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## Expanding Rights: Norm Innovation in the European and Inter-American Courts

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## Expanding Rights: Norm Innovation in the European and Inter-American Courts

Wayne Sandholtz

The stability of human rights norms is a necessary illusion. For rules to guide behavior, actors need to see them as establishing fixed standards of conduct. But rules are necessarily general and incomplete, and conduct is relentlessly particular. The collision between the two constantly triggers disputes, and disputes end up modifying the rules (Sandholtz 2007, chap. 1). As international relations become increasingly judicialized (Alter 2014), international courts are important sites of norm development. The European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) have in recent decades produced important innovations in human rights norms. By interpreting and applying human rights norms, the courts necessarily fill in gaps in the law or extend it to cover new situations. This chapter explains the differing approaches and methods deployed by the ECtHR and the IACtHR in expanding human rights.

The expansion of rights means the expansion of rules that protect rights.<sup>1</sup> Such growth occurs, for example, when new rights norms become embedded in national or international law. The political processes of norm creation are well understood. New human rights norms emerge when activists and norm entrepreneurs, working from within and without states, bring to bear sufficient political pressure so that governments enact new rights-protecting rules (Brysk 1993; Brysk 2000; Finnemore and Sikkink 1998; Keck

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<sup>1</sup> Norms and rules are the same thing: standards of conduct for given actors in given situations (Finnemore and Sikkink 1998, 891). I use the terms “norm” and “rule” interchangeably. Legal rules are a subset of norms, namely, those established and recognized through legal processes.

and Sikkink 1998). States can become entrapped into implementing norms that they accepted only grudgingly or hypocritically, as domestic, transnational, and international actors and organizations make political and legal use of the new norms (Risse-Kappen, Ropp et al. 1999; Risse, Ropp et al. 2013).

What we understand far less well is what happens to norms after they have been created. Norms cannot remain static; they change and develop in continuous interaction with lived experience. The perpetual motion machine is an impossibility in the physical world but it is the ubiquitous reality in the world of norms. The dynamism inherent in normative systems is driven by disputes over how rules should be applied in specific, practical situations. Disputes trigger contestation, which in turn leads actors to new understandings of the rules.

Human rights norms are subject to this inescapable dynamic. Disputes over rights and their practical meaning take place daily in courts around the world. The central claim of this chapter is that international human rights courts have emerged as vital sites of norm innovation and the expansion of rights. Domestic courts are certainly the front line in the interpretation and application of human rights laws; they determine how those laws will be lived in local or national jurisdictions. But international human rights courts are charged with overseeing the development of human rights norms for a community of states, that is, with giving effect to human rights that are grounded not in domestic law but in regional or global norms.

This chapter explores how the ECtHR and the IACtHR have produced normative innovations that have expanded the reach of human rights norms. I suggest that the courts' strategies for extending rights depend on (1) the level of human rights fulfillment in the

member states (their politico-legal contexts); and (2) the nature of the rights concerned, distinguishing between qualified and absolute rights.

### **1. Norm expansion and the role of courts**

Students of international norms and institutions have devoted more attention to how new norms come into being than to what happens to norms after they are created. Research on international norms has tended to focus on processes of norm creation, whether they are seen as driven by norm entrepreneurs and activist networks (Brysk 1993; Brysk 2000; Finnemore and Sikkink 1998; Keck and Sikkink 1998; Risse, Ropp et al. 2013; Risse and Sikkink 1999) or as endpoints in a process of rational institutional design (Koremenos 2008; Koremenos n.d.; Koremenos, Lipson et al. 2001). But once norms exist, they trigger dispute-driven processes that end up modifying the norms themselves.

The inherent dynamism of normative systems is fueled by two kinds of tensions. The first tension is between rules that are inevitably more general than the infinitely varied circumstances in which they are supposed to guide behavior. The second tension is between different norms that could apply to the same action or problem (Krook and True 2012, 109-111; Sandholtz 2007; Sandholtz 2009). People's (and states') conduct constantly activates both kinds of tensions, and actors inevitably disagree about how rules should be interpreted and applied. Such disputes launch practical arguments – contestation – that inevitably modify the rules (Wiener 2004; Sandholtz 2007). The rules can become clearer or less clear, more or less subject to exceptions, broader or narrower, stronger or weaker – but they cannot remain unchanged. The modified rules then create

the context for subsequent disputes, and the cycle repeats (Sandholtz 2007, chap. 1; Sandholtz 2009).

Courts are created specifically to resolve disputes over norms, establishing authoritative interpretations and argumentation frameworks that shape subsequent disputes. They are therefore sites where the progressive expansion of human rights can occur. By “norm expansion” I mean changes that extend the scope or reach of norms. It includes both the creation of new norms and the reinterpretation of existing rules. Expansive norm development implies that a rule changes in one or more of the following ways:

1. *Higher norm status.* A rule, or set of rules, rises in the norm hierarchy, or becomes a higher order rule. For example, when the European Court of Justice created the doctrines of direct effect and supremacy, it elevated certain EC treaty provisions to constitutional status (Stein 1981).

2. *Application to additional subjects.* An existing rule expands in scope by being applied to new categories of actors. For instance, the European Court of Human Rights extended the non-discrimination norm in Article 14 (European Convention on Human Rights) to a new group, namely, homosexuals (2010). The move to extend certain international human rights norms to apply to private companies (Ratner 2001; Weissbrodt and Kruger 2003; Kinley and Tadaki 2003-2004; Brysk 2005) offers another example.

3. *Application to additional categories of behavior.* An existing rule also expands in scope by application to new kinds of action or behavior. For example, the European Court of Human Rights and the Inter-American Court of Human Rights have both extended general anti-discrimination norms to recognize violence against women as a form of discrimination (2009; 2009).

4. *Creating new positive duties.* Even when the rights of persons remain unchanged, the duties of states relative to those rights can expand. The regional human rights conventions identify general positive duties of states. For instance, the American Convention on Human Rights obligates states to “undertake to adopt . . . such legislative or other measures as may be necessary to give effect” to Convention rights (Art. 2). Based on this and other Convention provisions, the IACtHR has established a duty of states to investigate and prosecute serious human rights violations (1988, para. 177).

## **2. Courts and their contexts**

This section explores how the political and human rights contexts within which courts operate shape the judicial strategies that they are likely to deploy to expand rights.

### 2.1 Human rights contexts

My central premise is that human rights courts always have some capacity for expanding the scope of rights norms, but how they can deploy that capacity depends on their human rights context, that is, on the degree to which states respect rights. The level

of rights fulfillment among states determines not whether or not courts can expand rights, but the strategy of rights expansion that is available to them. If member states are mostly rights respecting, the court can expand the scope of the international rights regime by following the rights leaders. Thus, when a majority of states has expanded a given right, the court can extend that right to the laggards. The court thus rules expansively but enjoys a degree of political cover. If states are mostly rights laggards, the court cannot follow the majority because doing so would mean abandoning its mission, losing legitimacy, and becoming irrelevant. Put differently, where the states are generally not fulfilling international rights commitments, the court must be ahead of them, acting as a rights leader.

Each approach – following the rights leaders or being the rights leader – implies a different strategy for the court in grounding and justifying its expansive decision-making. Where the level of rights fulfillment is high, and a majority of states has enacted domestic rules that are more protective of rights than the practice being challenged in litigation, the IC can expand rights by aligning its rulings with the more advanced majority. This strategy of “majoritarian activism” (Maduro 1998) protects the court from generalized backlash because a majority of the states would support the court’s interpretation. Majoritarian activism both mitigates “the legitimacy problems associated with judicial lawmaking” and makes “efforts at curbing the growth of their authority improbable or ineffective” (Stone Sweet and Brunell 2013, 63-64). The ECtHR has employed this strategy in a number of rights domains, grounding expansive interpretations of rights in a “European consensus” (Dzehtsiarou 2011; Dzehtsiarou 2011; Letsas 2013).

Where the rights context is less favorable, that is, where the majority of states does not protect basic rights, the IC must lead. It cannot follow a progressive majority if one does not exist. Similarly, if the court is unwilling to move ahead of the states in upholding rights, it will be seen as tolerating violations and lose credibility. In such contexts, the court can “find” new rights in the underlying convention and other sources of international rights and it can establish new positive duties with respect to those rights.

In general, then, human rights courts can expand rights by following the leaders when the states are mostly rights respecting and by taking the lead when the majority of states are rights laggards. What each strategy means in practice depends in part on the type of right in question.

## 2.2 Absolute and qualified rights

What it means for a court to follow the leaders or take the lead in rights expansion will differ between absolute and qualified rights. Rights in the first category are absolute because they do not permit limitations, derogations, or exceptions.

*Absolute rights* include the core physical integrity rights, for example, the rights to be free from torture, forced disappearance, and extrajudicial killing. With absolute rights, the scope of the right is not open to interpretation. Such rights cannot be expanded to new actors or categories of behavior because they are universal and permit no exceptions. The court’s decision on the merits of the claim (that is, whether or not a violation of Convention rights occurred) turns on the facts, not on an interpretation of the law. But the court can engage in expansive norm development in other ways, by:

1. Establishing new procedural rights.



2. Establishing new positive duties on the part of states.

*Qualified rights* include all rights that can be limited or restricted by law when necessary to realize legitimate public purposes. This category includes, for instance, freedom of expression, the right to personal liberty, the right to privacy, and the right to property. These rights are not unlimited. For instance, the right to freedom of expression can be limited by a prohibition on incitement to violence, based on the legitimate interest in public order and security. Courts can expand qualified rights by narrowing the kinds of state actions that constitute acceptable restrictions on those rights. In practice, courts can:

1. Find that the state restrictions on a right are not necessary in a democratic society.
2. Find that the means employed by the state infringe on a right more than is necessary to achieve the public aim.

### **3. Expanding rights: the ECtHR and the IACtHR**

Both the European Court of Human Rights and the Inter-American Court of Human Rights have produced rights-expanding jurisprudence. The European Court is widely seen as the most influential human rights court in the world. Its greater prestige is built on its longer history of adjudicating rights, its extensive case law, the generally acknowledged high quality of its legal reasoning, and the influence its judgments have had on law and policy in its member states (Keller and Stone Sweet 2008). The ECtHR has largely achieved what the Inter-American Court aspires to, namely, establishing “logics of collective, transnational rights protection, and . . . enlisting participation in the Convention’s expansionary

dynamics” (Stone Sweet and Keller 2008, 6). The IACtHR may be the younger sister, but it has also generated innovative rights jurisprudence.

Indeed, both courts have adopted a “living instrument” approach to their respective basic laws, the European Convention on Human Rights<sup>2</sup> (1978, para. 31) and the American Convention on Human Rights (1999, para. 114). A living instrument approach means that the underlying convention is to be must be interpreted in light of the evolving needs and standards of current society (Letsas 2013). Both courts have thus been willing to move beyond a minimum standard interpretation of convention rights and to interpret rights progressively.

Where the two courts differ is in their contexts and their approaches to expanding rights. The arguments set out in the previous section, on human rights contexts and on the types of rights in question, help to explain the courts’ varying approaches. Figures 1 and 2 depict the average level of respect for rights among ECtHR and IACtHR countries, for both absolute rights (physical integrity rights) and an important set of qualified rights (civil rights). Both types of rights have been better protected in Europe than in Latin America. Also noteworthy is the gradual narrowing of the gap between the two regions, as the Council of Europe has added countries with more serious rights failures and democratic transitions have stabilized in Latin America.

During its first decades, when the ECtHR developed its progressive approach to rights interpretation, it operated in a context in which the level of states’ respect for human rights was high. Moreover, the violations that the ECtHR was asked to adjudicate overwhelmingly concerned civil rights, like privacy and property rights, not core physical

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<sup>2</sup> To give it its official name, the Convention for the Protection of Human Rights and Fundamental Freedoms.

Figure 1: Average Physical Integrity Rights Scores, ECtHR and IACtHR Countries, 1981-2011

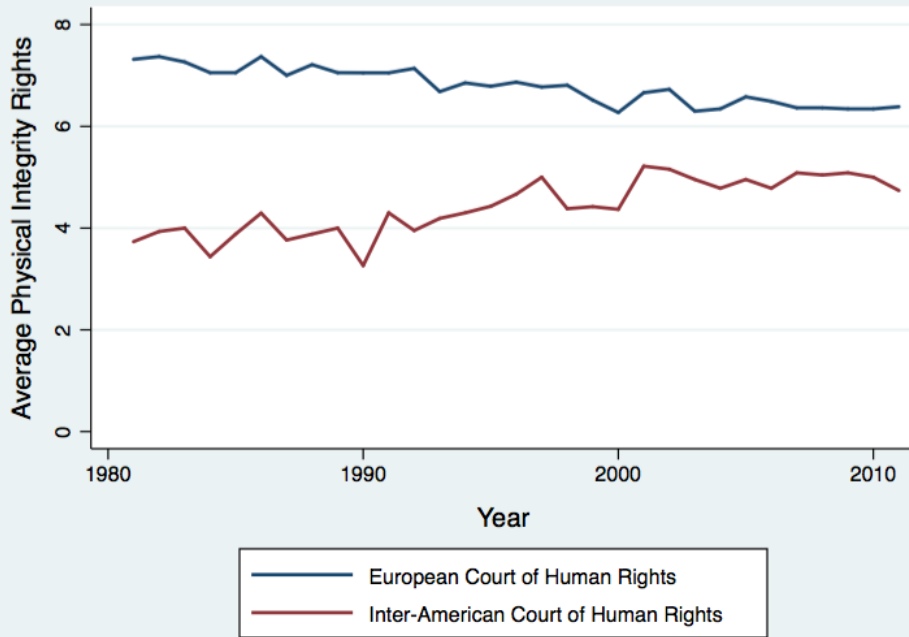
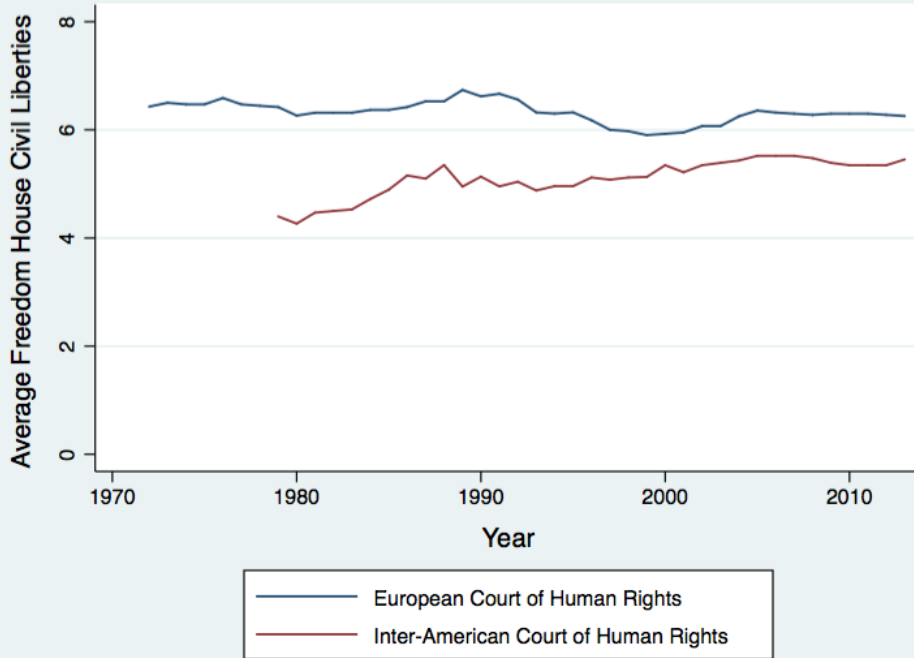


Figure 2: Average Civil Liberties Scores, ECtHR and IACtHR Countries, 1972-2012



integrity rights like torture (though those kinds of violations would reach the Court later). In other words, during its formative years, the ECtHR dealt mainly with qualified rights, in which the central task was to balance individual rights with legitimate public purposes.

The entry into the Council of Europe of states from Eastern and Central Europe and the former Soviet Union after 1990 meant that the court's membership embraced countries with poor rights records, including abuses of absolute rights. But by then the ECtHR's approach to expansive development of rights was in place. That approach has been one of expanding rights where a group of leading states has extended a right beyond the current interpretation of the European Convention (emerging consensus). The Court grounds its expansive interpretations in its own case law and in the practice of progressive rights-leading states.

In contrast, the IACtHR has operated in a context of low levels of respect for human rights across most of the region, often under brutal authoritarian regimes or in civil wars. The types of abuses brought to the Commission and the Court included massive violations of core physical integrity rights: torture, forced disappearances, and extrajudicial killings. Beginning in the 1980s, dictatorship gave way to democratic transitions. By the first decade of the new century, democracy was consolidating but still a work in progress in much of the region. Systematic repression had mostly ceased, but the Court was presented with claims arising out of the authoritarian period, as well as with ongoing violations of core physical integrity rights. In other words, the work of the IACtHR has been dominated by cases involving absolute rights. In this human rights context, the strategy of majoritarian activism was not available because following the practice of the majority of states would not advance rights. Furthermore, because the Court was dealing with

violations of absolute rights, it could not innovate by shifting the balance point between individual rights and legitimate state purposes. So the IACtHR has expanded rights, as suggested above, by asserting new procedural rights and new positive duties of states.

### 3.1 ECtHR: from European majority to emerging international trend

The European Court of Human Rights regularly expands Convention rights by interpreting them “in a progressive manner” (Stone Sweet and Keller 2008, 6). But the Court started out more cautiously. Established in 1959, the ECtHR did not rule against a state (that is, find a state violation of a Convention right) until 1968, in a case involving excessive pre-trial detention for an Austrian accused of tax fraud (1968). Even after *Neumeister*, the Court was widely seen as establishing “minimum, and largely minimal, standards for basic rights” (Stone Sweet and Keller 2008, 6). With respect to qualified rights, the Court tended to grant states a wide “margin of appreciation,” meaning that it allowed states considerable leeway in establishing the balance between individual rights and restrictions based on public purposes.

In the late 1970s, however, the Court started to shift to a different approach, in which a state’s limitation on a qualified right could be found to violate the Convention if a majority of states in the Council of Europe had adopted a more expansive interpretation of the right in question. In the landmark decision in which the ECtHR announced the living instrument approach to interpreting the Convention, the Court already signaled that the relevant evolving standards were those not of a particular society but of the broader community of European states: “The Court must also recall that the Convention is a living instrument which . . . must be interpreted in the light of present-day conditions. In the case

now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field” (1978, para. 31).

In a growing number of cases and for a growing range of rights, the ECtHR narrowed the margin of appreciation by looking to the majority practice of member states (European consensus) as a relevant standard. If a majority of states adhered to a more progressive norm than the one being challenged, the Court could ground a more expansive interpretation of the right in that majoritarian position. For example, the ECtHR found the United Kingdom’s criminalization of homosexual acts to be a violation of the Convention right to respect for private life (Art. 8). The Court invoked a majoritarian logic: “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” (1983, para. 60, emphasis added). The ECtHR quoted that passage, and its majoritarian logic, in determining that a similar Irish law violated the Convention (para. 46). Conversely, when the Court has not been able to identify a majority of European states in favor of an expanded right, it has been willing to defer to states. In a challenge to Austria’s denial of same-sex marriages or legal recognition of such unions, the ECtHR did not find a violation of the European Convention right to marriage and family life (Art. 12). The Court based that judgment on the absence of consensus among European states regarding same-sex marriage, noting that only six of 47 states parties to the Convention permitted same-sex marriages (2010, para. 58).

The ECtHR built on a majoritarian logic even more assertively in the *Soering* case. The issue arose in a claim by Jens Soering that his extradition to the United States, where he faced a potential death sentence, would violate the Convention's prohibition of torture and "inhuman or degrading treatment or punishment" (Art. 3). The Court noted that "the death penalty no longer exists in time of peace" in Europe. But the clear European consensus abolishing capital punishment did not necessarily mean that the death penalty *per se* violated Art. 3. However, the Court declared that "the manner in which [the death penalty] is imposed or executed . . . as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3." And the majoritarian logic applied to those factors: "Present-day attitudes in the Contracting States to capital punishment are relevant for the assessment whether the acceptable threshold of suffering or degradation has been exceeded" (1989, para. 104). In the end, the Court judged that Soering could not be extradited because there was a real risk that he would suffer the "death row phenomenon," which would violate his Art. 3 rights. In subsequent cases the Court extended the same logic, ruling that states could not deport (1991) or expel (1997) persons who would face a real risk of ill-treatment, even where the risk would arise from non-state actors.

The Court's decision in *Marckx v. Belgium* hinted at the potential for a shift in its approach to expanding rights. The applicants claimed that Belgian law discriminated against them by not creating automatic legal ties at birth between unwed mothers and their children. The Court agreed, pointing to the laws of a "great majority of member States of the Council of Europe" but also citing additional international treaties as evidence of "a

clear measure of a common ground in this area amongst modern societies” (1979, para. 41). In subsequent cases, the Court would show itself willing to expand rights based not on European consensus but on emerging international trends. In fact, in *Hirst v. United Kingdom*, the Court declared that the lack of European consensus was not in itself determinative (2005, para. 81).

An emerging trend in international law became the basis for the ECtHR’s expansion of rights in other domains. Regarding the rights of persons who have undergone gender reassignment surgery, the ECtHR initially followed a majoritarian approach. In early cases, the Court declined to find an obligation on states to allow post-operative persons to alter their official gender identity because no European majority position had yet emerged (1986; 1990; 1998, para. 58). But in *Goodwin v. United Kingdom*, the Court reversed that jurisprudence. It grounded its reasoning not in the presence of a European consensus, but rather in the existence of a "continuing international trend" of recognizing transsexual rights (2002, para. 85).

The Court went a bit further in *Demir and Baykara v. Turkey* (2008). The case involved the state’s prohibition of a public sector trade union, which was challenged as a violation of Art. 11 (freedom of association). The Court noted that in interpreting the Convention, it “can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values.” The Court also stated that it is sufficient that “the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States . . . and show, in a precise area, that there is common ground in modern



societies” (2008, paras. 69-86). The Court’s willingness to shift to a broader, international normative frame of reference for interpreting regional human rights norms was clear (Letsas 2013, 122).

### 3.2 IACtHR: creating positive obligations

The European Court initially looked for a European consensus on which to construct expansive interpretations of the European Convention and in later periods turned to emerging international trends. The Inter-American Court, in contrast, has from the beginning looked outward to support its interpretations of the American Convention (Contreras 2012, 56; Neuman 2008, 101-102). The IACtHR could hardly rely on a regional consensus on expanding rights when for most of its history the member states have been plagued by weak or non-existent democratic institutions and poorly functioning judicial systems. To the extent that any regional consensus existed, it would have served more as a drag on expansive interpretations of rights than an engine of it. Consequently, the IACtHR has only rarely even referred to a margin of appreciation or deference to states’ choices in implementing Convention rights (Contreras 2012).

Because violations of core physical integrity rights – torture, extrajudicial killings, and disappearances – constituted the bulk of its docket, the IACtHR was not faced with a different interpretive task than was the ECtHR. With absolute rights, finding a violation of the Convention depends on the facts, not on a determination of the appropriate balance between individual rights and state purposes. A primary avenue for the Inter-American Court to expand rights has been through establishing new positive obligations for states. The Convention basis for positive state obligations is based on four provisions. First, Art. 1

requires states “to ensure to all persons . . . the free and full exercise” of Convention rights and freedoms. Second, Art. 2 obligates states “to adopt . . . such legislative or other measures as may be necessary to give effect to those rights and freedoms.” Third, Article 8 defines the right of every person to a fair trial, and fourth, Article 25 enunciates “the right to simple and prompt recourse” (judicial protection). In constructing specific obligations on those general provisions, the Court has frequently relied on international sources.

One of the most important obligations established by the Court is the duty of the state to investigate, prosecute, and punish serious violations of basic rights. Disappearances and extrajudicial killings, of course, violate the rights of the immediate victims. But the Court has found that the lack of investigation, prosecution, and punishment of the perpetrators of such crimes also constitutes a violation of the right of the next of kin to clarification of the fate of those who have been subject to disappearance or extrajudicial killing. The Court has not created a new right but rather expanded the right to a fair trial (Art. 8) and the right to judicial protection (Art. 25) to include clarification of the fate of the disappeared (*Burgorgue-Larsen and Úbeda de Torres* 2011, 699-709). In a disappearance case brought against Guatemala, the Court explained that the state’s failure to determine the whereabouts of the disappeared, Efraín Bámaca Velásquez, and its obstruction of efforts to do so, violated “the right of the victim or his next of kin to obtain clarification of the facts relating to the violations” (2000, para. 201). And in a subsequent decision the Court declared that “for more than 18 years, the next of kin” had been “unable to obtain judicial determination of the facts and those responsible,” constituting a violation by Peru of “their right to judicial protection and judicial guarantees” under the American Convention (2007, para. 135).

The Court announced the obligation to investigate and prosecute in its first judgment in a contentious case, involving a forced disappearance in Honduras. The state, the Court ruled, had a duty “to use the means at its disposal to carry out a serious investigation of the violations committed within its jurisdiction” (1988, para. 174). The Court subsequently confirmed and elaborated this obligation, notably in *Goiburú*, where it explained that the investigation must be “prompt, serious, [and] impartial” and that the obligation had *jus cogens* status (2006, paras. 88, 84). The investigation must be effected by competent authorities who are genuinely independent “from the officials involved in the facts of the case” (2007, para. 122) and must possess “all the means necessary to promptly carry out all those actions and inquiries essential to clarifying the fate of the victims and identifying those responsible” (2008, para. 77).

The duty to investigate and prosecute gross violations of human rights undergirds one of the Court’s more assertive expansions of regional human rights norms: judging amnesty laws incompatible with the American Convention. As Latin America emerged from an era of brutal dictatorships and civil wars in the 1980s and 1990s, the transitions frequently included amnesty laws. The laws were created to shield state actors from prosecution and punishment for the gravest violations of basic rights, generally involving torture, disappearances, and extrajudicial killings. Among the states that had enacted amnesties of this sort were Argentina, Brazil, Chile, El Salvador, Guatemala, Peru, and Uruguay. The amnesty laws undermined the edifice of regional human rights because they precluded what the IACtHR was created to do, namely, holding states accountable for violations. In its first amnesty judgment, the Court not only ruled that Peru’s amnesty laws violated the Convention but also declared that they lacked legal effect (2001, para. 51). In

subsequent rulings, the Court reaffirmed the incompatibility of amnesties with the Convention and ordered that states not allow them, or similar barriers, to obstruct the investigation, prosecution, and punishment of gross violations.<sup>3</sup>

The IACtHR also created a positive obligation for states to prevent serious abuses of basic rights. One of the Court's most striking moves in this direction came in its decision in the "Cotton Field" case, which arose out of the disappearance or murder of hundreds, and probably thousands, of women in Juarez, Mexico. The judgment held that the state had not taken sufficient measures to halt and prevent violence against women, and that the failure constituted a violation of the Convention. The state was under an obligation that "encompasses all those measures of a legal, political, administrative and cultural nature that ensure the safeguard of human rights" (2009, para. 252). The state must not only prevent violations by agents of the state but also "adopt the necessary measures, not only at the legislative, administrative and judicial level . . . to prevent and protect individuals from the criminal acts of other individuals" (2006, para. 120; see also 2006, para. 84).

Finally, the IACtHR has established positive obligations for states with regard to marginalized groups, like indigenous communities. For instance, the Court has recognized a duty for states to recognize and guarantee the right of indigenous groups to communal ancestral lands (2001; 2006, para. 120). The obligation applies even to states that do not recognize indigenous communal property rights in their domestic law (2007, para. 96).

#### **4. International courts and the limits to expanding rights**

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<sup>3</sup> See (2005; 2006; 2009; 2010; 2011)

The ECtHR and the IACtHR have both actively expanded the scope of international human rights norms in their respective regions. The ECtHR's main strategy for expanding rights has been to reduce steadily, first by finding a European consensus and later by identifying emerging international trends, the scope allowed to states to restrict individual rights for the sake of public purposes. The Inter-American Court's favored approach has been to expand rights by establishing positive duties for states to ensure respect for rights, prevent violations, and investigate and prosecute serious abuses. The difference in strategies is tied to the courts' differing human rights contexts, including both the general level of respect for rights in member states and the modal types of claims brought before them. The ECtHR's strategy was possible because the member states by and large respected rights and the preponderance of claims dealt with qualified rights, not the core physical integrity rights. The IACtHR's strategy was necessary because, for much of its history, the level of respect for rights was low and the court mostly confronted grave violations of the core physical integrity rights.

Of course, human rights courts do not enjoy unlimited scope for expanding rights. The IACtHR has always been ahead of the states in terms of the progressive development of rights, and the ECtHR, by looking to emerging international trends, has moved in front of the European consensus in some areas. The primary constraint facing any international court is the willingness of states and other actors to accept its decisions and adjust their conduct to the court's interpretations of regional and international norms. In this conclusion, I briefly assess the main potential constraints on the capacity of human rights courts to expand human rights norms: non-compliance, state withdrawal, and the curtailing of courts' authority.

#### 4.1 Non-compliance

Skeptical accounts of international courts point to non-compliance by states as a fundamental constraint on international courts. Non-compliance could constrain ICs in two ways, *ex ante* (as a threat, leading courts anticipate non-compliance and shape their judgments to conform with state preferences (Carrubba, Gabel et al. 2008)) and *ex post* (as a punishment, with states refusing to carry out IC judgments). The *ex ante* threat of non-compliance is unlikely to induce courts to defer to states' preferences in specific rulings. Evidence from the ECJ is decisive in that regard (Stone Sweet and Brunell 2012; Stone Sweet and Brunell 2013). Furthermore, there are theoretical reasons to think that the threat of non-compliance will have a limited effect on human rights courts' willingness to rule expansively. First, courts cannot be seen as retreating from the protection of rights because that would mean failing in their primary mission, which in turn would undermine their legitimacy. In other words, courts' legitimacy concerns push both ways: a court that regularly deferred to state preferences would lose legitimacy and support among other crucial constituencies. Second, and relatedly, states are not the only, and not necessarily the most important, constituencies of human rights courts. Compliance coalitions (Hillebrecht 2014) or compliance constituencies (Alter 2014) are far more varied than simply the executive branch of the state. Legislators, domestic judges, prosecutors, and administrative agencies can all have important roles in bringing about compliance with IC decisions. A variety of non-state actors can also be decisive members of pro-compliance coalitions, including NGOs, civil society organizations, advocates, political parties, the news media, and public opinion.

*Ex post* non-compliance is also unlikely systematically to constrain international courts. Rather than constraining ICs, non-compliance tends to activate them (Stone Sweet and Brunell 2012; Stone Sweet and Brunell 2013), as violations give rise to new claims. In any case, compliance has generally been high among ECtHR states. Hawkins and Jacoby report that the ECtHR “regularly continues to achieve full compliance with its judgments, but . . . also faces a substantial minority of cases in which compliance is partial for quite extended periods (Hawkins and Jacoby 2010, 66). For the IACtHR, Hawkins and Jacoby find partial compliance in 83 percent of the cases they analyzed and complete non-compliance in only 11 percent (Hawkins and Jacoby 2010, 37). Using a strict measure of compliance (partial compliance counts as non-compliance), with specific mandates as the unit of analysis (each judgment can contain multiple mandates), Hillebrecht finds that the average compliance rate is 48 percent in the ECtHR and 34 percent in the IACtHR, though the rate varies widely across states and across types of mandates (Hillebrecht 2014, 48-51). Still, there has been considerable resistance on the part of national judiciaries to carrying out remedies order by the IACtHR that require judicial action, like reopening closed cases or initiating investigations and prosecutions. In fact, “[t]he Court has never declared that a state has fully complied with an order to investigate, try, and punish those responsible for the crimes underlying a case,” though states have engaged in substantial partial compliance with some rulings (Huneus 2010, 116). Supreme courts in Argentina, Chile, and Venezuela have openly refused to implement IACtHR orders (Huneus 2011). Still, despite substantial non-compliance with its judgments, the IACtHR continues to engage in the progressive development of human rights law.

## 4.2 Withdrawal

The threat of withdrawal from a court's jurisdiction might also be seen as the most drastic means of constraining its decision-making. For the ECtHR, the threat of exit from the regime is not credible, largely because acceptance of the Court's jurisdiction is mandatory for membership in the Council of Europe (COE). Withdrawal from the ECtHR would mean leaving the COE, a step that no state has so far been willing to take. The most serious threats of withdrawal have come in recent years from the United Kingdom and Russia. Dissatisfaction with specific ECtHR decisions (on voting rights for convicts and on deportation of suspected terrorists) has triggered talk of leaving the European Convention and the Court among a segment of the Conservative political elite (Madsen 2016, ms. pp. 31-33). Russia, which has been one of the countries most frequently brought before the ECtHR and found in violation of the Convention in the vast majority of cases, has been suspended from voting in key COE organs and threatened with expulsion. Russia has also threatened to exit the COE on several occasions since 2000 (Provost 2015), but there is no evidence that the ECtHR has retreated from its expansionary, living instrument approach to interpreting the European Convention.

On the Inter-American side, states can withdraw from the Court's jurisdiction or even denounce the American Convention altogether. Only two states have withdrawn, and only one of the withdrawals was motivated by displeasure with the Court's decisions. Trinidad and Tobago denounced the Convention in 1998 in order to retain the death penalty. Venezuela withdrew from the Convention in 2012, criticizing the Commission and the Court for their decisions with respect to cases arising out of a coup attempt against President Hugo Chávez in April 2002 and a broad work stoppage of December 2003. Peru



briefly threatened to withdraw in 2000. But widespread threats of exit appear unlikely and the IACtHR has shown no sign of abandoning its assertive approach to expanding rights.

#### 4.3 Curtailing courts' competences

If states were sufficiently dissatisfied with the decision-making of an international court they could, in principle, trim its jurisdiction or limit its authority. In practice, cutting back an IC's powers is virtually impossible. In the Inter-American System, states could revise the Court's rules of procedure or curtail its jurisdiction only by amending the American Convention. Amending the American Convention would require ratification by a two-thirds majority of the states parties, a threshold that could be reached only if displeasure with the IACtHR were extremely broad. In Europe, the barriers are even higher. Amending the European Convention to cut back the Court's powers or jurisdiction would require unanimity among the 47 member states.

Nevertheless, the COE states have signaled to the European Court their desire for the Court to be less assertive in expanding Convention rights. The first signal was the Brighton Declaration on the Future of the European Court of Human Rights, approved by the COE's Committee of Ministers in April 2012. The Brighton Declaration affirms the principle of subsidiarity (that states have the primary role in safeguarding rights and freedoms, with the ECtHR exercising a secondary, supervisory function) and the margin of appreciation (Council of Europe 2012, para. 11). The member states subsequently signed Protocol 15, which (when ratified by all of the member states) will amend the preamble to the Convention by including references to the principle of subsidiarity and the "doctrine" of the margin of appreciation (Council of Europe 2013). Protocol 15 does not curtail the

competences of the ECtHR, but it does send a clear message to the Court. Though the Court may have afforded the United Kingdom a wider margin of appreciation in some recent cases (Madsen 2016, 32), it remains to be seen whether the Court's broader approach to interpreting rights will shift.

In short, like all courts, the ECtHR and the IACtHR operate within political contexts. They must constantly balance their desire to expand the scope of human rights norms with the necessity of maintaining acceptance and support among their compliance constituencies, including states. Significant levels of non-compliance with its decisions have not appeared to restrain the rights-expanding impulses of the Inter-American Court, at least not so far. Significant state resistance to the ECtHR has not reduced the Court's formal authority. The ECtHR may well show greater deference to states in some cases or on some issues. But the living instrument approach is so deeply rooted in the European Court that it will continue to interpret progressively the European Convention. The regional human rights courts seem likely to remain important sources of rights innovation and expansion.

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