbated by democratic backsliding in Turkey in the late 1980s-early 1990s, the European human rights system faced a wave of cases it lacked the resources to handle.

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[190] HUDOC. These numbers include all decisions made by Chambers and the Plenary Court. Committee decisions are not included due to the fact that data on inadmissibility decisions is not available.

[191] A list of these states and their dates of admission into the CoE: Hungary (1990), Poland (1991), Bulgaria (1992), Estonia, Lithuania, Slovenia, Czech Republic, Slovakia, Romania (1993), Andorra (1994), Latvia, Moldova, Albania, Ukraine, North Macedonia (1995), Russia, Croatia (1996), Georgia (1999), Armenia, Azerbaijan (2001), Bosnia and Herzegovina (2002), and Serbia and Montenegro (2003).

Figure 7.1



Note: This chart includes judgments rendered by the Chambers and Grand Chamber only, not three-judge admissibility committees. Inadmissibility decisions that were rendered by these committees are not publicly available. Data is only available for decisions that were ultimately declared admissible. Consequently, I have chosen not to include any committee decisions in this chart, as those admissible cases are already accounted for within the Chamber decision data. All data sourced from HUDOC.

In 1991, the Committee of Ministers (CoM) met to discuss the urgent issue of reducing the system's case backlog.[192] The Ministers supported integrating post-Soviet states into the CoE, grasping the unique opportunity to leverage European human rights institutions to advance the eastward expansion of democracy.[193] It is clear that the Ministers were not inclined to disqualify newly-independent states from CoE membership based on existing shortcomings in their human rights practices.[194] Rather, the Ministers sought to imbue the European system with the capacity to manage the

[192] Minutes of the 89th Session of the Committee of Ministers (CoM). 1991. CM (91) PV 4, pg. 21-7.
[193] CM (91) PV 4 (1991). pg. 9, 24, 39.
[194] CM (91) PV 4 (1991). pg. 9.

immense challenge of guiding these new members towards compliance with European human rights standards. Subsequent meetings over 1992-3 considered the option of merging the Commission and Court. This proposal would streamline case processing by eliminating procedural redundancies. Ministers also sought to require all CoE member states to accept the right of individuals to petition the ECtHR.[195]

In 1994, these proposals were adopted in Protocol 11 to the Convention, which entered into force in 1998. It was at this point that the ECtHR became a full-time, permanent court. Judge terms were reduced from nine to six years, renewable once. The Court's admissibility criteria remained unchanged. The Commission, though technically rendered defunct through the implementation of Protocol 11, did not simply disappear. Rather, it was subsumed into the ECtHR Registry, a permanent administrative apparatus. Many lawyers from the former Commission were transferred directly into positions within the ECtHR Registry. Some of these Commissioners still work within the Registry today.[196]

Protocol 11 marked a major transitional phase in the ECtHR's history. The Court had to navigate its new role while herding member states with vastly different judicial systems and levels of democratic experience towards common conceptions of the rule of law. Protocol 11 was ultimately insufficient to alleviate the stressors of the Court's rapid growth. The number of annual judgements issued by the Court continued to grow rapidly. It became clear that additional reforms of the Court's case-processing apparatus were

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[195] *Explanatory Report*, ETS 155- Protocol 11, pg. 10-11. By 1990, acceptance of individual petition was already a *de facto* requirement for CoE admission.
[196] *Interview G*. ECtHR. Strasbourg, France, June 2019.

necessary in order to sustain the institution.[197] The November 2000 European Ministerial Conference on Human Rights adopted a resolution recognizing that the European system's effectiveness was in danger.[198] The Conference called on the Committee of Ministers to initiate reforms and conduct an "in depth reflection… on the various possibilities and options with a view to ensuring the effectiveness of the Court in light of this new situation".[199]

At that time, it was commonly acknowledged that two areas of the Court's caseload posed particular challenges in terms of their sheer volume and demands on the Court's resources. First, a monumental number of applications were being declared inadmissible or otherwise terminated prior to the Court issuing a ruling on the merits. In the early-2000s, this category constituted over 90% of all applications.[200] Second, the Court was overburdened with processing individual applications arising from the same "structural cause" within a member state (for example, many individual applications alleging violations of the right to liberty due to systemic deficiencies in a country's judicial system resulting in prolonged pre-trial detentions).[201] The CoE's rapidly expanding membership exacerbated case backlogs rooted in these issue areas.

The Committee of Ministers worked urgently to devise reforms that could lighten the Court's caseload without limiting the right to individual petition or compromising the

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[197] See *Protocol No. 14 to the European Convention on Human Rights; First Report of Session 2004-05.* House of Lords House of Commons Joint Committee on Human Rights, pg. 7
[198] *Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention.* CETS 194. Strasbourg, 13.V.2004. para. 20.
[199] Ibid.
[200] Ibid., para. 7.
[201] Ibid.

quality of the Court's admissibility decisions. The CoM identified three issue areas of particular consequence for the success of the reform project: 1) "preventing violations at the national level and improving domestic remedies", 2) "optimizing the effectiveness of filtering and subsequent processing of applications", and 3) "improving and accelerating the execution of the Court's judgements".[202] Centering these goals, Protocol 14 "amending the control system of the Convention" was adopted by the CoM and opened for signature in May 2004. The Protocol entered into force in May 2010, following the requisite ratification by all CoE member states.[203]

In January 2004, the Parliamentary Assembly had adopted a resolution advocating for adjustments to judicial term limits and other professional and security arrangements for judges, citing concerns about judicial independence.[204] Protocol 14 addressed these concerns in part by restoring nine-year judge terms and eliminating the ability for judges to be re-elected. The introduction of non-renewable judge terms was explicitly intended to reinforce judges' "independence and impartiality".[205] With the exception of this structural change, the Protocol 14 reforms were primarily procedural. Several changes were implemented to enhance the efficiency of the ECtHR's filtering and processing of applications. For example, Protocol 14 provided that a single judge could declare an application inadmissible.[206] Inadmissibility decisions rendered by single judges are not published on HUDOC, the Court's official database, or made publicly available in any

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[202] Ibid., para. 26.
[203] Russia's prolonged refusal to ratify the Protocol was primarily responsible for this six-year delay.
[204] Parliamentary Assembly of the Council of Europe. Recommendation 1649 (2004).
[205] *Explanatory Report to Protocol No. 14.* para. 50.
[206] *Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*. ETS 194. Strasbourg, 13.V.2004. Art. 7(1).

form. Prior to Protocol 14, an inadmissibility decision required the agreement of a committee of a minimum of three judges. Protocol 14 empowered these three-judge committees to rule not only on the admissibility of applications, but also on their merits when the application represented a "repetitive case". An application could be categorized as such when the underlying legal question it posed was already the subject of well-established case-law.[207]

In addition to altering the process by which cases could be deemed admissible, Protocol 14 added a new admissibility requirement to the Convention. This requirement allows the Court to declare inadmissible any application where it considers that the applicant "has not suffered a significant disadvantage".[208] The introduction of the "significant disadvantage" criterion was intended to accelerate case-processing and facilitate the timely issuance of judgements.[209] In the first two years of Protocol 14's implementation (2010-12), only the Chambers and Grand Chamber were permitted to apply the significant disadvantage criterion to throw out cases.[210]

As might have been anticipated due the vast subjectivity of what constitutes a "significant disadvantage", this new admissibility requirement has been the subject of considerable controversy. Dinah Shelton finds that the significant disadvantage criterion "did not have a major impact on the court's caseload" during the two-year period when only the Chambers and Grand Chamber were permitted to apply it. However, her analysis indicates that the number of rejected applications grew considerably during 2013 and

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[207] Ibid., Art. 8(1).
[208] Ibid., Art. 12.
[209] *Explanatory Report to Protocol No. 14.* para. 39.
[210] *Protocol No. 14.* ETS 194. Art. 20(2).

2014, by which point the single-judge and three-judge committees could apply the criterion. These findings could suggest that the committees have used the significant disadvantage criterion to dismiss applications on a much broader scale. It is impossible to confirm this due to the fact that committee inadmissibility decisions are not published. Unfortunately, we cannot know the legal reasoning motivating these decisions. (Shelton 2016: 306).

Regarding the objective to lighten the Court's caseload by preventing violations and strengthening domestic remedies, Protocol 14 falls decidedly short. During negotiations to draft the Protocol, it was at one point suggested that the Court should be granted competence to issue advisory opinions to clarify interpretation of the Convention and its domestic application. For reasons that are unclear, this proposal was rejected on the grounds that it "might interfere with the contentious jurisdiction of the Court".[211] Protocol 14 did attempt to raise the stakes of non-compliance with Court judgements. The Protocol amended the Convention to allow the Committee of Ministers to bring "infringement" proceedings before the Grand Chamber against any member state which it considers has refused to comply with an ECtHR judgement.[212] In practice, however, this provision has had little impact due to lack of utilization. The CoM did not make use of the provision until 2018, when it initiated infringement proceedings against Azerbaijan in the *Khadija Ismayilova* case.[213] To date, the CoM has only used its power to initiate infringement proceedings in that case. However, in December 2021, the Ministers

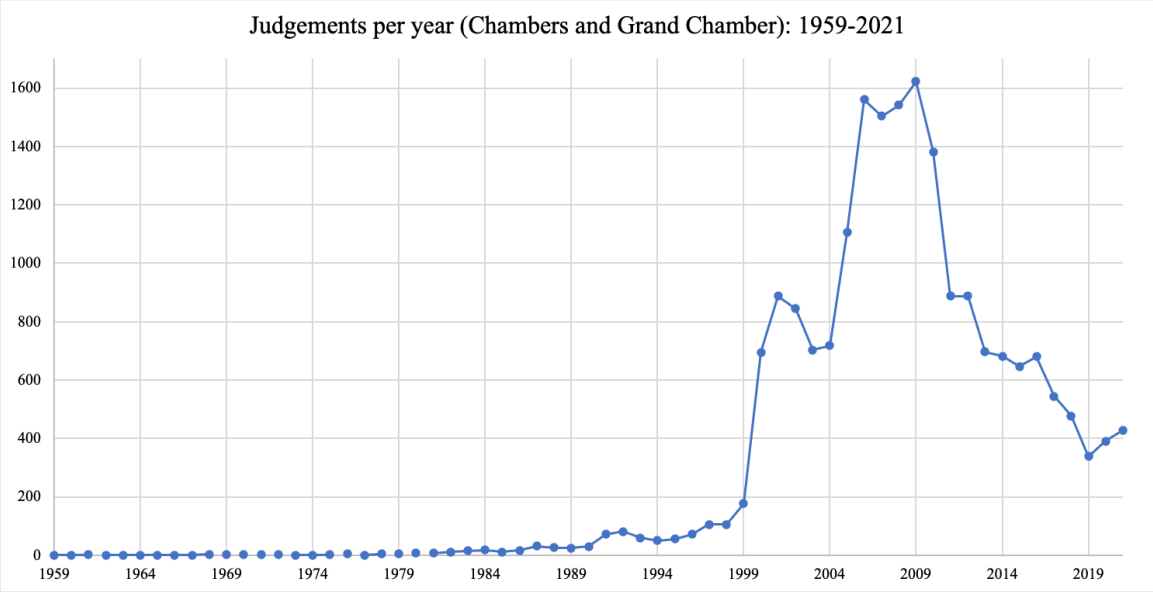
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[211] *Explanatory Report to Protocol No. 14.* para. 34. This is despite the fact that the IACtHR had been (relatively successfully) exercising advisory jurisdiction for over 30 years at this point.
[212] *Protocol No. 14.* ETS 194. Art. 16(4).
[213] *Case of Khadija Ismayilova v. Azerbaijan.* App. nos. 65286/13 and 57270/14. 10 January 2019.

notified Turkey that they were preparing infringement proceedings in response to the government's failure to comply with an ECtHR order to release Osman Kavala, a political prisoner. As of this writing (February 2022), Mr. Kavala is still in prison, and it appears that the CoM will soon launch only the second-ever infringement proceedings in the ECtHR's history (Al Jazeera 2022).

Several years following the implementation of Protocol 14, there is evidence that the reforms helped the ECtHR rein in its unmanageable caseload. The annual number of judgements issued by the Court has dropped precipitously since 2010:

Figure 7.2



What remains less clear, and what this analysis attempts to investigate, is whether these reforms altered the ECtHR's interpretation of its fundamental social purpose and, in turn, the legitimate reach of the Court's authority. In other words, did the Court's expanding membership and the imperative for efficiency force the ECtHR into a position where judges had to re-interpret the Court's social purpose? Or has the ECtHR's founding

interpretation of its mandate remained predominant in judges' exercise of their authority, even as the Court needed to find a way to weed out more cases than ever before? As I analyze the development of the Court's case law in subsequent chapters, I investigate whether major reforms have pushed the Court towards more deferential or interventionist behavior.

In order to determine if deferential ICs respond to member state backlash by constraining their exercise of judicial authority, I examine the evolution of the ECtHR's case law around the time of the Brighton Declaration. This declaration was adopted by all CoE member states at a 2012 High Level Conference. Brighton represented an unprecedented level of coordinated pushback against the ECtHR by CoE members. The United Kingdom was a primary instigator. Widespread discontent with certain ECtHR judgements motivated some British politicians, as well as the press, to publicly denounce the power of the "meddling Court" and issue calls for reform (Bates 2012).[214] Support for the British agenda spread to other CoE members states, where politicians as well as some national bar associations criticized the ECtHR's alleged overreach into domestic jurisdictions. Bolstering these criticisms were persistent concerns that the ECtHR was still unable to fairly and efficiently process its caseload. The UK took advantage of its 2012 presidency of the Committee of Ministers to capitalize on growing anti-ECtHR sentiment, launching an initiative to "renationalize" some of the Court's power. This initiative, which culminated in the Brighton Declaration, sought to "re-legitimize" the

[214] The *Hirst v. United Kingdom (No. 2)* judgement of October 2005, in which the Court ruled that the UK's blanket ban on convicted prisoners voting violated the Convention, sparked particularly vociferous domestic backlash. See Bates (2015).

ECtHR by demanding improvements in the quality of both the Court's judgements and its judges. (Madsen 2018: 204).

A central objective of Brighton was to recalibrate the balance of power between the Court and national authorities. Many member states felt that the Court, at that point over a decade into the reform project that began in 1998, had drifted away from its historical commitment that national authorities espoused primary authority for implementing the Convention's guarantees. This challenge to the Court's authority marked a "turning point" where "the reform process shifted from technical tinkering to enhance efficiency, to a full-blown challenge to the very legitimacy and role of the ECtHR in European human rights protection" (Arnardóttir 2018: 224). Brighton called on the Court to lean more heavily on the principle of subsidiarity and the margin of appreciation doctrine. Specifically, the Declaration requested that the margin of appreciation, a previously unwritten doctrine, be formally codified within the Preamble of the European Convention.[215]

Brighton also pushed several policy recommendations for enhancing the ECtHR's efficiency and legitimacy in the eyes of member states. The Declaration took aim at the quality of the ECtHR's judgements as well as the judges themselves: "The authority and credibility of the court depend in large part on the quality of its judges and the judgements they deliver".[216] To that end, the Declaration advocated for improved guidelines for selecting judges at the national level and called for a reassessment of the

[215] *Brighton Declaration*. High Level Conference on the Future of the European Court of Human Rights. April 2012, para. 12 (a, b). Note: Protocol 15, which entered into force in 2021, amended the Preamble of the European Convention to include a reference to the margin of appreciation.
[216] Ibid., para. 21.

judicial election procedure.[217] The Declaration bluntly asserted that "Judgements of the court need to be clear and consistent… it helps national courts apply the Convention more precisely, and helps potential applicants assess whether they have a well-founded application".[218] The implication here is clearly that member states were frustrated with perceived arbitrary reasoning in the ECtHR's judgements. Brighton represented a push for increased transparency from the ECtHR so that national courts could more effectively enforce the Convention on their own. This would shift the balance of power for enforcing the Convention "back" to the member states. Cementing the role of national courts as the primary enforcers of the Convention would respect the ECtHR's founding commitment to subsidiarity and, ideally, enhance the efficiency of the ECtHR by limiting the number of cases that rose to the level of international adjudication.

The following chapters analyze evolutions in the ECtHR's interpretation of its authority through a study of the Court's case law over time. This analysis focuses on the periods before and after Protocols 11 and 14, as well as the Brighton Declaration. Each juncture gives an opportunity to investigate how an IC founded on a deferential interpretation of its authority responds to domestic pushback as well as opportunities for re-invention.

III. The Inter-American Court of Human Rights

To evaluate the conditions under which interpretations of judicial authority evolve in interventionist courts, I focus my analysis of the IACtHR's case law on periods during which the Court 1) underwent procedural reforms that altered the Court's case processing

[217] Ibid., (para. 25 (a-c)).
[218] Ibid., para. 23.

procedures, 2) faced significant increases in its caseload, and 3) experienced backlash from member states. These periods include the 2001 overhaul of the IACtHR's Rules of Procedure, the rapid post-2017 increase in the Court's annual output, and a handful of incidents that resulted in particular member states withdrawing or threatening to withdraw from the Court's jurisdiction.

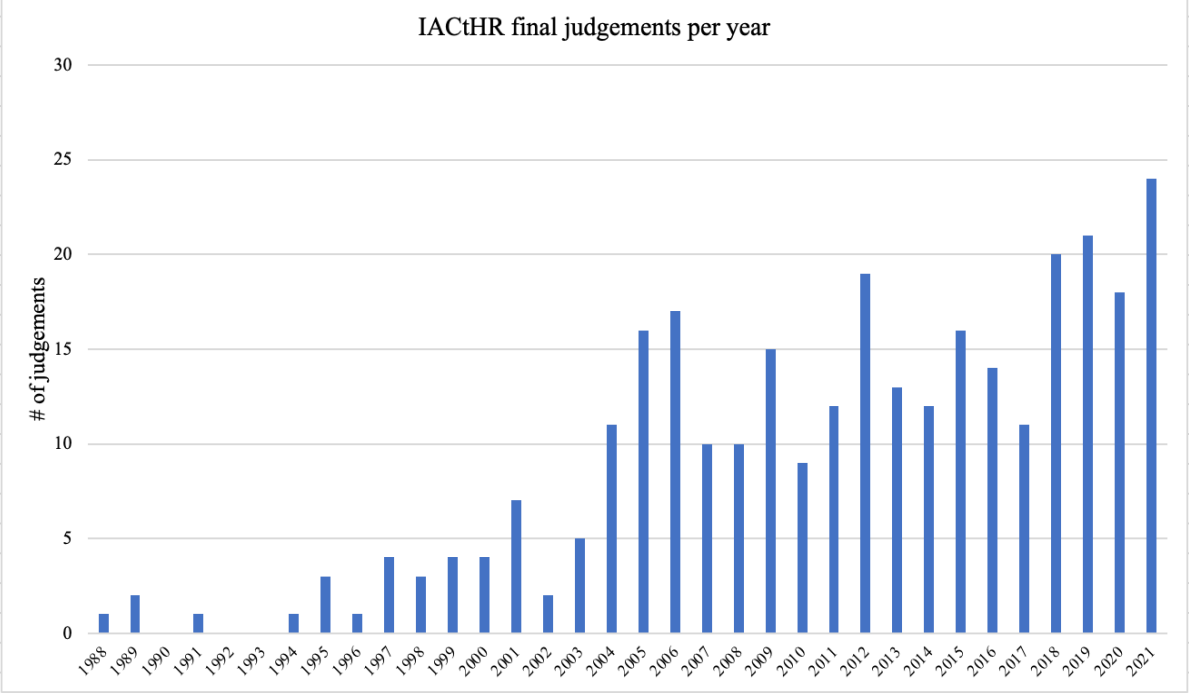
The Inter-American system faced a crisis of efficiency in the late 1990s. Lacking clear boundaries between the Commission and the IACtHR, cases languished in the processing stages. The OAS General Assembly called for reform in 2000, emphasizing the need for greater cooperation between the IACtHR and domestic authorities.[219] The Commission and Court responded by adopting new Rules of Procedure that entered into force in 2001. Prior to the new Rules, the Commission's admissibility decision procedures were not formally codified. The Commission also exercised significant discretion regarding whether to forward a case to the IACtHR. The new Rules introduced standardized admissibility procedures and criteria for case forwarding to the IACtHR that limited the discretion of the Commission.[220] The Rules also provided for an increase in victims' participation in hearings before the Court. As a result of these reforms, the IACtHR's workload increased. The dynamics of the Court's public hearings shifted, as victims took a more visible and involved role in presenting their cases to IACtHR judges (Gómez, 2001; Dulitzky, 2011: 151). In order to assess the impact of these procedural changes on the IACtHR's interpretation of its jurisdiction, I allocate specific focus to the IACtHR's case law between 2002-2005 in the following chapters.

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[219] OAE/Ser.P/AG/Res. 1701 (XXX-O/00). 5 June, 2000.
[220] Inter-American Commission Rules of Procedure (2001), Arts. 43-44.

The IACtHR's annual rate of judgements has grown considerably in recent years, though it has never approached the ECtHR's numbers. The IACtHR has always been a much smaller court than the ECtHR. The IACtHR has less than half of the number of member states (20 compared to the ECtHR's 47) and its budget and staffing numbers are only a fraction of the ECtHR's in any given year. Still, the IACtHR's output appears to be set in an upward trajectory since 2017. As seen in figure 7.3, despite constraints imposed by the pandemic, the IACtHR released its highest ever annual number of judgements in 2021:

Figure 7.3[221]



[221] This graph includes final judgements on contentious cases only. If the merits and reparations in a case were ruled on separately, only the merits judgement is counted to avoid double-counting.

The IACtHR's workload will likely continue to expand, imposing unprecedented pressure on the chronically-underfunded court. In the following chapters, I devote particular attention to the level of deference that the Court has afforded to governments in the post-2017 period. Analysis of this most recent era of the IACtHR's history provides insight into the durability of the Court's founding interpretation of its authority.

While episodes of backlash against the ECtHR have historically entailed coordinated efforts amongst member states, backlash against the IACtHR has occurred on a relatively more state-specific basis. The most severe episodes of backlash against the IACtHR have involved states withdrawing or threatening to withdraw from the Court's jurisdiction. Russia's periodic threats to denounce the European Convention on Human Rights have rattled the CoE to some extent (Glas 2019), but no CoE member state has ever formally submitted withdrawal instruments. On the other hand, four states have either fully withdrawn or attempted to withdraw from the IACtHR: Trinidad and Tobago, Perú, the Dominican Republic, and Venezuela.

A state's withdrawal from an IC in response to a particular ruling or set of rulings sends a clear message that the Court has overstepped its authority. ICs must constantly balance their judicial mandate with the political reality that rulings against a state may spur withdrawal or otherwise deteriorating relations between the court and member governments. But while withdrawal from an IC in any circumstance indicates a rebuke of that court's legitimacy, we might not expect every instance of withdrawal to prompt a court to re-think the boundaries of its authority. For example, if a state's reason for withdrawal is based on IC rulings that involve issues specific to that state, and these

rulings thus do not invoke similar ire from other member states, an IC is unlikely to be sufficiently concerned to re-interpret its mandate.

Of the four instances of withdrawal or attempted withdrawal from the IACtHR, two represent such individualized circumstances. First, Trinidad and Tobago's 1999 denunciation of the American Convention and withdrawal from the IACtHR directly resulted from a series of rulings in which the Court attempted to restrict the application of the death penalty in that country. The American Convention does not prohibit the death penalty, but the IACtHR's jurisprudence and regional domestic norms reflected a "strong trend within the Inter-American system toward abolition" of capital punishment by the 1990s (Concepción 2001: 864-5). Trinidad and Tobago's withdrawal did not spark any notable coordinated effort among IACtHR member states to oppose the Court's jurisprudence on the death penalty. Thus, this episode is not likely to have provoked the IACtHR to constrain its interpretation of its authority.

Second, Perú's attempted withdrawal from the IACtHR in 1999 reflected circumstances that were similarly state-specific. Throughout the 1990s, Peruvian dictator Alberto Fujimori dismantled checks on his executive power and engaged in an aggressive military campaign against Maoist insurgent groups that ultimately resulted in widespread torture and enforced disappearance of civilians. Following a series of IACtHR cases involving rights violations perpetrated by Fujimori's regime, Perú withdrew its recognition of the IACtHR's jurisdiction in 1999. The withdrawal was short-lived. Fujimori fled the county in 2000. The transitional pro-democracy regime quickly re-joined the IACtHR and largely cooperated with the Court's handling of cases involving

Fujimori-era rights violations (Soley and Steininger 2018: 247-8). The brevity of Perú's withdrawal and its specificity to Fujimori's regime renders it unlikely that this instance would provoke change in the IACtHR's status-quo interpretation of its authority.

Two other instances of withdrawal from the IACtHR involve broader concerns regarding the Court infringing on national sovereignty. As such, these episodes provide opportunities to evaluate whether and to what extent member state backlash has driven the Court to re-evaluate its interpretation of its authority. First, Venezuela denounced the American Convention and withdrew from the IACtHR in 2012. Venezuela had been a frequent target of scrutiny from the Commission and the Court throughout Hugo Chávez's regime, which was characterized by systemic violations of Venezuelans' civil and political rights and executive interference in the judiciary. In 2008, the IACtHR determined in *Apitz v. Venezuela* that three Venezuelan judges had been improperly removed from their positions on an appellate court, in violation of the American Convention's right to a fair trial and other due process guarantees. The IACtHR ordered Venezuela to pay reparations to these judges and reinstate them to judicial positions comparable to those they held when they were deposed. The Venezuelan Supreme Court responded to *Apitz* by ruling that the IACtHR's judgement violated domestic constitutional law and sovereignty, and thus that it could not be executed. The Supreme Court went so far as to call on Chávez to denounce the American Convention in its ruling. This was an extraordinary step displaying the corruption that had permeated the highest levels of the Venezuelan judiciary (Huneeus 2010: 127-9).

Venezuelan criticism of the Inter-American human rights system intensified in the years following the *Apitz* ordeal. Chávez leveraged arguments that the Commission and Court had overstepped their authority to launch broader opposition to the OAS as a whole. This opposition was rooted in allegations of a U.S.-led international conspiracy against the "Bolivarian Revolution", a socialist agenda pioneered by Chávez and at times supported by Evo Morales of Bolivia and Rafael Correa of Ecuador (Huneeus 2012). Following additional IACtHR rulings against Venezuela, including a 2011 case where Venezuela was found to have violated opposition leader Leopoldo López's right to political participation, Venezuela finally denounced the American Convention in 2012. Venezuela withdrew from the OAS entirely in 2017.

A key aspect of this instance of withdrawal is that Venezuelan authorities framed their criticism of the IACtHR as generalized concern about the Court's legitimate authority rather than specific critiques of the Court's reasoning in particular cases. National politicians and judges repeatedly accused the IACtHR of subverting the principle of subsidiarity and positioning itself as a "fourth instance" court in contravention of international legal norms (Soley and Steininger 2018: 252). This condemnation of the IACtHR evidences the Court's power in the region as well as, perhaps, the precarity of its interventionism. Alexandra Huneeus, a scholar of the Inter-American system, has commented, "That Chávez would go to the trouble of formally exiting suggests that the Court and Commission began to have bite. But it also suggests that they misjudged how far they could push states without backlash" (2012).

Second, the Dominican Republic's attempted withdrawal from the IACtHR in 2014 directly challenged the legitimacy of the Court. This conflict stemmed from a series of cases involving the Dominican government's discriminatory treatment of Haitian migrants and their Dominican-born children. Tensions between the IACtHR and the Dominican government came to a head after the Court's 2014 ruling on the *Expelled Dominicans and Haitians v. Dominican Republic* case. The Court ruled that the ongoing deportation of Haitian migrants constituted racial profiling and violated due process guarantees. The ruling also condemned a Dominican Constitutional Court decision that had retracted the citizenship of thousands of Dominican-born people of Haitian descent. The IACtHR determined that these actions violated the American Convention's obligation to prevent statelessness.

Just two months after the *Expelled Dominicans and Haitians* ruling, the Dominican Constitutional Court ruled that the state's recognition of the IACtHR's contentious jurisdiction had never received proper congressional approval. Thus, the IACtHR did not possess jurisdiction over the Dominican Republic and the government was not obliged to comply with IACtHR rulings. Dissenting judges in the Constitutional Court argued that the ruling was a reaction to *Expelled Dominicans and Haitians* and lacked sound legal reasoning. (Soley and Steininger 2018: 248-49). The Inter-American Commission, UN Human Rights Committee, UN Committee on Economic, Social, and Cultural Rights, and UN Committee on the Rights of the Child all issued statements in response, which ranged from expressing concern to outright condemning the

Constitutional Court ruling.[222] Nevertheless, the Dominican president and other high-ranking politicians threw their support behind the ruling and publicly rejected the constitutionality of the instrument of recognition. This development ignited broader criticism of the IACtHR among Dominican authorities, who claimed that the Court and Commission had engaged in illegitimate power-grabbing behavior in recent years.

A central element of the Dominicans' criticisms was that the Commission and Court were due to be reformed because they were founded during a bygone era when authoritarianism dominated the region. In this spirit, the Dominican Foreign Minister called for the Inter-American system to "revised and redesigned" because "times change" (Navarro 2014). The Dominican government stopped cooperating with the IACtHR and has declined to send representatives to hearings since the 2014 Constitutional Court ruling. The IACtHR, for its part, has issued multiple resolutions maintaining its jurisdiction over the Dominican Republic and has continued to process cases against the state. The government has not complied with any IACtHR rulings since 2014. The relationship between the Dominican Republic and the IACtHR thus remains in a strange state of limbo, with Dominican authorities claiming to have withdrawn (or to have never joined the Court in the first place) while the IACtHR continues to claim legitimate jurisdiction to rule on cases against the government. This fact alone is evidence that the IACtHR is not inclined to tamper down its interpretation of its authority in the face of political backlash.

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[222] *Resolución de la Corte Interamericana de Derechos Humanos de 12 de marzo de 2019*: *Caso de Las Niñas Yean Bosico y Caso de Personas Dominicanas y Haitianas Expulsadas vs. República Dominicana. Supervisión de Cumplimiento de Sentencias y Competencia,* para. 42-43.

The Dominican Republic's (attempted) withdrawal is significant because, even though it stemmed from a specific dispute regarding racial discrimination and citizenship rights, it ballooned into a broader conflict challenging the legitimacy of the IACtHR as an institution. Dominican authorities' calls for the IACtHR to be "redesigned" in light of the region's modern democratization suggests that, while governments might put up with a regional court wielding heavy-handed authority during times of mass state-sponsored violence, continuing to intrude in domestic affairs post-democratization may not be acceptable. Likewise, the IACtHR's insistence on denying the Dominican Republic's withdrawal indicates that a court that becomes accustomed to enjoying a certain level of authority during a time of crisis will not cede that authority easily, even when conditions improve. Evaluating the IACtHR's case law in the period following this contentious interlude provides an opportunity to observe how an interventionist court in an evolving geopolitical landscape responds to accusations of judicial overreach.

The following chapters will investigate IACtHR case law over the 2012-2020 period to get a sense of how these two challenges for the Court (threats of state withdrawal and a rising caseload) may have impacted the IACtHR's interpretation of its authority. One might reasonably expect the dual pressures of processing a larger case backlog and political backlash from member states to push an international court to re-evaluate it judicial practices. Fearing further member state withdrawals, a court might wish to afford more deference to governments. A rising caseload may also push a court to espouse greater deference towards governments out of practical necessity. For example, a court might adopt a narrower interpretation of its temporal admissibility criteria or higher

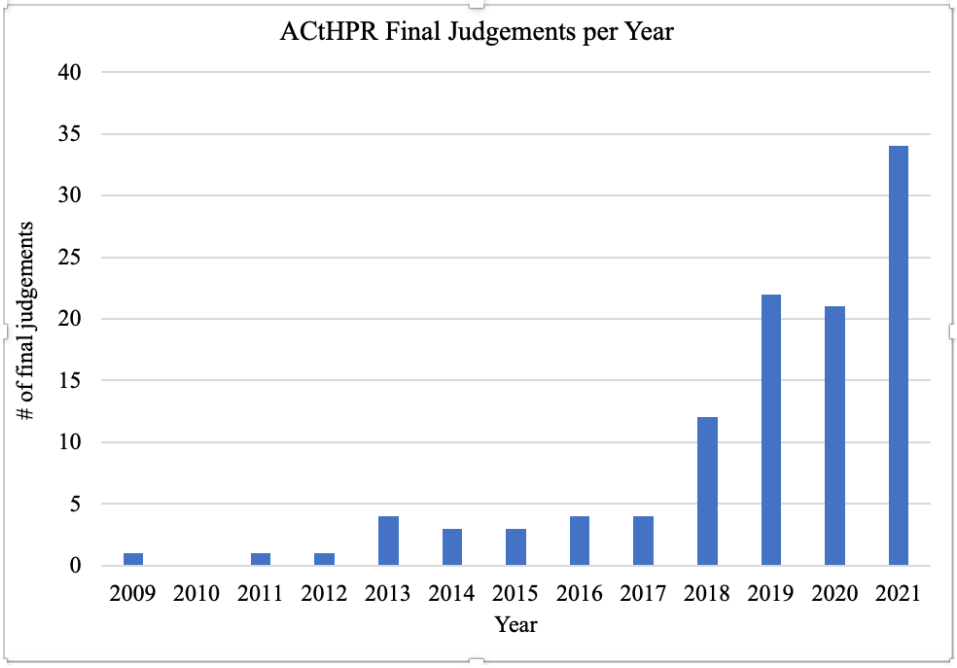
standards for the exhaustion of domestic remedies in order to limit the amount of time it spends debating the admissibility of borderline cases. That way, the court can make more room on its docket for cases whose admissibility is not contentious.

Because the IACtHR has faced its largest annual caseloads and the most vociferous state backlash in its history within the same span of years (2012-2020, roughly), it is difficult to separate out the impacts of these two challenges on the Court's jurisprudence. However, one might expect that scaled-back interpretations of an IC's authority stemming from concerns about case overload would manifest most clearly in the admissibility stage. At this stage, the court has the power to weed out cases or specific allegations within cases. On the other hand, if political backlash pushes a court to afford greater deference to governments, this is more likely to be visible in the merits and reparations stages. Observing indicators of deference across the admissibility stage compared to the reparations and merits stages during the 2012-2020 period can help shed light on whether the IACtHR has re-interpreted its mandate due to an increasing caseload and/or member state backlash.

IV. The African Court on Human and Peoples' Rights

The ACtHPR issued its first admissibility decision in 2009 and its first merits judgement in 2013. Although the Court is young, its judicial output in its first decade has outpaced that of the ECtHR and IACtHR in their respective first decades in operation. This is a promising sign for the Court's future. The Court has experienced an exponential rise in case output since 2016, an issued its highest-ever annual number of judgements in 2021:

Figure 7.4[223]



While this growth is encouraging, there are indications that serious trouble could be on the horizon for the ACtHPR. Since 2016, four states have withdrawn their declarations permitting individuals and NGOs to submit petitions directly to the Court (Rwanda, Tanzania, Côte d'Ivoire and Benin). These withdrawals are particularly concerning given the small number of states that have accepted to the right of individual access to the ACtHPR. Prior to Rwanda's withdrawal in 2016, only nine AU member states had submitted declarations permitting individuals and NGOs direct access to the ACtHPR. Three states (Gambia, Guinea-Bissau, and Niger) have submitted such declarations since 2018. Still, even with those accessions, nationals of only eight AU member states have direct access to the Court as of early 2022.

[223] This figure includes all decisions on admissibility, preliminary objections, merits, and reparations that are considered "final". I.e., if the merits judgement in a case occurred in 2017 and the reparations judgement on that same case occurred in 2018, only the judgement in 2018 is included in this graph. This is so that cases that are decided over multiple phases are not double-counted.

Rwanda was the first state to withdraw individual access to the ACtHPR. This withdrawal was a direct response to Court proceedings against Rwanda in a freedom of expression dispute. Freedom of expression was also at the crux of Benin's 2020 withdrawal of individual access to the Court. As such, discussion of Rwanda and Benin's withdrawals is reserved for the following chapter for the sake of properly contextualizing those disputes. In the years following Rwanda's withdrawal, the ACtHPR has faced a concerning wave of resistance from other member states. In 2019, Tanzania became the second state to withdraw its declaration permitting individuals and NGOs to access the Court. This backlash from Tanzania is particularly alarming because the ACtHPR is headquartered in that country. The Tanzanian withdrawal seems to stem from more generalized discontent with the Court's authority rather than a dispute over particular cases. At the time of the withdrawal, Tanzania had the highest number of cases filed by individuals and NGOs as well as judgements issued against it by the ACtHPR out of all member states (Amnesty International 2019). Additionally, the ACtHPR had recently issued a landmark ruling against Tanzania declaring that mandatory death penalty provisions in the country's Penal Code violated the rights to life and fair trial guarantees.[224]

Tanzania's withdrawal unfolded within the context of increasing democratic backsliding under President John Magufuli. Notably, Magufuli's administration implemented a series of draconian laws restricting media freedom. The most notorious of these laws, the Media Services Act, gave some state agencies arbitrary powers to grant

[224] *Ally Rajabu and Others v. United Republic of Tanzania* (App. no. 007/2015). Judgement of 28 November 2019. ACtHPR.

and revoke licenses for news outlets and journalists (Kirabira 2019). It is possible that Magufuli's desire to avoid scrutiny for increasing state control over the press contributed to Tanzania's withdrawal. However, the official reasoning underlying the withdrawal remains unclear. Tanzania's Minister for Foreign Affairs, Augustine Mahiga, only offered a vague statement that the declaration permitting individual access to the ACtHPR was "contrary" to Tanzania's Constitution (Magubira 2019).

Recent developments offer hope that Tanzania might shortly return to the ACtHPR. Following President Magufuli's death (suspected to be caused by Covid-19) in March 2021, current president Samia Suluhu Hassan appears open to re-engaging with the Court. In fact, the new Tanzanian administration seems to be unclear as to whether they have actually withdrawn from the ACtHPR. Magufuli's administration had deposited the withdrawal instrument with the AU in November 2019, and the withdrawal officially took effect one year later. However, in May 2021, Tanzania's new Foreign Minister, Liberata Mulamula, issued a contradictory statement: "We have not withdrawn from the [ACtHPR], that is why Tanzania is still the headquarters of the court. We cannot withdraw and then at the same time still host the court's headquarters". Mulamula elaborated that Tanzania's intention in critiquing the ACtHPR was to encourage citizens to utilize domestic mechanisms of legal recourse: "We have not withdrawn from that court. But what we are saying is that let us start with our courts. If that doesn't work, then we can proceed to the African Court" (Anami 2021). Given that exhaustion of domestic remedies is already a requirement for citizens to petition the ACtHPR, it is not entirely clear what changes to the Court's standard practice the Tanzanian government would like

to see. It is also unknown whether the new administration has submitted the requisite documents to the AU to reverse the state's withdrawal. As of February 2022, the ACtHPR's website indicates that Tanzania's withdrawal of individual access to the Court remains in place.

Further limiting the reach of the ACtHPR's jurisdiction, Côte d'Ivoire and Benin announced withdrawals of the declaration permitting individual and NGO access to the Court in 2020. Côte d'Ivoire's withdrawal announcement swiftly followed an ACtHPR provisional measures judgement that ordered the suspension of an arrest warrant for a former rebel leader who was running for president.[225] Foreign Minister Ally Coulibaly accused the ACtHPR of rendering a "political decision" in that judgement, and implied that the ACtHPR had disrespected the competence of national courts: "We have well-functioning courts. Our justice is impartial. We cannot accept that our jurisdictions are weakened because of this adherence to this protocol of recognition of jurisdiction" (AfricaNews 2020). The government's withdrawal announcement further emphasized concerns about the ACtHPR overstepping its authority. Sidi Tiemoko Touré, Ivorian Minister of Communication, said of the withdrawal decision, "We respect our international commitments, but we also appreciate our sovereignty". He went on to claim that recent ACtHPR decisions were "likely to cause serious disruption to the legal order… and undermine the foundations of the rule of law by creating genuine legal insecurity" (Ibid.). Côte d'Ivoire's retraction of individual access to the ACtHPR marked

[225] *Soro and Others v. Côte d'Ivoire* (App. no. 012/2020). Provisional Measures Order of 22 April 2020. ACtHPR.

a clear signal that the Court had pushed the boundaries of its jurisdiction farther than the government deemed legitimate.

As a young institution with a small membership, the stakes are particularly high for the ACtHPR. The Court is empowered by an expansive written mandate, but implementing that mandate with too heavy a hand could jeopardize the Court's future just as it is getting off the ground. The next three chapters assess whether and how ACtHPR judges have responded to compounding critiques of judicial overreach through their decision-making on recent cases.

V. Case Selection

The following chapters dive into three substantive areas within each regional court's case law: 1) freedom of expression, 2) physical integrity rights, and 3) gender identity and sexual orientation discrimination. This review of case law is far from exhaustive. It is impossible to discuss every important case each court has deliberated within a research project of this length. The ECtHR alone has emitted over 20,000 judgements in its institutional life. As such, I developed various criterion for selecting cases to feature in this analysis. First, I collected every case across the three selected issue areas. Next, I selected particular time periods to focus on according to the historical reasoning outlined above (ECtHR: 1990-2003, 2010-15; IACtHR: 2002-05, 2012-20; ACtHPR: 2017-20). Then, I established how often every case that fit within those parameters was subsequently cited by judges within the court that decided that case. I only counted one "cite" per subsequent case. In other words, if Case A was cited once within a later judgement (Case B), I counted one cite. If Case A was cited five times in

Case B, I still only counted one cite. I included citations made by judges in separate opinions as well as in majority judgements. For example, if the majority in Case B did not cite Case A in their judgement, but a dissenting judge in Case B cited case A, that citation would still count as a "subsequent cite" for Case A. To account for the three regional courts' varied case processing structures, all judgements pertaining to a given case (indicated by a shared application number) were treated as one case. For example, I did not differentiate between subsequent citations of the *Janowiec and others v. Russia* Chamber judgement and the *Janowiec and others v. Russia* Grand Chamber judgement. Subsequent citations of either judgement simply counted as one cite for *Janowiec and others v. Russia*. Similarly, if the IACtHR's *Gelman v. Uruguay* case was cited in both the merits judgement and the reparations judgement in a subsequent IACtHR case, I still only tallied one subsequent citation for *Gelman v. Uruguay* in that instance. I used this number of subsequent citations to identify a set of cases that had been particularly influential for setting precedent within each court. In order to facilitate valid comparison across courts, I then reviewed and recorded the basic substantive facts of each case within the frequently-cited subset. I used these descriptions to "match" cases with similar underlying circumstances across courts. These matches became the batch of cases that I referenced to write the following chapters.

This case selection process is not perfect. It required me to at times make subjective judgement calls in order to capture variation across time, case output, and regime type while selecting cases with sufficiently similar fact patterns to facilitate cross-court comparison. For example, due to the very different sizes of each court's case law, I

could not use a uniform "cut-off" number of subsequent citations to determine whether a case could join the frequently-cited subset. Additionally, relying on the number of subsequent citations to identify "important" cases imposes a bias in favor of selecting Grand Chamber judgements in the ECtHR. This potentially risks overlooking important case law developments that unfolded at the Chamber and Committee levels. Still, as the Grand Chamber only rules on cases that pose novel and/or particularly contentious legal interpretive questions, this bias may work in favor of identifying particularly influential cases. In order to mitigate the effect of any potential national peculiarities on this analysis, I made an effort to select cases involving a wide range of states of varied regime types and membership statuses (e.g., founding member state vs. newer member state). At times, this required me to disqualify cases that had higher subsequent citation counts than the cases I ultimately selected.

Given that every case is based on different facts, and therefore the impossibility of perfectly "matching" cases for comparison, I used very broad criteria to identify groups of cases with similar fact patterns. For example, within the group of cases involving freedom of expression violations, I grouped together cases that involved "defamation disputes". This matching technique is beneficial in that it helps create a manageable group of cases on which to conduct qualitative analysis. It also enables more direct comparison across cases and across courts. However, matching cases in this way does run the risk of neglecting types of cases that are not easily matched. For example, the IACtHR has decided several cases involving freedom of expression issues that took place within the context of more severe rights violations, such as enforced disappearances. The

ECtHR, on the other hand, does not have frequently cited cases involving both freedom of expression and state-sponsored physical violence during the time periods targeted in this analysis. Consequently, some IACtHR cases that involved both personal integrity rights and freedom of expression are not included in the chapter on freedom of expression. Still, given the attention to several categories of case characteristics employed by this matching technique, I am confident that the selection of cases it produced is sufficiently representative to produce valid analysis.

Chapter 8

The Right to Freedom of Expression

I. Introduction

In December 2018, the ECtHR issued a landmark decision establishing that holding news media companies liable for content hyperlinked on their websites violates the European Convention's right to freedom of expression. The applicant in this case was a media company called Magyar Jeti Zrt. The company had been found liable in Hungarian courts for "disseminating defamatory statements" in an article it published about a recent incident of racist harassment against Roma schoolchildren. The statements in question, which implied that the nationalist Jobbik political party incited the harassment, were made by an interviewee in a video produced by a different news company. Magyar Jeti Zrt had posted a hyperlink to that video in their own article, which resulted in Jobbik successfully suing Magyar Jeti Zrt for defamation. The ECtHR found that the Hungarian court's judgement produced a "chilling effect" on the press by discouraging journalists from hyperlinking to external sources, in contravention of the Convention's protections of freedom of expression.[226]

As the drafters of the European Convention were designing the ECtHR in the 1950s, they could not possibly have imagined such a thing as the internet, let alone anticipated the ECtHR's role in deciding when governments could impose restrictions on journalists posting hyperlinked content. As society evolves, international judges are inevitably tasked with applying law to circumstances that are very different from those

[226] Case of *Magyar Jeti Zrt v. Hungary* (App. no. 11257/16), Judgment of 4 December 2018 ECtHR (Fourth Section). para. 18.

envisioned by the creators of the law. In these cases, judges have to balance the imperative for consistent legal reasoning with changing social realities. This is a tricky task that may require judges to re-interpret their court's relationship with governments.

International courts are not known to be particularly dynamic. The procedures that guide court operations can only be changed through slow and often arduous reform processes that rely on elusive consensus across member states. Judges must rely on precedent in their decision-making, imposing an inherent bias towards status-quo legal interpretations. Even newly-appointed judges, who might be expected to impart novel judicial perspectives, may be more inclined to uphold the court's existing norms as a result of their professional socialization (Goldberg 1984; Arold 2007). For these reasons, early judges' interpretations of the boundaries of their court's authority are likely to be quite durable throughout the life of the institution. Still, these interpretations cannot be assumed to be "locked-in". A court may become more deferential or interventionist over time due to a variety of factors. I have hypothesized that shifts in each court's membership (which may be accompanied by changes in the types of rights violations faced by a court), state backlash against court decisions, and jurisprudential developments in other human rights courts might push judges to adopt more deferential or interventionist interpretations of the boundaries of their court's jurisdiction.

I expect that courts founded on deferential interpretations of judicial authority, such as the ECtHR, are more likely to be responsive to state backlash. Because deferential courts have historically prioritized respect for state sovereignty, these courts will be more likely to walk back their authority in response to critiques of judicial

overreach. In other words, deferential judicial behavior will become entrenched over time. In practice, this self-restriction of authority could take the form of judges adopting narrower interpretations of case admissibility criteria, hesitating to shift the burden of proof to governments, mandating less intensive remedies for established violations, or even making explicit statements urging deference to national authorities. On the other hand, I expect that courts founded on interventionist interpretations of judicial authority, such as the IACtHR, are less likely to be responsive to member state backlash. Interventionist courts are not likely to pull back on their authority, even when former "frequent offender" states demonstrate increased respect for human rights. The logic underlying this proposal is that, once courts self-define a given exercise of their authority as legitimate, they will not cede that authority easily. Put more generally, institutions are not inclined to relinquish power, even when the conditions that originally legitimized that power have changed. Indicators that a court is maintaining an interventionist interpretation of its authority include flexibly applying case admissibility criteria in favor of the applicant, frequently shifting the burden of proof to governments, and mandating remedies that significantly interfere in domestic authority, such as annulling criminal convictions or amending legislation.

In addition to state backlash, jurisprudential developments in other human rights courts may provoke a court to adopt more deferential or interventionist behaviors. Through "inter-court borrowing" or "jurisprudential dialogue", judges on one regional court may cite another court's jurisprudence to support a particular legal interpretation (Voeten 2010, Sandholtz and Feldman 2019). I anticipate that a court will be more

receptive to importing jurisprudence from another court within areas of case law in which that other court has more experience. For example, if Court A has little experience ruling on a specific type of rights violation, but Court B already has established case law in that area, Court A might be inclined to cite Court B's jurisprudence within rulings on cases involving that type of violation. Through this process of judicial exchange, deferential courts might develop more interventionist approaches within emerging substantive areas of case law, and vice versa. This chapter evaluates the validity of these proposals through analysis of each court's case law on the right to freedom of expression.

Freedom of expression is a fundamental pillar of democracy that has been integral to the development of each regional court's case law. While each court has adopted a unique interpretation of its authority in this area, there is a high degree of confluence across all three courts' approaches. In particular, IACtHR judges have demonstrated careful attention to European jurisprudence in freedom of expression cases. This may be attributable to the fact that the ECtHR already had a well-established freedom of expression case law by the time that the IACtHR started confronting expression violations in the late-1990s. As such, IACtHR judges naturally looked to their European peers for guidance. Still, the IACtHR has pushed the boundaries of its authority beyond the European example, imposing more intensive remedies for freedom of expression violations and pushing for significant domestic legislative reforms. The IACtHR and ACtHPR have largely shaken off episodes of member state backlash and continued to rule against states that have accused these courts of judicial overreach. The ECtHR, on the other hand, undertook significant revisions of its approach to adjudicating freedom of

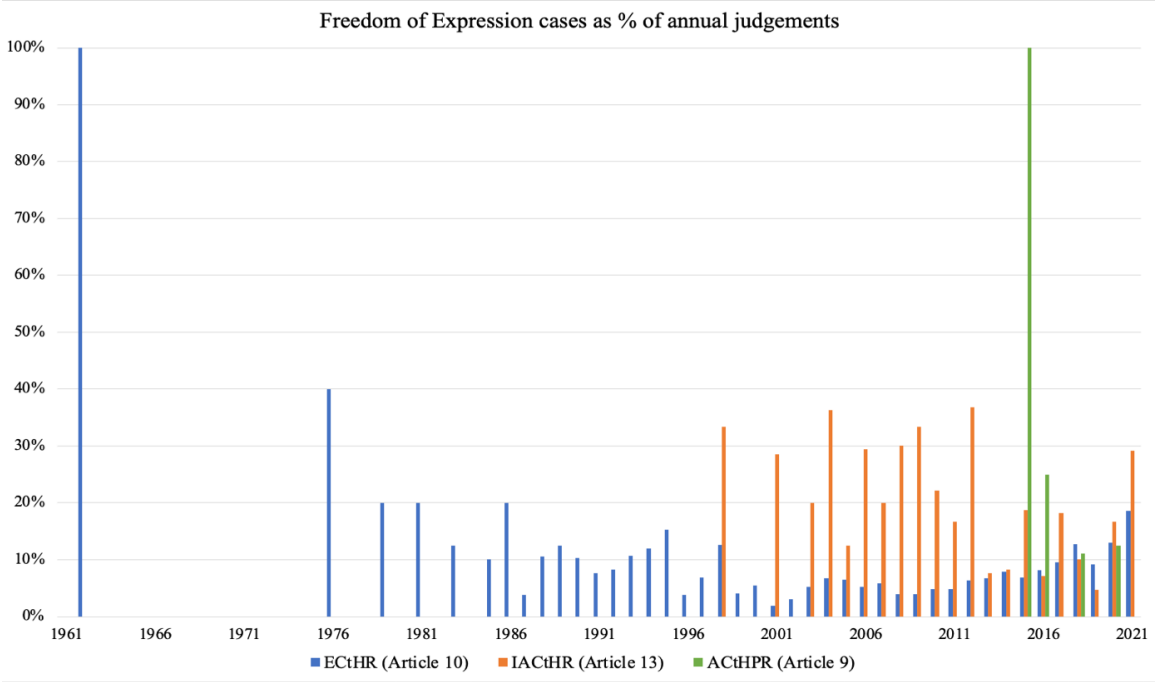
expression issues after the Brighton Declaration. This inter-court variation provides supportive evidence for the hypothesis that states founded with a deferential interpretation of their authority are more likely to be responsive to state backlash than interventionist courts

The right to freedom of expression is codified in Article 10 of the European Convention, Article 13 of the American Convention, and Article 9 of the African Charter. Cases involving freedom of expression have featured prominently in each court's case law at varying times. Figure 8.1 displays freedom of expression cases as percentages of total annual judgements across all three courts.[227] The ECtHR has frequently addressed freedom of expression disputes since the 1980s. The IACtHR, on the other hand, did not begin to rule on expression cases until the late-1990s. Despite this late start, the IACtHR has ruled on a particularly high proportion of expression cases. The ACtHPR has only issued six judgements on cases involving expression in its short history.[228] Meaningful comparison with the African Court is limited by that Court's relatively small body of case law. (For example, even though alleged Article 9 violations featured in 100% of ACtHPR cases in 2015, the Court only issued 2 merits judgements that year.)

[227] Note: In order to not count the same case multiple times (given each court's different phased approach to issuing judgments), only merits judgements are reflected in this chart. For the same purpose, only Chamber and Committee merits judgements are included for the ECtHR, not Grand Chamber judgements. These charts include cases where a freedom of expression violation was alleged, not necessarily established.

[228] As of the end of 2020.

Figure 8.1



This chapter analyses the ECtHR's freedom of expression case law from 1990-2003, when the Court admitted a wave of new member states and underwent institutional restructuring, and 2010-15, when the Court faced a case backlog crisis, implemented additional reforms, and faced unprecedented state criticism. I examine the IACtHR's case law from 2002-5, when reforms limited the role of the Commission in case processing and increased victim participation, and from 2012-2020, when the Court grappled with several withdrawals and attempted withdrawals amidst a growing caseload. Finally, I examine the ACtHPR's case law from 2017-2020. Usage of the ACtHPR has rapidly increased in that time, as well as incidences of state backlash and withdrawals. Using the matching case selection technique described in the previous chapter, I focus my analysis of the ECtHR and IACtHR's jurisprudence on cases involving defamation allegations.

Because the ACtHPR only issued four judgments involving expression during the 2017-2020 period, I discuss each of these judgements in turn.

II: The European Court of Human Rights

One of the first major freedom of expression cases the ECtHR faced in the 1990s forced the Court to intervene in domestic debates about publicly invoking Nazism. In *Oberschlick v. Austria* (1991), the applicant had been convicted of defamation for publicly accusing an Austrian politician of promulgating Nazi ideology. The politician, Walter Grabher-Meyer, had suggested that family allowances for Austrian women should be increased "in order to obviate their seeking abortions for financial reasons", while immigrant mothers' allowances should be reduced.[229] Oberschlick interpreted this statement as an incitement to Nazi ideas as it implied support for ethnic cleansing through selective abortions.[230] Oberschlick filed a criminal complaint against Grabher-Meyer, which Oberschlick then published in *The Forum*, a magazine where he was editor-in-chief. In response, Grabher-Meyer pressed defamation charges. Oberschlick was eventually convicted and fined, and the relevant copies of *The Forum* were seized by the state.[231]

The central issue facing the ECtHR was whether Oberschlick's conviction and the seizure of his magazine were "necessary in a democratic society… for the protection of the reputation or rights of others" within the scope of Article 10 (2). The Austrian government argued that Oberschlick had crossed the line of acceptable critique of a

[229] Case of *Oberschlick v. Austria* (App. no. 11662/85), Judgment of 23 May 1991. ECtHR (Plenary). para. 11.
[230] Ibid., para. 13.
[231] Ibid., para. 13-19.

politician by publishing those critiques in the form of a criminal complaint. This format could mislead the public by implying that Grabher-Meyer was the subject of an active criminal investigation. The majority of ECtHR judges rejected this reasoning, maintaining that "a politician is certainly entitled to have his reputation protected… but the requirements of that protection have to be weighed against the interests of open discussion…"[232] The Court ruled that Austria had violated Oberschlick's freedom of expression, and ordered the government to pay financial reparations.[233]

Three dissenting judges, Judges Matscher, Bindschedler-Robert, and Vilhjalmsson, argued that the potentially misleading format of Oberschlick's statement caused it to fall outside of the scope of protection provided by Article 10.[234] Furthermore, the Austrian court that convicted Oberschlick had correctly upheld its obligation to protect individuals' right to privacy under Article 8 of the Convention. The format of Oberschlick's statement "took it out of the sphere of mere political debate and carried it into the arena of personal attack, thereby impinging on private life".[235] Here, Judge Vilhjalmsson asserts that the majority inappropriately interfered in domestic decisions regarding how to balance competing Convention obligations.

Adjudicating that balance between protecting individuals' reputations and freedom of expression has been a recurring challenge for the ECtHR. As established in the aforementioned *Sunday Times*[236]case in 1979, deciding whether interference in

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[232] Ibid., para. 59-63.
[233] Ibid., para. 73.
[234] Ibid. Partly Dissenting Opinion of Judge Thor Vilhjalmsson; Partly Dissenting Opinion of Judge Matscher, Approved by Judge Bindschedler-Robert, para. 2.
[235] Ibid., Partly Dissenting Opinion of Judge Thor Vilhjalmsson.
[236] See Chapter 6, pgs. 144-6.

expression is "necessary in a democratic society" requires the ECtHR to determine 1) whether the complained-of interference corresponded to a "pressing social need", 2) whether it was proportionate to the legitimate aim pursued, and 3) whether the reasons given by national authorities to justify it are relevant and sufficient. The ECtHR has repeatedly stressed that national authorities "are left a certain margin of appreciation" to determine what constitutes a "pressing social need" and "legitimate aims" of interference in expression.[237] Still, "this power of appreciation is not, however, unlimited but goes in hand in hand with a European supervision by the Court…"[238]

Bladet Tromsø and Stensaas v. Norway (1999) exemplifies the difficulties inherent to interpreting Article 10(2) in defamation cases. The ECtHR was tasked with determining the extent to which media outlets must ensure the veracity of information pertinent to public interest before it is published. *Bladet Tromsø,* a Norwegian newspaper, had published a series of articles based on reporting by Mr. Lindberg, a freelance journalist who reported on seal hunting and later became a government-appointed inspector aboard the *M/S Harmoni*, a hunting vessel. *Bladet Tromsø* re-printed excerpts from Lindberg's reporting that contained allegations of criminal misconduct aboard the *Harmoni*, including animal cruelty.[239] These allegations catalyzed an eruption of public debate about ethics and regulatory practices in the seal-hunting industry. However, Lindberg offered little evidence to support his claims. An independent Commission of Inquiry later found that most of Lindberg's allegations either could not be

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[237] Case of *Bladet Tromsø and Stensaas v. Norway* (App. no. 21980/93), Judgment of 20 May 1999. ECtHR (Grand Chamber). para. 58.
[238] Ibid.
[239] Ibid. paras. 9-14, 27, 35.

proven or were substantially exaggerated.[240] The crew of the *Harmoni* successfully sued Lindberg and *Bladet Tromsø* for defamation. *Bladet Tromsø* was ordered by pay compensation to the crew members, which formed the basis for the newspaper's complaint before the ECtHR.

The ECtHR Grand Chamber pointed to the fact that Lindberg had produced his report while working as an inspector appointed by the Ministry of Fisheries. As such, the newspaper was not required to undertake independent research to verify Lindberg's statements. The "vital public-watchdog role of the press may be undermined" if the press is required to undertake extensive investigatory procedures on matters of urgent public interest.[241] In finding that Norway violated Article 10, the ECtHR majority determined that the crew members' interest in protecting their reputations was insufficient to outweigh the "vital public interest in ensuring an informed public debate over a matter of local and national as well as international interest".[242]

This decision was met with fervent dissent from judges who argued that it would hamstring national authorities from balancing Convention obligations to protect freedom of expression with protections against defamation. Judges Palm, Fuhrmann, and Baka wrote that the majority had essentially developed "a new test that newspapers can be dispensed from verifying the facts of a story" depending on the nature of the information.[243] Developing these criterion in the context of this case was particularly controversial given that Lindberg's report was never published by the Ministry of

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[240] Ibid. paras. 30-31.
[241] Ibid. para. 68.
[242] Ibid., para. 73.
[243] Ibid., Joint Dissenting Opinion of Judges Palm, Fuhrmann, and Baka.

Fisheries prior to being picked up by *Bladet Tromsø.* The Ministry had withheld the report precisely due to accuracy concerns. The majority's characterization of the report as "official" was thus tenuous.[244] Judge Greve implied that the emotive circumstances of the case had interfered with majority judges' reasoning: "It is vital that the assessment of the necessity of the interference in a democratic society should not be obscured by the sensitive nature of the seal hunting issue."[245]

The accession of a wave of Eastern European member states in the 1990s brought new judicial perspectives to the ECtHR, as each new member state appointed its own judge. The eastward expansion of the CoE stretched the application of the Convention to states who were still navigating post-communist transitions to democracy. *Dalban v. Romania* (1999), one of the first major defamation disputes involving a new Eastern European member state, was decided by the Grand Chamber in the same year as *Bladet Tromsø and Stensaas v. Norway.* Comparing the judges' reasoning across these two cases provides an opportunity to evaluate the Court's approach to (somewhat) similar issues within two very different member states. The applicant in *Dalban* was a journalist who reported on fraud at a state-owned agricultural company, allegedly orchestrated by a senator. Romania's Supreme Court had upheld Dalban's conviction for libeling that senator on the grounds that Dalban had "intended to cause prejudice to [the senator] without verifying his information before publishing the articles".[246]

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[244] Ibid.
[245] Ibid., Dissenting Opinion of Judge Greve.
[246] Case of *Dalban v. Romania* (App. no. 28114/95), Judgment of 28 September 1999. ECtHR (Grand Chamber). para. 44.

Consistent with the majority's reasoning in *Bladet Tromsø and Stensaas,* the Grand Chamber maintained that journalists cannot be criminally penalized for failing to verify information prior to publication, subject to certain limitations. While journalists are bound to respect the reputations and rights of others, "It would be unacceptable for a journalist to be debarred from expressing critical value judgments unless he or she could prove their truth".[247] The relevance of published information to public interest is a crucial factor that may condition journalists' duty to verify the truth. This interpretation of Article 10 recognizes the barriers that journalists may face to verifying information that the state has an interest in hiding: "…the national margin of appreciation is circumscribed by the interest of democratic society in enabling the press to exercise its rightful role of "public watchdog"…".[248] Furthermore, the Grand Chamber acknowledged that " journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation".[249] The Grand Chamber was unanimous in its decision that Romania had violated Article 10 by convicting Dalban.

Two judges (Greve and Baka) who had dissented in *Bladet Tromsø and Stensaas* were part of this unanimous decision, despite the fact that they had previously emphasized journalists' duty to establish the truth and cautioned against attributing undue weight to public interest in evaluating states' criminalization of defamation. There could be several explanations for why the Grand Chamber split in *Bladet Tromsø and Stensaas* but was unanimous in *Dalban.* First, the circumstances of the cases are different.

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[247] Ibid., para. 49.
[248] Ibid.
[249] Ibid.

Notably, the target of the alleged defamation in *Dalban* was a public figure, whereas *Bladet Tromsø* denounced ordinary seal hunters. The ECtHR has long recognized a distinction between the limitations on expression that are permissible to protect a public figure as opposed to private individuals.[250] Second, while Norway was a founding ECtHR member state and a well-established democracy, Romania had only transitioned to democracy in the past decade following over forty years of Communist rule. Judges may be more likely to afford deference to a state with a long track-record of respect for Convention obligations as opposed to a new member states who were still working to bring their domestic institutions in line with European human rights standards.

In the early 2000s, the ECtHR still struggled to establish coherent standards for evaluating acceptable restrictions on expression in defamation cases. The case of *Perna v. Italy* (2001), in which a Chamber judgement that found Italy in violation of Article 10 was later overturned by the Grand Chamber, exemplifies this struggle. The applicant was a journalist who published an article accusing a public prosecutor of corruption. The journalist highlighted the prosecutor's past membership in a militant communist party to imply that the prosecutor was abusing his current office to benefit ideological compatriots. The journalist was convicted of defamation and fined.[251] The ECtHR Chamber rejected the domestic court's argument that the journalist's lack of evidence proving a connection between the prosecutor's politics and his professional decisions caused the article to be defamatory.

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[250] See *Case of Lingens v. Austria* (App. No. 9815/82). Judgement of 8 July 1986. para. 42.
[251] Case of *Perna v. Italy* (App. no. 48898/99), Judgment of 25 July 2001. ECtHR (Second Section). paras. 6-11.

> The Court observes that a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof…Where a judicial officer is an active political militant, his unconditional protection against attacks in the press is scarcely justified by the need to maintain the public confidence which the judiciary needs in order to be able to function properly.[252]

The Chamber's distinction between facts and value-judgements developed guidance for the conditions under which journalists should be required to furnish proof for potentially defamatory statements. The judges, who ruled unanimously to find Italy in violation of Article 10, again emphasized the concern for public interest that has consistently driven the Court's reasoning.

However, the tables turned when Italy appealed the Chamber's ruling to the Grand Chamber. In 2003, the Grand Chamber found that Italy had not, in fact, violated Article 10 in *Perna.* The Grand Chamber rejected the Chamber's assessment that the journalist's accusations against the prosecutor constituted value judgements. Rather, the Grand Chamber considered that the journalist had made specific accusations of misconduct against the prosecutor without furnishing proof. Thus, national courts had correctly applied the Convention when convicting the applicant of defamation.[253] The only dissenting judge in the Grand Chamber, Judge Conforti, had been a member of the Chamber bench that originally established a freedom of expression violation. The fact that the Chamber unanimously found a violation while the Grand Chamber (with the exception of Judge Conforti) unanimously found no violation suggests a lack of consistency across ECtHR judges' legal reasoning.

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[252] Ibid., para. 40-1.
[253] Case of *Perna v. Italy* (App. no. 48898/99), Judgment of 6 May 2003. ECtHR (Grand Chamber). para. 47.

Based on *Perna,* one might speculate that the Grand Chamber is more likely to express greater deference to member governments compared to Chamber judicial formations. After all, if a state has invested the time and resources to appeal a decision to the Grand Chamber, this indicates substantial domestic dissatisfaction with the Court's decision that could potentially put political pressure on the Court. However, *Cumpana and Mazare v. Romania,* a freedom of expression case decided by the Grand Chamber just months after *Perna*, provides contrary evidence to this conjecture. In *Cumpana and Mazare,* it was the Chamber that initially found no violation of Article 10, only to be overturned by the Grand Chamber. The applicants were journalists who were convicted of defamation, sentenced to seven months imprisonment, and banned from working as journalists for one year after publishing an article and disparaging cartoon of a judge they accused of corruption.[254] The article and accompanying cartoon launched several personal criticisms, including insinuations that the judge had an extramarital affair. The Chamber maintained that commentary on the judge's personal life caused the journalists' speech to fall outside of the protection afforded by Article 10, weighing the need to balance freedom of expression with the right to privacy and family life.[255]

Two judges dissented, arguing that the journalists' accusations of corruption were rooted in credible evidence and thus of public interest:

> We are quite aware that, as in libel cases, there is a fine balance to be struck. Reputation and honour are also protected by the Convention, in Article 8 and Article 10 § 2. We too are sensitive to that…. Overall, however, the balance was

[254] Case of *Cumpana and Mazare v. Romania* (App. no. 33348/96), Judgment of 10 June 2003. ECtHR (Second Section). para. 25
[255] Ibid. para. 55.

> tipped slightly too far; in our opinion, there was no "pressing social need" justifying the lengths to which the Romanian courts went.[256]

The Grand Chamber picked up this reasoning, citing both the public interest aspect of the case as well as the severity of the punitive measures against the applicants in its rejection of the Chamber's ruling: "the criminal sanction and the accompanying prohibitions imposed on [the applicants] by the national courts were manifestly disproportionate in their nature and severity to the legitimate aim pursued by the applicants' conviction for insult and defamation".[257] Essentially, while the Grand Chamber recognized the difficulties of balancing freedom of expression and privacy, the severity of the journalists' punishment constituted a violation.

The ECtHR's defamation case law during late 1990s-early 2000s was characterized by a few consistencies: for example, less permissive standards for restricting defamatory speech targeted at public officials relative to private individuals. Still, the Court struggled to develop clear guidance for member states in applying Article 10. The Grand Chamber's rejection of multiple Chamber decisions evidences the murky nature of this area of case law. In all of the above cases where the ECtHR established an Article 10 violation, the state was only ordered to pay the applicant financial reparations. The Court did not order states to nullify a conviction or undertake specific domestic policy changes. Only mandating financial reparations was standard practice for the ECtHR at the time.

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[256] Ibid., Joint Dissenting Opinion of Judges Costa and Thomassen.
[257] Case of *Cumpana and Mazare v. Romania* (App. no. 33348/96), Judgment of 17 December 2004. ECtHR (Grand Chamber). paras. 94, 120.

The 2010-15 period was marked by a concerted effort among ECtHR judges to delegate the assessment of evidence to national courts as much as possible. Responding to increasing state criticism of the quality of the Court's decisions, this move was intended to help the Court stay out of the minutiae of domestic adjudication and develop more consistent standards for state behavior. One of the central critiques that states launched at the ECtHR in the Brighton Declaration, issued in April 2012, was that the Court too often engaged in arbitrary reasoning. This issue, which states acknowledged was in part driven by the court's overwhelming caseload, "represented a threat to the quality and the consistency of the case law and the authority of the Court".[258] Member states had jointly presented this criticism for the first time at the 2010 Interlaken Conference, where the initial conversations that culminated in the Brighton Declaration took place. The ECtHR was thus aware of states' discontent well in advance of the Brighton Declaration's official release.

The case of *Sanoma Uitgevers B.V. v. The Netherlands*, decided by the Grand Chamber just months after the entry into force of Protocol 14 in 2010, sheds light on member states' rising frustration in the years leading up to the Brighton Declaration. The applicant in this case was a magazine editor who alleged that the police had violated his freedom of expression by seizing CDs containing photographs taken for the magazine. The photographs were taken at an illegal street race. The police alleged that one of the race cars was later involved in another crime, and that the photographs on the CDs contained crucial evidence. The magazine editor had refused to turn over the CDs, citing

[258] High Level Conference on the Future of the ECtHR. 2012. *Brighton Declaration*. para. 5.

journalistic integrity and the need to maintain the trust of his sources.[259] In 2009, in a 4-3 decision, an ECtHR Chamber found no violation of Article 10 in this case.[260] Although the majority lamented the police's "regrettable lack of moderation" in conducting the seizure, the judges were satisfied that "no reasonable alternative possibility of identifying the vehicle existed at the relevant time".[261]

The Grand Chamber later overturned the Chamber's ruling, declaring that Dutch authorities had indeed violated Article 10. This unanimous decision hinged on the assertion that state law lacked proper procedural safeguards to ensure that the seizure would not reveal identities of the photojournalist's sources.[262] One judge who was a member of the Chamber that initially found no violation flip-flopped and voted to establish a violation in the Grand Chamber. That judge, Egbert Myjer, was a national of the Netherlands. He explained his position candidly:

> It seems to be that any judge who is a lone voice against all others in the Grand Chamber will have to come up with very persuasive arguments indeed, but a national judge even more so. A suspicion may well arise that that judge is incapable of taking the necessary critical distance of legal practice in his or her country of origin.
>
> The fact is that I have not found sufficient convincing reason to stick to my guns and vote for no violation. I was originally of the opinion that this was a borderline case in which the circumstances of the case ultimately tipped the scales towards the respondent. I am still of the opinion that this is a borderline case, even after hearing the views of the other members of the Grand Chamber, and I even ask myself whether this case really raises "a serious question affecting the interpretation or application of the Convention ... or a serious issue of general importance".[263]

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[259] Case of *Sanoma Uitgevers B.V. v. The Netherlands*, (App. no. 38224/03), Judgment of 31 March 2009. ECtHR (Third Section) paras. 5-18.
[260] Ibid., para. 44.
[261] Ibid., para. 60.
[262] Case of *Sanoma Uitgevers B.V. v. The Netherlands*, (App. no. 38224/03), Judgment of 14 September 20010. ECtHR (Grand Chamber) para. 92.
[263] Ibid., Concurring Opinion of Judge Myjer.

Myjer should get credit for his honesty. Still, a judge reaching two different conclusions after examining the same set of facts within different judicial formations raises questions about the rigor of that judge's reasoning. Perhaps of greater concern, Myjer demonstrated rather blunt ambivalence about whether the case even raised "a serious issue". Given this attitude, it is a small wonder that some states had concerns about arbitrary reasoning within the ECtHR around the turn of the 2010 decade.

Kasabova v. Bulgaria, decided one year prior to the Brighton Declaration, demonstrates the ECtHR's shift towards a procedural standard of review that prioritized governments' responsibility to establish legal facts. The applicant was a journalist who had published articles accusing school administrators of accepting bribes from parents in exchange for their children's admission. Domestic courts had convicted the applicant of defamation and imposed a two-year prison sentence in part due to the lack of evidence supporting the allegations. The ECtHR accepted the government's argument regarding the necessity to restrict the applicant's freedom of expression, yet still found that Bulgaria violated Article 10 due to "the potential chilling effect of the proceedings on [the applicant] and other journalists".[264] Given the severity of the penalties imposed by the national courts, the ECtHR did not even consider the veracity of the journalist's statements to be particularly relevant to the case:

> …the Court is prepared to accept that the national courts' finding that the applicant had failed to sufficiently research her article before going to press, and had thus failed to act as a responsible journalist, could not be considered as manifestly unreasonable, and that the applicant's conviction could be regarded as necessary for protecting the reputations of the officials concerned. However, the Court does not consider it necessary to take a firm stance on that

[264] Case of *Kasabova v. Bulgaria* (App. no. 22385/03), Judgment of 19 April 2011. ECtHR (Fourth Section). para. 71.

> point, because it is in any event of the view that the sanction imposed on the applicant was disproportionate.[265]

Unlike in earlier cases, the ECtHR declined to substantively discuss the question of whether restricting the applicant's expression was legally justified. Rather, the Court accepted the government's argument supporting this restriction without engaging in its own evaluation of the facts. This ruling exemplifies a procedural, opposed to substantive, approach to evaluating the compatibility of state behavior with the Convention. The Bulgarian judicial authorities were trusted to render a correct decision based on the facts that they discerned. The ECtHR only judged those authorities on the proportionality of the applicant's punishment relative to those facts. The ECtHR's shift towards a procedural standard of review in the early 2010s prioritized the role of national judiciaries in establishing legal facts. This approach further entrenched the ECtHR's deferential interpretation of its authority.

There is evidence to suggest that the Court was aware that states' frustration would peak around spring 2012 and attempted to head off Brighton's criticisms (or at least proactively address them). For example, *Axel Springer AG v. Germany* (2012), another defamation dispute, contains clear evidence of the Court's responsiveness to critiques of inconsistent reasoning. Discussion of how to balance states' competing obligations under the right to freedom of expression and the right to privacy had been a consistent feature of the Court's case law for decades. Even so, the Court had never before developed clear standards for evaluating the proportionality of restrictions on expression for the sake of respecting privacy. The Court finally did so in *Axel Springer.*

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[265] Ibid. para. 68.

This case was decided by the Grand Chamber in February 2012, two months prior to the Brighton Declaration's release. In the judgement, the Court developed the following evaluative criteria for conducting "the balancing exercise" between freedom of expression and privacy: 1) whether the complained-of statements "contribute to a debate of general interest", 2) "How well known is the person concerned and what is the subject of the report?", 3) the prior conduct of the person concerned, 4) the method of obtaining the information and its veracity, 5) the content, form, and consequences of the publication, and 6) the severity of the sanction imposed.[266]

Prefacing these criteria, the judgement states that "where the balancing exercise between [freedom of expression and protection of privacy] has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts".[267] In other words, having articulated clear standards for balancing Articles 8 and 10 in defamation cases, the ECtHR would only issue a judgement based on whether national authorities had applied that balancing test. The Court would *not* review whether national authorities arrived at a satisfactory result through that test, except in extraordinary cases. The court's new balancing test thus responded directly to states' call in Brighton for more coherent standards as well as demands for greater deference to national authorities.

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[266] Case of *Alex Springer AG v. Germany* (App. no. 399954/08), Judgment of 7 February 2012. ECtHR (Grand Chamber). paras. 89-95.
[267] Ibid., para. 88.

The ECtHR has constrained itself to this procedural interpretation of its oversight powers even in cases where domestic courts applied the balancing test to very different circumstances than those in which the test was originally developed. For example, in *Brčko and others v. Bosnia and Herzegovina* (2015), the ECtHR found no Article 10 violation when domestic courts ruled that several NGO employees had engaged in defamation by writing a letter that they never disseminated publicly. The employees sent the letter directly to state officials to express concerns regarding a candidate being considered for director of a local public radio station. The candidate had allegedly made ethnically prejudicial comments in the past, which were referenced in the letter. Even though the NGO employees had never intended for the letter to be made public, it was leaked and published in several newspapers. This leak culminated in the employees being forced to pay damages for defamation in a civil suit.[268] When the employees took their case to the ECtHR, a Chamber judgment determined that national courts had taken the appropriate steps to evaluate the balance between freedom of expression and privacy in this case. "Therefore, the Court does not see any serious reason to substitute its own assessment for that of the Constitutional Court..."[269] Even though three Chamber judges dissented, primarily citing the fact that the applicants had not purposefully publicized defamatory statements[270], the Grand Chamber later upheld the Chamber's ruling.[271]

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[268] Case of *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina*, (App. no. 17224/11), Judgment of 13 October 2015. ECtHR (Fourth Section). paras. 5-17.
[269] Ibid., para. 35.
[270] Ibid., Joint Dissenting Opinion of Judges Nicolaou, Tsotsoria, and Vehabovič.
[271] Case of *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina*, (App. no. 17224/11), Judgment of 27 June 2017. ECtHR (Grand Chamber).

The ECtHR's shift towards a procedural standard of review and development of clear(er) standards for restricting expression in the 2010s demonstrates the Court's respect for the competence of national judiciaries. This behavior aligns with the expectation that deferential courts are likely to be responsive to state criticism and adjust the exercise of their judicial authority accordingly.

III. Inter-American Court of Human Rights

While the ECtHR struggled to establish coherent standards for the burden of proof that rests with journalists when criticizing public figures, the IACtHR's jurisprudence on this issue consolidated relatively more quickly. In *Herrera-Ulloa v. Costa Rica* (2004), the IACtHR was charged with determining whether Costa Rica had violated a journalist's freedom of expression in a defamation case. Mr. Herrera-Ulloa had published articles that partially reproduced information from Belgian media outlets. Those articles connected Mr. Félix Przedborski, who at the time was Costa Rica's Ambassador to the International Atomic Energy Agency, to an international scandal involving illicit sales of combat helicopters.[272] Herrera-Ulloa was convicted of defamation and fined. Exercising its authority to order provisional measures in pending cases, the IACtHR ordered Costa Rica to refrain from collecting the fine or registering Herrera-Ulloa as a convicted felon until the Court was able to rule on his case.[273]

The government argued in *Herrera-Ulloa* that Costa Rica's criminal laws pertaining to defamation "only criminalize malicious conduct", and thus "strike a fair

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[272] Case of *Herrera-Ulloa v. Costa Rica.* Judgement of 2 July 2004 (Preliminary Objections, Merits, Reparations and Costs). IACtHR. para. 66(a).
[273] Ibid., para. 14-26.

balance between freedom of expression and the right to have one's honor and reputation respected".[274] The government also maintained that Costa Rican laws did not necessarily require everything published by journalists to be verified as true. They insisted that Mr. Herrera-Ulloa was convicted based on malicious intent rather than an inability to verify the Belgian press's accusations against Przedborski. However, independent lawyers testified before the IACtHR that Costa Rica's defamation laws do require journalists to verify information sourced from foreign media outlets containing "alleged defamatory statements against a Costa Rican public official".[275]

The IACtHR unequivocally rejected the legality of requiring journalists to verify statements critiquing public officials. In a unanimous decision, the judges wrote that the standard of proof required of journalists under Costa Rican law "has a deterrent, chilling and inhibiting effect on all those who practice journalism. This, in turn, obstructs public debate on issues of interest to society."[276] The IACtHR ordered the government to pay Herrera-Ulloa significant financial reparations, as well as nullify his conviction. Curiously, the Court did not order Costa Rica to adapt its penal code.

Just one month after the *Herrera-Ulloa* judgment, the IACtHR intervened in a delicate freedom of expression dispute rooted in the growing pains of democratization. *Ricardo Canese v. Paraguay* concerned the conviction of Paraguayan presidential candidate Ricardo Canese for slander. Canese had implied that another candidate, Carlos Wasmosy, maintained allegiances to former dictator Alfredo Stroessner. At the time,

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[274] Ibid., para. 103 (f).
[275] Ibid., 66(c-d), 137(4a).
[276] Ibid., para. 133.

Wamosy was the President of CONEMPA, a civil works company with close government ties. Canese publicly stated that Wamosy "was the Stroessner family's front man in CONEMPA", which prompted CONEMPA members to file a criminal defamation suit against Canese. Canese was sentenced to several months in prison, fined, and prohibited from leaving the country.[277] Canese's prison sentence was stayed and he was eventually acquitted by Paraguay's Supreme Court while his case was still pending at the IACtHR. Still, the IACtHPR proceeded with the case on the grounds that the Supreme Court had not offered Canese reparations, so the situation had never been sufficiently remedied.[278]

In a unanimous judgement finding Paraguay in violation of Article 13, the IACtHR emphasized that Canese's statements took place in the context of Paraguay's democratization after a 35-year-long dictatorship.[279] The Court cited ECtHR jurisprudence maintaining that any restriction on the speech of political candidates, and particularly opposition candidates, calls for the "closest scrutiny", and that it is "particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely".[280] Furthermore, the IACtHR condemned Canese's prison sentence as disproportionate, claiming that 'there was no imperative social interest that justified the punitive measures…".[281] The Court ordered Paraguay to pay Canese compensation, but again stopped short of mandating specific legislative change.

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[277] Case of *Ricardo Canese v. Paraguay.* Judgement of 31 August 2004 (Merits, Reparations and Costs). IACtHR. para. 2.
[278] Ibid., para. 71.
[279] Ibid., para. 87.
[280] Ibid., para. 89-90.
[281] Ibid., 106.

In general, European and Inter-American freedom of expression jurisprudence in the late 1990s-early 2000s upheld the same basic principles. IACtHR judges took particular note of jurisprudential developments across the pond. In a 2005 case concerning the seizure of a book that called for revised ethical standards within Chile's military intelligence agencies, the IACtHR borrowed directly from the ECtHR's language to declare that the seizure and criminal conviction of the book's author were "disproportionate and unnecessary in a democratic society".[282] The author, a retired Navy officer working as a civilian military contractor, was accused of publishing information that constituted a "threat to national security".[283] This is despite the fact that expert reports commissioned by the Naval Prosecutor concluded that the book "did not breach the secrecy and security of the Chilean Navy".[284] The IACtHR found a freedom of expression violation in this case and ordered Chile to compensate the author and annul his conviction. In a concurring opinion, Judge Sergio García Ramírez noted that the "subject matter in the actions brought before the Inter-American Court coincides with the experience of the European Court of Human Rights", in a clear nod to the attention that American judges afford to European jurisprudence when evaluating freedom of expression disputes.

In the past decade, IACtHR judges have been inclined to take a subsidiary role in evaluating the balance between free expression and protecting individuals' reputations in defamation cases. This interpretation is remarkably similar to the approach employed by

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[282] Case of *Palamara-Iribarne v. Chile.* Judgement of 22 November 2005 (Merits, Reparations and Costs). IACtHR. para. 88.
[283] Ibid. para. 63(18).
[284] Ibid. para. 75.

the ECtHR. In *Mémoli v. Argentina* (2013) the Court found that Argentina had not violated two citizens' right to freedom of expression when they were convicted of libel for accusing a local company of fraudulently selling burial niches. The IACtHR's decision in this case defied arguments submitted by the Inter-American Commission, which had called on the Court to find Argentina in violation of Article 13.[285] In defense of its position, the Court majority cited several ECtHR cases to emphasize the importance of obtaining balance between protecting individuals' reputations and freedom of expression.[286] Furthermore, the majority echoed the ECtHR's overriding concern with upholding subsidiarity when evaluating national authorities' determination of this balance:

> …the Court is not a higher court of a court of appeal to decide disagreements between the parties on some implications of the assessment of evidence…in strict observance of its subsidiary competence, the Court considers that, in a case such as this one, it must verify whether the State authorities made a reasonable and sufficient weighing up between the two rights in conflict, without necessarily making an autonomous and independent weighing, unless the specific circumstances of the case require this.[287]

Here, the IACtHR seems to embrace a shift towards a procedural standard of judicial review, similar to developments within the ECtHR around the same time period. By emphasizing the Court's subsidiary role to national authorities, the majority in *Mémoli* distanced itself from reviewing the substantive conclusions reached by domestic courts. Rather, these judges promoted the idea that the Court should constrain itself to reviewing the procedural compatibility of national judicial proceedings with the state's Convention

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[285] Case of *Mémoli v. Argentina.* Judgement of 22 August 2013 (Preliminary objections, Merits, Reparations and Costs). IACtHR. para. 139.
[286] Ibid., paras. 114-16.
[287] Ibid., para. 140.

obligations. In other words, so long as the national courts reasonably considered the balance between expression and privacy with good faith attention to the Convention, the IACtHR should not attempt to revise the domestic judgement. This push to retrench the subsidiarity of the IACtHR did not go unchallenged. Three dissenting judges, Judges Robles, Vio Grossi, and Mac-Gregor Poisot, ignored the majority's call for greater trust in the judgement of the national courts. Their dissenting opinion included an extensive review of the facts of the case and of the domestic court's reasoning, which the dissenters argued was fundamentally flawed.[288]

The majority in *Mémoli* took care to note that, "Contrary to other cases decided by this Court, in the instant case, the statements for which Messrs. Mémoli were convicted did not involve public figures or officials and did not relate to the functioning of State institutions".[289] Hence, balancing protections of expression and privacy had to be approached differently than in cases involving public figures.[290] This position was reiterated in *Álvarez Ramos v. Venezuela,* decided in 2019. Venezuela's denunciation of the American Convention had entered into force in 2013. However, in accordance with Article 78(2) of the Convention, the IACtHR maintained jurisdiction over cases based in events that occurred prior to the withdrawal date.[291] The applicant, Mr. Álvarez Ramos, had been convicted of defamation in 2005 after writing an op-ed alleging

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[288] Ibid., Joint Partially Dissenting Opinion of Judges Manuel E. Ventura Robles, Eduardo Vio Grossi, and Eduardo Ferrer Mac-Gregor Poisot. Section I.
[289] Ibid., para. 146.
[290] The 2011 *Fonteveccia and D'Amico v. Argentina* case involving President Carlos Menem (discussed in Chapter 2, pg. 16) is another example of the IACtHR's greater scrutiny of restrictions on expression targeted at public officials relative to private citizens.
[291] Case of *Álvarez Ramos v. Venezuela.* Judgement of 30 August 2019 (Preliminary objections, Merits, Reparations and Costs). IACtHR. para. 16.

misappropriation of public funds by the Venezuelan National Assembly. Mr. Willian Lara, who was then the President of the Assembly, filed a criminal complaint against Álvarez. Álvarez was sentenced to over two years imprisonment (which was ultimately suspended), prevented from traveling internationally, and temporarily blocked from political participation.[292]

In its unanimous decision finding Venezuela in violation of Article 13, the IACtHR referenced the ECtHR's standards for establishing a "pressing social need" that could justify restriction of expression.[293] The IACtHR could not establish the existence of such a need in this case, emphasizing that government spending is a matter of public interest. Furthermore, the Court declared that any legislation that criminalizes critiquing public officials is incompatible with the American Convention.[294] The Court noted that journalistic conduct can "produce liability in another legal sphere, such as in civil law", but rejected the application of criminal codes to speech criticizing public officials.[295] Still, while the IACtHR ordered Venezuela to expunge Álvarez's conviction, the Court stopped short of explicitly mandating that Venezuela revise its penal code. This decision may be attributable to unresolved questions regarding whether the Court had the power to order such measures given that Venezuela's withdrawal had already taken effect.

There is evidence that the IACtHR has taken up, to some extent, a turn towards a more procedural standard of review similar to that promoted by the ECtHR in the 2010s. This development indicates that the ECtHR's example may have induced the IACtHR to

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[292] Ibid., para. 1.
[293] Ibid., para. 109.
[294] Ibid., para. 129.
[295] Ibid., para. 124.

ease up on its interventionist approach to reviewing the facts established by domestic authorities (at least in freedom of expression cases). However, not all IACtHR judges have been on board with this trend towards greater deference, as is evident in *Mémoli*'s dissenting opinions. The IACtHR has pushed notably farther than the ECtHR in its development of the idea that criminal punishment for defamation violates international human rights principles. Additionally, the IACtHR has not constrained itself to only ordering financial remedies in cases where states have violated freedom of expression guarantees. This variation suggests that cross-court convergence in legal standards brought about through inter-jurisprudential dialogue can still produce different outcomes due to each court's divergent circumstances. The IACtHR may afford greater deference on a case-by-case basis (particularly with regard to states such as Argentina that have dramatically improved human rights protections in recent decades), but the Court will not reverse its established authority to push for domestic legislative change and order intensive remedies. One certain conclusion is that the IACtHR has not responded to member state backlash to any extent that is comparable to the ECtHR's post-Brighton reckoning. As seen in *Álvarez Ramos*, the IACtHR did not hesitate to hand down a condemnatory ruling on Venezuela even after that country's withdrawal. Even though the fluid domestic leadership situation in Venezuela might leave the door open for the state's return to the IACtHR in the relatively near future, the Court is clearly not inclined to incentivize that return through deferential rulings.

IV: African Court on Human and People's Rights

The ACtHPR has had a rocky start to its institutional life, with four member states withdrawing the right of their citizens to petition the Court since 2016. The right to freedom of expression was at the center of a dramatic dispute that ultimately provoked Rwanda's withdrawal. This episode was the first time a state withdrew from the Court, and, thus, the first significant challenge to the ACtHPR's legitimacy by a member state. Rwanda had previously been a strong ally of the Court, as one of only eight states to accept the right of individual citizens and NGOs to petition the ACtHPR directly. This relationship took a sharp turn for the worse after Victoire Ingabire, president of the opposition FDU-Inkingi party, was convicted and imprisoned for the crime of "genocide ideology" in a trial that international human rights organizations criticized as "flawed" and "politically-motivated" (Human Rights Watch 2012; Amnesty International 2013). Ingabire had been arrested after speaking at the Genocide Memorial Center in Kigali. Her speech addressed challenges with reconciliation and ethnic violence, "issues that are rarely discussed openly in Rwanda" (Amnesty International 2013: 6). A Rwandan court sentenced Ingabire to eight years in prison in 2012. This sentence was later increased to fifteen years following an unsuccessful appeal to the Rwandan Supreme Court in 2013 (Human Rights Watch 2016).

Through her legal counsel while imprisoned, Ingabire launched an application with the ACtPHR alleging that the Rwandan government had violated her rights to a fair trial, freedom of expression, and equality before the law.[296] Four days before the ACtHPR was scheduled to commence public hearings in Ingabire's case, the Rwandan

[296] *Ingabire Victoire Umuhoza vs. Republic of Rwanda* (App. no. 003/2014). Ruling on Jurisdiction. Decision of 03 June 2016. ACtHPR. para. 4.

government sent a terse note to the African Union announcing the country's immediate withdrawal from the provisions of the Protocol to the African Charter permitting individual access to the ACtHPR. Notably, Rwanda did not seek to withdraw from the Protocol entirely. The withdrawal was aimed at blocking individuals from petitioning the Court directly, recognizing that the African Commission could still submit cases against Rwanda to the Court post-withdrawal. In its announcement, the Rwandan government lamented that "…a Genocide convict… secured a right to be heard by the Honourable Court, ultimately gaining a platform for re-invention and sanitation, in the guise of defending the human rights of Rwandan citizens" (Windridge 2018: 249). Further illuminating the government's motivations, a Rwandan ambassador commented, "We quickly realised that [the African Court] is being abused by the judges on absence of a clear position of the court vis-á-vis genocide convicts and fugitives, and that is why we withdrew" (Ibid.). The Rwandan withdrawal was explicitly aimed at obstructing the Ingabire case, placing the ACtHPR in a precarious position on the eve of the first public hearing.

Following its announcement, the Rwandan government immediately submitted an objection challenging the ACtHPR's jurisdiction to hear Ingabire's case. The case was thrown into a chasm of legal ambiguity by the fact that neither the African Charter nor the Protocol specify procedures for withdrawal or denunciation of particular provisions. In contrast, the European and Inter-American Conventions elaborate specific timelines between the deposit of a withdrawal or denunciation notice and the entry into force of those instruments (Articles 58 and 78, respectively). The Rwandan government argued

that, in the absence of clear direction from the Charter, it fell to the Secretariat of the AU, and not the Court, to determine how to implement Rwanda's withdrawal.[297] ACtHPR judges summarily rejected this argument, stating that the Court "is empowered to interpret and apply the Protocol" pursuant to Article 3.[298] Furthermore, the judges cited IACtHR jurisprudence originating from Perú's withdrawal to declare that an advance notice period of one year is necessary before a withdrawal can take effect.[299] ACtHPR judges unanimously upheld the Court's authority to rule on the *Ingabire* case.[300]

However, the ACtHPR's decision to rely on the Inter-American example establishing a one-year advance notice period was not unanimous. In their separate opinion, Judges Gerard Niyungeko and Augustino Ramadhani criticized the majority's lack of reasoning on this front:

> The conventional practice and jurisprudence of the Inter-American human rights system is, like many other, a practice from which we can indeed draw inspiration, but it cannot be applied without prior discussion at the Africa Court. In Europe, the Convention…for example, provides for a six month notice period. At the Universal level, the Optional Protocol to the [ICCPR] for its part provides a three-month notice period. The Court does not explain why it prefers to be guided by the practice in the Inter-American system rather than by the practices in the United Nations system or the European system…[301]

Beyond its general critique of the Court's reasoning in this case, this dissent illustrates some judges' concerns that the ACtHPR was relying too heavily on precedent set by outside institutions rather than developing its own standards.

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[297] *Ingabire Victoire Umuhoza vs. Republic of Rwanda* (App. no. 003/2014). Ruling on Jurisdiction. Decision of 03 June 2016. ACtHPR. paras. 36-7.
[298] Ibid., para. 52.
[299] Ibid., paras. 63-5.
[300] Ibid., paras. 68-9.
[301] *Ingabire Victoire Umuhoza vs. Republic of Rwanda* (App. no. 003/2014). Ruling on Jurisdiction. Decision of 03 June 2016. ACtHPR. Dissenting Opinion of Judges Gerard Niyungeko and Augustino S.L. Ramadhani. para. 13.

In its merits judgement in 2017, ACtHPR judges unanimously found that Rwanda had violated Ingabire's right to a fair trial and freedom of expression.[302] While the Court ordered Rwanda to pay significant financial reparations to Ingabire and her family[303], it stopped short of ordering Ingabire's release from prison. The judges were all in agreement on this issue, emphasizing that the Court "does not have the power to repeal national legislation".[304] Here, the ACtHPR drew a clear line in the sand. However, given the pressure the Court was under amidst the withdrawal of one of its key member states, it is remarkable that the Court pushed its authority in *Ingabire* far as it did. The ACtHPR judges self-interpreted new rules that blocked Rwanda's withdrawal from impacting the case. Furthermore, they went on to condemn Rwanda for multiple rights violations even while the government's foot was already hanging out of the door. This episode demonstrates ACtHPR judges' resistance to cede authority, even in the face of unprecedented backlash that threatened the Court's legitimacy.

Benin's withdrawal of the right of individuals to petition the ACtHPR can be traced to a sensational dispute between President Patrice Talon and Sebastien Ajavon, an opposition politician and livestock mogul known in Benin as the "Chicken King". In 2016, Benin customs authorities discovered 18 kilograms of cocaine in a container of frozen poultry imported by Ajavon's company. Ajavon was charged with drug trafficking but was later acquitted in a national criminal court. During those proceedings, Ajavon's

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[302] *Ingabire Victoire Umuhoza vs. Republic of Rwanda* (App. no. 003/2014). Judgement of 24 November 2017. ACtHPR. para. 172.
[303] *Ingabire Victoire Umuhoza vs. Republic of Rwanda* (App. no. 003/2014). Judgement on Reparations of 7 December 2018. ACtHPR. para. 74.
[304] Ibid., para 167.

company's imports into Benin were disrupted and the signals of two radio stations he owned mysteriously went dark. Following his acquittal, Ajavon submitted a petition to the ACtHPR alleging that the drug trafficking charges and interferences in his businesses were part of a conspiracy orchestrated against him by President Talon and constituted human rights violations. While the petition was still pending before the ACtHPR, Benin announced the creation of a new court dedicated to economic crimes and terrorism. This special court promptly tried Ajavon for drug trafficking based on the same incident for which he had already been acquitted. Ajavon, who at that point had fled to exile in Paris, was convicted *in absentia* to twenty years in prison.

After an international warrant was issued for Ajavon's arrest, Ajavon asked the ACtHPR to implement provisional measures postponing the execution of that arrest warrant until the ACtHPR's final ruling on his case.[305] The ACtHPR granted this request, and in 2019 ruled that Benin had violated Ajavon's right to a fair trial and equality before the law. The Court ordered Benin to annul Ajavon's conviction by the special court, a move that is indicative of the Court's increasingly expansive interpretation of its authority to mandate remedies that directly intervene in domestic judicial affairs.[306]

The Chicken King saga was not over, however. Ajavon found himself back at the ACtHPR after President Talon effectively blocked all opposition parties, including Ajavon's Social Liberal Union, from participating in Benin's April 2019 parliamentary elections. This crackdown on political opposition provoked mass protests, which the

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[305] *Sebastien Germain Ajavon v. Republic of Benin* (App. no. 013/2017). Provisional Measures Order of 7 December 2018. ACtHPR. paras. 1-9.
[306] *Sebastien Germain Ajavon v. Republic of Benin* (App. no. 013/2017). Judgement of 29 March 2019. ACtHPR. para. 292.

government suppressed violently. Hundreds of thousands of citizens boycotted the elections out of frustration (*France 24* 2019). Later in 2019, Ajavon filed a petition at the ACtHPR alleging human rights violations stemming from the elections. In April 2020, the ACtHPR granted a provisional measures request by Ajavon to order Benin to postpone municipal elections scheduled for May 2020 until after the ACtHPR could rule on the case.[307] For Benin, this was the last straw. Ordering a government to suspend scheduled elections is a monumental incursion on sovereignty. Neither the ECtHR nor the IACtHR has ever issued such an order. Eleven days after the ACtHPR's decision, Benin announced it was withdrawing the right of individuals and NGOs to petition the ACtHPR. The government's press release did not mention the Ajavon situation explicitly, but called out the ACtHPR as a "source of real legal and judicial insecurity" (IJRC 2020).

Due to the *Ingabire* precedent that withdrawals from the right of individual access can only take effect after a year, the ACtHPR was still able to issue a judgment on the merits of Ajavon's case. Exercising its jurisdiction to interpret other human rights agreements beyond just the African Charter, the ACtHPR found Benin in violation of several provisions of the ECOWAS Protocol on Democracy and the International Covenant on Economic, Social, and Cultural Rights (as well as the African Charter). These violations primarily pertained to the state's manipulation of election law, violent repression of protests, and failure to guarantee the independence of national courts.[308] However, the ACtHPR ruled that Benin had not violated Ajavon's right to freedom of

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[307] *Sebastien Germain Ajavon v. Republic of Benin* (App. no. 062/2019). Provisional Measures Order of 17 April 2020. ACtHPR. Operative paragraph 5.
[308] *Sebastien Germain Ajavon v. Republic of Benin* (App. no. 062/2019). Judgement of 4 December 2020. ACtHPR. para. 369.

expression. This may have been due to the specific allegations lodged by Ajavon. Ajavon only claimed a violation of freedom of expression incurred by the Digital Code, a national law that prohibits racially motivated and xenophobic hate speech. The Court found the Digital Code to constitute an acceptable restriction of expression based on existing norms in international human rights law.[309]

The Court did not consider whether the right to freedom of expression had been violated in the context of the manipulated election and the state's subsequent crackdown on protestors, even though the Court found multiple other rights violations related to those circumstances. This omission could indicate the Court's resistance to consider violations that are not specifically alleged by the applicant- in other words, resistance to applying the legal principle of *iura novit curia.* Interestingly, Ajavon had alleged a violation of the right to freedom of expression in his first case before the ACtHPR, concerning suspected state interference in his radio companies. The Court, for reasons that are not clear in the judgement, decided not to address that alleged violation. In a separate opinion on that case, Judge Gerard Niyungeko noted that the majority opinion failed to draw clear conclusions on several alleged issues:

> In all, these lacunae or shortcomings in the reasoning of the Court on certain issues, in addition to the lack of concordance between the reasoning and the operative part in some areas unfortunately leave a vague impression that the Court was in a haste to produce its judgement, which naturally does not suit the usual serenity of justice.[310]

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[309] Ibid., paras. 121-8.
[310] *Sebastien Germain Ajavon v. Republic of Benin* (App. no. 013/2017). Separate Opinion of Judge Gerard Niyungeko. 29 March 2019. ACtHPR. para. 29.

Ajavon's cases are undoubtedly among the most complicated and politically contentious cases that the ACtHPR has faced. Judge Niyungeko's criticisms, accompanied by the rather glaring lack of attention to freedom of expression concerns in both cases, suggest that the ACtHPR may have found itself overwhelmed. Critiques asserting deficiencies in legal reasoning from within the Court itself are a troubling, and may lend credence to the complaints raised within Côte d'Ivoire and Benin's respective withdrawal announcements.[311]

Even amidst Benin's pending withdrawal, the ACtHPR continued to employ a heavy-handed approach to ruling on and demanding remedies for human rights violations committed under Talon's regime. In November 2020, the ACtHPR issued a ruling on a case that challenged the international legality of recent amendments to Benin's Constitution. These amendments, which transferred certain legislative powers to the executive, were adopted under irregular procedures that did not comply with domestic law.[312] The applicant argued that the government violated the right to information (a component of freedom of expression under Article 9) by failing to publish the proposed constitutional amendments until after they had already taken legal effect. Publication of new legislation as well as records of legislative debates related to constitutional reform is required under Beninese law.[313]

ACtHPR judges unanimously established that Beninese citizens' right to information had been violated in this case, among several other rights violations.[314] The

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[311] Côte d'Ivoire's withdrawal is discussed in Chapter 7, pg. 201.
[312] *XYZ v. Republic of Benin* (App. no. 010/2020). Judgement of 27 November 2020. ACtHPR. para. 15.
[313] Ibid., paras. 107-21.
[314] Ibid., para. 159.

ACtHPR ordered the government to repeal multiple laws related to the constitutional reform. Furthermore, the Court stipulated that no further elections could take place in Benin until those laws were repealed.[315] Even after the ACtHPR's prior attempt to intervene in Benin's election schedule provoked the government to withdraw individual access, the ACtHPR continued to assert its authority to delay national elections contingent on compliance with the Court's judgements.[316]

The stakes are particularly high for the ACtHPR as a young court that has already faced a considerable amount of backlash from the very member states who were its greatest allies when the Court was founded. Given these circumstances, the Court has engaged in a risky strategy by continuing to stretch its authority to order interventionist remedial mandates, including postponing national elections and ordering the repeal of domestic legislation. The ACtHPR's freedom of expression case law provides compelling evidence that the Court's judges are committed to expanding their authority even in the face of government backlash.

V. Conclusion

In general, the development of freedom of expression jurisprudence within the ECtHR and IACtHR has followed remarkably similar trajectories. IACtHR judges have extensively referenced the ECtHR's standards for evaluating state restriction of

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[315] Ibid., para. 159 (xiv.-xv.).

[316] Recent developments indicate that Benin may be open to re-joining the ACtHPR in the near future. In October 2021, Benin Minister for Justice and Legislation, His Excellency Séverin Maxime Quenum, met with ACtHPR President Lady Justice Imani Daud Aboud to communicate Benin's commitment to "strengthening human rights and good governance, and that it will work very closely with the [ACtHPR] to attain this objective. Minister Quenum urged the Court to "undertake reforms to make it more effective by reviewing the structure of the Court and its Registry as well as conditions of service of judges". Benin has not yet announced any plans to reverse its withdrawal: http://www.african-court.org/wpafc/republic-of-benin-to-work-closely-with-the-african-court-on-human-and-peoples-right-to-strengthen-human-rights/

expression in cases involving defamation. This jurisprudential borrowing was not a two-way street, however. ECtHR judges did not cite IACtHR jurisprudence in any of the cases discussed above. A significant faction of IACtHR judges appear to have taken inspiration from the ECtHR in adopting a more procedural standard of judicial review in expression cases, emphasizing the subsidiary role of the IACtHR relative to domestic authorities. Still, the IACtHR has pushed its interpretation of its authority in this realm beyond the ECtHR's example. Notably, the IACtHR has pioneered jurisprudence in support of the decriminalization of defamation and assumed the authority to unilaterally overturn convictions rendered by domestic courts. However, the IACtHR has repeatedly declined to order the nullification of national legislation in this area, despite assuming the authority to do so in other areas of case law. The IACtHR may simply be more willing to afford governments greater discretion for remedying freedom of expression violations compared to more severe violations (for example, personal integrity rights violations, discussed in the next chapter).

Cross-court convergence in the ECtHR and IACtHR provides evidence that interventionist courts may be willing to adopt more deferential behavior in discrete circumstances. However, persistent divergences across the IACtHR and ECtHR evidence the durability of interpretations of authority forged in each court's founding moments. The IACtHR's freedom of expression case law contains little evidence that the Court has adapted its behavior in response to outside criticism and state withdrawals. The ECtHR, on the other hand, was clearly shaken by the Brighton Declaration and took concrete steps to address states' criticisms. These steps included developing standardized

assessments for balancing freedom of expression and privacy and moving towards a procedural standard of review that limited the Court's role in evaluating evidence. This variation across the ECtHR and IACtHR provides support for the hypothesis that courts founded with a deferential interpretation of their authority are more likely to be responsive to state backlash than interventionist courts.

The ACtHPR's refusal to capitulate to critiques of judicial overreach is in some ways reminiscent of the early days of the IACtHR. Like founding IACtHR judges, ACtHPR judges are operating within a tumultuous geopolitical context. The ACtHPR's membership includes states with long histories of instability that are still navigating transitions to democracy. In this context, international judges may feel emboldened to expand the boundaries of their authority to address the exigencies of the moment, and less inclined to cooperate with governments who have poor track records of human rights abuse. Furthermore, younger courts may be willing to roll the dice on more aggressive incursions into domestic sovereignty in order to bolster the international reputation of the court and garner public support. It remains to be seen how far down this road the ACtHPR can go, particularly as critiques of the quality of the Court's judgements have intensified from actors outside as well as inside of the institution.

Chapter 9

Personal Integrity Rights

I. Introduction

In Argentina, the politics of human rights lets you talk about whatever you want. Whoever is interested is always going to have some place to go to ask questions and clear up their concerns. But in Spain there are no Truth Commissions. Where are you going to go? It is like searching for needles in haystacks. – Adriana Fernández, complainant in the Argentine lawsuit investigating crimes against humanity and genocide committed in Spain under the Franco dictatorship[317]

In 2010, a group of Spanish citizens filed a historic universal jurisdiction lawsuit in an Argentine federal court, demanding the Spanish government investigate and prosecute human rights abuses committed under General Francisco Franco's regime.[318] An amnesty law passed during Spain's democratic transition that blocks the prosecution of Franco-era political crimes has obstructed domestic attempts to obtain justice for decades. That Spanish victims have resorted to courts in Argentina, of all places, is puzzling. Spain pioneered the use of universal jurisdiction starting in the 1990s, when Spanish judges extradited several state officials who directed human rights abuses during Latin American military dictatorships, including Argentines. The Argentine lawsuit has turned the tables, highlighting Spain's resistance to addressing the same types of atrocities in its own past for which it has condemned former Latin American leaders. The ongoing lawsuit has enabled the exhumation of over 100 victims of Francoism buried in mass graves across Spain (Baquero 2020).

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[317] Quoted in an interview conducted by Ainhoa Maestu Fonseca for *CTXT Revista Contexto* (July 2016). Translated from original Spanish.

[318] *Querella 4591/2010, N.N. por genocidio y/o crímenes de lesa humanidad cometidos en España por la dictadura franquista*. Juzgado Nacional en lo Criminal y Correccional Federal Nro. 1. Buenos Aires, Argentina.

Like Spain, Argentina passed amnesties during its 1983 democratic transition that blocked the investigation and prosecution of human rights crimes orchestrated by the former regime. Argentina judicially overturned these laws in 2005 amidst a regional trend towards state accountability for past atrocities. This phenomenon, referred to as a 'justice cascade', opened the doors for human rights trials and victim reparations across Latin America (Sikkink 2011). The IACtHR has been a critical proponent of the 'anti-amnesty norm' that propelled the justice cascade (Binder 2011; Ceia 2015), and has consistently established that member states can be held responsible for serious human rights crimes that occurred prior to their accession to the Court. The ECtHR has resisted taking a comparably strong stand against amnesties, and has historically been more hesitant than the IACtHR to admit cases involving pre-accession violations. In recent decades, the ECtHR's increasingly strict case admissibility criteria have limited the scope of the Court's temporal jurisdiction (Van Pachtenbeke and Haeck 2010; Heri 2014; Moynihan 2016). This has narrowed available legal avenues for Europeans seeking recourse for past crimes. For example, victims of Franco-era violence and their relatives have submitted twelve cases to the ECtHR since 2008. All have been dismissed on the grounds that the alleged violations fall outside of the ECtHR's temporal jurisdiction (Claude 2010; Citroni 2016: 37). Despite Europe's reputation as a regional citadel of human rights protection, the "justice cascade" never reached Europe.

Cross-court temporal jurisdiction discrepancies represent just one example of how regional human rights courts have adopted different approaches to adjudicating state violence. Regional courts have grappled with a wide range of personal integrity (PI)

rights violations stemming from such violence, including enforced disappearances, extra-judicial executions, torture, and police brutality. Unfortunately, these issues have not been relegated to the past, and contemporary PI rights violations remain a major concern for all three regional courts. This chapter investigates how the ECtHR and IACtHR's approaches to admitting, ruling on, and ordering remedies in cases implicating PI rights have evolved over time, as well as the African Court on Human and People's Rights (ACtHPR)'s nascent jurisprudence in this area.

Focusing on PI rights cases provides a unique opportunity to investigate the conditions under which regional courts' founding interpretations of their authority change. As PI violations constitute the most fundamental human rights abuses, judges have less legal latitude to grant deference to governments in cases involving alleged PI rights violations relative to other types of cases. Applying the same framework as in the previous chapter, I evaluate whether and how changes in the types of rights violations faced by a court, escalating caseloads, state backlash, and jurisprudential developments in other human rights courts can push judges to adopt more deferential or interventionist interpretations of the boundaries of their authority in PI rights cases.

The following analysis of each court's PI case law yields several findings regarding how each court divergently interprets the boundaries of its authority relative to member governments. There are three main areas of divergence: 1) determining temporal jurisdiction, 2) allocating the burden of proof, and 3) mandating remedies for established PI rights violations. The ECtHR's narrow interpretation of its temporal jurisdiction has become even narrower over time, as the accession of new members has forced the Court

to deal with an increasing number of alleged continuing violations stemming from past state violence. The ECtHR has historically maintained the evidentiary standard of "proof beyond reasonable doubt", although the Court has demonstrated willingness to relax that standard in cases of severe PI rights violations over the past decade. The ECtHR has also predominately maintained its standard practice of limiting its remedial mandates to financial reparations in PI violation cases. However, beginning with the introduction of the "pilot judgement" procedure in 2004, the Court has expanded its authority to mandate non-financial remedies in consultation with the Committee of Ministers in discrete cases. The IACtHR's flexible interpretation of its temporal jurisdiction, willingness to shift the burden of proof from the applicant to the government, and interventionist approach to mandating remedies have remained largely consistent throughout the Court's history. These practices have persisted even in the face of state backlash and criticisms of judicial overreach. The ACtHPR's jurisprudence on PI rights violations, while still limited, indicates that the Court is cautiously willing to flexibly interpret its temporal jurisdiction and shift the burden of proof to governments. The ACtHPR has thrown that sense of caution to the wind with regard to remedial mandates, and has repeatedly ordered specific and intensive domestic policy changes.

The European Convention, American Convention, and African Charter all include strong protections against state interference in individuals' physical and mental well-being. The European Convention's PI rights protections are codified in Articles 2 (right to life) and 3 (prohibition of torture and inhuman/degrading treatment). PI rights are protected by Articles 4 (right to life) and 5 (right to physical, mental, and moral integrity;

prohibition of torture and inhuman/degrading treatment) in the American Convention. The African Charter protects PI rights in Articles 4 (right to life) and 5 (respect of human dignity; prohibition of torture and inhumane/degrading treatment). Within international human rights law, the right to life and prohibition of torture are universally recognized as *jus cogens* principles. These principles are non-derogable, meaning that states are never permitted to violate the right to life or participate in torture under any circumstances.[319]

Due to the *jus cogens* status of PI rights, international judges have little latitude to grant deference to governments in cases involving PI rights relative to other, derogable rights (for example, protections on expression and assembly, which can be legally suspended in exigent circumstances). Non-derogable rights are often referred to as "core" rights while derogable rights are "qualified" rights. International judges' discretion is necessarily restricted in cases involving core rights due to the fundamental, inviolable nature of those rights. According to an ECtHR judge, the core-qualified continuum is a key element that drives the Court's application of the margin of appreciation doctrine. ECtHR judges have greater liberty to apply the margin of appreciation to defer to states in cases involving qualified rights as opposed to core rights.[320] Given judges' limited discretion to defer to states in PI rights cases, we would expect to see less cross-court variation in judges' approaches to adjudicating cases involving such rights compared to

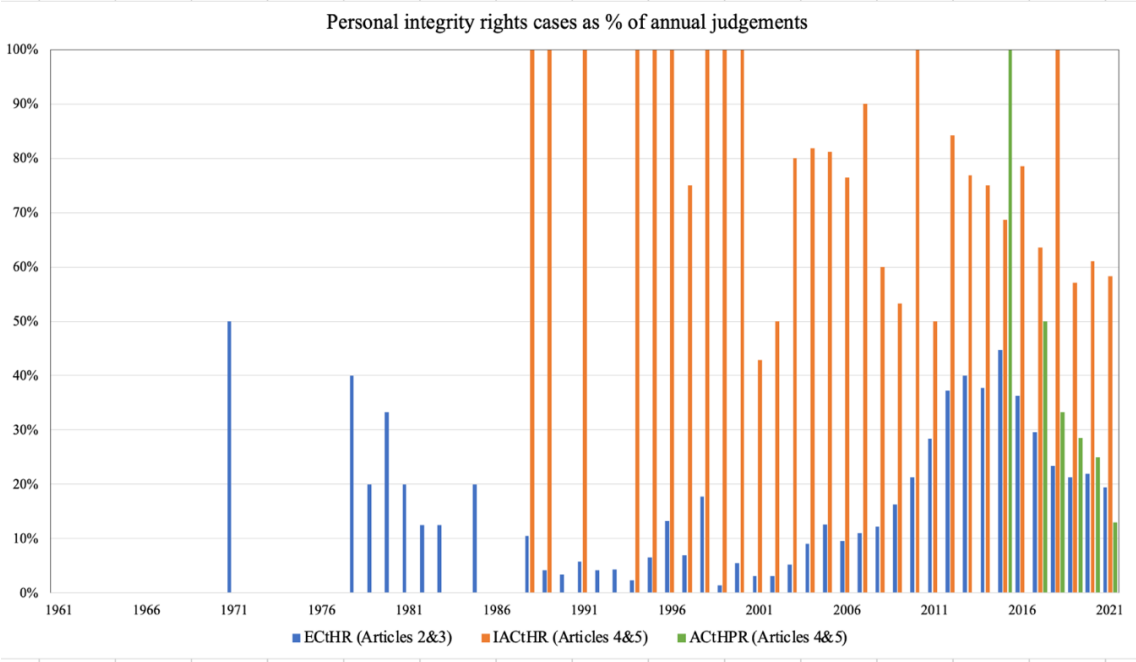
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[319] See D'Amato (2010); de Wet (2004); and *UN Human Rights Committee General Comment No. 36 on Article 6 of the ICCPR*. The glaring exception to the non-derogable, *jus cogens* status of the right to life is the contested international legality of the death penalty. See *Ally Rajabu v. Tanzania* (App. no. 007/2015), ACtHPR Judgement of 28 Nov. 2019, paras. 96-103 for a brief discussion of evolving international legal norms regarding the death penalty.

[320] Interview D.

derogable/qualified rights. Figure 9.1 illustrates the relative historical predominance of cases alleging PI rights violations in each regional court's case law.[321]

Figure 9.1



As discussed in Chapter 6, the ECtHR did not routinely have to address PI issues until the late 1990s.[322] These issues have historically predominated the IACtHR's case law relative to the two other regional courts. Since 1994, cases alleging PI rights violations have made up at least a majority of the IACtHR's annual output in all but one year. PI cases as a percentage of annual ECtHR judgements rose steadily post-2000 before leveling off

[321] Note: In order to not count the same case multiple times, only merits judgements are reflected in this chart. Only Chamber and Committee merits judgements are included for the ECtHR, not Grand Chamber judgements. This chart includes cases where a PI rights violation was alleged, not necessarily established.
[322] In order to not double-count cases, this chart includes only Chamber merits judgements for the ECtHR. Early figures for the ECtHR in this chart are inflated by the Court's low output in the 1970s-80s. For example, in 1971, the Court only issued two merits judgements. The ACtHPR's annual percentage figures are similarly inflated due to low case output. For example, in 2015, the Court only issued two merits judgements (both of which involved PI violations).

recently. While the ACtHPR has issued only 72 merits judgements so far in its history,[323] 24% of those judgements have involved alleged PI rights violations.

II. The European Court of Human Rights

Evidencing the ECtHR's lack of experience with PI cases in its early decades, the Court did not find a member state in violation of the right to life (Article 2) until 1995, 35 years after the ECtHR's first judgment. In that 1995 case, *McCann and Others v. The United Kingdom,* judges seized the opportunity to elaborate on the specific obligations that the right to life imposes on states. Of particular importance, the *McCann* judgement established that Article 2 imposes not only a substantive obligation on states to protect life, but also a procedural obligation to conduct an effective, independent, and transparent investigation when state-agents are alleged to have taken a life.[324] The IACtHR had already established independent substantive and procedural obligations under the right to life in the aforementioned *Velásquez-Rodríguez v. Honduras* (1988) case, however, ECtHR judges did not cite the IACtHR in *McCann.*

Regarding substantive obligations under Article 2, a central challenge for the ECtHR has been establishing when the burden of proof leans towards the state vs. the applicant in cases of alleged state responsibility for a death. This issue was at the crux of *Kaya v. Turkey* (1998), in which the applicant alleged that her brother had been unlawfully killed by security forces. *Kaya* was crucial for establishing "proof beyond reasonable doubt" as the ECtHR's evidentiary standard in cases of alleged state-

[323] As of the end of 2021.
[324] *McCann and Others v. the UK* (App. no. 1898491). ECtHR. Judgement of 27 September 1995. paras. 157-62.

sponsored killings. Due to a lack of cooperation from key witnesses to the applicant's brother's death, the Court ruled that Turkey could not be found to have violated its substantive Article 2 obligations in this case. However, Turkey was found in violation of its procedural obligations for not effectively investigating the killing.[325] The Court reached a similar conclusion in *Tanrikulu v. Turkey* (1999). The applicant alleged that her husband, a Kurdish doctor, was fatally shot by security forces. While the judges in this case acknowledged a broader pattern of state violence against Kurds, they could not establish Turkey's responsibility for the killing "beyond reasonable doubt." Still, the Court found Turkey in violation of Article 2's procedural requirements based on the lack of an investigation.[326]

The ECtHR's jurisprudence on enforced disappearances has developed in large part through cases against Turkey. In *Kurt v. Turkey* (1998), the applicant alleged that her son had been disappeared by state agents following a military attack on their village aimed at rooting out PKK fighters. Four years had passed since her son's disappearance without word of him. The applicant assumed that he had been killed in state custody and submitted that Turkey had violated his right to life as well as the Convention's prohibition on inhuman treatment. Once again citing the lack of proof beyond reasonable doubt, the ECtHR declined to rule on the alleged Article 2 and 3 violations. However, due to Turkey's negligence in investigating the son's disappearance, the ECtHR ruled that the applicant herself had suffered a violation of Article 3 due to the "anguish [she]

[325] *Kaya v. Turkey* (App. nos. 158/1996/777/978). ECtHR. Judgement of 19 February 1998. paras. 76-7, 92.
[326] *Tanrikulu v. Turkey* (App. No. 23763/94). ECtHR. Judgement of 8 July 1999. paras. 49-51, 99, 110-11, 120-21.

has endured over a prolonged period of time".[327] The *Kurt* ruling expanded the ECtHR's conceptualization of who can be considered a "victim" in cases of PI rights violations and recognized that mental anguish, and not only physical mistreatment, can constitute "inhuman or degrading treatment".

Caraher v. the United Kingdom (2000) offers critical insight into the Court's approach to determining appropriate remedies for Article 2 violations. The applicant in this case was a Northern Irish woman whose husband had been wrongfully shot and killed by British soldiers. Prior to approaching the ECtHR, the applicant had received a monetary settlement from the UK Ministry of Defense through a civil suit. Her motivation for submitting an Article 2 complaint was not to obtain further financial reparations, rather, to attempt to secure a judgement mandating that the UK military revise its use of force training and investigation procedures to prevent additional civilian deaths. The ECtHR found the applicant's claim to be "manifestly ill-founded" and dismissed it on the grounds that, as she had received a civil settlement, she could "no longer… clam to be a victim of a violation of the Convention".[328] The applicant in this case asked the Court to intervene significantly in domestic sovereignty by mandating changes in military protocol. Mandating measures of non-repetition would defy the Court's standard practice at the time of exclusively mandating financial remedies. It was a step that the Court was not willing to take. Even as the ECtHR faced an increase in Article 2 cases in the late-1990s, judges did not respond to this development by ordering more interventionist remedies.

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[327] *Kurt v. Turkey* (App. no. 24276/94). ECtHR. Judgement of 25 May 1998. paras. 106-9, 116-17, 133.
[328] *Caraher v. the UK* (App. No. 24520/94), ECtHR. Judgement of 11 January 2000.

By the mid-1990s, the ECtHR had found violations of Article 3 (the prohibition of torture and inhuman or degrading treatment) in several cases involving abuse under police custody.[329] In *Yagiz v. Turkey* (1996), in which the applicant claimed to have been beaten while detained at a police station, the ECtHR was faced with delineating the boundaries of its temporal jurisdiction. The Court determined the case to be inadmissible on the grounds that Mrs. Yagiz's alleged mistreatment by police occurred one month prior to Turkey's recognition of the ECtHR's jurisdiction.[330] In doing so, the ECtHR declined to recognize the potential for police brutality to cause continuing physical or mental impairment that might bring elements of events that occurred pre-accession into the Court's temporal jurisdiction. The Court's rigid approach to determining admissibility in this case is a consistent with its founding pre-disposition to defer to governments to address past state violence.

The end of the Cold War brought a new frontier for the Council of Europe, as former Soviet states were eager to join Western international institutions. But the European system was ill-prepared to take on the slew of cases that accompanied the accession of new members. During negotiations to draft Protocol 11 in 1991, the Committee of Ministers discussed the urgent issue of reducing the system's case backlog.[331] Notably absent from these discussions was any mention of the need to address ongoing rights violations and past trauma from fallen Communist dictatorships. The Ministers spoke wistfully of a "pan-European future",[332] and "rallying all the peoples of

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[329] See *Tomasi v. France* (App. No. 12850/87), *Ribitsch v. Austria* (App. No. 18896/91).
[330] *Yagiz v. Turkey* (App. No. 19092/91). ECtHR. Judgement of 7 August 1996. para. 28.
[331] *Minutes of the 89th Session of the Committee of Ministers*, CM (91) PV 4 (1991), 21-7.
[332] Ibid., 39.

Europe to the basic values which are our common heritage".[333] They pledged to "promote democratic values and provide training and expertise to those countries in the East which need our help".[334] It is clear that the Ministers did not perceive the Council of Europe's mission to include holding new member states accountable for recent human rights atrocities. Rather, the Ministers sought to ensure that the ECtHR could handle the task of guiding new member states towards compliance with European human rights standards. Protocol 11, which entered into force in November 1998, marked the largest structural reform in the ECtHR's history. Protocol 11 also represented an opportunity for the Court to re-interpret its authority to intervene in ongoing issues stemming from past violence in new member states.

With regard to contemporary violations in established member states, Protocol 11 does not appear to have significantly influenced the Court's delineation of its temporal jurisdiction or evidentiary standards in PI cases. In *Göç v. Turkey* (2000), the applicant alleged he had been tortured in police custody. The ECtHR dismissed that claim on the grounds that the applicant had petitioned the Court nearly two years after his release from custody, outside of the six-month time limit. The applicant argued that he had attempted to exhaust domestic remedies in compliance with the ECtHR's admissibility requirements, but was delayed when domestic prosecutors ignored his complaints. The Court rejected that argument, reiterating its strict temporal admissibility criteria.[335] The Court stood fast to stringent evidentiary standards in *Labita v. Italy* (2003), another case

[333] Ibid., 24.
[334] Ibid., 9.
[335] *Göç v. Turkey* (App. No. 36590/97), ECtHR. Judgement of 6 April 2000.

in which the applicant claimed he had been tortured by police. Acknowledging the inherent power differentials that exist between detainees and state agents, the ECtHR's judgement recognized that "it may prove difficult for prisoners to obtain evidence of ill-treatment by their prison warders. In that connection, it notes that the applicant alleged that the warders at Pianosa applied pressure on the prisoners by threatening reprisals if they were denounced".[336] Still, however, the Court found no violation of Article 3, citing the lack of positive evidence to prove beyond a reasonable doubt that police had tortured the applicant. The *Göç* and *Labita* judgements are consistent with pre-Protocol 11 jurisprudence, indicating that the Court's dismissal of the Article 3 complaint in *Göç* and its allocation of the burden of proof to the applicant in *Labita* were not products of the reform process. Rather, those judgements reflect the Court's long-established practices of formalistically applying temporal case admissibility criteria and requiring applicants to furnish proof beyond reasonable doubt. Both of these practices are consistent with the ECtHR's deferential interpretation of its judicial authority.

The Court issued a pivotal decision developing its approach to determining temporal jurisdiction for conflict-era continuing violations in 2006.[337] In this case, *Blečič v. Croatia*, the Court was asked to rule on Croatia's termination of the applicant's tenancy when she left the country in 1991 and was unable to return for several months due to the war.[338] Despite the fact that the final domestic ruling on this case was issued two years after Croatia ratified the European Convention, the ECtHR declared the case

[336] *Labita v. Italy* (App. No. 26772/95), ECtHR. Judgement of 6 April 2000.
[337] See also *Loizidou v. Turkey* (App. no. 15318/89).
[338] *Blečič v. Croatia* (App. no. 59532/00). ECHR 2006 [13-33].

inadmissible because the initial violation occurred prior to Croatia's accession.[339] The *Blečič* case marked the first time that the Court grappled with the question of temporal jurisdiction in a civil conflict context following the implementation of Protocol 11 and eastward expansion of CoE membership.

Three years after *Blečič*, the ECtHR's jurisprudence shifted in *Šilih v. Slovenia,* a case involving national authorities' failure investigate a death caused by medical negligence. The death occurred just over a year prior to Slovenia's accession. The Court considered that the fundamental nature of the right to life merited revised consideration of the temporal jurisdiction standards established in *Blečič,*[340] and ruled that the substantive obligation to uphold the right to life and the procedural obligation to investigate violations of that right could be considered temporally independent obligations.[341] The Grand Chamber judgment in *Šilih* cited several IACtHR cases to support this position.[342]

By ruling that procedural obligations under Article 2 fell within its temporal jurisdiction in *Šilih*,[343] the ECtHR loosened its approach to admitting continuing rights violations. However, the Court added caveats to the *Šilih* decision that would constrain its temporal jurisdiction in future enforced disappearance cases. To admit cases alleging violations of the right to life, a 'genuine connection' must exist between the death and the

[339] Ibid., para. 92. Exhaustion of domestic legal remedies is required before petitioning the Court.
[340] *Šilih v. Slovenia* (App. no. 71463/01). Judgement of 9 April 2009. paras.147, 159.
[341] Ibid., para. 152.
[342] Ibid, paras. 114-118.
[343] Ibid., para. 159.

entry into force of the Convention in the relevant state. A genuine connection can be established in one of two circumstances:

1) When a 'significant proportion of the procedural steps required by [Article 2]- which include not only an effective investigation into the death of the person concerned but also the institution of appropriate proceedings for the purpose of determining the cause of the death and holding those responsible to account- will have been or ought to have been carried out after the critical date'.
2) When such a connection can be justified 'based on the need to ensure that the guarantees and the underlying values of the Convention are protected…'. [344]

Interviews with ECtHR Registry lawyers revealed a lack of consensus regarding the interpretation of these criteria. One lawyer commented that the *Šilih* criteria are 'vague' and would benefit from further "elaboration".[345] Another interviewee explained that there is no standard metric for determining that a sufficient proportion of the procedural steps have taken place after state accession. Rather, the Court considers the context of a given case.[346]

Continuing rights violations complicate case admissibility decisions even when those violations commenced after state accession. All three regional courts require applicants to submit petitions within six months of the exhaustion of domestic remedies. However, it is not always clear when that period begins and ends. This issue arose in *Varnava and Others v. Turkey*, which concerned the enforced disappearance of nine civilians during the 1974 Turkish invasion of Cyprus. Turkey objected that the ECtHR lacked temporal jurisdiction because the applicants did not petition the Court until 1990. The applicants rebutted by citing an established position in the ECtHR's case law that the

[344] Ibid., para. 163.
[345] Interviews G, Q, and X, Strasbourg, France, June 2019.
[346] Interview X, Strasbourg, France, June 2019.

six-month time limit starts afresh each day as long as the violation is ongoing.[347] In a decision that extensively cited the IACtHR's jurisprudence on temporal jurisdiction in enforced disappearance cases, the ECtHR admitted the case and ruled that Turkey had continuously violated Article 2 by failing to investigate the disappearances.

However, *Varnava* ultimately narrowed the Court's temporal jurisdiction. The Court specified that the six-month clock starts when the applicant "first became or ought to have become" aware of the infeasibility of a domestic remedy.[348] A defining feature of enforced disappearance is obfuscation by state authorities regarding the whereabouts and fate of the victim(s). The victim(s)' relatives are unlikely to know exactly when there no longer exists a possibility that their loved one(s) will be located. Consequently, they will not know their deadline for seeking international recourse. Within two months after *Varnava*, the ECtHR cited that judgement's specification of the six-month rule to dismiss 50 separate petitions in which applicants alleged that their relatives had been disappeared by the Turkish military (Álvarez 2014: 143-6).

Dorado Ortiz v. Spain was the first case of a Franco-era enforced disappearance submitted to the ECtHR.[349] This case followed a 2008 decision in Spain's National Criminal Court that effectively foreclosed the possibility of obtaining justice for Franco-era rights abuses through the Spanish court system (Hilbink 2015: 194). The victim's relatives petitioned the ECtHR in 2009, within the six-month limit. They claimed that

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[347] *Varnava and others v. Turkey*, nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Eur. Ct. H. R., ECHR 2009 [154, 159].

[348] Ibid. at paras 157, 158.

[349] *Gutierrez Dorado and Dorado Ortiz v. Spain,* no. 30141/09, Eur. Ct. H. R., ECHR 2012.

Spain's amnesty law violates Article 13 of the Convention by blocking any effective remedy for Franco-era disappearances.

The ECtHR declared *Dorado Ortiz* inadmissible. Referencing *Šilih,* the Court first decided it could not find a 'genuine connection' between the victim's death and the Convention's entry into force.[350] Second, citing *Varnava*, the ECtHR ruled that the applicants did not exhibit 'due diligence' in submitting their petition in a timely manner. This ignores monumental barriers that Spanish victims faced and still face pursuing domestic recourse for Franco-era rights violations (Jimeno 2017). The developments in Spain's National Criminal Court indicate that investigations into Franco-era disappearances were possible as late as 2008. It is unclear why these proceedings did not constitute a 'significant proportion of the procedural steps' after Spain's accession that would activate the Court's jurisdiction. All cases that Spanish victims of Franco-era rights abuses have submitted to the ECtHR since 2008 have been dismissed on temporal jurisdiction grounds (Citroni 2016: 37).

The ECtHR has accepted temporal jurisdiction over procedural complaints in conflict-era PI cases in which the alleged events occurred just a few years prior to state accession. *Association "21 December 1989" and Others v. Romania* (2011) and *Mocanu and Others v. Romania* (2014) involved applicants who had been injured or whose relatives had been killed during violent crackdowns on anti-government protesters amidst the fall of the Communist regime in 1989. The European Convention did not come into force in Romania until 1994. In these cases, the ECtHR ruled that, while it could not

[350] *Gutierrez Dorado and Dorado Ortiz v. Spain,* paras. 34-6.

consider whether Romania had violated its substantive obligations under Articles 2 and 3, the state had violated procedural obligations under those Articles by failing to effectively investigate the applicants' claims.[351]

Subsequent case law suggests the ECtHR is unlikely to admit even procedural complaints under Articles 2&3 if the alleged violations occurred more than a few years pre-accession. *Janowiec v. Russia* alleged state failure to investigate a Soviet massacre of Polish prisoners of war in 1940.[352] The Court considered whether the second *Šilih* criterion for establishing a genuine connection might apply here- the need to protect the underlying values of the Convention.[353] Even though the allegations concerned war crimes, the Grand Chamber determined that no genuine connection existed.[354] In 2018, the ECtHR cited lack of temporal jurisdiction to dismiss a case involving the 1948 massacre of twenty-four unarmed civilians by British soldiers in what is now Malaysia.[355] With its stringent application of temporal admissibility criteria even in cases involving war crimes and crimes against humanity, the ECtHR has unequivocally rejected responsibility for securing state accountability for past human rights atrocities.

The Convention's drafters designed the European human rights system not to punish states for their anti-democratic pasts, but rather to create a *break* with the past and forge a new future based on a collective commitment to human rights. Creating the Court

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[351] *Association "21 December 1989" and Others v. Romania* (33810/07). ECtHR. Judgement of 4 May 2011. para. 118; *Mocanu and Others v. Romania* (App. Nos. 10865/09, 45885/07, 32431/08). ECtHR. Judgement of 17 Sept. 2014. paras. 204, 352.
[352] *Janowiec and Others v. Russia* (App. Nos. 55508/07 and 29520/09). ECHR. Judgment of 21 October 2013.
[353] Ibid. at para 150.
[354] Ibid. at para 160.
[355] *Chong and Others v. the UK* (App. no. 29753/16). ECtHR. Decision of 11 September 2018.

was, in and of itself, an act of closure. Likewise, the goal of the Court's expansion was not to dredge up new members' pasts but to hold them accountable for their human rights obligations from the moment they joined the club. This required the Court to narrowly interpret its temporal jurisdiction and largely defer to member states to handle transitional justice concerns. As a result, many European victims of continuing violations have been left without options for legal recourse.

The ECtHR's narrow interpretation of its temporal jurisdiction seems to have become more entrenched over time, indicating a durable proclivity to defer to governments to address past state violence. With regard to evidentiary standards in PI cases, however, there is evidence that the Court has recently become more receptive to shifting the burden of proof from applicants to governments in cases of particularly severe abuses. For example, in *Grinenko v. Ukraine* (2012), in which the applicant claimed to have been tortured while in police custody, the Court acknowledged that detainees are at a distinct disadvantage when it comes to providing evidence:

> In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt"…However…Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons under their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. Indeed, the burden of proof may be regarded as lying with the authorities to provide a satisfactory and convincing explanation…[356]

Still, the Court ruled that a lack of evidence prevented it from establishing a substantive violation of Article 3. However, the Court did find Ukraine in violation of its procedural obligations.[357]

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[356] *Grinenko v. Ukraine* (App. No. 33627/06). ECtHR. Judgement of 15 November 2012. para. 55.
[357] Ibid., paras. 58, 62-3.

The year following the *Grinenko* judgement, the Court reiterated that alleged PI violations invoke unique imperatives for the ECtHR to shift the burden of proof to the government. In *Askhabova v. Russia* (2013), in which the applicant alleged that her son had been disappeared by state agents, the burden of proof emerged as a key issue:

> The Court is sensitive to the subsidiary nature of its role and recognises that it must be cautious in taking on the role of a first-instance tribunal of fact… Nonetheless, where allegations are made under Articles 2 and 3 of the Convention, the Court must apply a particularly thorough scrutiny… even if certain domestic proceedings and investigations have already taken place.[358]

While careful to emphasize its fundamentally subsidiary role relative to governments, the Court stipulated that:

> …where the applicant makes out a prima facie case, it is for the Government to provide a satisfactory and convincing explanation of how the events in question occurred. The burden of proof is thus shifted to the Government and if they fail in their arguments, issues will arise under Article 2 and/or Article 3.[359]

The *Askhabova* case marks a distinct shift in approach relative to earlier enforced disappearance cases in which the facts of the case were similarly disputed, for example the aforementioned *Kurt v. Turkey* case. In *Askhabova*, the fact that the applicant's son was last seen detained by police and had not reappeared was enough for the ECtHR to assume that 1) the son had died, and 2) Russia was responsible for that death.[360] The Court thus ruled that Russia had violated both the substantive and procedural requirements of Article 2, in addition to violating Article 3 with respect to the mental suffering endured by the victim's mother.[361]

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[358] Askhabova v. Russia (App. No. 54765/09). ECtHR. Judgment of 4 April 2013. para. 131.
[359] Ibid., para. 133.
[360] Ibid., paras. 135-8.
[361] Ibid., paras. 143, 160-7.

Although the IACtHR had already established a practice of shifting the burden of proof to governments in PI cases by the 2010s, the ECtHR did not cite the IACtHR at all in the *Grinenko* and *Askhabova* judgements. However, this does not necessarily mean that ECtHR judges have not been influenced by the IACtHR in this area. The ECtHR's relaxation of the "beyond reasonable doubt" requirement in PI cases could reflect judges' receptivity to shifting norms in international human rights law more broadly. The early-2010s period was concomitant with the release of the Brighton Declaration, when the ECtHR faced the most vociferous criticism from states in decades (arguably in the Court's history). The ECtHR's re-assessment of the burden of proof during this time affords less deference to governments, in contravention of the expectation that the Court would constrict its authority when facing state backlash.

The ECtHR has continued to only order states to pay financial reparations to injured parties in most cases involving PI violations. In all of the cases discussed above in which a violation was established, financial reparations were the only remedies mandated by the Court. However, a new approach to ordering remedies introduced in 2004, called the "pilot judgement procedure", has in some respects expanded the scope of the Court's remedial mandates in certain PI cases. The purpose of pilot judgements is to assist CoE member states in resolving systemic or structural problems that are causing high numbers of cases involving the same underlying issues to arrive at the ECtHR. The procedure was designed to help the ECtHR manage its growing caseload by reducing the number of repetitive cases that are submitted to the Court. There is an element of a trade-off between the authority of the Court and the authority of governments involved in pilot

judgements. In such judgements, the Court will identify specific remedial measures that go beyond the scope of individualized financial reparations. These measures are targeted at alleviating the underlying social or legal conditions that give rise to repetitive human rights violations. In exchange for asserting this broader authority, the ECtHR will "freeze" consideration of any related cases against the government in question for a specified period of time. This freeze on proceedings is intended to give the government time to take the necessary measures to comply with the Court's remedial mandate (ECtHR Press Unit 2021).

The first pilot judgement, *Broniowski v. Poland*, was issued in June 2004. This case involved applicants whose property was expropriated by the Polish government prior to the Second World War. The post-war government had established a system for compensating individuals deprived of their or their families' property due to post-war border changes, but this system fell apart due to resource constraints in 1989, two years prior to Poland's accession to the ECtHR. As a result, this unremedied deprivation constituted a continuing violation of the right to property, codified in Article 1 of the first Protocol to the European Convention. Going beyond its standard practice of only ordering financial reparations for the first time in the ECtHR's history, the Court ordered Poland to "through appropriate legal measures and administrative practices, secure the implementation of the property right in question".[362] It is unclear why the Court interpreted its temporal jurisdiction to encapsulate continuing property rights violations stemming from disputes that occurred in the 1940s, 50 years before Poland joined the

[362] *Case of Broniowski v. Poland* (App. No. 31443/96), Judgement of 22 June 2004. ECtHR Grand Chamber.

ECtHR, but has repeatedly rejected responsibility to adjudicate continuing violations stemming from pre-accession enforced disappearances and extrajudicial executions. One might argue that the continuing effects of the deprivation of life incur even greater and longer-lasting harm than the continuing effects of the deprivation of property.

The ECtHR has only issued seven pilot judgements in PI rights cases. All of these cases involved violations of Article 3 due to inhumane prison conditions.[363] The ECtHR has never issued a pilot judgement in response to enforced disappearances or extrajudicial executions. The non-financial remedial mandates included in pilot judgements are very brief and do not mandate specific mechanisms for addressing the issues that are causing repetitive violations. For example, in *Varga and Others v. Hungary* (2015), the Court ordered the government to "produce, under the supervision of the Committee of Ministers, within six months from the date on which this judgement becomes final, a time frame in which to make appropriate arrangements and to put in practice preventative and compensatory remedies". In another example, *Neshkov and Others v. Bulgaria* (2015), the Court ordered Bulgaria to "within eighteen months… make available a combination of domestic remedies in respect of conditions of detention that have both preventative and compensatory effects". These mandates give governments considerable latitude to decide how to implement domestic reforms. The most specific mandates in pilot judgements have ordered the release of prisoners. For example, in *Ilaşcu and Others v.*

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[363] These cases are: *Ilaşcu and Others v. Moldova and Russia* (App. No. 48787/99), *Neshkov and Others v. Bulgaria* (App. Nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12, and 9717/13), *Varga and Others v. Hungary* (App. Nos. 14097/12, 45135, 73712/12, 34001/13, 44055/13, and 64586/13), *Sukachov v. Ukraine* (App. No. 14057/17), *Ananyev and Others v. Russia* (App. Nos. 42525/07 and 60800/08), *Rezmiveş and Others v. Romania* (App. Nos. 61467/12, 39516/13, 48231/13, 68191/13), and *Torreggiani and Others v. Italy* (App. Nos. 43517/09, 35315/10, 37818/10, 46882/09, 55400/09, 57875/09, 61535/09).

Moldova and Russia (2004), the Court ordered the respondent states to "take all necessary measures to put an end to the arbitrary detention of the applicants still imprisoned and secure their immediate release".

Once a pilot judgement has been issued, the Committee of Ministers engages in talks with the relevant government to discern how to specifically implement the ECtHR's orders and monitor the state's compliance. ECtHR judges are often part of these discussions in an "informal way" through internal conversations with the Execution Department of the Committee, but, according to one ECtHR judge, these conversations are "very casual" and "depend on the direction of the political wind".[364]

The ECtHR has used the pilot judgement procedure to mandate remedies that go beyond individual measures and target broader social conditions that lead to human rights violations. However, this broadening of the scope of the Court's remedial mandates was not a result of the Court re-interpreting its fundamental social purpose, but, rather, was borne out of a practical necessity to decrease the number of repetitive cases that were arriving at the Court. The Court has taken care to maintain its deferential exercise of authority even while expanding its remedial mandates by only using the pilot judgement procedure in a small subset of cases, issuing non-specific mandates that allow states significant discretion to implement the Court's orders, and delegating the enforcement and monitoring of state compliance to the Committee of Ministers, an inter-governmental body.

[364] Interview W, Strasbourg, France, June 2019.

Throughout the many structural changes and normative evolutions in human rights law that the ECtHR has navigated in the past thirty years, the Court has held firm to its founding disposition to leave the past in the past. A central mission of the Court's founders was to foster states' collective commitment to the new European integration project. The ECtHR was established to create a break with the past, not litigate it. The ECtHR's persistence in employing a narrow interpretation of its temporal jurisdiction has largely been consistent pre-and post-Protocol 11. That consistency suggests that this practice is a function of the Court's normative mission as opposed to a product of practical exigencies incurred by rising caseloads.

In an effort to reduce its proliferating backlog of cases, the ECtHR introduced the pilot judgement procedure expanding the scope of the Court's remedial mandates in discrete areas. The ECtHR has balanced this expansion of its authority by giving states a grace period to implement pilot judgements before admitting new cases against the state and allowing the state to work with the Committee of Ministers to define appropriate domestic reforms. In a similarly deferential manner, the Court has historically resisted shifting the burden of proof to governments in PI cases. Still, particularly in the 2010s, the Court has loosened evidentiary standards in favor of applicants in cases of severe PI violations such as enforced disappearance and torture. The Court has also broadly interpreted states' procedural obligations under Articles 2 and 3 and expanded definitions of victimhood to encompass the mental anguish endured by victims' relatives. These developments suggest that the political resistance that the Court has faced in the post-Brighton era has not resulted in greater deference to states in this area of case law.

Rather, the ECtHR is increasingly willing to subject governments to intense scrutiny in cases of the most serious PI abuses.

III. The Inter-American Court of Human Rights

Beginning with its first ever judgement, *Velásquez-Rodríguez v. Honduras*[365], the IACtHR has established that an observable pattern of state-sponsored PI rights abuses can constitute sufficient evidence to rule against a state even in cases where there exists no tangible evidence to support an applicant's specific claims. The IACtHR's approach to developing evidentiary standards has therefore historically departed from the ECtHR's requirement of "proof beyond reasonable doubt". For example, *Juan Humberto Sánchez v. Honduras* (2003) concerned the alleged kidnapping, torture, and killing of a man by military agents. The state rejected responsibility for these events and submitted evidence that Mr. Sánchez was not kidnapped by the military.[366] The IACtHR emphasized that "a framework of a practice of grave human rights violations promoted or tolerated by the state" must be taken into account when evaluating evidentiary standards. "…if it is proven for the specific case that it fits within the pattern of extra-legal executions, it is reasonable to assume and conclude that there is an international responsibility of the State".[367] Therefore, even in the absence of direct evidence of state involvement in Mr. Sánchez's death, the IACtHR ruled that Honduras violated his right to life based on the broader context of state involvement in and impunity for PI rights abuses.[368] Furthermore,

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[365] This case is discussed in Chapter 6, pgs. 156-7.
[366] *Juan Humberto Sánchez v. Honduras* (Series C No. 99). IACtHR. Judgement of 7 June 2003. para. 106.
[367] Ibid., para. 108.
[368] Ibid., paras. 109-11, 100.

Honduras had violated to Mr. Sánchez's family's "mental and moral integrity" by failing to investigate his killing and burying his remains without the family's consent.[369]

The IACtHR shed further light on its approach to delineating evidentiary standards in *19 Merchants v. Colombia* (2004), another enforced disappearance case:

> In the matter of receiving and assessing evidence, the Court has indicated previously that its proceedings are not subject to the same formalities as domestic proceedings… considering that international courts have the authority to assess and evaluate the evidence according to the rules of sound criticism, **it has always avoided a rigid determination of the quantum of evidence needed to support a judgment**… This criterion is especially true for international human rights courts, **which have greater latitude to assess the evidence on the pertinent facts.** [emphasis added][370]

Here, the IACtHR explicitly asserts it authority to shirk the requirement of "proof beyond reasonable doubt" when adjudicating state responsibility. Physical evidence in the *19 Merchants* case was lacking, in part because the bodies of the disappeared victims were never found. Still, the Court found Columbia in violation of Articles 4 and 5 based on circumstantial evidence, witness testimony, the state's negligence in investigating the disappearances, and the broader context of impunity for paramilitary violence in Colombia.

While IACtHR judges have repeatedly emphasized the Court's prerogative to flexibly interpret evidentiary standards, this approach does not always favor applicants. *Norín Catrimán et al. v. Chile* (2014) concerned the detention and conviction of several Mapuche indigenous activists under Chile's controversial anti-terrorism legislation.[371] The applicants alleged that they had been subjected to inhuman treatment during their

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[369] Ibid., para. 101.
[370] *19 Merchants v. Colombia* (Series C No. 109). IACtHR. Judgement of 5 July 2005. para. 65.
[371] *Norín Catrimán et al. v. Chile* (Series C No. 279). IACtHR Judgment of 29 May 2014. para. 98.

time in prison. They primarily cited physical deterioration due to the hunger strike they embarked on while jailed and mental decline due to prison conditions. The IACtHR rejected this argument, finding that 1) the state could not be held responsible for the applicants' decision to hunger strike and 2) that the evidence submitted by the applicants did not indicate that their treatment in prison amounted to a violation of Article 5.[372] This case clarifies the limits of the IACtHR's general tendency to shift the burden of proof to the state in cases of alleged PI rights violations.

The aforementioned *19 Merchants* case exemplifies the IACtHR's interventionist approach to mandating remedies for PI abuses. In addition to ordering that extensive financial reparations be paid to the victims' families, the Court mandated that Colombia:

> …erect a monument in memory of the victims and, in a public ceremony in the presence of the next of kin of the victims, shall place a plaque with the names of the 19 tradesmen..
> …organize a public act to acknowledge its international responsibility for the facts of this case and to make amends to the memory of the 19 tradesmen, in the presence of the next of kin of the victims, and in which members of the highest State authorities must take part…
> … provide, free of charge, through its specialized health institutions, the medical and psychological treatment required by the next of kin of the victims…[373]

The IACtHR's elaboration of specific memorialization acts requiring the participation of high-level state authorities, as well as its mandate that the state provide medical care to the next of kin, marks a sharp divergence from the ECtHR's standard practice of mandating only financial reparations. Even in its pilot judgements, the ECtHR's remedial mandates to not reach anywhere near the level of specificity of the IACtHR's. The

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[372] Ibid., paras. 390-400.
[373] *19 Merchants v. Colombia,* operative paragraphs 8-9.

IACtHR has consistently adopted a holistic approach to its remedial orders that recognizes the diverse mental and physical needs of victims of state violence.

Beyond remedial mandates targeted at individual victims, the IACtHR has also adopted an interventionist approach to specifying remedies aimed at ensuring the non-repetition of rights violations. These measures of non-repetition pursue broader, structural solutions to recurring instances of state violence. A notable example of this approach is found in *Tibi v. Ecuador* (2004), in which the applicant was arbitrarily detained, denied legal counsel, and held without trial for over two years, during which time he was repeatedly tortured. The IACtHR ruled that, in addition to financial reparations and a public acknowledgement of wrongdoing, Ecuadorian officials must implement nationwide reforms to intervene in the recurring issue of prisoner mistreatment. The Court outlined the required components of such reforms in great detail:

> The State must establish a training and education program for the staff of the judiciary, the public prosecutor's office, the police and penitentiary staff, including the medical, psychiatric and psychological staff, on the principles and provisions regarding protection of human rights in the treatment of inmates. Design and implementation of the training program must include allocation of specific resources to attain its goals, and it will be conducted with participation by civil society. For this, the State must establish an inter-institutional committee to define and execute the training programs on human rights and treatment of inmates. The State must report to this Court on the establishment and functioning of said committee, within six months…[374]

The IACtHR's detailed enumeration of mandates for reform, as well as its commitment to monitoring the state's compliance with those mandates, exemplifies the Court's wide-reaching interpretation of its authority to intervene in domestic policy-making.

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[374] *Tibi v. Ecuador* (Series C No. 114). IACtHR. Judgement of 7 September 2004. Operative paragraph 13.

More recent case law indicates that, even as the IACtHR has faced growing critiques of judicial overreach,[375] the Court has declined to soften its approach. For example, even after Venezuela's denunciation of the American Convention in 2013 and withdrawal from the IACtHR, the Court has ruled against the state in six cases involving PI rights violations.[376] The Court has mandated a wide range of remedies in those cases, including criminal investigations and prosecutions, provisions for free medical care, public apologies, and nationwide policy reforms in the areas of prison administration and police and military use of force.

Building on precedent established in the aforementioned *Velásquez-Rodríguez v. Honduras, Blake v. Guatemala*, and *Barrios Altos v. Peru* cases,[377] the IACtHR has leveraged the right to judicial protection alongside a flexible interpretation of the Court's temporal jurisdiction to admit cases involving pre-accession PI violations. This approach has engendered the IACtHR's pioneering role in developing international jurisprudence prohibiting amnesties for crimes against humanity. For example, the IACtHR admitted *Serrano-Cruz Sisters v. El Salvador*, which concerned the disappearance of two girls perpetrated by the Salvadoran military thirteen years before El Salvador's accession to the Court. While the IACtHR accepted that it could not rule on alleged violations of the right to life due to the time that had passed between the girls' disappearance and the

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[375] See Contesse (2017); Soley and Steininger (2018); Contesse (2019).
[376] These cases are: *Landaeta Mejías Brothers et al. v. Venezuela* (Series C No. 281). Judgement of 27 August 2014; *Ortiz Hernández et. al v. Venezuela* (Series C No. 338). Judgement of 22 August 2017; *López Soto et al. v. Venezuela* (Series C No. 362). Judgement of 26 September 2018; *Díaz Loreto et. al v. Venezuela* (Series C No. 392). Judgement of 19 November 2019; *Olivares Muñoz et al. v. Venezuela* (Series C No. 415). Judgement of 10 November 2020; *Mota Abarullo et al. v. Venezuela* (Series C No. 417). Judgment of 18 November 2020. The IACtHR maintains jurisdiction over cases submitted to the Inter-American Commission prior to Venezuela's withdrawal date.
[377] Discussed in Chapter 6.

state's accession to the Court, the Court did retain temporal jurisdiction over the continuing effects of their disappearance post-accession. Accordingly, the IACtHR ruled that El Salvador continuously violated the right to judicial protection (Article 25) by applying an amnesty law to block investigations into the sisters' disappearance. The Court also found that El Salvador violated the prohibition of inhuman treatment (Article 5) with respect to the mental anguish suffered by the girls' family members.[378] In addition to financial reparations and free medical care for the family, the Court ordered that El Salvador establish "a national commission to trace the young people who disappeared during the armed conflict", "organize a public act acknowledging its responsibility for the violations", and identify and prosecute the perpetrators.[379] The *Serrano-Cruz* case was crucial for consolidating a now-entrenched regional norm opposing the application of amnesties to crimes against humanity.

Uruguay and Chile also passed amnesties after their respective transitions back to democracy in 1985 and 1990 that blocked the investigation and prosecution of dictatorship-era human rights violations. In *Gelman v. Uruguay* (2011), the IACtHR condemned the state's amnesty law and ruled that the continuing effects of Ms. Gelman's disappearance brought the case within the Court's jurisdiction, even though Ms. Gelman disappeared nine years prior to Uruguay's accession.[380] The IACtHR mandated that Uruguay amend its amnesty law to exclude application to "serious human rights

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[378] *Serrano-Cruz Sisters v. El Salvador* (Series C 120). IACtHR. Judgement of 1 March 2005 paras. 113-15, 172, 218.
[379] Ibid., Operative paragraphs 6-14.
[380] *Case of Gelman v. Uruguay* (Series C 221). IACtHR. Judgement of 24 February 2011. paras. 244-66.

violations".[381] Similarly, the IACtHR found an Article 25 violation and mandated that Chile amend its Pinochet-era amnesty law in *Almonacid-Arellano v. Chile* (2006), a case based on an extra-legal execution committed seventeen years before Chile's accession to the Court.[382] The IACtHR has consistently maintained an interventionist approach to admitting decisions and mandating remedies in cases involving PI rights violations committed during civil conflict, even when the violations originated prior to state accession.

Almonacid-Arellano v. Chile is also notable as the first case in which the IACtHR asserted the "conventionality control doctrine" (*la doctrina del control de convencionalidad*).[383] The doctrine obligates national authorities to incorporate the American Convention's norms and principles into domestic legislation, modify legislation to accord with the IACtHR's interpretation of the Convention, and give direct effect to IACtHR rulings. The "intensity" of these obligations varies according to the depth of a given state's legalization of Inter-American human rights principles- hence, like the margin of appreciation in the European system, the conventionality control upholds the principle of subsidiarity in the Inter-American system (González Domínguez 2017). However, while the MOA maintains a certain distance between the ECtHR and the authority of national institutions, conventionality control empowers closer supervision by the IACtHR.[384] The central aim of the conventionality control doctrine is to enhance

[381] Ibid., Operative paragraph 11.
[382] *Case of Almonacid-Arellano v. Chile* (Series C 154). IACtHR. Judgement of 26 September 2006. paras. 49-59, 160; operative paras. 5-6.
[383] Ibid., para. 124.
[384] Interview B, May 2020

state compliance with IACtHR rulings. Still, the doctrine has been criticized as an excessive incursion on national sovereignty, supporting the IACtHR's "radically monist approach to the relationship between international and national law" (Binder 2011: 1204). Ariel Dulitzky argues that the conventionality control doctrine is "one of the tools the Court uses to define its own identity and role in the hemisphere" and furthermore that the doctrine elevates the American Convention as "no longer a subsidiary treaty but an integral, fundamental, and hierarchically superior norm of the national domestic legal system" (2015: 47-8). Other assessments emphasize that the doctrine supports a multidirectional, not hierarchical, participatory process in which IACtHR and domestic judges can better communicate with one another to determine how best to implement Convention obligations in diverse contexts (Gonzalez-Ocantos 2018). In any case, the conventionality control doctrine represents an unprecedented attempt by a regional court to self-legitimize extending its own authority in the domestic realm. That this doctrine emerged within a case in which the IACtHR flexibly interpreted its temporal jurisdiction and ordered the modification of national legislation suggests interventionist intentions on the part of the judges.

Evaluating a practical explanation for the ECtHR and IACHR's divergent approaches to temporal jurisdiction

The ECtHR's interpretation of its temporal case admissibility criteria has gradually narrowed since the implementation of Protocols 11 and 14. These reforms were explicitly intended to improve the Court's efficiency in response to case backlogs. Following from this, one could reasonably argue that international courts have to become

more selective about the petitions they admit as their caseloads grow. Weeding out cases involving transitional justice disputes may be a necessary by-product of this process. The types of continuing violations often seen in such cases raise murky jurisdictional questions that an overloaded court may not have the capacity to wade through, particularly while clearly admissible cases pile up. If a strict approach to delineating temporal jurisdiction is simply a practical necessity for overburdened courts, rather than a direct function of a court's founding mandate, we should expect to observe the IACtHR's temporal jurisdiction similarly narrowing as the Court's caseload reaches new peaks.

The reform of the Inter-American Commission and the IACtHR's rules of procedure in 2001 provides an opportunity to assess the practical necessity argument. The Inter-American system faced a crisis of efficiency in the late 1990s. Lacking clear boundaries between the Commission and the IACtHR, cases languished in the processing stages. The OAS General Assembly called for reform in 2000, emphasizing the need for greater cooperation between the IACtHR and domestic authorities.[385] The Commission and Court responded by adopting new Rules of Procedure in 2001. Prior to the new Rules, the Commission exercised significant discretion regarding whether to forward a case to the IACtHR. The new Rules introduced standardized admissibility procedures and criteria for case forwarding to the IACtHR that limited the discretion of the Commission.[386] The new Rules also increased victims' participation in Court hearings.

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[385] *Evaluation of the Workings of the Inter-American system for the Protection and Promotion of Human Rights with a View to its Improvement and Strengthening*. 200. OAE/Ser.P/AG/Res. 1701 (XXX-O/00).
[386] *Rules and Procedure of the Inter-American Commission on Human Rights* (2000), Articles 43-4.

As a result of these reforms, the IACtHR's workload increased significantly Gómez 2001; Dulitzsky 2011).

The practical necessity argument suggests that the IACtHR would become increasingly selective regarding its admission of pre-accession rights violation cases after 2001. However, the IACtHR doubled-down on its flexible temporal jurisdiction post-2001. Prior to the reform, the IACtHR had admitted one petition involving pre-accession continuing rights violations.[387] In 2004, the Court admitted *Molina-Theissen v. Guatemala*, the first case submitted in the post-reform era in which a state contested the Court's temporal jurisdiction. Between 2004 and 2010, the Court admitted 12 petitions alleging violations that originated prior to state accession.[388] In 2011, the IACtHR experienced its highest ever annual rate of petition submissions between its founding and 2019.[389] Between 2011 and 2020, the Court admitted another 14 petitions alleging pre-accession rights violations.[390] In all 27 such petitions the IACtHR has admitted

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[387] *Blake v. Guatemala* (1998). To my knowledge, *Blake* is the only contentious case submitted to the IACtHR prior to 2001 involving rights violations that originated pre-accession.

[388] These are: *Case of Molina-Theissen v. Guatemala,* Series C 106 IACtHR 2004; *Case of the Moiwana Community v. Suriname,* Series C 124 IACtHR 2005; *Case of the Serrano-Cruz Sisters v. El Salvador,* Series C 120 IACtHR 2005; *Case of Almonacid-Arellano v. Chile,* Series C 154 IACtHR 2006; Case of *Nogueira de Carvalho et al. v. Brazil,* Series C 161 ACtHR 2006; *Case of Heliodoro Portugal v. Panama,* Series C 186 IACtHR 2008; *Case of Ticona Estrada et al. v. Bolivia,* Series C 191 IACtHR 2008; *Case of the Las Dos Erres Massacre v. Guatemala,* Series C 211 IACtHR 2009; *Case of Radilla-Pacheco v. Mexico,* Series C 209 IACtHR 2009; *Case of the Río Negro Massacres v. Guatemala,* Series C 250 IACtHR 2012; *Case of Gomes Lund et. al. v. Brazil,* Series C 219 IACtHR 2010; *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia,* Series C 217 IACtHR 2010.

[389] 'Statistics by Year: Cases Sent to the Inter American Court of Human Rights,' Inter-American Commission on Human Rights (2020), http://www.oas.org/en/iachr/multimedia/statistics/statistics.html.

[390] These are: *Case of Gelman v. Uruguay,* Series C 221 IACtHR 2011; *Case of García and Family Members v. Guatemala,* Series C 258 IACtHR 2012; *Case of González Medina and Family v. Dominican Republic,* Series C 240 IACtHR 2012; *Case of Gudiel Àlvarez et al. v. Guatemala,* Series C 262 IACtHR 2013; *Case of Osorio Rivera and Family v. Perú,* Series C 274 IACtHR 2013; *Case of Rochac Hernández and others v. El Salvador*, Series C 285 IACtHR 2014; *Case of Maldonado Vargas and others v. Chile*, Series C 300 IACtHR 2015; *Case of the Municipality of Rabinal v. Guatemala*, Series C 328 IACtHR 2016); Case of *Tenorio Roca and others v. Peru*, Series C 314 IACtHR 2016; *Case of Favela Nova Brasília v. Brazil,* Series C 333 IACtHR 2017; *Case of Herzog et al. v. Brazil,* Series C 353 IACtHR 2018; *Case of*

throughout its history, the Court interpreted continuing violations of the right to judicial protection to fall under the Court's temporal jurisdiction.[391] The IACtHR has never rejected a petition alleging conflict or dictatorship-era rights violations on temporal jurisdiction grounds.[392]

These figures suggest that efficiency concerns cannot, on their own, explain constriction of a court's admissibility criteria. This is not to say that the ECtHR's overwhelming caseload is unrelated to its increasingly narrow interpretation of its temporal jurisdiction. But to pin that interpretation solely on practical exigencies is insufficient. Of course, the IACtHR still faces an overall caseload that is only a small fraction of the ECtHR's in a given year.[393] It is possible that the IACtHR's caseload has not yet reached a critical tipping point for the Court to interpret its temporal jurisdiction more narrowly. The IACtHR also benefits from the Commission as a buffer institution to guide parties towards friendly settlements, deflecting cases from reaching the Court. That being said, the IACtHR has faced cases of grave state-sponsored violence since its inception and consistently interpreted its temporal jurisdiction flexibly in such cases. The Court has done so even in the face of perpetual underfunding[394] and a chronic lack of

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Órdenes Guerra et al. v. Chile, Series C 372 IACtHR 2018; *Case of Terrones Silva et al. v. Perú*, Series C 360 IACtHR 2018; *Case of Perrone and Preckel v. Argentina*, Series C 384 IACtHR 2019.

[391] As of January 2021.

[392] Due to the ECtHR's practice of not publishing the majority of its inadmissibility decisions, it is unfortunately impossible to gather comparative statistics on the number of continuing rights violation petitions the ECtHR has admitted/rejected.

[393] The ECtHR delivered decisions on 2,187 applications in 2019, while the IACtHR delivered 25 decisions.

[394] The IACtHR's annual budget totaled USD $5,296,100 in 2020. See AG/RES. 24940 (XLIX-O-19), https://www.oas.org/budget/2020/Approved%20Budget%202020.pdf. The ECtHR's 2020 annual budget totaled €74,169,000/approximately USD $89,500,000. See *Council of Europe Programme and Budget* (2019), https://rm.coe.int/1680994ffd#page=2.

political support from the OAS.[395] This indicates that there is something different about the IACtHR that supersedes logistical circumstances.

The founders of the IACtHR deliberately created a wider-reaching system of human rights protection to respond to the acute challenges of the region. As a result, the IACtHR has become a consequential actor in domestic debates about how to investigate and remedy human rights atrocities, including those arising from state actions committed pre-accession. The IACtHR has continued to employ evidentiary standards that recognize the inherent obstacles that victims of state violence may face in providing evidence to support their claims. The IACtHR's rejection of the "beyond reasonable doubt" standard may be a product of precedents set in the Court's early years when state violence plagued the region. Still, the continued prominence of PI violations in the Court's case law gives judges little motivation to re-evaluate this approach. Consistent with its founding social purpose, the IACtHR maintains sweeping authority to flexibly interpret its jurisdiction and mandate remedies in cases of severe fundamental rights violations. Furthermore, IACtHR judges have created a new legal doctrine, the conventionality control, which has no textual basis outside of the Court's case law but intensifies their influence in domestic legal systems. Consistent with theorized expectations, even amidst a rising workload and state criticism, the IACtHR is not inclined to pull back its judicial authority. Rather, the Court has further developed its founding interventionist interpretation of its authority.

IV. The African Court on Human and Peoples' Rights

[395] See Cavallaro and Brewer (2008): 782-4.

While the ACtHPR has only ruled on a relatively small handful of cases involving alleged PI rights violations, judges have seized those opportunities to clarify the contours of the Court's authority. In *Ally Rajabu and Others v. Tanzania* (2019), the Court was faced with one of the most contentious challenges in international human rights law: adjudicating when, if ever, the death penalty can be compatible with the right to life. The applicant in this case had been convicted of murder in a domestic court and sentenced to death by hanging. At the time, the Tanzanian Penal Code imposed mandatory death sentences in all cases of murder. The applicant alleged that the legality of the death penalty violated the African Charter's right to life (Article 4) and respect of human dignity (Article 5). The Court's judgement reviewed existing international jurisprudence, noting that, "despite a global trend towards the abolition of the death penalty… the prohibition of the death sentence in international law is still not absolute".[396] The Court ultimately determined that while it could not establish a basis for a total ban of the death penalty in the Charter, imposing the death penalty as an automatic, mandatory sentence constituted an arbitrary deprivation of life in violation of Article 4.[397] Furthermore, the Court ruled that hanging is a form of torture in violation of the Charter's protection of human dignity.[398] Sending a clear signal of its willingness to intervene domestically in this issue, the Court mandated that Tanzania remove the mandatory imposition of the death penalty from its Penal Code and provide the applicant with a new sentencing hearing.[399]

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[396] *Ally Rajabu v. Tanzania* (App. no. 007/2015). Judgement of 28 Nov. 2019, para. 96.
[397] Ibid., para. 114.
[398] Ibid., para. 119.
[399] Ibid., Operative paragraphs xv-xvi.

The ACtHPR again asserted its authority to intervene in domestic legal affairs in *Sébastien Germain Ajavon v. Benin* (2020).[400] The Court ruled that Benin had violated the right to life and prohibition of torture in connection with May 2019 post-election violence. When citizens had taken to the streets to protest election irregularities, the army opened fire on crowds, killing dozens. The government then passed an amnesty law that blocked investigation into these events and granted impunity to the perpetrators. The ACtHPR ordered Benin to repeal that amnesty law, as well as amend several other provisions within national legislation.[401] The ACtHPR's willingness to order states to amend and appeal legislation follows the example of the IACtHR, while the ECtHR has solidly rejected assuming that authority.

The ACtHPR is still developing its delineation of its temporal jurisdiction. However, existing case law indicates that the Court is adopting a flexible approach to admitting pre-accession violations with continuing effects, and a relatively more stringent approach to applying the six-month rule. This balance is observable in *Chananja Luchagula v. Tanzania* (2020). The applicant was a former death row inmate who had recently been released through a presidential pardon. The applicant alleged that the court that had sentenced him to death had erred, and claimed several PI violations connected to his sentencing and imprisonment. The applicant's sentencing had occurred in 2003, seven years before Tanzania acceded to the ACtHPR. The Court recognized the continuing effects of that sentencing as falling within its temporal jurisdiction. However, the

[400] This case was previously discussed in Chapter 8 in the context of the right to freedom of expression.
[401] *Sébastien Germain Marie Aikoué Ajavon v. Benin* (App. no. 062/2019). Judgement of 3 December 2020. paras. 158, 172-3.

application was ultimately still declared inadmissible on temporal grounds due to noncompliance with the six-month rule.[402] The Court noted that the applicant did not provide evidence to justify why he had waited over three years after exhausting domestic remedies to approach the ACtHPR.[403] This statement suggests that, had he provided evidence, the Court may have been open to granting an exception to the six-month-rule. Particularly given the Court's flexible interpretation of its temporal jurisdiction in the aforementioned *Zongo v. Burkina Faso*[404] case, which dealt with pre-accession state-sponsored killings, the ACtHPR has the potential to take on a central role in reckoning with past state violence in the region.

As with its temporal jurisdiction, the ACtHPR is still grappling with establishing evidentiary standards. In one recent case, *Andrew Ambrose Cheusi v. Tanzania* (2020), the Court found no violation of Article 5 on the grounds that the applicant, who claimed to have been tortured in police custody, provided no corroborating evidence. It should be noted, however, that the applicant did not even provide specific descriptions of the alleged torture.[405] In another recent PI case, *Léon Mugesera v. Rwanda* (2020), the ACtHPR demonstrated openness to shifting the burden of proof to the government. The applicant, Mr. Mugesera, alleged he had been subjected to death threats and denied food and medicine while in prison. Mr. Mugesera had been convicted of inciting genocide by Rwandan courts in 2016. He had then petitioned the ACtHPR in February 2017, before

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[402] While the African Charter does not specify a time limit for submitting petitions following the exhaustion of domestic remedies, the ACtHPR has adopted the six-month rule based on existing international standards.
[403] *Chananja Luchagula v. Tanzania* (App. No. 039/2016). Ruling on Jurisdiction and Admissibility of 25 September 2020. Summary of Judgement.
[404] Discussed in Chapter 6, pgs. 165-7.
[405] *Andrew Ambrose Cheusi v. Tanzania* (App. No. 004/2015). Judgement of 26 June 2020. paras. 131-36.

Rwanda's withdrawal from the Court went into force. As such, the Court could still admit the case. When asked by the ACtHPR to provide documentation in connection with *Mugesera*, the Rwandan government responded "reminding the Court of its withdrawal" and declined to participate in the proceedings. The Court then issued provisional measures ordering Rwanda to allow Mugesera access to his lawyers and correct the complained-of issues regarding his treatment in prison. The ACtHPR eventually decided to render a judgement on the case in *suo motu*, without the acknowledgement or participation of the Rwandan state.[406]

The *Mugesera* judgement offers important insight into the ACtHPR's allocation of the burden of proof. The Court noted that Mugesera's detailed descriptions of his mistreatment in prison and documented attempts to appeal to domestic authorities "justify shifting the burden of proof to the Respondent State, given that the Applicant is in prison and that it is difficult for him to produce additional evidence beyond the steps he claims to have taken".[407] This statement demonstrates the Court's cognizance of the inherent power differentials between prisoners and state agents. On these grounds, the ACtHPR ruled that Rwanda had violated Article 5.

The ACtHPR has already developed a distinct approach to navigating the level of deference it affords to member governments. Despite a recent spate of withdrawals, the Court has rejected requiring proof beyond reasonable doubt to rule against governments. As seen in *Mugesera*, the Court does not appear interested in going easy on withdrawn governments to attempt to win back their membership. The ACtHPR has also developed

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[406] *Léon Mugesera v. Rwanda* (App. No. 012/2017). Judgement of 27 November 2020. paras. 6-9.
[407] Ibid., para. 88.

a (cautiously) flexible interpretation of its temporal jurisdiction and an unabashedly interventionist approach to mandating remedies for established PI violations. As the Court's jurisprudence develops, it will be interesting to see whether the ACtHPR decides to take on a transitional justice-oriented role in addressing past state violence akin to that of the IACtHR.

V. Conclusion

The ECtHR and IACtHR's starkly divergent approaches to defining temporal jurisdiction represent one of the most consequential fissures across international jurisprudence on PI rights protections. This disparity can be traced to each court's unique interpretation of the boundaries of its authority over member governments, rooted in the courts' founding moments. The ECtHR and IACtHR were both founded to reckon with state-sponsored violence and advance democratization, but adopted very different strategies for doing so based on the exigencies of their geopolitical contexts. The ECtHR's founders designed the Court to institutionalize closure on a recent era of mass violence and illuminate the path for a visionary regional integration project. This mission necessitated a forward-thinking approach to human rights adjudication, shutting the door tight on the demons of the past. Consequently, the ECtHR has adopted a deferential approach that largely leaves it up to governments to determine whether and/or how to address past human rights atrocities. The ECtHR's persistently narrow interpretation of its temporal jurisdiction is a product of this engrained deference. At the creation of the IACtHR, on the other hand, the demons were still in the house. The drafters of the American Convention and the IACtHR's founding judges faced pervasive, ongoing state-

sponsored violence. Meeting the unique challenges of the moment required the IACtHR to adopt an interventionist conceptualization of its authority and broadly interpret its temporal jurisdiction. The IACtHR continues to assert that authority today, as PI rights violations still dominate the Court's caseload. The ACtHPR's early case law indicates that it is positioned to follow the example of the IACtHR more closely than that of the ECtHR when interpreting its temporal jurisdiction. Still, the ACtHPR has remained cautiously attentive to international consensus on this issue, despite the African Charter's lack of temporal constraints on case admissibility.

While the IACtHR and ACtHPR have always maintained flexible evidentiary standards, the ECtHR has held fast to requiring "proof beyond reasonable doubt" to rule against governments in most cases. However, over the past decade or so, the ECtHR has demonstrated increased willingness to shift the burden of proof to governments in cases of PI rights violations in which applicants face systemic impediments to procuring evidence to support their claims. This shift recognizes the inherently different dynamics and aims of international human rights adjudication relative to domestic legal proceedings. The ECtHR's loosening of evidentiary standards has unfolded amidst vocal government critique of the Court in the post-Brighton era, indicating that the expectation that deferential courts will be more responsive to accusations of judicial overreach does not appear to hold true in the case of PI rights violations. This is likely due to the unique gravity of these violations, as the *jus cogens* status of PI rights allows comparatively little room for judicial discretion. ECtHR judges have not directly cited IACtHR jurisprudence in several key PI cases that re-evaluated the burden of proof. Still, is possible that the

IACtHR's repeated insistence on flexible evidentiary standards has influenced ECtHR judges' shifting views on allocating the burden of proof in PI cases.

Chapter 10

Gender Identity and Sexual Orientation Discrimination

I. Introduction

In March 2021, the Inter-American Court delivered a historic ruling advancing legal protections for transgender individuals in one of the most dangerous regions in the world for such people. Vicky Hernández, a Honduran trans woman, had been murdered amidst widespread attacks on trans individuals following a 2009 military coup that deposed the Honduran president. After over a decade of state refusal to investigate Ms. Hernández's murder and broad impunity for anti-trans violence in Honduras, the Inter-American Court ordered the government to re-open Ms. Hernández's case, prosecute those responsible for her killing, and pay reparations to her family. The Court also ordered Honduras to implement extensive measures aimed at dignifying the legal personhood of trans individuals and preventing future anti-trans violence, including developing a national database for tracking violence against LGBT persons, implementing an anti-discrimination training program for state agents, creating a system to allow trans individuals to amend the sex notated on their official identification documents, and establishing a national education scholarship for trans women in Ms. Hernández's name. Rosa Hernández, Vicky's mother, reflected on the implications of the IACtHR's ruling while speaking to the New York Times: "It's so significant that there will always be this memory of her. We are always going to remember that she was the one that created a before and after" (Lopez 2022).

International law surrounding LGBT rights protections has evolved dramatically in recent decades. Regional human rights courts have been at the forefront of this progress. For example, Helfer and Voeten (2014) have found that ECtHR judgements against states in cases involving LGBT issues increase the probability of national-level policy change in states across Europe. Protections against discrimination based on sexual orientation and gender identity were not included in any of the regional courts' constitutive documents. In the 1950s-70s, when the European Convention, American Convention, and African Charter were drafted, discrimination against homosexual and transgender people was not widely considered to be a pressing human rights issue. As domestic and transnational social movements supporting LGBT rights have grown, the regional courts have had to decide where they stand. Because LGBT rights were not contemplated at the founding of each court, judges have not been bound by precedent or written law in this area to the same extent as in other established areas of law. Consequently, examining the development of LGBT rights jurisprudence offers a unique opportunity to observe how and when regional courts' interpretations of their authority change in the context of "new" human rights issues.

In previous chapters, I have hypothesized that changes in the types of rights violations faced by a court, state backlash against court decisions, and jurisprudential developments in other human rights courts might push judges to adopt more deferential or interventionist interpretations of the boundaries of their court's jurisdiction. First, I expect that courts founded on deferential interpretations of judicial authority, such as the ECtHR, will be more likely to walk back their authority in response to critiques of

judicial overreach. Meanwhile, courts founded on interventionist interpretations of their authority, such as the IACtHR, are less likely to be responsive to member state backlash. Second, when one court has more experience with a given type of rights violation than another, that court may be more willing to import elements of the other court's interpretation of its jurisdiction. Third, the preponderance of particularly grievous, fundamental rights violations might drive a court to re-interpret its judicial authority. Alternatively, expansions or restrictions of a court's jurisdiction could be driven by practical constraints, for example, the need to quickly weed out cases to relieve a backlog, rather than by legal motivations linked to the court's founding social purpose.

The following sections evaluate these hypotheses while reviewing regional human rights jurisprudence on LGBT issues. For the ECtHR, I have applied the same case selection technique as in previous chapters, focusing on discussion of cases that have set particularly influential precedent. Because the IACtHR has only ruled on a handful of cases involving sexual orientation and gender identity issues, I discuss each one of these cases in turn. The ACtHPR has not yet had the opportunity to rule on any LGBT rights cases. I take this opportunity to review the challenges that have impeded development of LGBT rights in the African system. Then, drawing from the experiences of the ECtHR and IACtHR, I sketch out a few potential pathways for overcoming those roadblocks and getting LGBT rights cases in front of the ACtHPR.

The following analysis reveals that neither member state backlash nor practical concerns stemming from rising caseloads have deterred the ECtHR or IACtHR from issuing rulings that expand the scope of LGBT rights protections. While the ECtHR been

more restrained than the IACtHR in its approach to developing pro-LGBT rights jurisprudence, the ECtHR has grown increasingly interventionist in the area of LGBT rights over time. In doing so, the ECtHR has pursued a strategy of cautious incrementalism with close attention to evolving domestic social consensus, in keeping with its deferential founding interpretation of its authority. The IACtHR, on the other hand, has moved quickly to expand the scope of LGBT rights in Latin America, controversially leveraging its advisory jurisdiction to impose new obligations on states that are not codified in the American Convention and are supported by scant international precedent.

II. The European Court of Human Rights

As discussed in Chapter 6, several key judgements in the 1980s set the stage for the development of the ECtHR's case law on LGBT rights. The Court repeatedly found laws criminalizing homosexuality to violate the European Convention's Article 8 protections of private life.[408] However, the Court unequivocally denied extending the right to marry (protected by Article 12) to same-sex couples, and declined to require states to allow transgender individuals to change the sex listed on their official identification documents. With regard to both same-sex marriage and transgender sex identification, the majority of judges noted the lack of European social consensus on these issues and emphasized that national governments should retain primary authority to define the scope of LGBT rights. Judges did acknowledge rapidly-evolving social norms in this area and signaled an openness to reconsidering the issue of transgender

[408] See *Dudgeon v. the United Kingdom* (1981) and *Norris v. Ireland* (1988). The Court again upheld this position in *Modinos v. Cyprus* (App. No. 15070/89), Judgement of 22 April 1993.

identification rights in the future. However, they did not indicate that reinterpretation of Article 12 to extend to same-sex marriage was possible. [409]

ECtHR case law on LGBT rights accelerated significantly in the 1990s. The first LGBT rights case of that decade, *Cossey v. the United Kingdom* (1990), was factually similar to the aforementioned *Rees v. the United Kingdom* case. The applicant, a transgender woman, wished to be able to change the sex listed on her birth certificate and enter into a legal marriage with a man. Ms. Cossey invoked Article 8's protections of private life to argue for her right to change her birth certificate. She claimed that her inability to do so produced a further violation of Article 12 because U.K. law did not permit same-sex marriage. Additionally, Ms. Cossey alleged that the government was in violation of Article 14, the Convention provision which prohibits discrimination. The ECtHR majority declined to consider the Article 14 component of Ms. Cossey's complaint.[410] Given the factual similarity between the two cases, the majority in *Cossey* found no reason to diverge from the conclusions reached in *Rees v. the United Kingdom*. Thus, the Court ruled that the government had not violated Article 8 or Article 12.[411]

However, the final judgement was more contentious in *Cossey* as compared to *Rees.* In *Rees,* only three out of fifteen judges had dissented to the majority's finding of no violation of Article 8, and the ruling of no violation of Article 12 was unanimous. In *Cossey,* however, eight out of eighteen judges voted that there had in fact been a violation of Article 8, and four out of eighteen judges voted that there had been a violation of

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[409] See *Rees v. the United Kingdom* (1986), discussed in Chapter 6, pgs. 149-52.
[410] Case of *Cossey v. the United Kingdom* (App. no. 10843/84). Judgement of 27 September 1990. ECtHR (Plenary).
[411] Ibid., paras. 38-42.

Article 12. Among the dissenters, Judges MacDonald and Spielmann argued that the finding of no violation of Article 8 lacked attention to important legal developments in Europe that had advanced popular conceptualizations of transgender rights since the 1986 *Rees* judgement:

> We consider that since 1986 there have been, in the law of many of the member States of the Council of Europe, not "certain developments" but clear developments. We are therefore of the opinion that, although the principle of the States' "wide margin of appreciation" was at a pinch acceptable in the Rees case, this is no longer true today.[412]

This argument reveals stark differences of opinion among ECtHR judges regarding how to apply the margin of appreciation to defer to national authority, as well as divergent understandings of how legal protections for transgender people were progressing at the domestic level.

Judges Palm, Foighel, and Pekkanen, who dissented to the majority's findings with regard to both Article 8 and Article 12, explicitly rejected a textualist interpretation of the Convention and called on the Court to contemplate the sociolegal context in which the Convention was drafted in the 1950s:

> When drafting Article 12 of the Convention the draftsmen probably had in mind the traditional marriage between persons of opposite biological sex… however, transsexualism was not at that time a legal problem, so that it cannot be assumed that the intention was to deny transsexuals the right to marry. Moreover… there have been significant changes in public opinion as regards the full legal recognition of transsexualism. In view of the dynamic interpretation of the Convention followed by the Court, these social and moral developments should also be taken into account in the interpretation of Article 12.[413]

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[412] Ibid., Joint Partly Dissenting Opinion of Judges MacDonald and Spielmann, para. 2.
[413] Ibid., Joint Dissenting Opinion of Judges Palm, Foighel, and Pekkanen. para. 5.

This excerpt rejects the majority's reasoning in *Rees* that imposed a literal interpretation of Article 12 isolated from evolving social attitudes towards same-sex marriage.

Judge Martens, in what is perhaps one of the most prolific dissenting opinions in the history of the ECtHR, launched a scathing critique of the *Rees* judgement in his dissent to *Cossey:* "A true reconsideration of the issues arising under Articles 8 and 12 should have led [the Court] to conclude that the Rees judgement was wrong- or at least that present day conditions warranted a different decision in the Cossey case".[414] Judge Martens then analyzed domestic legislative reforms both within and outside of the Council of Europe that had permitted transgender people to change the sex listed on their identification documents. This was followed by a lengthy castigation of ECtHR precedent, including sections titled "Why The Rees Case Should Have Been Decided Differently As Regards Article 8", a companion section regarding Article 12, and "Why The Court In The Cossey Case Should Have Overruled Its Decision In The Rees Case". It is rare for ECtHR judges to so acutely and extensively criticize their colleagues. Judge Martens concluded his dissent with the following appeal:

> There is an ever-growing awareness of the essential importance of everyone's identity and of recognising the manifold differences between individuals that flow therefrom. With that goes a growing tolerance for, and even comprehension of, modes of human existence which differ from what is considered "normal"… These tendencies are certainly not new, but I have a feeling that they have come more into the open especially in recent years.[415]

[414] Ibid., Dissenting Opinion of Judge Martens. para. 1.1.
[415] Ibid., para. 5.5.

Judge Marten's dissent reflected the frustration of those who felt that the ECtHR had lost touch with domestic realities and was moving too slowly in recognizing LGBT rights. His dissent also demonstrated confidence that, like society, the Court could change.

The ECtHR got a chance to revise its precedent on transgender sex identification in *B. v. France* (1992). Like Ms. Cossey, Ms. B. alleged that refusal to amend the sex listed on her identification documents amounted to a violation of Article 8. The majority judgement engaged in substantial discussion about whether the facts of Ms. B's case and/or predominant sociolegal norms sufficiently diverged from those present in *Brees* and *Cossey* to establish an Article 8 violation. Of particular importance was the difference between the types of identification documents used in Britain and France and their requirements for sex identification. Notably, all French citizens are given an INSEE number that includes sex identification. This number is required for social security, insurance, employment, and banking purposes. Thus, any transgender person not permitted to change their official sex identification was unable to conceal their situation from potential employers and financial institutions. Ms. B. alleged that she had experienced social and professional difficulties as a result of this system.[416] The Court majority was convinced of the disproportionate severity of this incursion into Ms. B.'s private life "even having regard to the State's margin of appreciation", and, for the first time in the Court's history, established that refusal to allow transgender people to change their official sex identification violated Article 8.[417] The decision was not unanimous- six

[416] *B. v. France,* App. No. 13343/87, Judgement (Eur. Ct. Hum. Rts. March 25, 1992): paras. 59-60.
[417] Ibid., para. 63.

out of twenty-one judges voted that there had been no violation. Still, the *B.* case marked a distinct shift in the ECtHR's disposition towards transgender rights.

A key challenge of the Council of Europe's expansion in the 1990s was instilling shared conceptualizations of European human standards across member states. This was a herculean task. Member states' varied cultural heritages encompassed diverse understandings of what "human rights" should look like and the responsibilities that governments held to implement those rights. This challenge was intensified in areas such as LGBT rights, where there was no prevailing consensus even among the Court's founding member states regarding the scope or necessity of such rights. In 1998, no CoE member state had yet legalized same-sex marriage, although seven states (Denmark, Norway, Sweden, Iceland, France, Belgium, and the Netherlands) had legalized some form of registered same-sex partnership or civil union. All seven of these states were Western European, founding members of the CoE. In the new crop of Eastern European member states, social attitudes regarding LGBT issues tended to be more conservative than in the West. The eastward expansion of the CoE coincided with rapid developments in LGBT rights debates worldwide in the late-1990s-early 2000s, setting the stage for contentious legal battles within the ECtHR.

The first major LGBT rights issue that the ECtHR confronted after the 1998 Protocol 11 reforms was discharging military members on the basis of sexuality. In September 1999, the ECtHR issued final judgements on two cases, *Smith and Grady v. the United Kingdom* and *Lustig-Prean and Beckett v. the United Kingdom*, in which members of the Royal Air Force and Royal Navy had been discharged after commanding

officers discovered their homosexuality. At that time, military law banned British servicemembers from participating in homosexual acts.[418] All four applicants in *Smith and Grady* and *Lustig-Prean and Beckett* had been subjected to invasive interviews by their command prior to ultimately being discharged. These interviews involved questions on a range of deeply private topics, including the applicants' sexual histories, medical issues, and the personal information of other homosexual people known to the applicants.[419] In both cases, the government submitted that discharging gay and lesbian servicemembers was justified to protect the "nation's security", voicing concerns that homosexual servicemembers working in close quarters with the same sex would distract from their missions. The government argued that "admitting homosexuals to the armed forces at this time would have a significant and negative effect on the morale or armed forces' personnel and, in turn, on the fighting power and the operational effectiveness of the armed forces".[420]

ECtHR judges were unconvinced. While the Court acknowledged that governments are afforded a particularly wide margin of appreciation with regard to military policy, the Court found the government's argument that homosexual servicemembers threated fighting effectiveness to be lacking in evidence. The Court unanimously ruled that the military's investigations into the applicants' sexual orientation constituted excessive interference in their privacy in violation of Article 8, and ruled 6-1

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[418] Case of *Lustig-Prean and Beckett v. the United Kingdom* (App. no. 31417/96; 32377/96). Judgement of 27 September 1999. ECtHR (Third Section). para. 37.
[419] Case of *Smith and Grady v. the United Kingdom* (App. no. 33985/96; 33986/96). Judgement of 27 September 1999. ECtHR (Third Section). paras. 11-28; *Lustig-Prean and Beckett v. the United Kingdom* paras. 11-21.
[420] *Smith and Grady v. the United Kingdom* paras. 77-8; *Lustig-Prean and Beckett v. the United Kingdom* paras. 69-71.

that the applicants' subsequent discharge violated Article 8.[421] The Court unanimously declined, however, to rule on whether the applicants in both cases had experienced discrimination in violation of Article 14.[422] This was consistent with ECtHR jurisprudence at the time, which tended to relegate concerns regarding the treatment of LGBT people to the category of "private life" rather than abject discrimination.

However, it was not long before the tendency to sideline discrimination concerns would deteriorate. In December 1999, the Court unanimously ruled in *Salgueiro Da Silva Mouta v. Portugal* that refusing to grant custody to a divorced parent on the grounds that the parent was living with a same-sex partner violated Article 14's protection against discrimination.[423] This case set a clear-cut precedent that, although the Convention drafters did not include sexual orientation as a protected category under Article 14, times had changed. The ECtHR now recognized states' distinct obligation to prevent discrimination on the basis of sexual orientation.

In a signal of rapidly-changing social tides, the Netherlands became the first country in the world to legalize same-sex marriage on April 1, 2001. The ECtHR next had the opportunity to weigh-in on the development of LGBT rights in *I. v. the United Kingdom* and *Christine Goodwin v. the United Kingdom*, two cases finalized on the same day in July 2002. Both cases involved transgender applicants who reported suffering interferences in their quality of life due to not being permitted to change their legal sex.

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[421] *Smith and Grady v. the United Kingdom* para. 88-112; *Lustig-Prean and Beckett v. the United Kingdom* para. 82-105.
[422] The ECtHR later upheld this interpretation in *Perkins v. the United Kingdom* (App. No. 43208/98;44875/98), where the applicants' discharges from the armed forces were found to violate Article 8 but the Court again declined to rule on a potential Article 14 violation.
[423] Case of *Salgueiro Da Silva Mouta v. Portugal* (App. no. 33290/96). Judgement of 21 December 1999. ECtHR (Fourth Section).

Ms. I. had been bullied at work and denied entry into nursing school after refusing to produce her birth certificate which listed her sex as male.[424] Ms. Goodwin experienced workplace discrimination and sexual harassment as a result of her transition, and complained of having to choose between producing her birth certificate or foregoing certain employment and financial opportunities.[425] Both women also argued that their inability to change their legal sex violated their right to marry under Article 12, as U.K. law at that time still banned same-sex marriage. Recall that, in the aforementioned *Rees* (1986) and *Cossey* (1990) judgements, the ECtHR upheld states' authority to deny transgender individuals the ability to marry partners of the same sex-at-birth. In both *I.* and *Goodwin*, the Court upheld its *B. v France* (1992) precedent and found a violation of Article 8 for not allowing the applicants to change their legal sex.[426] When it came to transgender marriage rights, the Court was willing to revise its past reasoning. In both judgements, the Court highlighted changing social and medical understandings of the transgender condition:

> There have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality …The Court would also note that Article 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women.[427]

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[424] Case of *I. v. the United Kingdom* (App. no. 25680/94). Judgement of 11 July 2002. ECtHR (Grand Chamber). paras. 12-19.
[425] Case of *Christine Goodwin v. the United Kingdom* (App. no. 28957/95). Judgement of 11 July 2002. ECtHR (Grand Chamber). paras. 12-19.
[426] This precedent mandating that states allow transgender individuals to amend the sex listed on official identification documents has since been repeatedly upheld, notably in *Grant v. the United Kingdom* (App. no. 32570/03), Judgement of 23 May 2006 and *L. v. Lithuania* (App. No. 27527/03), Judgement of 11 September 2007.
[427] *I. v. the United Kingdom* para. 80; *Christine Goodwin v. the United Kingdom* para. 100.

Of particular note here is the judges' attention to gender-neutral language in recently-adopted European Union marriage rights protections. In both *I.* and *Goodwin*, the ECtHR Grand Chamber unanimously found a violation of the right to marry under Article 12.[428] As succinctly stated in the *Goodwin* judgment:

> The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court's view, she may therefore claim that the very essence of her right to marry has been infringed.[429]

These judgements marked monumental advancements in transgender rights in the CoE. The judges resoundingly endorsed interpreting the Convention as a "living instrument" and correspondingly expanded the scope of Article 12, even in the face of government opposition.

As European states continued to be on the global forefront of the fight for marriage equality throughout the early-2000s, LGBT citizens turned to the ECtHR seeking rulings that would bolster domestic legal progress. Central to these disputes was the question of whether denying homosexual couples the same rights as heterosexual couples could be considered legitimate for protecting "family life" under Article 8. A key example is *Karner v. Austria* (2003), which the ECtHR ruled on one month after Belgium became the second country in the world to legalize same-sex marriage. The applicant in *Karner*, a gay man, challenged an Austrian Supreme Court ruling that denied his ability to retain the tenancy of his male life partner following the partner's death. The applicant's partner had specified the applicant as his legal heir prior to his passing.

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[428] Note: both of these cases had been relinquished to the Grand Chamber by the Chamber formation to which they were originally assigned. There was no lower Chamber judgement in either case.
[429] *Christine Goodwin v. the United Kingdom* para. 101.

Following an appeal by the applicant's landlord, the Austrian Supreme Court ruled that domestic law permitting succession of tenancy to surviving partners in heterosexual couples was not intended to apply to homosexual couples. In defense of that Supreme Court decision, the government argued before the ECtHR that excluding homosexual couples from tenancy rights protections was necessary for the "protection of the traditional family unit". The government submitted that this differential treatment thus fulfilled a legitimate aim under Article 8's protection of "family life".[430]

The ECtHR had maintained a heteronormative definition of "the family" in previous cases involving LGBT applicants[431]. In *Karner,* however, judges reconsidered the scope of Article 8 in the new millennium. Referencing recent precedent establishing sexual orientation as a protected category under Article 14's prohibition of discrimination[432], the majority underscored that unequal treatment must be proportionate to legitimate aims:

> In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people – in this instance persons living in a homosexual relationship… The Court cannot see that the Government have advanced any arguments that would allow such a conclusion.[433]

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[430] Case of *Karner v. Austria* (App. no. 40016/98). Judgement of 24 July 2003. ECtHR (First Section). paras. 38-41.
[431] See *Rees v. the United Kingdom* (App. no. 9532/81), Judgment of 17 October 1986, discussed in Chapter 6, pgs. 149-52.
[432] See, for example, *Salgueiro Da Silva Mouta v. Portugal* (App. no. 33290/96), Judgement of 21 December 1999, discussed above.
[433] *Karner v. Austria* (App. no. 40016/98) para. 41.

Here, we see clear evidence that the margin of appreciation had narrowed for unequal treatment of homosexual couples, to the point where discrimination on the basis of sexual orientation was considered equally unacceptable as discrimination on the basis of sex itself. This statement signaled a shift in the ECtHR's approach to deferring to governments in the area of LGBT rights. By a vote of 6-1, the ECtHR found Austria in violation of Articles 14 and 8 in *Karner*.

The ECtHR continued to build up its authority to demand equal treatment for homosexual couples in the 2000s. The Court again found governments in violation of Article 14 for discriminating against homosexual couples in cases involving adoption (*E. B. v. France*, 2008)[434] and surviving tenant rights (*Kozak v. Poland,* 2010)[435]. In the meantime, Spain became the third country in the world to legalize same-sex marriage in 2005, followed by Sweden in 2009 and Portugal and Iceland in 2010. Additionally, twelve CoE member states legalized some form of registered partnership or civil union for same-sex couples between 2000 and 2010[436].

Amidst this shifting legal landscape in the 2000s, the margin of appreciation undoubtedly narrowed with regard to certain types of anti-LGBT discrimination covered by Articles 8 and 14. However, the ECtHR repeatedly refused to intervene in domestic decisions about extending the full rights of marriage to same-sex couples. Recall that the aforementioned *I.* and *Christine Goodwin* judgements in 2002 had expanded marriage rights for couples in which one partner had transitioned into the opposite sex of the other

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[434] Case of *E.B. v. France* (App. no. 43546/02). Judgement of 22 January 2008. ECtHR (Grand Chamber).
[435] Case of *Kozak v. Poland* (App. no. 13102/02). Judgement of 2 March 2010. ECtHR (Fourth Section).
[436] These states were: Andorra, Austria, the Czech Republic, Denmark, Finland, Germany, Hungary, Ireland, Luxembourg, Slovenia, Switzerland, and the United Kingdom.

partner. However, these judgements ultimately entrenched an interpretation of Article 12 that would deny marriage rights to same-sex couples.

For example, in November 2006, the ECtHR ruled on two cases involving transgender applicants who had transitioned into the *same* sex as their spouse. In both cases, *Parry v. the United Kingdom* and *R. and F. v. the United Kingdom*, the applicants wished to change the sex listed on their official identification documentation to reflect their post-transition identity. Doing so, however, would invalidate the legality of their existing marriages, as the U.K. did not permit same-sex marriage. The ECtHR unanimously declared both cases to be inadmissible on the grounds that the applicants' complaints were "manifestly ill-founded". In defense of this decision, the judges addressed evolving domestic conceptualizations of marriage:

> While it is true that there are a number of Contracting States which have extended marriage to same-sex partners, this reflects their own vision of the role of marriage in their societies and does not, perhaps regrettably to many, flow from an interpretation of the fundamental right as laid down by the Contracting States in the Convention in 1950. The Court cannot but conclude therefore that the matter falls within the appreciation of the Contracting State as how to regulate the effects of the change of gender in the context of marriage.[437]

In this passage, the judges appear to throw out the idea of the Convention as a "living instrument" that had been emphasized in previous LGBT rights cases. Rather, the judges explicitly direct attention to the Convention drafters' intentions in 1950. Those founding intentions, presumably, did not permit the extension of marriage to same-sex couples. Furthermore, the wording of Article 12 qualifying the right to marry "according to the

[437] Case of *Parry v. the United Kingdom* (App. no. 42971/05). Judgement of 28 November 2006. ECtHR (Fourth Section). Section B; Case of *R. and F. v. the United Kingdom* (App. no. 35748/05). Judgement of 28 November 2006. ECtHR (Fourth Section). Section B.

national laws governing this right" reserved marriage as an area where the Court was to defer to national authorities. The judges in *Parry* and *R. and F.* upheld this principle in 2006.[438] These decisions demonstrate how the deferential interpretation of the ECtHR's authority espoused by its founders has continued to motivate judges' reasoning in the 21st Century, even amidst domestic changes in conceptualizing human rights.

The ECtHR had another opportunity to address same-sex marriage rights in *Schalk and Kopf v. Austria* in June 2010. The applicants, a gay couple, alleged that Austria's non-recognition of same-sex marriage violated their rights to private and family life (Article 8), the right to marry (Article 12), and furthermore constituted discrimination (Article 14). Referencing the precedent set in *Christine Goodwin* and reinforced in *Parry* and *R. and F.,* the Court unanimously declared that Austria had not violated Article 12 by refusing to recognize same-sex marriages. This decision was rooted in prioritizing deference to governments: "The Court reiterates that it must not rush to substitute its own judgement in place of that of the national authorities, who are best placed to assess and respond to the needs of society".[439]

LBGT rights cases at the ECtHR in the 1980s-2000s tended to focus on issues of privacy and family life. However, the ECtHR began to face cases involving more public facets of anti-LGBT discrimination in the 2010s, including alleged violations of freedom of expression and assembly rights. For example, in *Identoba and Others v. Georgia*

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[438] The ECtHR again upheld this precedent in 2014 in *Hämäläinen v. Finland* (App. No. 37359/09), in which Finland refused to allow the transgender applicant to change her legal sex identification unless her marriage to her spouse, who was a cisgender woman, was first converted into a civil partnership. The ECtHR found no violation of Articles 8, 14, or 12 in this case.

[439] Case of *Schalk and Kopf v. Austria* (App. no. 30141/04). Judgement of 24 June 2010. ECtHR (First Section). para. 62.

(2015), the ECtHR was tasked with determining whether Georgian authorities had made sufficient efforts to prevent and investigate homophobic violence against LGBT protestors. The applicants were a group of LGBT activists who had been injured when counter-protestors attacked them during a peaceful demonstration in 2012. The activists had obtained prior approval from the authorities to hold their demonstration and were assured that police would be present to provide security.[440] The ECtHR majority found that, despite this, authorities failed to fulfill their "positive obligation to provide the peaceful demonstrators with heightened protection from attacks by private individuals".[441] Furthermore, by failing to approach investigation into the protestors' injuries with specific attention to the potential for homophobic motivations, Georgian authorities had failed to fulfill their procedural obligations under Article 3 (the prohibition of inhuman and degrading treatment).[442] This case set an important precedent clarifying that states have positive obligations to both prevent homophobic violence and specifically investigate the role of sexual orientation discrimination in attacks aimed at LGBT individuals.

The majority of LGBT rights cases that made it to the ECtHR in the 2010s were provoked by the Russian government's increasingly antagonistic attitude towards homosexuality. Russia's relationship with the CoE has been dysfunctional under Vladimir Putin's rule. The Parliamentary Assembly of the CoE suspended Russia's voting rights in 2014 following the invasion of Crimea, after which Russia threatened to

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[440] Case of *Identoba and Others v. Georgia* (App. no. 73235/12). Judgement of 12 May 2015. ECtHR (Fourth Section). paras. 6-9.
[441] Ibid., para. 73.
[442] Ibid., para. 77.

withdraw from the CoE entirely (Harding 2010). Russia stopped paying its yearly dues to the CoE in 2017 in protest (Batchelor 2017) and repeated its threats of withdrawal (including, at one point, asserting that it would not consider ECtHR judgements to be legally-binding) (Radio Free Europe 2017). Russia only agreed to resume payments and return to the Parliamentary Assembly in 2019 after Putin essentially coerced Assembly members into revising the body's Rules of Procedure to limit the conditions under which the CoE can impose sanctions on member states. The Assembly granted these concessions despite no efforts by Russia to improve conditions in Crimea, a move that cast very public doubt on the CoE's ability to reign-in rogue member states (Glas 2019).

The Russian government gone to great lengths over the past decade to limit public displays of homosexuality. These measures include preventing gatherings related to LGBT issues, which has landed Russia in the ECtHR on several occasions. Nicolay Alekseyev, a Russian gay rights activist, petitioned the ECtHR after Moscow authorities repeatedly refused to grant his organization permission to hold peaceful protests and parades in support of the LGBT community. When the activist and his colleagues attempted to hold these events without government approval, they were arrested. The ECtHR ruled on his case in 2010. Mr. Alekseyev alleged that Russia had violated the right to freedom of assembly (Article 11) and the prohibition of discrimination (Article 14). In defense of their decision to prohibit the activist's events, the government "claimed a wide margin of appreciation in granting civil rights to people who identify themselves as gay men or lesbians, citing the alleged lack of European consensus on issues relating

to the treatment of sexual minorities".[443] ECtHR judges did not appreciate the government's attempt to assert its own interpretation of the margin of appreciation doctrine. The Court unanimously ruled that Russia had violated Articles 11 and 14.[444]

In June 2013, Putin signed into law a highly controversial federal mandate commonly referred to as the "gay propaganda law". The law criminalized publishing information about "non-traditional sexual relations", including homosexuality, bisexuality, and transgender experiences. The official intent of the law was to protect children from "harmful information". The law, which has been widely condemned by human rights organizations (Human Rights Watch 2018), has contributed to growing anti-LGBT discrimination in recent years. One 2019 study found that anti-LGBT violence in Russia has increased substantially since 2013 (Kondakov 2019).

The ECtHR confronted Russia's anti-LGBT legislation in the case of *Bayev and Others v. Russia,* which the Court ruled on in June 2017. The applicants in this case were three gay rights activists, including the aforementioned Mr. Alekseyev. The applicants claimed to be victims of several regional anti-gay propaganda laws that had been implemented between 2006-2011, prior to the federal law in 2013. While this case did not directly invoke the 2013 law, ECtHR judges took this opportunity to evaluate the general compatibility of laws that criminalized public displays of homosexuality with the Convention. Citing that the government had provided no evidence that the legislation

[443] Case of *Alekseyev v. Russia* (App. no. 4916/07; 25924/09; 14599/09). Judgement of 21 October 2010. ECtHR (First Section). para. 83.
[444] Ibid., paras. 86; 109.

protected minors, the ECtHR found Russia in violation of Articles 10 (freedom of expression) and 14 (prohibition of discrimination) in a 6-1 vote.[445]

The timing of the *Bayev* judgement was critical. The case was the first major LGBT rights challenge at the ECtHR after Russia stopped paying its CoE dues and renewed its threats to withdraw from the Council. Consequently, this case sheds important light on how the ECtHR responds to domestic backlash. My theoretical expectations anticipate that the ECtHR's deferential founding identity leads the Court to be hesitant to rule against states who accuse the Court of judicial overreach, as Russia was doing in the *Alekseyev* and *Bayev* cases. However, this expectation does not hold, at least in this case. The ECtHR repeatedly applied a narrow margin of appreciation in cases of alleged Russian violations based in anti-LGBT discrimination. The Court continued to condemn Russian human rights practices even as the state was withholding substantial funds from the CoE and threatening to leave the institution entirely.[446]

As of August 2021, 63% of CoE member states recognize some form of same-sex partnership, ranging from registered partnerships and civil unions to full marriage rights.[447] Russia is not among those states. In a landmark July 2021 decision, *Fedotova and Others v. Russia*, the ECtHR unanimously ruled that Russia's lack of any form of

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[445] Case of *Bayev and Others v. Russia* (App. no. 67667/09; 44092/12; 56717/12. Judgement of 20 June 2017. ECtHR (Third Section). paras. 82-92.

[446] In 2019, the ECtHR also found Russia in violation of the freedom of assembly (Article 11) and prohibition of discrimination (Article 14) for refusing to allow various LGBT activism organizations to register for non-profit status: Case of *Zhdanov and Others v. Russia* (App. no. 12200/08; 35949/11; 58282/12. Judgement of 16 July 2019. ECtHR (Third Section).

[447] The states that recognize full marriage rights are: Austria, Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom. The states that recognize other forms of same-sex partnership (but not the full rights of marriage) are: Andorra, Croatia, the Czech Republic, Cyprus, Estonia, Greece, Hungary, Italy, Liechtenstein, Monaco, Montenegro, San Marino, Slovenia, and Switzerland.

legal recognition for same sex-couples constituted a violation of Article 8's protections of private and family life. The Court declared that the situation of same-sex couples in Russia created "a conflict between the social reality of the applicants who live in committed relationships based on mutual affection, and the law, which fails to protect the most regular of 'needs' arising in the context of a same-sex couple". [448] Even just ten years earlier, it would have been unthinkable for the Court to rule that states had a positive obligation to legally recognize same-sex unions. Still, the *Fedotova* ruling is not necessarily surprising, as it aligns with the Court's historical attention to social consensus when applying the margin of appreciation.

ECtHR judges made it clear in this ruling that it is *regional* social consensus that carries the most weight when allocating deference to governments, not domestic consensus. The judges acknowledged the government's assertion that the majority of Russians disapproved of same-sex unions, but declared that assertion irrelevant to the case:

> It is true that popular sentiment may play a role in the Court's assessment when it comes to the justification on the grounds of social morals. However… It would be incompatible with the underlying values of the Convention, as an instrument of the European public order, if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority.[449]

Critics of the margin of appreciation doctrine have argued that relying on social consensus to adjudicate appropriate state practice defies the ECtHR's mission to uphold the rights of minorities who may be neglected under majority-rule in democratic regimes

[448] Case of *Fedotova and Others v. Russia* (App. no. 40792/10; 30538/14; 43439/14). Judgement of 13 July 2021. ECtHR (Third Section). para. 51.
[449] Ibid., para. 52.

(let alone under authoritarians like Putin) (Benvenisti 1999; Brauch 2005). In *Fedotova*, the judges offered a rebuke to that critique by definitively stating that domestic social consensus does not justify widening the margin of appreciation. In doing so, the judges reaffirmed the founding mission of the ECtHR as an agent for European integration. The Convention's purpose was to guide CoE member states towards shared democratic principles, thereby engineering a cohesive European identity that would ensure the success of the integration project. Russia, in not keeping up with the times, had become an obstacle to the ever-evolving integration process. Hence, at least with respect to LGBT rights, the ECtHR abandoned deference and took on a distinctly interventionist approach to condemning the domestic status-quo.

Over the past three decades, the ECtHR has expanded the scope of LGBT rights under the Convention by gradually building up supportive precedent. Of notable exception is the ECtHR's swift dismantling of established precedent that had blocked transgender individuals from marrying partners of the same sex-at-birth. This sudden reversal of course is rare in the ECtHR, and reflects a schism between judges who viewed the Convention as a "living instrument" and others who prioritized attention to the Convention drafters' intentions in 1950. The latter approach still dominates within same-sex marriage jurisprudence, as the Court has consistently deferred to national authorities in this area. Still, judges have demonstrated acute sensitivity to changing domestic legislation and social attitudes. The margin of appreciation in this area has narrowed significantly in recent years, as the Court has developed stringent obligations for governments to prevent discriminatory treatment of LGBT individuals.

There is no evidence that the ECtHR shirked contentious LGBT rights cases as a result of increasingly caseloads or institutional reforms. Some of the Court's most pivotal judgements against governments (for example, condemning the UK for discharging gays and lesbians from the military) occurred in the late 1990s as CoE membership was quickly expanding and Protocol 11 reformed the case-processing system. Neither is there evidence that state backlash to Court judgements has had any substantive impact on the Court's decision-making in this area. For example, even after states collectively accused the ECtHR of overstepping its authority in the 2012 Brighton Declaration, the ECtHR continued to issue judgements that imposed additional obligations on state authorities to prevent and investigate homophobic violence. While Russia was cancelling payments to the CoE and repeatedly threatening withdrawal, the ECtHR doubled-down on its condemnation of Russian anti-gay propaganda laws.

The ECtHR's increasingly interventionist approach vis-à-vis Russia indicates that judges are not inclined to grant greater deference to Russia to attempt to temper the state's withdrawal threats. This conclusion may initially appear to countervail theorized expectations that the ECtHR will defer to member states in cases of backlash. However, the trajectory of the Court's LGBT rights jurisprudence exemplifies the Court's historical mission to facilitate regional consensus. The prioritization of consensus is a pillar of the founders' deferential interpretation of the ECtHR's authority. Over the past thirty years, ECtHR judges carefully calibrated their decisions expanding LGBT rights protections with attention to sociolegal developments across the CoE. While such rights protections were progressing in the majority of member states, they were rapidly backsliding in

Russia. Consequently, when given the opportunity, ECtHR judges have cracked down on Russian deviance. This approach demonstrates an important caveat to the expectation that the ECtHR is more likely to constrict is interpretation of its authority in response to member state backlash. When the objecting state deviates from regional norms, the ECtHR will intervene to try to push that state towards behavior that aligns with the regional consensus.

However, the ECtHR is only willing to go so far. It is critical to note that the ECtHR did not order states to provide remedies beyond financial reparations in *any* of the cases discussed above. Even in *Fedotova v. Georgia* (2021), where the ECtHR declared that Russia's denial of legal recognition for same-sex couples violated Article 8, the Court did not order Russia to implement any sort of legislative changes. In fact, the ECtHR even declined the applicants' requests for financial reparations in that case, deciding instead that the finding of the violation itself constituted a sufficient remedy.[450] While the ECtHR has encouraged changes in domestic LGBT rights policy, the Court has firmly declined mandating specific remedies to achieve those changes. In keeping with its historical tradition, the ECtHR has prioritized deferring to governments to decide how best to remedy established violations.

III. The Inter-American Court of Human Rights

The ECtHR has several decades of experience adjudicating disputes involving LGBT rights claims. For the IACtHR, on the other hand, this area of case law is relatively new terrain. Still, in just under a decade since the IACtHR ruled on its first gay

[450] *Fedotova and Others v. Russia*. Judgement of 13 July 2021. paras. 62-4, operative para. 5.

rights case, the Court has developed innovative precedent strengthening LGBT rights in Latin America. The Court has done so by widely interpreting the scope of its authority, particularly through the use of its advisory jurisdiction. Legal protections for LGBT people vary widely by region within Latin America. While Mexico and much of South America have seen significant advancements in LGBT rights over the past decade, legal protections for LGBT people in most of Central America and the Caribbean are severely lacking. As of January 2022, homosexuality is still illegal in nine states across Latin America and the Caribbean.[451] Only one of these states, Barbados, is subject to the jurisdiction of the IACtHR. In 2010, Argentina became the first state in Latin America (and only the tenth country in the world) to legalize same-sex marriage on the federal level. Argentina was quickly followed by Mexico later that year. Since then, Brazil, Colombia, Costa Rica, Ecuador, and Uruguay have also legalized same-sex marriage. Chile has recognized same-sex civil unions since 2015, and is the only state in the region to recognize civil unions but *not* same-sex marriage. In total, 40% of the IACtHR's 20 member states recognize some form of legal same-sex partnership.

The IACtHR did not confront its first case involving LGBT rights until 2012, in the case of *Atala Riffo and daughters v. Chile.* The applicant, a divorced lesbian mother, had lost custody of her three daughters after moving in with her female partner. The primary argument the girls' father advanced in the domestic custody lawsuit was that the "sexual choice made by the mother would disrupt the healthy, fair, and normal

[451] Homosexuality is illegal in the Caribbean states of Antigua and Barbuda, Barbados, Saint Kitts and Nevis, Dominica, Grenada, Jamaica, Sant Lucia, and Saint Vincent and the Grenadines, in addition to the South American state of Guyana.

coexistence to which [the daughters] have a right". Additionally, the father claimed that, by living with a lesbian couple, the girls would be "under constant risk of contracting sexually transmitted diseases such as herpes and AIDS".[452] The family's custody battle made it all the way to the Chilean Supreme Court. The Supreme Court ultimately ruled that permanent custody was to be granted to the girls' father. In that decision, the Supreme Court asserted that the girls were in a "situation of risk" because "their unique family environment differs significantly from their school companions…exposing them to ostracism and discrimination, which would also affect their personal development".[453] Facing the loss of her daughters, Ms. Atala turned to the IACtHR.

In the February 2012 ruling, IACtHR judges stressed that the Court's "international jurisdiction has a subsidiary, reinforcing, and complementary role, and therefore does not perform the duties of a 'fourth instance' court".[454] In other words, the IACtHR was not to serve as a custody appeals court, and could not assess whether Ms. Atala or the father offered the girls a better home. Establishing these facts belonged to the purview of domestic courts alone. The IACtHR could only evaluate whether domestic judicial authorities, in their review of the custody case, had upheld their human rights obligations under the American Convention.

The judges first considered Article 1(1) of the Convention, which prohibits "discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition".

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[452] Case of *Atala Riffo and Daughters v. Chile* (Merits, Reparations, and Costs). Judgement of 24 February 2012. IACtHR. para. 31.
[453] Ibid., para. 57.
[454] Ibid., para. 65-6.

Like the European Convention, the American Convention does not list sexual orientation as a protected category. Citing the example set by the ECtHR, the IACtHR underscored that "human rights treaties are living instruments, whose interpretation must go hand in hand with evolving times and current living conditions".[455] Referencing the aforementioned *Salgueiro da Silva v. Portugal* case (as well as developments in the UNCESCR and UN General Assembly), the IACtHR declared sexual orientation to constitute a protected category under Article 1(1).[456]

With regard to the rights to privacy and family life (protected under Articles 11 and 17 of the American Convention, respectively), the IACtHR again invoked ECtHR precedent to clarify that the right to a private life "encompasses physical and social identity, an individual's personal development and personal autonomy as well as their right to establish and develop relationships with other people and their social environment, including the right to establish and maintain relationships with people of the same sex".[457] Furthermore, building on the ECtHR's discussion of what constitutes a "traditional family" in *Karner v. Austria*, the IACtHR declared that "the language used by the Supreme Court of Chile regarding the girls' alleged need to grow up in a 'normally structured family'… reflects a limited, stereotyped perception of the concept of the family, which has no basis in the Convention, since there is no specific model of family".[458]

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[455] Ibid., para. 83.
[456] Ibid., paras. 87-95.
[457] Ibid., para. 135.
[458] Ibid., para. 145.

In no uncertain terms, the IACtHR condemned the Chilean judicial system for homophobic treatment of Ms. Atala's custody case. The IACtHR unanimously ruled that Chile had violated Articles 1(1) (the prohibition of discrimination), 8 (the right to a fair trial), 11 (the right to privacy), 19 (the rights of the child), and 24 (equality before the law). Reliance on ECtHR precedent was crucial for arriving at this outcome. However, the IACtHR went well beyond the ECtHR's standard practice of only mandating financial reparations in *Atala.* In addition to financial compensation for Ms. Atala and her daughters, the IACtHR ordered Chile to provide them with free medical and psychological care, publish an acknowledgement of its responsibility for the rights violations, and implement a nationwide training program for public officials aimed at "overcoming gender stereotypes of LGBTI persons and homophobia".[459] These measures sought not only to push the state to rectify Ms. Atala's individual situation, but to implement structural reforms that would prevent future sexual orientation discrimination.

While only a few cases involving LGBT rights disputes reached the IACtHR in the 2010s, the Court continued to build precedent supporting anti-discrimination protections in surviving partner benefits/pension law[460] and military law. Particularly with regard to domestic military regulations banning homosexual servicemembers, the IACtHR has leaned heavily on ECtHR precedent. *Flor Freire v. Ecuador* (2016) concerned an Ecuadorian Army officer who had been discharged after his colleagues

[459] Ibid., paras. 272, 314.
[460] Case of *Duque v. Colombia* (Preliminary Objections, Merits, Reparations, and Costs). Judgement of 26 February 2016. IACtHR.

accused him of participating in homosexual acts.[461] Mr. Flor Freire denied that he had engaged in a sexual act with another man and stated that he does not identify as homosexual. Still, as he was discharged from the Army on the basis of perceived homosexual orientation, the IACtHR was tasked with evaluating the compatibility of Ecuadorian military regulations banning homosexual servicemembers with the Convention.

The IACtHR unanimously ruled that Ecuador had violated the prohibition of discrimination (Articles 1(1) and 24) as well as the right to honor and dignity (Article 11) with respect to Mr. Flor Freire. To support this decision, the Court cited ECtHR precedent in the aforementioned *Lustig-Prean* and *Smith and Grady* cases, as well as recent domestic legal developments in Argentina, Chile, Colombia, Brazil, and Perú that had amended policies discriminating against homosexual servicemembers.[462] By the time of the IACtHR judgement, Ecuador had already undertaken similar reforms to remove the rule under which Mr. Flor Freire had been discharged. Even so, the IACtHR mandated that Ecuador provide Mr. Flor Freire with financial compensation, restore him to his military position, strike the discharge from his military record, and implement training programs for members of the Armed Forces aimed at eliminating sexual orientation discrimination within the ranks.[463]

Throughout its history, the IACtHR has leveraged its unique jurisdiction to issue advisory opinions to expand the scope of the Court's authority. Advisory opinions are

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[461] Case of *Flor Freire v. Ecuador* (Preliminary Objections, Merits, Reparations, and Costs). Judgement of 31 August 2016. IACtHR. paras. 102-103.
[462] Ibid., paras. 130-36.
[463] Ibid., operative paras. 9-13.

international court rulings that answer general questions about the interpretation of international law. Advisory opinions do not issue decisions on specific disputes. Requests for advisory opinions can be submitted by state governments. The IACtHR has always possessed jurisdiction to issue advisory opinions in accordance with the original draft of the American Convention. The ECtHR only recently gained advisory jurisdiction with the implementation of Protocol 16 in 2018.[464]

On January 9, 2018, the IACtHR issued a landmark advisory opinion that dramatically accelerated the regional legal development of LGBT rights in Latin America. The government of Costa Rica had submitted the request for the advisory opinion, which was titled "State Obligations Concerning Change Of Name, Gender Identity, and Rights Derived From A Relationship Between Same-Sex Couples" (hereafter referred to as "OC-24/17"). Costa Rica asked the IACtHR to answer five central questions in this advisory opinion:

> 1) Are states obligated to recognize and facilitate the name change of an individual in accordance with his or her gender identity?
> 2) If so, are states required to provide administrative procedures to facilitate name changes (as opposed to judicial procedures)?
> 3) Are states required to provide administrative name change procedures that are free, prompt, and accessible?
> 4) Are states obligated to recognize patrimonial rights derived from a relationship between persons of the same sex?
> 5) Must states provide a legal institution that regulates relationships between persons of the same sex in order to recognize all the patrimonial rights that derive from that relationship?[465]

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[464] The ECtHR has only issued two advisory opinions so far (as of August 2021).

[465] Advisory Opinion OC-24/17 of November 24, 2017, requested by the Republic of Costa Rica. *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples: State Obligations Concerning Change of Name, Gender Identity, and Rights Derived From A Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18, and 24, in relation to Article 1, of the American Convention on Human Rights).* para. 3.

These are wide-ranging questions that invited the Court to develop declarative stances on critical LGBT rights concerns. The IACtHR answered these questions in a sweeping discussion that extensively referenced domestic sociolegal developments, ECtHR precedent, statements submitted by nearly one hundred national and international academic experts, civil society leaders, and non-governmental organizations, as well as reports by international organizations ranging from the United Nations Committee Against Torture to the World Health Organization.

The IACtHR unanimously concluded that the ability of individuals to change their name and relevant identity documents to conform to their "self-perceived gender identity" constituted a right protected by Articles 1(1), 3, 7(1), 11(2), 18, and 24 of the American Convention. Consequently, all state parties to the American Convention must provide individuals wishing to change the annotation of their gender, sex, name, or photograph on their identification documents with a free, accessible, prompt, and confidential procedure for doing so. While this procedure is not required to be administrative, the judges noted that administrative procedures are preferable to judicial procedures. States must not require individuals to provide evidence of surgery and/or hormonal therapy in order to amend identification documents. Furthermore, the Court unanimously concluded that all protections of private and family life under Articles 11 and 17 were to be afforded to same-sex couples. In a 6-1 vote, the Court ruled that "States must ensure full access to all the mechanisms that exist in their domestic law, **including the right to marriage**, to ensure the protection of the rights of families formed

by same-sex couples, without discrimination in relation to those that are formed by heterosexual couples".[466]

In defense of these groundbreaking conclusions, IACtHR judges emphasized that expanding the scope of the Convention's human rights protections honored both the nature of the Convention as a "living instrument" and the Convention drafters' founding intentions:

> Those who drafted and adopted the American Convention did not presume to know the absolute scope of the fundamental rights and freedoms recognized therein. Accordingly, the Convention confers on the States and the Court the task of identifying and protecting the scope in accordance with the passage of time. Thus, the Court considers that it is not diverging from the initial intention of the States that signed the Convention; to the contrary, by recognizing this [same-sex] family relationship, the Court is adhering to the original intention.[467]

Not every judge agreed that OC-24/17's conclusions regarding same-sex marriage aligned with the IACtHR's founding social purpose. Judge Vio Grossi was the sole opponent to the vote in favor of requiring state parties to the American Convention to legalize same-sex marriage. He attached a partially-dissenting opinion to OC-24/17 that argued that the IACtHR had stretched its authority too far by interfering in domestic marriage policy.

Judge Vio Grossi articulated two main concerns regarding the IACtHR's order to legalize same-sex marriage: First, that the Court was attempting to regulate an area which, by wide international legal consensus, fell within the "internal, domestic or exclusive jurisdiction of the State". Second, that the Court was attempting to do so through an advisory opinion, when the Court had only ever issued binding jurisprudence

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[466] Ibid., Section IX, paras. 2-8.
[467] Ibid., para. 193.

related to same-sex relationships in a single case- the *Atala* judgement.[468] In a particularly acute critique, Judge Vio Grossi asserted that OC-24/17 defied Article 31 of the Vienna Convention on the Law of Treaties by according "no importance to the fact that the States Parties agreed to sign the Convention in good faith" and failing to consider the "context" of the terms of the Convention.[469] Consequently, the interpretation of the Convention advanced in the OC-24/17 "runs the risk of affecting the principle of legal certainty".[470] Judge Vio Grossi supported OC-24/17's order to extend civil rights to same-sex couples through other forms of legal partnerships. But he objected that "it cannot be considered, in light of contemporary international law, that it would be discriminatory if the domestic laws of the States of the Americas did not allow marriage between persons of the same sex".[471] Advisory opinions are not technically legally binding. But these opinions have a "preventative nature" in that they signal appropriate application of the Convention to states.[472] If a state does not comply with the terms of an advisory opinion, that state is vulnerable to receiving an adverse, binding judgement if an applicant brings a contentious case to the Court based on that noncompliance. In Judge Vio Grossi's view, exposing states to those risks and obligations through an advisory opinion supported by scant jurisprudential precedent was a step too far. At least one prominent international legal scholar has accused the IACtHR of "misuse" of its advisory

[468] Ibid., Separate Opinion of Judge Eduardo Vio Grossi. paras. 66-71.
[469] Ibid., paras. 84-5.
[470] Ibid., para. 97.
[471] Ibid., para. 108.
[472] Ibid. para. 71.

jurisdiction to expand LGBT rights protections at the risk of undermining the Court's legitimacy and provoking government backlash (Contesse 2021).

Advisory Opinion OC-24/17 reflected a boldly interventionist interpretation of the IACtHR's authority. The terms of OC-24/17 apply to all 23 states that have ratified the American Convention (the IACtHR's 20 member states in addition to Dominica, Grenada, and Jamaica). The Court risked government ire by issuing an advisory opinion that imposed intensive new obligations on states with little international legal precedent. Some backlash did materialize. The governments of Argentina, Brazil, Chile, Colombia, and Paraguay issued a statement accusing the IACtHR of judicial overreach and calling for the Court to recognize a "margin of appreciation". However, this statement appears to have had negligible impact, as domestic political crises quickly overshadowed those states' standoff with the IACtHR.[473] The domestic policy consequences of OC-24/17 are still evolving, but the record so far is mixed. Only two states that did not previously recognize same-sex marriages, Costa Rica and Ecuador, have federally legalized such marriages since OC-24/17 was issued. Three states (Costa Rica, Brazil, and Chile) have implemented nationwide legislation allowing transgender individuals to change their legal name and gender identity (without providing proof of surgery) in direct response to OC-24/17 (Alvarado 2018; Reid 2018; Human Rights Campaign 2020) . The opinion's orders require intensive domestic reforms that necessarily take time to implement, even

[473] See Statement from the Governments of Argentina, Brazil, Chile, Colombia, and Paragauy, Submitted to the Inter-American Commission on Human Rights (April 11, 2019), available at: https://www.mre.gov.py/index.php/noticias-de-embajadas-y-consulados/gobiernos-de-argentina-brasil-chile-colombia-y-paraguay-se-manifiestan-sobre-el-sistema-interamericano-de-derechos-humanos; see also Contesse (2021): 365-9.

in hospitable political environments. It may be a few more years before the domestic impact of OC-24/17 is fully observable. For now, however, the states that have most intensely resisted recognizing LGBT rights in the past have not demonstrated significant legal advancements post-OC-24/17.

The IACtHR bolstered protections for LGBT parental custody rights in *Ramírez Escobar et al. v. Guatemala*, decided three months after OC-24/17. The applicants in this case were Maria Ramírez Escobar and Gustavo Tobar Fajardo, parents whose two sons had been abducted by the government and later adopted out to separate families in the context of massive irregularities in Guatemalan international adoptions. Between 1990 and 2007, Guatemalan state agents, doctors, social workers, and international adoption agencies participated in now-widely documented fraudulent adoptions for financial gain. These schemes typically targeted poor, single mothers such as Ms. Escobar. Through various tactics, including false claims of neglect or abandonment, physical threats, tricking parents into transferring "sick" kids to complicit hospitals, and kidnapping, Guatemalan authorities systematically acquired children to sell through international adoption agencies. Most of these children were likely adopted by families in the United States.[474]

Ms. Escobar and Mr. Fajardo had a son together when they were teenagers. They later ended their romantic relationship but remained in contact. Ms. Escobar then had another son. Both children lived with Ms. Ecobar. Mr. Fajardo visited periodically and

[474] Case of *Ramírez Escobar and Others v. Guatemala* (Merits, Reparations, and Costs). Judgement of 9 March 2018. IACtHR. paras. 61-71; See also *Report of a Fact-Finding Mission to Guatemala in Relation to Intercountry Adoption*, Hague Conference on Private International Law (May 2007).

provided financial support. In 1997, state agents forcibly took both boys. The authorities reported that they had received a complaint that Ms. Escobar neglected the children. Despite a lengthy legal battle in which Ms. Escobar and Mr. Fajardo repeatedly attempted to regain custody, the boys were declared "abandoned" and adopted out to families in Illinois and Pennsylvania.[475] As part of the effort to get the boys back, Ms. Escobar's mother (the children's grandmother) had attempted to gain custody. The courts rejected this request, asserting that the grandmother's lesbian lifestyle would compromise the "values" that would be passed on to her grandsons.[476]

Citing the *Atala* judgement and OC-24/17's definition of the "family", the IACtHR unanimously found Guatemala in violation of the rights to privacy (Article 11), family life (Article 17), and the prohibition on discrimination (Article 1.1).[477] The Court ordered Guatemala to provide a wide range of remedies, including free medical and psychological care for the parents, children, and grandmother, family reunification efforts, prosecution of those responsible for the boys' abduction and subsequent legal malpractice, public acknowledgement of international responsibility for the systematic abduction of children, and reforms of the national adoption system. This case reinforced the IACtHR's legal conceptualization of "the family" in custody rights disputes to include extended family, regardless of sexual orientation.

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[475] *Ramírez Escobar and Others v. Guatemala.* Judgement of 9 March 2018. paras. 83-113.
[476] Ibid., paras. 95-8, 300-03.
[477] Ibid., para. 5. The Court ruled that Guatemala violated a number of additional rights in this case, including the rights to fair trial, judicial protection, personal liberty, personal integrity, and the right to an identity and name.

The IACtHR has historically held states to stringent standards for preventing and investigating violence against marginalized populations. States have positive "due diligence" obligations to recognize patterns of violence, state-sponsored or otherwise, devote resources to interrupting those violence patterns, and investigate violent acts with attention to potential bias motivations.[478] In *Azul Rojas Marín v. Perú* (2020), the IACtHR applied these principles for the first time in a case of explicitly homophobic violence. The victim, who at the time identified as a gay man, was arbitrarily detained by police and subjected to physical and mental violence, including homophobic threats, beatings, and rape.[479] Police subsequently conducted an investigation into these events, but the investigation was marred by negligence, police harassment, and a further alleged assault of the victim by a forensic investigator.[480] In a ruling that cited the aforementioned *Identoba and Others v. Georgia* case[481], the IACtHR unanimously ruled that Perú had violated the Convention's prohibition of discrimination (Article (1)), the prohibition of torture (Article 5), and the rights to personal liberty (Article 7), fair trial (Article 8) and judicial protection (Article 25). In addition to financial reparations and free medical and psychological care for the victim, the IACtHR ordered that Perú develop new protocols on "investigation and administration of justice in criminal proceedings involving LGBTI victims of violence" and create a national database system to track violence against LGBTI people.[482] The *Azul Rojas Marín* judgement and corresponding

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[478] See, for example, *González and Others ("Cotton Fields") v. México*, Judgement of 16 November 2009, a landmark case involving a pattern of gender-based violence ("feminicidio").
[479] Case of *Azul Rojas Marín et al. v. Peru* (Preliminary Objections, Merits, Reparations, and Costs). Judgement of 12 March 2020. IACtHR. paras. 52-3.
[480] Ibid., paras. 60-9.
[481] Ibid., para. 96.
[482] Ibid., operative paras. 4-17.

remedial mandates laid the foundation for the groundbreaking case of Vicky Hernández highlighted in the opening of this chapter.

As with the ECtHR, there is no evidence that the IACtHR's interpretation of its authority in LGBT rights disputes has been tempered by practical exigences related to rising caseloads or member state backlash. The 2012 *Atala* judgement came during a time when the Court was facing an unprecedented level of case submissions as well as major political fallout from Venezuela's withdrawal. Advisory Opinion OC-24/17, which represents the most expansive interpretation of LGBT human rights protections by any international court to date, was issued in a year where the IACtHR ruled on a record number of cases.[483] While substantive backlash to OC-24/17 quickly fizzled out, and a handful of states did legalize same-sex marriage and reform identification documentation policies in response to the advisory opinion, these states represent a minority among the IACtHR's member states.

There have been concerning setbacks in LGBT rights in Latin America over the past year that suggest more governments may soon find themselves clashing with the IACtHR. For example, in June 2020, a Guatemalan congressional commission attempted to depose the country's human rights ombudsman. This episode was provoked by the ombudsman posting a rainbow flag on social media along with statements urging Guatemala to fulfill its international obligations to prevent anti-LGBT violence and discrimination (Human Rights Watch 2020). The COVID-19 pandemic has intensified daily challenges particularly for transgender people, as several countries, including

[483] See Figure 7.3, pg. 189.

Colombia, Panama, and Perú, have imposed gender-based curfews to reduce virus transmission. These curfews stipulate that men and women can leave home on alternating days, creating a potentially dangerous situation for trans people who have not been able to change their gender on legal identification documents (Angelo and Bocci 2021).

In early 2021, the Honduran legislature approved a constitutional amendment aimed at impeding any future efforts to overturn the state's constitutional ban on same-sex marriage (Reuters 2021). But just a few months afterwards, the IACtHR still condemned Honduras in the Vicky Hernández case and mandated intensive policy reforms. This persistence even in the face of government resistance is emblematic of the IACtHR's interventionist interpretation of its authority. This interpretation was forged in the Court's founding years and has only intensified. The IACtHR's interventionist identity has motivated judges' approach to interpreting the Convention amidst evolving social realities. As a result, the IACtHR has developed the most comprehensive framework for LGBT human rights protections in modern international law.

IV. The African Court on Human and Peoples' Rights

LGBT rights in Africa remain severely restricted in 2022. Of the African Union's 54 member states, 34 states still criminalize homosexual acts. In four of those states (Mauritania, Sudan, Nigeria, and Somalia), homosexuality is punishable by death (Amnesty International UK 2018; Reuters 2021*). Of the six states that currently allow citizens to directly petition the ACtHPR, half (the Gambia, Ghana, and Tunisia) still criminalize homosexuality. South Africa is the only state in the African Union that has legalized same-sex marriage. As of January 2022, the ACtHPR has not had the

opportunity to rule on any cases involving claims of anti-LGBT discrimination. Thus, unlike the above discussions of the ECtHR and the IACtHR's case laws, the following section will not discuss jurisprudential developments. Rather, it will review the unique challenges that face LGBT Africans seeking international legal recourse. These challenges primarily stem from three sources: the language of the African Charter, the role of the African Commission in gatekeeping cases from the ACtHPR, and the broader problem of the ACtHPR's limited jurisdiction and fragile relationships with governments. Then, drawing from the ECtHR and IACtHR's experiences, I will discuss how the ACtHPR might yet become an influential force in expanding LGBT rights in the region.

One potential barrier to advancing LGBT rights within the ACtHPR is the wording of the African Charter. First, there is no explicit right to privacy in the African Charter as there is in the European and American Conventions. Appeals to the right to privacy have been crucial for developing jurisprudence in support of LGBT rights protections in the ECtHR and IACtHR. This has particularly been the case in the ECtHR. It took several decades for the ECtHR to start to recognize states' unique human rights obligations to transgender and homosexual people. When this eventually happened, the ECtHR almost exclusively relegated those rights to the realm of "private life". It was not until the 2010s that the ECtHR began to take up anti-LGBT discrimination as an issue of public life, primarily in the context of the freedoms of expression and assembly. Based on the ECtHR's example, filing complaints under the right to private life might be a promising avenue for transgender and homosexual Africans while ACtHPR judges have not yet clarified their stances on LGBT rights protections. Although the African Charter

does not protect privacy, appeals to the right to private life may still be possible within the ACtHPR due to the Court's uniquely expansive jurisdiction. Recall that, according to the terms of the Protocol that established the Court, ACtHPR judges can rule not only on violations of the African Charter, but on violations of *any other human rights instrument* that the state in question has ratified. A citizen of any state that has ratified both the African Charter and the International Covenant on Civil and Political Rights (ICCPR) could submit a petition to the African Commission or the ACtHPR directly (depending on the state) alleging a violation of the ICCPR's right to privacy. While somewhat convoluted, this strategy represents a potential path for kick-starting the ACtHPR's engagement with LGBT rights. The ACtHPR has exercised its jurisdiction to rule on violations of the ICCPR in the past.[484]

Another potential hurdle to LGBT rights recognition within the Charter is the document's emphasis on the family as "the custodian of morals and traditional values recognized by the community".[485] The Convention's protections of "traditional" family values may complicate efforts to expand the ACtHPR's legal definition of the family beyond the heteronormative standard. In at least one instance, domestic actors have pointed to the African Charter to justify restricting LGBT rights. After eleven men were detained on sodomy charges in Cameroon in 2005, the Cameroonian Minister of Justice referenced the Charter's promotion of "African cultural values" and the "moral well-being of society" to claim that "by virtue of the African culture, homosexuality is not a

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[484] See, for example, *Lohé Issa Konaté vs. Republic of Burkina Faso* (App. no. 004/2013). Judgment of 2 June 2016. ACtHPR; *Houngue Eric Noudehouenou v. Republic of Benin* (App. No. 003/2020). Judgement of 4 December 2020. ACtHPR.

[485] *African Charter on Human and People's Rights*, Article 18(2).

value accepted in the Cameroonian society" (Murray and Viljoen 2007: 93). Scholars of African political history have pushed back on the blanket assumption that "African values" are monolithic and necessarily opposed to homosexuality. Murray and Viljoen underline that laws criminalizing homosexuality "were unknown in pre-colonial Africa, and coincided with the imposition of Victorian moral law as part of the British colonial project". (2007: 94). Regardless of the factual basis of claims about the historical morality of homosexuality within African cultures, the current legal reality in most African Union countries impedes the recognition of LGBT rights.

The African Commission has played a significant role in blocking the ACtHPR from ruling on LGBT issues. Unlike the post-2001 Inter-American Commission, the African Commission enjoys broad discretion over the cases that it forwards to the African Court. Particularly given the fact that so few states allow citizens to petition the ACtHPR directly, the African Commission is a formidable stumbling block for citizens who are trying to get their cases in front of the Court. Until fairly recently, the African Commission has been demonstrably opposed to incorporating LGBT rights into the African human rights framework. For example, in 2010, the African Commission refused to grant observer status to the NGO *Coalition of African Lesbians*, citing that "the activities of the said Organization do not promote and protect any of the rights enshrined in the African Charter" (Johnson 2013: 258). Commissioners' lack of independence also deters individuals from bringing LGBT rights complaints before the African Commission. Many commissioners throughout the institution's history have simultaneously held government positions, including within governments that have been

openly antagonistic towards LGBT rights. At one point, the International Gay and Lesbian Human Rights Commission warned individuals against submitting complaints to the African Commission based on the risk of receiving an adverse decision:

> We do not recommend sending formal complaints about violations based on sexual orientation or gender identity to the African Commission… A complaint coming to it without prior preparation or lobbying might actually end with the Commission endorsing the idea that homosexuality is opposed to "African values". Such a precedent would be extremely difficult to reverse… (Murray and Viljoen 2007:106).

Wariness that approaching the Commission would end up backfiring has undoubtedly produced a chilling effect on the development of LGBT rights within the African system. However, there have been signs in the past decade that commissioners are warming up to expanding the scope of the Charter with regard to transgender and homosexual rights. In 2014, the Commission adopted an unprecedented resolution condemning violence and discrimination against LGBT persons.[486] In 2017, the Commission specifically called on states to prevent and address torture and sexual violence against "lesbian, gay, bisexual, transgender, and intersex persons".[487] These statements are encouraging, but progress has been slow-going.

While the obstacles to developing regional LGBT rights jurisprudence are daunting, there are a number of potential pathways for success. Particularly now that the African Commission has openly condemned anti-LGBT violence and discrimination,

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[486] ACHPR/Res.275(LV)2014. *Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity.* 55th Ordinary Session, Luanda, Angola, 28 April to 12 May 2014.

[487] *General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman , or Degrading Punishment or Treatment (Article 5).* 21st Extra-Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 23 February to 4 March 2017. para. 59.

individuals and NGOs could pave a way to the ACtHPR by bringing cases that focus on more public-facing elements of discrimination. Cases alleging violations of private life, such as discrimination in legal relationship recognition, may be unlikely succeed due to the dual hurdles of weak protection within the Charter and persistent attitudes among commissioners and/or their government connections that homosexuality is incompatible with "African values". On the other hand, cases that focus on public discrimination against LGBT individuals rather than the intimate aspects of private relationships may be more likely to gain traction within the Commission and ultimately make it to the ACtHPR. Cases that involve anti-LGBT discrimination in the broader context of rights protections that are already well-established within the African system, such as the freedom of assembly or the prohibition of torture, may have better chances for success.

Another potential option could be for the ACtHPR to take a page from the IACtHR's book and issue an advisory opinion on member states' human rights obligations to LGBT people. As documented in previous chapters, the ACtHPR has been inclined to emulate the IACtHR's example to expand its judicial authority (for example, with regard to temporal jurisdiction interpretation and intensive remedial mandates). However, there is evidence that the ACtHPR's bold attempts to expand its authority have backfired, culminating in several states withdrawing the rights of their citizens to petition the Court. Issuing an advisory opinion on LGBT rights without first building up supportive jurisprudence risks provoking further accusations of judicial overreach. Partially due to the young age of the ACtHPR, the Court has not yet built up the level of legitimacy in the eyes of governments and civil society that the IACtHR had amassed

before releasing its 2018 advisory opinion. Still, in light of the African Commission's history of deterring complaints from LGBT individuals, it might be wise for the ACtHPR to leverage its advisory jurisdiction to jumpstart regional legal support for the rights of homosexual and transgender Africans.

V. Conclusion

Analysis of the development of LGBT rights jurisprudence in the ECtHR and IACtHR reveals that neither court has been deterred by member state backlash or rising case backlogs. Both courts have developed increasingly expansive interpretations of the scope of LGBT human rights protections over time. However, true to its deferential founding interpretation of its authority, the ECtHR has adopted a more cautious approach to expanding such protections that has consistently been sensitive to regional social consensus. The ECtHR has also declined to mandate that states implement specific policy remedies to address anti-LGBT discrimination. The IACtHR, on the other hand, has characteristically thrown caution to the wind, leveraging its advisory jurisdiction to expand member states' obligations to LGBT people and mandating expansive remedial mandates, including legislative reforms. As a result, the IACtHR became the first international court in the world to require member states to legalize same-sex marriage. It remains to be seen whether the ACtHPR will, as it has in the past, follow in the IACtHR's footsteps and adopt an interventionist approach to developing regional LGBT rights protections.

Chapter 11

Conclusion

The experiences of the regional human rights courts reveal a counterintuitive finding: the courts that were founded in the most inhospitable environments for human rights have ended up asserting the most expansive authority over governments. This phenomenon provides compelling evidence that international human rights law can actually fulfill the emancipatory mission that motivated its creation. While international law is often criticized as a mere political tool that governments can manipulate to wield power, the ECtHR, IACtHR, and ACtHPR have each exerted considerable authority to subjugate dominant political interests. These courts have done so through pioneering their own conceptualizations of what "justice" looks like, rooted in their unique social purposes forged during each court's founding moments.

On the importance of founding moments

The founding stories of the IACtHR and the ACtHPR are marked by distinct government apathy. Political representatives repeatedly passed on opportunities to provide feedback on the American Convention and African Charter. Government appointees to the negotiation delegations that created those courts as well as appointees to their first judicial benches had demonstrated professional and personal commitments that, in the case of many unstable and authoritarian founding member states, appeared to be in direct contravention of government interests. Although the IACtHR and ACtHPR were founded in regions rife with systemic human rights violations perpetrated by militarism, civil conflict, and authoritarian oppression, these geopolitical conditions actually seem to

have engendered those courts' wider-reaching judicial mandates. Lack of government participation from transitional and unstable regimes during the founding of IACtHR and ACtHPR (whether due to preoccupation with domestic crises, lack of diplomatic capacity, or disbelief that such courts could ever meaningfully constrain national authorities) created situations where legal bureaucrats could capture control over negotiation delegations and design courts with greater authority to intervene in domestic affairs. As a result, the written mandates of the IACtHR and ACtHPR encompass a wider range of human rights protections and, particularly in the case of the ACtHPR, impose comparatively few limits on judges' ability to self-interpret their authority relative to the written mandate of the ECtHR. Government representatives from the mostly Western European democracies that founded the ECtHR retained tight control over the negotiations to found that court. The leadership of the ECtHR's founding member states perceived themselves as already-exemplary protectors of human rights, and were skeptical of the need for a regional human rights court in the first place. The central goal shared by all major players in the founding of the ECtHR was for the Court to serve as an instrument of cross-national socialization that would bolster Europeans' sense of shared identity in support of the broader integration project. In order to secure political support for that project, the ECtHR's mission had to be rooted in deference to governments and attention to fostering regional consensus.

Examination of the dynamics surrounding the founding of each of the regional courts provides a more nuanced picture to complement existing explanations for why transitional democracies tend to be particularly likely to ratify human rights treaties, as

well as why authoritarian regimes ratify such treaties even when it seems unlikely that they intend to comply with them. While the act of ratification itself may well be driven by the benefits that such regimes can accrue by signaling respect for human rights (for example, bolstering the regime's international reputation or fending off domestic critics), national executives may not actually be particularly attentive to the content and scope of the agreements that they are signing. Actors that are interested in promoting international governance can capitalize on this lack of government attention to craft treaties that imbue international courts with wide-reaching authority. There is perhaps no clearer example of this phenomenon than the fact that over 30 states have ratified the African Charter on Human and Peoples' Rights and its First Protocol, even though these agreements define no temporal limitations on the ACtHPR's jurisdiction! It is hard to imagine a situation in which any reasonable person would sign a legal agreement that did not explicitly define the timeframe during which that agreement would be enforceable. Yet, such an agreement is currently the foundation of the African human rights system.

The ECtHR's early case law indicates a strong commitment to respecting national authority, as judges established broad conditions under which states could legitimately restrict freedom of expression, resisted labeling state interrogation practices as torture, and declined to intervene in burgeoning debates surrounding the rights of sexual orientation minorities. The ECtHR's founding social purpose required the Court to tread carefully in condemning government human rights practices and mandating remedies for violations of international law. Early IACtHR judges, on the other hand, had relatively less to lose by throwing caution to the wind. Faced with emergency conditions as

democratic backsliding swept through the region, IACtHR judges were motivated by a unique moral imperative to protect vulnerable individuals from abusive governments. In service of this mission, IACtHR judges expanded the scope of their authority by engaging in flexible interpretations of the Court's substantive, temporal, and advisory jurisdiction. Early IACtHR precedent established stringent obligations for states to prevent, investigate, and remedy grave human rights violations, including past violations whose ongoing implications negatively prejudiced the well-being of victims and their families. The IACtHR's first judges quickly asserted broad authority to mandate that states provide specific and intensive remedies to respond to established human rights violations. These remedial mandates aimed not only to secure reparations for individual victims, but to remediate the underlying social and political conditions that facilitated human rights violations. The ACtHPR's first judges in many ways followed the IACtHR's lead, for example, by developing an implied right to domestic legal recourse that could be leveraged to stretch the Court's temporal jurisdiction in continuing violation cases, rejecting the criminalization of defamation, exerting authority to mandate domestic legislative reforms, and attempting to intervene in domestic criminal proceedings.

Regional courts' interpretations of the boundaries of their authority have evolved over time. Still, the influence of each court's founding social purpose has remained a constant fixture in its contemporary jurisprudence. Analysis of the historical development of each court's case law demonstrates that traditions of judicial deference and interventionism drive entrenched variation across how judges admit, rule on, and mandate remedies across diverse types of cases. International courts' founding

interpretations of their authority exert durable influence on how those courts respond to political backlash, engage in cross-court jurisprudential dialogue, and react to dynamic caseloads. The following section will discuss the findings and implications of this analysis in light of recent calls from judges within the three regional courts to achieve greater harmonization across their jurisprudence. Then, I will reflect on the ramifications of divergent approaches to conceptualizing what "justice" looks like at the international level. I conclude with a brief discussion of how the regional courts might navigate the post-pandemic world, where these courts have the potential to be focal points of successful multilateralism in an age of rising opposition to global governance institutions.

Modern jurisprudential evolution and the contested imperative for cooperation

A consistent refrain that emerged during the 2nd International Human Rights Forum, a virtual meeting that brought together judges from all three regional courts in March 2021, was a desire to achieve greater convergence across the courts' jurisprudences. In the words of Judge Patricio Pazmiño Freire, Vice-President of the IACtHR:

> We have grasped that the developments in, and implications of, globalization mean that a single legal language needs to be used. The classic borders of international and national law are blurred… In a globalized world, justice, too, must be global. We as judges have to continue rolling out and expanding spaces for dialogue, and ensuring that the law that we apply is grounded in reality and is constructed according to criteria adopted not only by us in isolation, but in conjunction with other local and international courts.

Analysis of the courts' case laws in the areas of freedom of expression, personal integrity rights, and anti-LGBT discrimination reveals that, while opportunities for cross-court coordination abound, consequential schisms in their respective approaches to defining the

boundaries of their authority may pose significant challenges for future harmonization of jurisprudence. These courts' unique founding interpretations of their social purpose have fostered engrained legal philosophies that guide judges' decision-making through the present day. It may not be feasible or even normatively desirable to reconcile cross-court jurisprudential divergences for the sake of achieving a more "globalized" legal framework. Attempts at cross-regional harmonization simply for the sake of harmonization may backfire if not attentive to diverse conceptualizations of justice that persist within the regional courts' respective jurisdictions. It is critical to strike a balance between the inherent universality of human rights guarantees and local ideas as to how best to implement those guarantees.

Within freedom of expression jurisprudence, the high degree of cross-court confluence in defining legitimate restrictions of expression can largely be attributed to IACtHR judges' close attention to referencing ECtHR jurisprudence. As the IACtHR did not confront alleged freedom of expression violations until the late-1990s, by which point the ECtHR had amassed extensive case law in that area, it was natural that IACtHR judges would look to a more experienced court for guidance. Still, IACtHR judges pushed the boundaries of their authority farther than the IACtHR in freedom of expression cases, particularly by rejecting the criminalization of defamation and ordering reforms of domestic penal codes to protect free speech. ACtHPR judges have similarly referenced external precedent to guide their reasoning in freedom of expression cases. For example, in *Lohé Issa Konaté vs. Republic of Burkina Faso,* ACtHPR judges repeatedly cited both ECtHR and IACtHR jurisprudence. However, they ultimately

issued a ruling that more closely emulated the IACtHR's interventionism by rejecting imprisonment and heavy fines as acceptable penalties for defamation and ordering Burkina Faso to amend its Penal Code. For four African judges, even this mandate did not go far enough, as they penned a separate opinion urging a ban on the criminalization of broader categories of speech beyond just defamation.[488]

The IACtHR and ACtHPR's incursions into domestic freedom of expression disputes have provoked considerable backlash, for example, the 2017 Argentine Supreme Court decision that declared that the government did not have to comply with the IACtHR's ruling in *Fonteveccia and D'Amico v. Argentina*, and Benin's withdrawal after the ACtHPR ordered the government to postpone scheduled elections following violent crackdowns on protestors. While this backlash does not appear to have changed the IACtHR or ACtHPR's dispositions towards deferring to governments, the ECtHR has been much more attentive to criticism from national officials. For example, in the run-up to the Brighton Declaration, several states voiced concerns about inconsistency in ECtHR judges' reasoning and accused the Court of "meddling". The ECtHR's responsiveness to these criticisms is plainly visible in the Court's freedom of expression jurisprudence in the early-2010s, as judges developed clearer standards for restricting expression and shifted to a procedural standard of review that reinforced the Court's subsidiary relationship to national authorities.

Divergences across ECtHR and IACtHR jurisprudence on personal integrity rights and LGBT rights indicate that, just because one court has more experience in a

[488] This case is discussed on pgs. 155-6.

given area than another, the less-experienced court will not necessarily follow the more-experienced court's lead. In other words, cross-court citation is sometimes a one-way street. While the ECtHR is the most experienced human rights court in adjudicating claims of gender identity and sexual orientation discrimination, the IACtHR has imposed far more stringent standards on states in this area (including a mandate to legalize same-sex marriage), despite the fact that the IACtHR has only adjudicated a handful of cases directly involving LGBT rights. Overall, the direction and scope of inter-court jurisprudential borrowing appears to depend more on the compatibility of the imported legal reasoning with the importing court's founding mandate than on the relative level of experience that a court has within any particular issue area.

IACtHR judges had already developed a sophisticated body of case law concerning torture and violations of the right to life by the time that the ECtHR faced an uptick in such cases in the 2000s. Even so, ECtHR judges developed distinct approaches to adjudicating those cases, often bucking the IACtHR's example. As a result, the IACtHR and ECtHR maintain disparate standards for evaluating evidence, allocating the burden of proof, delineating temporal jurisdiction, and ordering remedies in personal integrity rights cases. The IACtHR has clearly influenced ECtHR's case law on personal integrity rights violations to some extent, for example, in the ECtHR's recognition of enforced disappearances as continuing violations, development of independent procedural obligations to investigate violations of the right to life, and, more recently, a willingness to shift the burden of proof to governments in particularly grave cases. However, the ECtHR has unequivocally rejected responsibility for holding states

accountable for pre-accession rights violations that incur ongoing harm, an area in which the IACtHR has repeatedly intervened. The ECtHR is not, and has never sought to be, a forum for adjudicating the historical truth or accessing transitional justice measures. This divergence can be attributed to the ECtHR's founding social purpose to create a break with the past that would help states and citizens redefine themselves as members of an integrated "European" community. The ECtHR was created to paper over past wounds, not heal them.

Meanwhile, the IACtHR was explicitly founded to intervene in ongoing human rights emergencies amidst fragile democracies and an epidemic of militarism. This task required adopting an assertive approach to interpreting the Court's jurisdiction that could not abide letting old wounds fester. In service to their institution's founding social purpose, IACtHR judges have strategically leveraged creative applications of the Court's advisory powers, flexible definitions of its temporal jurisdiction, and wide-reaching interpretations of the scope of the American Convention to exert authority over member states. Operating in similarly emergent conditions against a backdrop of post-colonial power scrambles, and empowered by distracted governments' lack of attention to imposing formal boundaries on the Court's jurisdiction, ACtHPR judges have also exercised wide-reaching interpretations of the substantive and temporal scope of the Court's authority. The ACtHPR's interventionism has landed the Court in hot water with member states, as a young institution that has not yet cultivated the level of popular support from local constituencies that has bolstered the IACtHR throughout the decades.

In the creation of any international institution, the priorities and convictions of the institution's founders and the geopolitical context in which they operate will fundamentally condition not only the scope of the institution's written mandate, but how actors working within that institution construct narratives of the source of their own legitimacy. These narratives will drive how those actors define their institution's social purpose, with long-lasting influence on how and when the institution projects authority into the domestic arena. This influence is likely to be particularly durable in international courts, as reliance on precedent and professional legal socialization favor attention to and re-creation of established norms. The persistent influence of founding context is both inevitable and necessary for sustaining judges' confidence in the legitimacy of their court's mission and ability to speak to the needs of local populations. As such, scholars should be cautious not to characterize cross-institutional fragmentation in the implementation of international law as an inherently normatively positive or negative phenomenon. Rather, fragmentation is a natural feature of international law that may degrade, bolster, or be agnostic to the law's efficacy depending on how efficacy is defined in variable contexts.

What does "justice" look like?

Perhaps the most fundamental divergence across the ECtHR, on the one hand, and the IACtHR and ACtHPR, on the other hand, is represented by their wildly disparate approaches to ordering remedies for established human rights violations. This disparity has profound implications, as remedial mandates define what constitutes "compliance" with international law. In doing so, remedial mandates provide opportunities for judges

to, in a very public and transparent way, project what they believe justice substantively looks like. These projections speak to how judges perceive the broader role of their court in facilitating social reconciliation and directing public discourse surrounding human rights. In no area are the regional courts' remedial mandates more revelatory of judges' divergent conceptualizations of legal justice than in personal integrity rights cases. Torture and death at the hands of the state are the most grievous and irreparable violations of human dignity. These acts not only inflict permanent trauma on individual victims and their loved ones, but unleash rippling breakdowns in intra-personal trust that can destroy the social fabric of communities and impede genuine reconciliation for generations.

The ECtHR, IACtHR, and ACtHPR have developed unique approaches to mandating remedies in personal integrity rights cases guided by each court's social purpose. The ECtHR's focus on individual financial reparations for victims of human rights violations reflects the Court's conceptualization of legal justice as based on the principle of *restitutio in integrum* ("restoring to original condition"). The European Convention is viewed as contract between governments and individual citizens, and breaches of legal contracts are remedied by restitution in kind. In the words of one ECtHR judge, "the aim [of the Court's remedial mandates] is not symbolism, nor a general moral condemnation. They are **legal** remedies".[489] This conceptual melding of "legal" with "financial" remedies and juxtaposition of " legal" with "general moral condemnation" paints a distinctive picture of what "justice" means in the European

[489] Interview D, June 2019, Strasbourg, France.

system. That judge went on to directly contrast the ECtHR's remedial approach with that of the IACtHR, elaborating that the "Inter-American Court is based on a very different logic- a more revolutionary system". IACtHR judges "go very far" and "engage in a lot of policy-making" through their remedial mandates.[490]

This fissure between what constitutes a "legal remedy" in the ECtHR and IACtHR can be traced back to their respective founding commitments to interpreting the boundaries of their authority. "Moral condemnation" and "policy-making" fall outside of the scope of the ECtHR's self-interpreted identity as an international judicial institution, and are thus conceived as extra-legal. Meanwhile, remedial mandates that impose policy-making obligations on governments (for example, orders to amend domestic penal codes or establish databases to track conflict-era enforced disappearances) or express moral condemnation (for example, orders for the state to pay for a dignified re-burial of a person's remains, issue a public apology for past atrocities, or construct a memorial to honor victims of state violence) are indeed cornerstones of what IACtHR judges consider to be "legal justice". The ECtHR sees itself as an institution for resolving discrete human rights disputes between the state and specific injured parties, in keeping with its mandate to be a "safety valve" or "insurance policy" whose authority supplements domestic institutions but does not supersede them. It is the ECtHR's job to condemn states when they have failed to uphold their human rights obligations, but not to dictate the measures that states must take to address the sociopolitical conditions that facilitated those violations. The IACtHR, on the other hand, treats specific cases as windows to reach into

[490] Ibid.

the domestic realm and issue remedial mandates aimed at broader social reconciliation and policy change. IACtHR judges' definition of "justice" thus transcends the traditional legal sense, in that restitution is one necessary but insufficient component to addressing human rights crimes. Real justice means creating conditions that elevate the stories of victims of human rights violations over the narrative created by the state and directing reforms that prevent the repetition of similar crimes in the future.

In the ACtHPR's limited but growing case law on personal integrity rights violations, African judges have projected similar commitments to a vision of justice that goes beyond individual restitution. In recent cases, ACtHPR judges have asserted authority to intervene in domestic policy-making and public discourse by ordering states to repeal mandatory death penalty sentencing, reform election law, and publish ACtHPR judgements in public forums. It is not surprising that the ACtHPR has followed in the IACtHR's footsteps in this area. From the beginning of negotiations to draft the African Charter, the African regional human rights system was conceived as a distinctly collectivist project, rejecting existing notions of human rights law as a contract between individuals and the state and instead viewing such rights as collective responsibilities that communities must work together to uphold. The ACtHPR's interventionist approach to issuing remedial mandates reflects the Court's founding commitment to a definition of justice that encompasses measures of social restoration and non-repetition, in addition to individual restitution.

Even when the ECtHR expanded its authority to issue non-financial remedial mandates through the introduction of the pilot judgement procedure, this decision was

rooted in the ECtHR's founding commitment to deference to national authorities. Facing a deluge of repetitive cases instigated by systemic domestic human rights deficiencies, the ECtHR had to find a way to reduce its case backlog. The pilot judgement procedure did not represent a re-imagining of the ECtHR's authority to intervene in domestic affairs. Rather, the change was a direct response to practical and logistical exigencies aimed at sustaining the Court's case-processing capabilities. Consistent with the ECtHR's founding commitment to cooperation with domestic authorities, pilot judgements are not an interventionist power-grab. These judgements represent bargains that the ECtHR strikes with states, in which the ECtHR pauses pending cases to give governments time to enact reforms. Furthermore, aside from a handful of cases in which the ECtHR has ordered the release of specific prisoners, the remedial mandates contained in pilot judgements are exceedingly vague compared to those routinely issued by the IACtHR and ACtHPR. These judgements offer considerable leeway for states to decide how to implement domestic reforms, and state representatives can negotiate with the Committee of Ministers to define what constitutes "compliance" with pilot judgements.

The types of cases in which the ECtHR utilizes pilot judgements provides insight into the underlying objectives of the procedure. Recall that the first pilot judgement, *Broniowski v. Poland,* responded to ongoing deprivation of the right to property stemming from a border dispute that occurred decades prior to Poland acceding to the ECtHR. While the ECtHR has repeatedly declined to admit cases involving pre-accession personal integrity rights violations, and never ordered remedies beyond financial reparations in such cases, the Court mandated domestic legislative change in a pre-

accession property rights dispute case. This decision was a puzzling move for a court that has consistently avoided holding states accountable for past human rights violations, even when such violations have continuing effects in the present day.

However, when evaluated in light of the ECtHR's historical rejection of responsibility to address pre-accession violence and conceptualization of legal "justice" as individual restitution, the *Broniowski v. Poland* pilot judgement comports with the ECtHR's founding commitment to deference. Ordering a state to provide compensation for expropriated property is much less politically sensitive, and much less likely to be interpreted as "moral condemnation", than ordering a state to go dig up the bodies of victims of political violence and return them to their families. Offering citizens money is only ever going to be politically popular for national executives. While governments might begrudge being told what to do with their money by an international court, complying with that judgement is not likely to pose a substantive threat to domestic leaders' authority. An international court ordering a government to construct a memorial or publicly acknowledge responsibility for past human rights abuses, on the other hand, represents a profoundly polemical incursion into domestic society with potentially destabilizing political ramifications. When looking for ways to reduce a deferential court's caseload, it makes sense to target systemic issues that can be addressed by throwing money at the problem, rather than issuing judgements that could cause festering old wounds to split open. Hence, while the ECtHR has repeatedly issued pilot judgements in cases involving property restitution and improving prison conditions, judges will not

apply this procedure to systemic issues that require healing broader social traumas, for example, investigating unresolved conflict-era enforced disappearances.

ECtHR and IACtHR jurisprudence on LGBT rights demonstrates how an international court's founding interpretation of its authority conditions court behavior even when adjudicating contemporary issues that were not contemplated by the court's founders. Both courts have broadened the scope of human rights protections for LGBT people in recent decades, imposing new obligations on member states to allow transgender individuals to alter their official identification documents, legally recognize same-sex partnerships, and investigate and prosecute homophobic violence. However, the pace and extent of jurisprudential developments on these issues has varied significantly across the ECtHR and IACtHR. ECtHR judges have engaged cautious incrementalism in expanding their interpretations of governments' obligations to LGBT people since the mid-1980s. Their approach has been consistently characterized by attention to domestic legal consensus and evolving social norms surrounding homosexuality and transgenderism. This process has aligned with the ECtHR's historical adherence to the margin of appreciation doctrine when determining when to defer implementation of the European Convention to domestic authorities.

IACtHR judges, on the other hand, have taken it upon themselves to proactively promote LGBT rights rather than waiting on domestic consensus. Even after only having issued a binding judgement in one case involving anti-lesbian discrimination, IACtHR judges issued a sweeping advisory opinion in 2018 that dramatically expanded states' legal obligations to LGBT people. Issuing an advisory opinion that obligates states to

implement intensive domestic legal reforms based on such meager jurisprudential precedent is a boldly interventionist assertion of judicial authority. It is not surprising, however, that IACtHR judges risked government backlash and pushed ahead with the 2018 advisory opinion. Since the early-1980s, even before the Court issued its first binding judgement, IACtHR judges have been leveraging advisory opinions to push the boundaries of the Court's jurisdiction and strengthen its authority in the region. The 2018 advisory opinion introduced a variety of new requirements for states to uphold the human rights of LGBT people, the most contentious of which mandated that states provide full marriage rights to same-sex couples. In doing so, the IACtHR became the first court in the world to establish that depriving same-sex couples of the ability to marry constitutes a violation of international human rights law. The ECtHR has, as of the July 2021 *Fedotova v. Russia* judgment, ruled that states must provide some form of legal recognition to same-sex couples. However, the ECtHR has repeatedly and unequivocally rejected the argument that states must provide such couples with the right to marry, maintaining that governments must be afforded a wide margin of appreciation to implement Article 12 of the European Convention. The ECtHR and IACtHR's divergent approaches to expanding LGBT rights protections illustrate how, even when faced with issues not contemplated by their founders, variation across international courts' founding interpretations of their authority can produce very different legal outcomes. Changing social norms influence how international judges interpret the scope of their authority, but their response to "new" norms will still be conditioned by their Court's founding social purpose.

The pandemic as a catalyst for deeper cross-court convergence?

A central challenge for all three regional human rights courts in the coming years will be grappling with cases provoked by the Covid-19 pandemic. As the first truly global crisis that the world has faced since the Second World War, the pandemic's fallout may catalyze greater cross-court coordination and inter-jurisprudential borrowing within the regional courts. In September 2021, the ECtHR became the first regional court to confront a dispute directly linked to the pandemic. The applicants in two pending cases against Greece protested that a national law mandating Covid-19 vaccination for healthcare workers violated numerous Convention guarantees. The ECtHR rejected the Greek applicants' request for interim measures to suspend the compulsory vaccination law.[491] Recent precedent suggests that the ECtHR will not rule that mandatory Covid-19 vaccinations in workplaces or schools violate any human rights obligations. In April 2021, in a case that did not specifically address Covid-19 vaccination, the ECtHR established that requiring schoolchildren to be vaccinated against common infectious diseases does not violate the right to private life.[492] In August 2021, the ECtHR again rejected a request to suspend a compulsory Covid-19 vaccination law, this time in a pending case brought by 672 French firefighters.[493]

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[491] ECHR 266 (9 September 2021), "Refusal of requests for interim measures in respect of the Greek law on compulsory vaccination of health-sector staff against Covid-19", Press release issued by the Registrar of the Court.

[492] *Vavřička and Others v. the Czech Republic* (App. nos. 47621/13, 3867/14, 73094/14, 19298/15, 19306/15, 43883/15), Judgment of 8 April 2021 (Grand Chamber) ECtHR.

[493] ECHR 243 (25 August 2021). "Requests for interim measures from 672 members of the French fire service concerning the Law on the management of the public health crisis fall outside of the scope of Rule 39 of the Rules of Court", Press release issued by the Registrar of the Court.

Disputes surrounding mandatory vaccinations are just one example of the many human rights issues provoked by the pandemic that the regional courts will likely have to confront. In May 2020, the IACtHR issued its first decision tied to Covid-19-related concerns in an urgent measures resolution that ordered Panama to adopt several new measures to protect the rights of immigration detainees during the pandemic. The IACtHR frequently orders urgent measures, also referred to as provisional measures, in pending cases in an effort to protect parties to the case and pause any potentially-ongoing human rights violations until the Court has the opportunity to issue a final judgement. This process is similar to the interim measures procedures utilized by the ECtHR and ACtHPR. The IACtHR, however, has in recent years issued urgent measures resolutions in several cases even *after* a final judgement has already been issued. The purpose of these resolutions is, ostensibly, to further specify the measures that states must immediately take in order to comply with a Court judgement. These post-judgement urgent measures resolutions can confusingly overlap with the Court's procedures for monitoring compliance with judgements. Indeed, Judge Vio Grossi has repeatedly penned dissenting opinions to post-judgement urgent measures resolutions arguing that, once a case has reached the monitoring of compliance phase, the IACtHR no longer has jurisdiction to order urgent measures (Girardi Fachin and Nowak 2020).

The IACtHR's May 2020 order regarding immigration detainees in Panama was issued as an urgent measures resolution to comply with the Court's 2010 judgement in *Vélez Loor v. Panama.* This case originally concerned degrading conditions in Panamanian immigration detention centers. In response to renewed concerns regarding

the health and safety of detainees after Panama shut its borders amidst the pandemic, the IACtHR utilized the urgent measures procedure to order Panama to improve conditions in those centers.[494] Casting this order as a requirement for compliance with *Vélez Loor v. Panama*, a case decided a decade earlier, is a controversial extension of the Court's authority in that it appears to allow IACtHR judges to continue to impose new conditions for compliance on states for an unspecified time period after a judgement has been finalized. It is interesting that the IACtHR is leveraging this strategy to try to intervene in immediate human rights concerns produced by the pandemic. Cases typically take several years to progress through the regional human rights systems. The case processing timeline necessarily mitigates the ability of these courts to intervene in domestic policy during periods of acute crisis, for example, pandemics. The IACtHR's extension of its jurisdiction to order post-judgement urgent measures essentially represents an attempt to skirt around these temporal constraints and lean on the Court's compliance monitoring powers to intercede in emergent crises. In doing so, IACtHR judges may be carving out space for themselves to intervene in other developing human rights concerns connected to the pandemic, or, potentially, other future quagmires.

Because all three regional courts will likely face cases involving similar pandemic-related human rights concerns, the pandemic's fallout may represent an opportunity for the courts to learn from one another and achieve greater inter-jurisprudential convergence. During the 2nd International Human Rights Forum, IACtHR

[494] Resolution of the President of the IACtHR: Adoption of Urgent Measures in the case of *Vélez Loor v. Panama* (26 May 2020).

President Judge Elizabeth Odio Benito emphasized that the regional courts must work together to confront the mutual and intersectional challenges provoked by the pandemic:

> It is very important that we realize the enormous benefit that we have, that all of us in our courts work with a Universal Declaration of Human Rights that gathers the general principles to be developed through international human rights law that are universal, that are indivisible, that are inalienable…We know that the impact and challenges of the pandemic have affected our populations in different ways, however, it stands that, with regard to health, with regard to workers' rights, with regard to the economy, with regard to violence against women, we have a shared covenant.

Unlike areas of case law discussed in this work in which regional judges have incorporated jurisprudence from other courts that have more experience adjudicating particular issues, human rights concerns arising from the Covid-19 pandemic represent uncharted territory for all three courts. As such, judges may find cross-court coordination in this area to be uniquely advantageous. Even so, we likely to see each court developing its own set of legal interpretations consistent with its founding social purpose. As is evident from the ECtHR and IACtHR's jurisprudences on LGBT rights, even when faced with new challenges and changing norms, the influence of courts' founding interpretations of the boundaries of their authority is likely to percolate through contemporary legal reasoning. For example, we should expect that the ECtHR will be relatively more willing to defer to governments' discretion regarding the international legality of virus mitigation measures. As has already been seen in the case of the urgent measures resolution discussed above, the IACtHR has taken a characteristically interventionist approach to guiding government behavior in light of pandemic-related concerns.

One unintended positive consequence of the pandemic is that each of the regional courts actually seem to have increased their level of productivity upon switching to virtual operations. All three of the courts are still conducting a substantial portion of their work through virtual mediums, with the ACtHPR operating almost entirely virtually as of February 2022. The ECtHR's annual judgement output increased in 2020 compared to 2019, and continued to increase even further in 2021.[495] The IACtHR and ACtHPR both produced their highest-ever annual number of judgements in 2021.[496] These numbers are promising indicators of the institutions' strength and ability to adapt to challenging circumstances. The IACtHR and ACtHPR's increase in annual case law output does raise the question of whether, if that trend continues, those courts may soon experience similar backlog concerns to those that have provoked past institutional reforms in the ECtHR. At any rate, the experiences of the regional courts throughout the pandemic indicate that, far from inhibiting daily operations, switching to virtual work channels may help international institutions operate more efficiently. The regional courts' relatively small staffing levels and centralized operations may have better positioned them to make an efficient shift to virtual operations compared to more sprawling international institutions. The WTO, for example, has been "paralyzed" not only by political disputes over the temporary waiver of key intellectual property protections and accusations of marginalizing developing member states, but also by practical challenges for facilitating meetings under Covid-19 restrictions (Kelsey 2021).

A regional human rights court in Asia?

[495] See Figure 7.2 on pg. 184.
[496] See Figures 7.3 on pg. 189 and 7.4 on pg. 198.

The stories of founding the world's three regional human rights courts provide insight into the challenges and possibilities for new regional courts that could be created in the future. In recent years, several international lawyers, scholars, and civil society actors have proposed plans for the creation of a regional human rights court in Asia. This court would most likely be established under the auspices of the Association of Southeast Asian Nations (ASEAN), a regional integration organization founded in 1967 that now has 10 member states (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam). ASEAN has already taken non-judicial steps towards enhancing human rights protections by establishing the ASEAN Intergovernmental Commission on Human Rights and drafting the ASEAN Human Rights Declaration, which was adopted in 2012. (Chung 2019, Durbach et. al 2009, Phan 2012). The ASEAN Human Rights Declaration has the potential to serve as the basis for an expansive human rights treaty. The Declaration enumerates a broad range of civil, political, economic, social, and cultural rights. Notable among these is a detailed codification of a right to development, which calls on ASEAN member states to "adopt meaningful people-oriented and gender responsive development programmes aimed at poverty alleviation" and "the protection and sustainability of the environment".[497]

A closer inspection of the document, however, reveals concerning openings for governments to leverage the Declaration to subvert fundamental human rights guarantees. For example, in its "General Principles" section, the Declaration maintains that "the realisation of human rights must be considered in the regional and national context

[497] *ASEAN Human Rights Declaration*, adopted at the 21st ASEAN Summit in Phnom Penh, Cambodia, 2012. Art. 36.

bearing in mind different political, economic, legal, social, cultural, historical, and religious backgrounds".[498] This statement directly contravenes the universality of human rights, instead rendering those rights conditional on a laundry list of contextual factors. Furthermore, the Declaration contains many claw-back clauses that limit the scope of crucial rights guarantees. These claw-back clauses are significantly more restrictive than previously-discussed claw-back clauses within the African Charter. For example, the right to life codified in the ASEAN Declaration states that "No person shall be deprived of life *save in accordance with the law*".[499] Defining fundamental rights such as the right to life as contingent on national law is widely-recognized to be unacceptable in modern human rights law. In response to the ASEAN Declaration, a committee of experts within the UN Human Rights Council penned a letter voicing concerns about the wording of the document, implying that the draft was not "credible" and urging ASEAN to formulate an agreement that "maintains international standards" (UN News 2012). UN High Commissioner on Human Rights Navanethem Pillay issued a statement criticizing ASEAN's lack of transparency surrounding the drafting of the Declaration, in particular the lack of consultation with civil society constituencies (Santosa and Ririhena 2012). 55 local and transnational civil society organizations in Southeast Asia signed a letter condemning the ASEAN Declaration, stating that they would not use the Declaration in their human rights promotion work: "It is deplorable that the governments of ASEAN have insisted on making a Declaration that implies that their people are less deserving of human rights than the people of Europe, Africa, or the Americas" (Reporting ASEAN

[498] Ibid., Art. 7.
[499] Ibid., Art. 11.

2012). It is clear that the Declaration will have to be re-worked if it is to serve as the basis of any legitimate, binding human rights treaty in Southeast Asia.

There are several factors that inhibit the founding of a regional human rights court within ASEAN. Most predominantly, democratic deficiencies among all 10 member states render it unlikely that a court design project would find support from national political leaders. Even though being founded within regions experiencing widespread democratic backsliding ultimately resulted in the IACtHR and ACtHPR enjoying wider-reaching mandates, support from interested national executives, for example, José Trejos Fernández of Costa Rica and Léopold Sédar Senghor of Senegal, was crucial for getting negotiations to create those courts off the ground. Key to the successful establishment of both the IACtHR and ACtHPR was the presence of a minority of stable democracies alongside a majority membership comprised of unstable transitional democracies and authoritarian regimes. It is unclear if any current ASEAN member government, let alone a minority coalition, possesses a sufficient commitment to democratic governance to facilitate regional court design negotiations. As counterintuitive and unfortunate as this assertion is, this work's findings indicate that the best window of opportunity for creating a human rights court with a serviceable jurisdiction in Southeast Asia will occur if a minority of ASEAN members commit to democratic consolidation while a majority devolve into civil conflict and/or authoritarianism. To that end, if a commitment to begin court design negotiations within ASEAN can be secured, persistent clashes between government forces and armed insurgents in Thailand, Myanmar, and the Philippines may

provide openings for legal bureaucrats to co-opt negotiation delegations from those states and create a human rights court whose jurisdiction has teeth.

In 2010, the Australian Parliament's Human Rights Sub-Committee issued a report examining the possibilities of establishing a regional human rights enforcement mechanism in the Asia-Pacific region. That report noted several broad impediments to achieving political support for such a mechanisms, including "geographic and resource constraints; the lack of cohesive regional identity; limited engagement with human rights concepts; and perceived tensions with culture".[500] This work's findings suggest that at least some of these issues may not, in fact, substantively impede the development of regional human rights jurisprudence in Asia. The lack of regional identity within the OAS seems to have only emboldened IACtHR judges' interpretation of the boundaries of their authority. Lacking a political mission to advance regional integration, IACtHR judges have less to lose by cracking down on member states that are systematically abusing human rights. The jurisprudence of the ECtHR, on the other hand, has historically been brimming with judges' hand-wringing about over-stepping their mandates and careful attention to fostering regional consensus.

Resource constraints have always plagued the IACtHR and ACtHPR. While it remains to be seen whether the ACtHPR can supercede these challenges long-term, the Court's increasing output amidst the shift to virtual operations is a promising sign. The IACtHR has long been accustomed to financial crises and navigating last-minute budget

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[500] *Human Rights in the Asia-Pacific: Challenges and Opportunities,* Report of the Joint Standing Committee on Foreign Affairs, Defence, and Trade's Human Rights Sub-Committee, 24 May 2010, Parliament of Australia: Chapter 5, pg. 97.

shortfalls. Particularly during frequent periods of tension between the IACtHR and the political branches of the OAS, the IACtHR's budget is often targeted with cuts. IACtHR judges have soldiered on with what, at least from the outside, looks like remarkable lack of concern. When asked about the most recent pre-pandemic budget cuts in a 2016 interview, IACtHR judge Eduardo Ferrer Mac-Gregor Poisot responded nonchalantly, "We speak about crisis now, but in fact the crisis started 38 years ago when the system came into being…Even though the Inter-American system has always been in crisis, it has always found a way out" (Kunz 2016). Lack of financial resources may limit the number of cases a potential Asian-Pacific human rights court could process in a given year, but the experiences of the IACtHR and ACtHPR indicate that, so long as the court is judicious about selecting cases, it can still be a powerful force for developing regional human rights law.

The Australian Parliament report's warning that cultural tensions and lack of human rights engagement could hamstring a regional court may well be credible. Certainly, the text of the ASEAN Declaration indicates that South Asian governments perceive incongruities between local cultures and the concept of "human rights" as it has been applied in other regions of the globe. However, it is worth recalling that central among the topics of discussion during initial negotiations to draft the African Charter was the underlying philosophical compatibility between "Western rule of law values" and "African ideas of law and justice".[501] Automatically assuming that human rights-centered institutional frameworks are antithetical to non-Western cultural values is reductionist

[501] See Chapter 5, pg. 101.

and unimaginative. That this narrative is being peddled by governments whose interests would be undermined by a regional human rights court should prompt us to question its validity, as should the fact that a large coalition of Southeast Asian civil society organizations have rejected the ASEAN Declaration precisely due to the Declaration's framing of human rights guarantees as contingent on cultural context.

The rise of China and the future of the ACtHPR

Inextricable from the potentiality of a regional human rights court in Asia is the rise of China as a global political and economic superpower. Although China is not a member of ASEAN, the shadow of Chinese influence in the region will undoubtedly come to play in any attempt to establish a regional court within that organization. The Chinese Communist Party (CCP) is likely to repress any regional human rights movement, although there is a possibility that the CCP will latch onto ASEAN's already-strong commitment to framing development as a human right to bolster opposition to international environmental regulations. China's expanding sphere of influence will likely influence regional human rights developments beyond the Asia-Pacific in the coming years. In particular, massive Chinese investment in African infrastructure projects through the Belt and Road Initiative (BRI) in recent years raises questions surrounding the long-term political viability of the already-imperiled ACtHPR. According to the Council on Foreign Relations, 44 African states are now official BRI participants, representing the vast majority of African Union member states (Sacks 2021). The billions of dollars in Chinese investments that have flooded the continent are a powerful mechanism of political influence. The BRI has been criticized as "debt trap diplomacy",

in which China funds infrastructure projects in developing countries under cryptic loan terms and then leverages those countries' indebtedness to advance its own economic, military, and political interests (Risberg 2019). In a particularly concerning example, China and Uganda have reportedly established a loan agreement that would allow China to take control of Uganda's only international airport should the government default on the loan (Ojambo 2021). According to a 2020 report published by the Heritage Foundation, Chinese companies have constructed or renovated 186 African government buildings since 1966, including presidential palaces and parliament buildings. Additionally, Chinese telecommunications companies have built at least 14 intra-governmental communications networks in the continent, and the Chinese government has gifted computers to at least 35 African governments (Meservey 2020). These developments indicate that economic activity and sensitive political conversations across the continent are being heavily surveilled by China.

The African Union has already become embroiled with scandals related the BRI. The Chinese government fully funded the construction of the AU's $200 million headquarters in Addis Ababa, which opened in 2012. In 2018, reports began to emerge claiming that Chinese operatives had bugged the building and transferred data from AU computers to Chinese servers on a nightly basis for five years. The Chinese government denied the reports (Maasho 2018). If the ACtHPR cannot repair its shaky relationship with Tanzania, where the Court's headquarters is currently located, the Court may soon be looking for a new home. China's demonstrated interest in investing in African Union infrastructure suggests that any potential new Court headquarters will be funded, at least

in part, by Chinese dollars. Even if the ACtHPR is able to maintain its current headquarters, its increasing administrative needs will likely require expansion of the Court's facilities in the near future. The potential influence of Chinese investment in that process, as well as in indebted member states' dispositions towards the Court, may have consequential implications for the ACtHPR as it seeks to improve its standing in the eyes of its stakeholders.

In particular, the ACtHPR's uniquely wide-ranging mandate encompassing collective duties and economic, social, and cultural rights might attract interested parties to use the ACtHPR to promote legal interpretations that legitimate pro-CCP policy stances. Through strategic litigation or the nomination of sympathetic judges to the Court's bench, the ACtHPR could be co-opted as a forum for producing controversial jurisprudence in a variety of areas, including interpreting the right to development to oppose environmental regulations[502], supporting military conscription[503], even endorsing foreign military intervention[504]. On the other hand, the ACtHPR could be a crucial resource for individuals seeking to resist oppressive political, social, or economic conditions imposed by governments indebted to China. However, the ACtHPR will need to engage much more substantively with local civil society and legal aid organizations in order to build supportive constituencies that will help the Court resist government antagonism. Such engagement will be critical for the future viability of the ACtHPR regardless of any potential Chinese effort to influence the Court's jurisprudence.

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[502] See African Charter on Human and Peoples' Rights, Art. 22.
[503] Ibid., Art. 29(2).
[504] Ibid., Art. 20 (3). See also the discussion on pg. 109 of this work.

Final thoughts

During the meeting of the three regional courts in March 2021, ECtHR judge Anja Seibert-Fohr underscored the urgency of achieving deeper cross-court cooperation and jurisprudential coherence:

> Over the past years in which, unfortunately, multilateralism seems to have lost momentum, our mutual engagement becomes even more important. This is true for our regular meetings as much as for our judicial dialogue… By taking into account other bodies' interpretations of similar rights, the notion of universality can be enhanced. Coordination can help us to foster the notion of universal human rights protection by addressing common legal issues.

In this age of rising nationalism and isolationist political movements across the globe, presenting a coordinated front may help international human rights institutions weather the storm. We may soon be embarking on a new era in which the regional human rights courts, cognizant of their essential role as the most direct links between international law and domestic institutions, commit to cultivating shared legal interpretations in service of truly "universal" human rights protections. Stable partnerships between international and domestic authorities will be imperative in the coming years as the world confronts proliferating threats to human security. The climate change emergency, mass migration and refugee crises, the COVID-19 pandemic, and the looming threat of a land war on NATO's doorstep all cast in stark relief the urgency of transnational cooperation. Careful calibration of international institutional power with domestic sovereignty will be crucial for maintaining forums in which that cooperation can be realized. The unique geopolitical contexts in which international institutions are founded fundamentally condition how actors within those institutions interpret the normative legitimacy of their mandates and, accordingly, define the boundaries of their authority. The influence of that

founding social purpose persists well into the future, presenting challenges for coordinating the efforts of institutions who pursue divergent levels of deference in their relationships with national governments. Understanding and appreciation of the ways in which founding context shapes international institutions' varied conceptualizations of justice can empower actors within those institutions to navigate the exigencies of the current moment. Though the regional human rights courts are each staring down formidable threats from anti-democratic forces, their renewed determination to learn from one other represents a compelling reason to have hope for the future of international justice.

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Appendices

Appendix to Chapter 2

Table 1

If an IC has a "**deferential**" interpretation of its authority, we should expect to observe the following indicators/behaviors in the admissibility, merits, and remedial stages of case processing:

Case admissibility stage	**Merits stage**	**Remedial stage**
• Narrow interpretation of ratione temporis (temporal jurisdiction) Example: The Court decides that ongoing effects of an alleged human rights violation that originated prior to the accused state's accession to the court do not bring that alleged violation into the court's temporal jurisdiction. Consequently, the application alleging this ongoing rights violation is declared inadmissible.	• Applies margin of appreciation doctrine/strongly emphasizes subsidiarity The margin of appreciation doctrine (MOA) is used by international courts to determine the extent to which member states should be granted discretion to implement their international legal obligations as those state deem appropriate within their unique domestic contexts. "Subsidiarity" refers to a legal principle that mandates that disputes should be resolved at the judicial level that is most proximate to where the dispute occurred. MOA example: An IC cites the MOA to support its decision not to rule that an	• Limited reparations mandates focusing on individual measures Example: The Court orders a member state government that committed a rights violation to financially compensate the injured party, but does not order the government to implement measures of non-repetition to prevent the state from committing similar violations in the future.

	accused state has violated an applicant's rights. The IC argues that, because there is not broad consensus across the IC's member states regarding whether the accused states actions constitute a violation of the rights provision in question, the IC will assume that the state is in compliance with international law. Subsidiarity example: An IC judge cites the principle of subsidiarity to argue that member state governments, and not the IC, should be primarily responsible for deciding how to implement appropriate remedies for established human rights violations.	
• Strict interpretation of procedural admissibility criteria Example: The court does not make exceptions to the rule that applicants must exhaust domestic remedies for their complaint before petitioning the court, even when applicants allege prohibitive circumstances to applying for domestic remedies.	• Routinely selects to rule only on the core allegations in a petition, not all allegations Example: An applicant alleges that a state violated a long list of rights provisions, but the Court elects to only rule on the merits of a few of those alleged violations.	• Cannot mandate the abrogation of domestic legislation Example: The IC does not have the power to order that states repeal domestic legislation that the IC perceives to contradict the state's international legal obligations
	• Employs evidentiary standards that allocate the burden of proof to the	• Enforcement of remedies and assessments of

	applicant, and resists shifting that burden to the state Maintains that the burden of proof lies with the applicant, in line with standard domestic judicial practice that allocates the burden of proof to plaintiffs. Adheres to this allocation of the burden of proof even in cases of grave human rights violations, for example, alleged personal integrity rights violations. A particularly strong example of deferential behavior in this area would be if an applicant alleges a violation whose occurrence can only be substantiated by evidence to which the state has exclusive access, the state refuses to furnish that evidence, and the IC rules against the applicant on the grounds that their claim has not been substantiated.	state compliance with judgments is delegated to a political body Example: The IC rules that a violation has occurred, but defers the decision about how to remedy that violation to other domestic or international political actors. In the European system, this political actor is the Committee of Ministers.

Table 2

If an IC has a "**interventionist**" interpretation of its authority, we should expect to observe the following indicators/behaviors in the admissibility, merits, and remedial stages of case processing:

Case admissibility stage	**Merits stage**	**Remedial stage**
• Use of *iura novit cura* to add allegations to submitted petitions	• Does not apply/ rejects application of a margin of	• Broad reparations mandates focusing on individual as well as societal

(Dinah Shelton [2015] calls this the "kitchen sink approach" to constructing a case file). Example: An applicant alleges that the state violated her right to freedom of expression. After examination of the facts contained in the applicant's petition, the case lawyers observe that the applicant's right to family life may have also been violated during the complained-of state action. Consequently, the lawyers add an allegation to the applicant's petition requesting that the Court also examine a potential violation of the applicant's right to family life, even though the applicant only alleged a violation of her freedom of expression in her petition.	appreciation doctrine Example: The IC does into take into account existing member state government consensus regarding the compatibility of a complained-of practice with international law when ruling on whether that practice constitutes a human rights violation.	measures , often requiring action by multiple state actors Example: The Court orders a member state government that committed a rights violation to financially compensate the injured party, amend domestic legislation to prevent re-occurrence of the violation in the future, and re-open closed domestic investigations into similar alleged crimes.
• Broad interpretation of ratione temporis Example: The Court decides that ongoing effects of an alleged human rights violation that originated prior to the accused state's accession to the court bring that alleged violation into the court's temporal jurisdiction. Consequently, the	• Use of conventionality control doctrine The conventionality control doctrine is a legal approach applied by ICs that requires domestic judges to keep apprised of developments in the IC's case law and interpret domestic law in accordance with the IC's jurisprudence.	• Can mandate the abrogation of domestic legislation Example: If an IC rules that specific domestic legislation contradicts international law, the IC can consider that law, and its domestic effects, to be null and void.

application alleging this ongoing rights violation is declared admissible.	Example: An IC rules that a member state's ban on in-vitro fertilization has violated an applicant's right to family life. Applying the conventionality control doctrine, the IC expects all member states to repeal any similar bans on in-vitro fertilization to comply with this new development in the IC's case law. If states fail to do so, the IC can find them in violation of the right to family life.	
• Flexible interpretation of procedural admissibility criteria Example: The court routinely makes exceptions to the rule that applicants must exhaust domestic remedies for their complaint before petitioning the court when the applicant alleges prohibitive circumstances to applying for domestic remedies.	• Routinely rules on most/all allegations in a petition Example: An applicant alleges a violation of the prohibition against torture. Case lawyers add allegations that the state also violated the applicant's right to privacy and freedom from ex-post facto laws in connection with the alleged torture. The IC rules on the merits of all three of these allegations, even though the torture allegation was the core issue in the case. Another example is the routine use of the legal principle *iura novit curia*, "the court knows the law", to rule on violations that were not initially alleged by the applicant's legal team.	• Court is responsible for assessing state compliance with its own judgements Example: The IC holds compliance hearings after the conclusion of a case to assess the extent to which member states found guilty of violations have complied with the IC's remedial mandates. The IC can respond to non-compliance by ordering additional remedial mandates.

	• Is routinely willing to adjust evidentiary standards to shift the burden of proof to the state Example: If an applicant makes a claim that can only be substantiated by evidence that the applicant does not have access to, the IC will shift the burden of proof to the state to prove that the alleged violations did not occur. In the event that the state refuses to furnish contradictory evidence, the IC will rule in favor of the applicant.	

Appendix to Chapter 6

ECtHR

Name of Case	**Issue Under Discussion**	**Decision/Judgement Outcome**
Ireland v. the United Kingdom	Torture of IRA detainees	Violation of Article 3- inhuman and degrading treatment *not* constituting torture
Lawless v. Ireland	Arbitrary detention of suspected IRA member during derogation period	No violations
Tyrer v. the United Kingdom	Corporal punishment in school	Violation of Article 3- inhuman and degrading treatment *not* constituting torture
X and Y v. the Netherlands	Lack of legal recourse for sexual assault of a minor	Violation of Article 8. Court declines to examine complaints under articles 3, 13, and 14.

Soering v. the United Kingdom	Potential violation of the Convention by extraditing a murder suspect to a state (the US) where he could be subjected to the death penalty	*If* the extradition were to occur, it *would* violate Articles 2 & 3.
De Becker v. Belgium	Deprivation of civil and political rights following the applicant's conviction for collaborating with Nazis *before* Belgium's accession to the ECtHR	Court recognizes that the applicant's circumstances constitute a continuing situation over which the Court retains temporal jurisdiction. Case ultimately struck from the Court's docket due to domestic resolution.
Engel and Others v. the Netherlands	Detention of conscripted military members for publishing content "inconsistent with military discipline"	No violation of Article 10
Handyside v. the United Kingdom	Conviction of book publisher who published "obscene" materials. The publisher was fined and book were seized by authorities.	No violation of Article 10
Müller and Others v. Switzerland	Conviction of artists who displayed "obscene" paintings in a private gallery. The artists were fined and the paintings were seized by authorities.	No violation of Article 10
The Sunday Times v. the United Kingdom	Domestic court injunction to block publication of news articles regarding the "thalidomide children" scandal	Violation of Article 10
Dudgeon v. the United Kingdom	Northern Irish laws criminalizing sex between two men, but not two women	Violation of Article 8. Court declines to consider applicant's complaint of gender discrimination (Article 14).
Norris v. Ireland	Irish laws criminalizing homosexuality	Violation of Article 8

Rees v. the United Kingdom	Transgender applicant seeking change of official sex identification and right to marry partner of same sex-at-birth	No violations

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Name of Case	**Issue Under Discussion**	**Decision/Judgement Outcome**
Velásquez-Rodríguez v. Honduras	Enforced disappearance	Violation of Articles 4 & 5. Court established independent substantive and procedural obligations under the right to life
Blake v. Guatemala	Enforced disappearance	Violation of Article 5. No violation of Article 13. Court established enforced disappearance as a continuing violation.
Barrios Altos v. Peru	Amnesty law prohibiting investigation and prosecution of crimes against humanity	Violation of Articles 4 and 5. Court established that amnesty laws applicable to crimes against humanity violate the right to judicial protection.
"The Last Temptation of Christ" v. Chile	Domestic court upheld censorship of a film deemed religiously offensive	Violation of Article 13
Ivcher-Bronstein v. Peru	State intimidation of media channel owner who broadcast material critical of the military, illegal invalidation of the owner's nationality	Violation of Article 13

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Name of Case	**Issue Under Discussion**	**Decision/Judgement Outcome**
The Tanganyika Law Society, Legal and Human Rights Center, and Rev.	Constitutional amendment barring independent	Violation of Articles 10 & 13

Christopher Mtikila v. Tanzania	candidates from seeking political office.	
The African Commission v. Libya	Legality of domestic criminal proceedings against former president Muammar Gaddafi's son	Violation of Articles 6 & 7
Zongo et al. v. Burkina Faso	Politically-motivated murder of a journalist and his companions	Violation of Articles 7 & 9. No violation of Article 4. Temporal jurisdiction not activated by a pre-accession alleged violation of the right to life.
Lohé Issa Konaté vs. Republic of Burkina Faso	Journalist convicted of defamation, fined, and imprisoned for accusing state prosecutor of corruption	Violation of Article 9

Appendix to Chapter 8

ECtHR

Name of Case	**Issue Under Discussion**	**Decision/Judgement Outcome**
Magyar Jeti Zrt v. Hungary	Media company convicted of defamation based on hyperlinked web content	Violation of Article 10
Oberschlick v. Austria	Magazine publisher convicted of defamation and fined, and his magazines seized by the state, after accusing politician of promulgating Nazi ideology	Violation of Article 10
Bladet Tromsø and Stensaas v. Norway	Applicant convicted of defamation and fined for investigative reporting on animal cruelty aboard a seal hunting vessel	Violation of Article 10
Dalban v. Romania	Journalist convicted of libel for accusing a senator of fraud	Violation of Article 10

Perna v. Italy	Journalist convicted of defamation and fined for accusing a public prosecutor of corruption	No Violation of Article 10 (overturning Chamber finding of violation)
Cumpana and Mazare v. Romania	Journalist convicted of defamation, sentenced to prison time, and banned from journalistic work for one year after publishing disparaging cartoon accusing a judge of corruption and extramarital infidelity	Violation of Article 10 (overturning Chamber finding of no violation)
Sanoma Uitgevers B.V. v. The Netherlands	Police seized a photojournalist's sensitive source material while investigating a crime	Violation of Article 10 (overturning Chamber finding of no violation)
Kasabova v. Bulgaria	Journalist convicted of defamation and sentenced to prison time after accusing school administrators of accepting bribes from parents	Violation of Article 10
Axel Springer AG v. Germany	Magazine publisher convicted of violating actor's right to privacy after publishing articles about the actor's arrest for cocaine possession	Violation of Article 10
Brčko and others v. Bosnia and Herzegovina	NGO employees convicted of defamation after a letter they wrote expressing concerns about a candidate for director of a local public radio station was published without their consent	No Violation of Article 10

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Name of Case/	**Issue Under Discussion**	**Decision/Judgement Outcome**
Herrera-Ulloa v. Costa Rica	Journalist convicted of defamation and fined after	Violation of Article 13

	publishing information connecting a public official to illicit sales of combat helicopters	
Ricardo Canese v. Paraguay	Presidential candidate convicted of slander, fined, and sentenced to prison time after implying that another candidate maintained ties with former dictator Alfredo Stroessner	Violation of Article 13
Palamara-Iribarne v. Chile	Retired Navy officer convicted and fined after publishing a book containing information that allegedly compromised national security. The books were subsequently seized by authorities.	Violation of Article 13
Mémoli v. Argentina	Applicants convicted of libel for accusing a local company of fraudulently selling burial niches	No Violation of Article 13
Álvarez Ramos v. Venezuela	Applicant convicted of defamation after writing op-ed alleging misappropriation of public funds by the Venezuelan National Assembly. Applicant was sentenced to prison time, prevented from traveling internationally, and temporarily blocked from political participation.	Violation of Article 13

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Name of Case	**Issue Under Discussion**	**Decision/Judgement Outcome**
Ingabire Victoire Umuhoza vs. Rwanda	Politician convicted of "genocide ideology" and imprisoned after giving a speech at the Kigali	Violation of Article 9

	Genocide Memorial that addressed challenges with reconciliation and ethnic violence	
Sebastien Germain Ajavon v. Republic of Benin (App. no. 013/2017).	Opposition politician and businessman convicted of drug trafficking charges for which he had already been acquitted, government interfered with his businesses	Violation of Articles 3 & 7
Sebastien Germain Ajavon v. Republic of Benin (App. no. 062/2019).	Opposition politician blocked from participating in elections, government responded to election boycott with violent crackdowns on protesters	Several violations of the African Charter, ECOWAS Protocol on Democracy, and the International Covenant on Economic, Social, and Cultural Rights
XYZ v. Republic of Benin	Applicants challenged the international legality of amendments to the Beninese constitution that transferred certain legislative powers to the executive	Violation of Article 9 (among other violations)

Appendix to Chapter 9

ECtHR

Name of Case	**Issue Under Discussion**	**Decision/Judgement Outcome**
McCann and Others v. The United Kingdom	State-sponsored killing of IRA members suspected to be planning a terrorist attack	Violation of Article 2
Kaya v. Turkey	State-sponsored killing	Violation of Article 2 (procedural only)
Tanrikulu v. Turkey	State-sponsored killing	Violation of Article 2 (procedural only)
Kurt v. Turkey	Enforced disappearance	Court declined to rule on alleged Article 2 & 3 violations with respect to the victim, found an Article 3 violation with respect to

		the applicant (victim's mother)
Caraher v. the United Kingdom	Wrongful shooting death of a Northern Irish civilian perpetrated by British forces	Inadmissible
Yagiz v. Turkey	Police brutality	Inadmissible
Göc v. Turkey	Alleged torture in police custody	Inadmissible
Labita v. Italy	Alleged torture in police custody	No Violation of Article 3
Blečič v. Croatia	Termination of applicant's tenancy when she had to flee the country due to war	Inadmissible
Šilih v. Slovenia	State failure to investigate wrongful death caused by medical negligence	Violation of Article 2 (procedural only). Established temporally independent substantive and procedural obligations under the right to life.
Varnava and Others v. Turkey	Enforced disappearances	Violation of Article 2 (procedural only)
Dorado Ortiz v. Spain	Enforced disappearance	Inadmissible
Association "21 December 1989" and Others v. Romania	Police brutality against protesters	Violations of Articles 2 & 3 (procedural only)
Mocanu and Others v. Romania	Police brutality against protesters	Violations of Articles 2 & 3 (procedural only)
Janowiec v. Russia	State failure to investigate Soviet-era massacre of Polish POWs	Inadmissible (overturning Chamber judgement)
Chong and Others v. the United Kingdom	Massacre of unarmed civilians by British soldiers in what is now Malaysia	Inadmissible
Grinenko v. Ukraine	Alleged torture in police custody	Violation of Article 3 (procedural only)
Askhabova v. Russia	Enforced disappearance	Violation of Article 2 (substantive and procedural) with respect to the victim; Violation of Article 3 with respect to the applicant (victim's mother)

IACtHR

Name of Case	Issue Under Discussion	Decision/Judgement Outcome
Juan Humberto Sánchez	Kidnapping, torture, and unlawful killing of a civilian by military agents	Violation of Articles 4 & 5 with respect to the victim; Violation of Article 5 with respect to the victim's family
19 Merchants v. Columbia	Enforced disappearances	Violation of Articles 4 & 5
Norín Catrimán et al. v. Chile	Conviction and detention of indigenous activists for alleged terrorism. The activists alleged that they were mistreated in prison.	No Violation of Article 5
Tibi v. Ecuador	Arbitrary detention without legal counsel for two years, alleged torture	Violation of Article 5
Serrano-Cruz Sisters v. El Salvador	Enforced disappearances; Amnesty law applicable to crimes against humanity	Court determined it could not rule on alleged violation of the right to life. Established violations of Articles 5 & 25.
Gelman v. Uruguay	Enforced disappearance; Amnesty law applicable to crimes against humanity	Violation of Articles 4, 5, & 25
Almonacid-Arellano v. Chile	Extra-legal execution; Amnesty law applicable to crimes against humanity	Violation of Article 25

ACtHPR

Name of Case	Issue Under Discussion	Decision/Judgement Outcome
Ally Rajabu and Others v. Tanzania	International legality of mandatory death penalty sentencing guidelines	Violation of Articles 4 & 5
Sébastien Germain Marie Aikoué Ajavon v. Benin (App. no. 062/2019)	Amnesty law blocking investigation and prosecution of injuries and deaths caused by police officers during a crackdown on post-election protests	Violation of Articles 4 & 5

Chananja Luchagula v. Tanzania	Alleged wrongful imprisonment and death penalty sentence (applicant was pardoned while on death row)	Inadmissible
Andrew Ambrose Cheusi v. Tanzania	Alleged torture in police custody	No Violation of Article 5
Léon Mugesera v. Rwanda	Mistreatment of applicant while in prison	Violation of Article 5

Appendix to Chapter 10

ECtHR

Name of Case	**Issue Under Discussion**	**Decision/Judgement Outcome**
Cossey v. the United Kingdom	Applicant wished to change sex listed on official identification documents and be able to marry partner of the same sex-at-birth	No Violation of Articles 8 or 12; Court declined to consider applicant's complaint of discrimination under Article 14
B. v. France	Applicant wished to change sex listed on official identification documents	Violation of Article 8
Smith and Grady v. the United Kingdom Smith and Grady v. the United Kingdom	British servicemembers were discharged from the military after their commanding officers were informed that they were homosexual.	Violation of Article 8, Court declined to consider applicants' complaints of discrimination under Article 14
Lustig-Prean and Beckett v. the United Kingdom	British servicemembers were discharged from the military after their commanding officers were informed that they were homosexual.	Violation of Article 8, Court declined to consider applicants' complaints of discrimination under Article 14
Salgueiro Da Silva Mouta v. Portugal	Applicant deprived of custody of child during divorce proceedings on the grounds that applicant was	Violation of Article 14

	living with a same-sex partner	
I. v. the United Kingdom	Applicant wished to change sex listed on official identification documents and be able to marry partner of the same sex-at-birth	Violation of Articles 8 & 12
Christine Goodwin v. the United Kingdom	Applicant wished to change sex listed on official identification documents and be able to marry partner of the same sex-at-birth	Violation of Articles 8 & 12
Karner v. Austria	International legality of Austrian Supreme Court decision denying a gay man the right to retain his life partner's tenancy after the partner's death	Violation of Articles 8 & 12
Parry v. the United Kingdom	Applicant wished to change sex listed on official identification documents, but doing so would invalidate the legality of the applicant's existing marriage under U.K. law prohibiting same-sex marriage	Inadmissible
R. and F. v. the United Kingdom	Applicants wished to change sex listed on official identification documents, but doing so would invalidate the legality of their existing marriages under U.K. law prohibiting same-sex marriage	Inadmissible
Schalk and Kopf v. Austria	Applicants challenged Austria's ban on same-sex marriage	No Violation of Article 12
Identoba and Others v. Georgia	Lack of due diligence on the part of the state to prevent, respond to, and	Violation of Article 3 (procedural only)

	investigate homophobic violence	
Alekseyev v. Russia	Government repression of pro-LGBT demonstrations	Violation of Articles 11 & 14
Bayev and Others v. Russia	Applicants challenged Russia's "anti-gay propaganda laws"	Violation of Articles 10 and 14
Fedotova and Others v. Russia	Applicants objected to Russia's lack of any form of legal recognition for same-sex couples	Violation of Article 8

IACtHR

Name of Case	**Issue Under Discussion**	**Decision/Judgement Outcome**
Vicky Hernández and Others v. Honduras	Murder of a trans woman and subsequent lack of state investigation	Violation of Articles 4 & 5 with respect to the victim; Violation of Article 5 with respect to the victim's family
Atala Riffo and daughters v. Chile	Applicant deprived of custody of children during divorce proceedings on the grounds that applicant was living with a same-sex partner	Violation of Articles 1, 8, 11, 19, & 24
Flor Freire v. Ecuador	Applicant was discharged from the armed forces after being accused of participating in homosexual acts	Violation of Articles 1, 11, & 24
Ramírez Escobar et al. v. Guatemala	State authorities illegally kidnapped two children from their parents and adopted them out to families in the U.S. Domestic courts ruled against restoring the children to their family on several grounds, including that the children's	Violation of Articles 1, 5, 7, 8, 11, 17, 18, 19, & 25

	grandmother was a lesbian.	
Azul Rojas Marín v. Perú	Arbitrary detention of a gay man who was then beaten and sexually assaulted by police.	Violation of Articles 1, 5, 7, 8, & 25.