

# Article

## Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts

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INTRODUCTION .....	2
I. THE EVOLUTION OF HUMAN RIGHTS LITIGATION .....	5
A. The Classic Declaratory Model .....	6
1. The Limits of the Declaratory Model in the Americas .....	8
2. Docket Crisis in Europe .....	11
B. The Structural Reform Model .....	13
1. International Structural Reform Litigation Today .....	15
2. Constitutional Power Grab? .....	17
II. HOW THEY DO IT: STRUCTURAL REFORM STRATEGIES .....	18
A. National Courts and Structural Reform .....	19
B. Are International Courts Different? .....	20
1. Jurisdiction over the Wrong Subject .....	21
2. Where There Is No Special Master .....	22
3. Information Deficit .....	23
4. International Court Legitimacy .....	24
C. Rights Review in the Americas .....	25
D. Rights Review in Europe .....	31
E. International Review Strategies .....	34
1. Deference to the State .....	35
2. Stakeholder Participation .....	37
III. CONCLUSION .....	38

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## INTRODUCTION

During the 1950s and 1960s, landmark rulings ordering school desegregation, prison reform, and other structural changes transformed civil litigation in the United States. The most striking feature of the new model of litigation, Abram Chayes argued, was the metamorphosis of the judge into a “creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge’s continuing involvement in administration and implementation.”<sup>1</sup> In structural reform litigation cases, courts issue complex equitable remedies, and then remain seized of the matter until the remedies are implemented, with judges guiding and monitoring—at times in great detail—the creation or transformation of state bureaucracies.

As constitutional courts and the practice of judicial review spread throughout the world in the 1980s and 1990s,<sup>2</sup> structural reform litigation began to appear, and even to flourish, outside the United States. Today high courts in Colombia, Costa Rica, India, and South Africa respond to certain social and economic rights-based claims with orders mandating significant reform of how government provides particular services.<sup>3</sup> Scholars differ over whether and under what circumstances such rulings are effective in altering the distribution of material and symbolic goods in a society.<sup>4</sup> But none dispute that

litigation.” See David Sloss, *Polymorphous Public Law Litigation: The Forgotten History of Nineteenth Century Public Law Litigation* (Santa Clara Univ. Legal Studies Research Paper No. 01-14, 2014), <http://ssrn.com/abstract=2380681>.

2. See TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* (2003); *THE GLOBAL EXPANSION OF JUDICIAL POWER* (C. Neal Tate & Torbjörn Vallinder eds., 1995); *THE JUDICIALIZATION OF POLITICS IN ASIA* (Björn Dressel ed., 2012); *THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA* (Rachel Sieder, Line Schjolden & Alan Angell eds., 2005); MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008).

3. See generally *COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD* (Varun Gauri & Daniel M. Brinks eds., 2008) (exploring the outcomes of social and economic rights litigation in developing states); CÉSAR RODRÍGUEZ GARAVITO & DIANA RODRÍGUEZ FRANCO, *CORTES Y CAMBIO SOCIAL: CÓMO LA CORTE CONSTITUCIONAL TRANSFORMÓ EL DESPLAZAMIENTO FORZADO EN COLOMBIA* (2010) (examining the role of structural reform litigation in Colombian forced displacement cases); *SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW* (Malcolm Langford ed., 2008) (providing a comparative study of social rights litigation); Manoj Mate, *Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective*, 12 SAN DIEGO INT’L L.J. 175 (2010) (examining social rights and structural cases before the Indian Supreme Court).

4. See Daniel M. Brinks & William Forbath, *Social and Economic Rights in Latin America: Constitutional Courts and the Prospects for Pro-Poor Interventions*, 89 TEX. L. REV. 1943 (2011); David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT’L L.J. 189 (2012); Daniel M. Brinks & Varun Gauri, *The Law’s Majestic Equality?: The Distributive Impact of Litigating Social and Economic Rights* (World Bank Dev. Research Grp. Working Paper 5999, 2012); see also Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY 715 (1992) (emphasizing indirect and symbolic impacts courts can have on social change); Gerald N. Rosenberg, *Hollow Hopes and Other Aspirations: A Reply to Feeley and McCann*, 17 LAW & SOC. INQUIRY 761 (1992) (debating how to assess whether courts have an impact on social change).

the spreading practice fundamentally alters the judicial role.<sup>5</sup>

The latest and perhaps most unexpected chapter in the evolution of structural reform litigation is international. With the turn of the millennium, the European Court of Human Rights and the Inter-American Court of Human Rights began ordering reform of government policy and institutions, using remedies for individual rights violations as a platform from which to restructure state policies and institutions. In recent years, the Inter-American Court of Human Rights has ordered states to reform conditions in prisons, mental health centers, and juvenile detention centers;<sup>6</sup> to delimit indigenous territories and grant indigenous communities collective land title based on customary usage;<sup>7</sup> to create a mechanism for granting nationality to the children of undocumented immigrants;<sup>8</sup> and even to conduct “an educational program for the general population” of Chihuahua, Mexico.<sup>9</sup> Over a quarter of the Inter-American Court’s judgments have required states to undertake structural reforms.<sup>10</sup> For its part, in 2004 the European Court began to declare in certain cases that the situation leading to a violation is “systemic” and using a mechanism called the “pilot procedure” to order extensive institutional reform measures. Through twenty-nine pilot judgments, the European Court has ordered Russia to relieve conditions of overcrowding in its prison system; required Bulgaria, Germany, Greece, and Turkey to reduce delay in their

5. It alters the judicial role as *formally* conceived. As Chayes himself noted, the formal description of adjudication was perhaps never empirically accurate. In practice, judges often engage in long-term supervision of equitable decrees, for example, in bankruptcy and divorce proceedings. Further, litigants can always return to court if their rights continue to be violated.

6. Vélez Loor v. Panamá, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶¶ 272, 278, 280 (Nov. 23, 2010) (migrants); Montero Aranguren (Detention Center of Catia) v. Venezuela, Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 150, ¶¶ 143-44 (July 5, 2006) (prison); “Juvenile Reeducation Institute” v. Paraguay, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶¶ 318, 320-21 (Sept. 2, 2004) (minors).

7. Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶¶ 281-90 (Aug. 24, 2010); Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 199 (Nov. 28, 2007); Sawhoyamaya Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 248(12) (Mar. 29, 2006); Indigenous Community Yakye Axa v. Paraguay, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 194-95 (June 17, 2005); Moiwana Community v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 209 (June 15, 2005); Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶¶ 153, 164 (Aug. 31, 2001).

8. Girls Yean and Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶¶ 239, 241 (Sept. 8, 2005).

9. González (“Cotton Field”) v. Mexico, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 602.23 (Nov. 16, 2009) (ordering an education program as one measure, among many others, towards ending femicides in Ciudad Juárez, Mexico).

10. Data on the Inter-American Court’s structural reform cases used in this Article is based on the author’s own reading, classification, and coding of the Inter-American Court’s judgments and compliance reports. To be classified as structural reform, cases have to meet three criteria: (1) the remedial order requires equitable relief that requires change to a government policy or bureaucracy, (2) the remedies affect parties not before the court, and (3) the court has been involved in supervising the implementation of the remedy. For the European System, the author relies on the European Court’s classification of cases as pilot judgments, and draws on the Secretariat and Committee of Ministers reports on these cases.

judicial systems; and mandated that Albania, Poland, and Romania improve mechanisms of compensation for communist-era takings.<sup>11</sup> In these cases, both courts remain seized of the matter until they deem the state has implemented their orders successfully.

Mandating and then supervising structural reform at first seems a quixotic undertaking for a supranational court. The problems that hound courts at the national level—lack of knowledge about the institution targeted for reform, lack of buy-in from the targeted parties, lack of enforcement mechanisms—are only magnified at the international level. More deeply, by undertaking structural reform adjudication, the human rights courts are stretching, if not re-writing, their mandates. Reform litigation makes courts less court-like. When courts rule against governments and order broad reforms based on individual rights claims, they are at the ebb of their “triadic” legitimacy,<sup>12</sup> acting in a legislative and administrative rather than judicial role.

The appearance of structural reform litigation at the international level thus poses two puzzles: *why* did the international human rights courts—with weaker enforcement capacity and a narrower mandate than their counterparts—come to engage in structural reform litigation, and *how* do they make it work? Part I of the Article addresses the question of why. It argues that the courts chose this path due to their encounter, starting in the 1990s, with new democracies and other transitional states that were unable or unwilling to bring their legal system into line with the courts’ jurisprudence. Under the original model of international human rights litigation, the human rights courts issued remedies focused on making victims whole through monetary compensation. However, this model soon faltered. In the face of repeat violations and ongoing noncompliance, the courts chose to involve themselves more deeply at the structural level, guiding and pressuring states to undertake ever more specific reforms. Further, in both systems what began as a judicial creation has come to be accepted as an important aspect of the courts’ work. Part I closes with a portrait of the contemporary structural reform practice of the human rights courts: it provides information on the amount of cases each court has heard, the subject matter of those cases, and levels of compliance.

Part II turns to the question of how the human rights courts undertake the challenge. The Article’s second argument is that each court has devised a distinct set of judicial review strategies to contend with the practical problems and legitimacy challenges of reforming the state from the distant seat of an international court. Part II first sets the stage by discussing the types of judicial review strategies that national courts adopt. It then explores whether international courts are somehow different, concluding that while the human rights courts are subject to the same pressures as national courts, their position

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11. *Pilot Judgments*, EUR. COURT OF HUMAN RIGHTS (Sept. 2014), [http://www.echr.coe.int/Documents/FS\\_Pilot\\_judgments\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf). See also Eur. Parl. Ass., *Ensuring the Viability of the Strasbourg Court: Structural Deficiencies in States Parties*, Doc. No. 13087 (2013) (counting twenty-nine pilot procedure cases).

12. See MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 1-2 (1981) (discussing triadic legitimacy as “the basic social logic of courts”).

without the state creates additional challenges in the realm of structural reform litigation. Through examination of two property cases, one from each system, the Article portrays and analyzes how each court contends with those challenges. The Inter-American court has developed a review practice that emphasizes the leadership of judges alongside active participation by victims and the non-governmental organizations that represent them. By contrast, the European supervisory dialogue emphasizes the role of third-party states through the Committee of Ministers, in what this Article terms “multilateral review.”<sup>13</sup> These distinct strategies reflect the political and institutional context of each court, and add to our understanding of how international courts construct their authority through engagement with distinct audiences. Part III closes the Article with a call for further comparative study of the effectiveness and legitimacy of this new practice.

While scholars have examined the European pilot procedure cases, on the one hand, and the advent of structural cases at the Inter-American Court, on the other, no other study of which I am aware compares the two courts’ turn to structural reform. Viewing them together gives us insight into the choices and challenges they each face, and provides a window into the question of how international courts construct their power more generally. The study is thus in conversation with the emerging scholarship on what Karen Alter calls “new-style” international courts as a type of political actor with distinct political agendas and effects.<sup>14</sup> By drawing from insights in the field of national judicial politics to understand the growing international judiciary, the Article also forms part of an emerging project to study national and international courts as a single subject.<sup>15</sup> It contributes to the scholarship on comparative strategies of judicial review a closer understanding of the review strategies international courts forge in response to their unique political settings.

## I. THE EVOLUTION OF HUMAN RIGHTS LITIGATION

The European and Inter-American human rights systems are Cold War creations. They grew from the post-war project of building international law and cooperation in order to safeguard against repetitions of mass-scale armed conflict,<sup>16</sup> as well as to provide a safeguard against spreading communism.<sup>17</sup>

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13. David Sloss suggested this term.

14. KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* (2013).

15. Jeffrey K. Staton & Will H. Moore, *Judicial Power in Domestic and International Politics*, 65 *INT’L ORG.* 553 (2011) (arguing that the study of international and national courts should be a single field).

16. Mikael Rask Madsen, *From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics*, 32 *LAW & SOC. INQUIRY* 137, 139-40 (2007).

17. *Id.* at 140; see also KLAAS DYKMANN, *HUMAN RIGHTS POLICY OF THE ORGANIZATIONS OF AMERICAN STATES IN LATIN AMERICA: PHILANTHROPIC ENDEAVORS OR THE EXPLOITATION OF AN IDEAL?* 16 (2004) (“The Latin American countries agreed to create the OAS as an ‘anti-Communist instrument’ because the US accepted the nonintervention principle and the Southern States were eager for the US promise to provide economic assistance.”) (citations omitted).

Thus, the Council of Europe Human Rights System, which came into being in 1959 and to which the European Court of Human Rights belongs, was conceived originally as a type of “early warning system to sound the alarm in case Europe’s fledgling democracies began to backslide toward totalitarianism.”<sup>18</sup> Working within a system of like-minded liberal democracies, it was an acknowledgment of the lesson of World War II that even democratic republics could devolve into tyranny and needed external checks. The Inter-American Court opened its doors almost two decades later. While modeled after the European Court of Human Rights, it quickly began to reshape its remedial regime in response to its distinct political context.

#### A. *The Classic Declaratory Model*

Three features distinguish the original declaratory model of human rights litigation, as embodied in the European Court of Human Rights’ early practice: the scope of the judgment’s declaration of a rights violation on the merits, the scope of the remedies, and the manner of supervision and enforcement. First, the Court’s judgment refers and applies exclusively to the facts and the litigants before the Court. The Court was conceived of not as reviewing the content of a law as such, but rather its application in a particular case. As Chayes phrased it, “[t]he controversy is about an identified set of completed events.”<sup>19</sup> Thus, even if a particular violation was the fruit of a particular government policy or law, it was the state action rather than the policy that violated the underlying human rights convention. It is true that the state had a duty to comply with the underlying convention. If a judgment indicated that the application of a law in a particular case had violated the convention, the state was on notice that it should consider revising the offending law. But that was not, strictly speaking, the concern of the judgment. The Court’s ruling served to indicate the meaning of the rights guaranteed by the European Convention of Human Rights, and states had discretion over how to bring themselves into compliance.

Second, the remedy, as originally conceived, was aimed only at making the victim whole. The European Convention makes but brief mention of the Courts’ reparatory powers late in the text, providing that “[i]f the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”<sup>20</sup> While the term “just satisfaction” would seem to include equitable relief as well as monetary compensation, the European Court ordered only monetary compensation in its early years.<sup>21</sup>

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18. Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT’L L. 125, 129 (2008).

19. Chayes, *supra* note 1, at 1282.

20. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 41, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter *European Convention*].

21. Helfer, *supra* note 18, at 136; Tom Barkhuysen & Michiel L. van Emmerik, *A Comparative View on the Execution of Judgments of the European Court of Human Rights*, in

Third, the European Convention assigns supervision of the European Court's sentences to the Committee of Ministers, the Council of Europe's main decision-making body, composed of foreign ministers.<sup>22</sup> Thus, it is a political body, rather than the Court itself, that concerns itself with implementation of its judgments.

Under this classic model, the Court has a twofold role. First, it declares to the state, and the world, that a particular action by the state violates a human rights standard protected by the Convention. It is then the state and the Committee of Ministers—not the Court—that work towards ensuring the state does not repeat the violation. Second, the Court concerns itself with the individual victims, ordering the state to make them whole. This twofold role is reflected in the structure of the judgments. The merits section declares that the state has violated a right, enunciating the right in question and applying it to the facts of the case. The remedial or operative section focuses on making the victim whole, most often by assigning monetary compensation. The declaratory model expresses the idea that even as democratic governments need an external check, they must retain their core role of deciding on particular policies and laws, as a matter of sovereignty and democracy.

The early trajectory of the European Court suggests that the declaratory model worked among a small group of states similarly committed to democratic governance. Although the European Convention on Human Rights was written in the shadow of the atrocities of World War II, Western Europe in the post-war era was a lawful and mostly democratic region.<sup>23</sup> The Court began its work with jurisdiction over eight states, all Western European, rule-of-law democracies.<sup>24</sup> Its early years were quiescent.<sup>25</sup> The Court acted as a fine-tuner, “setting up subtle tests of proportionality to examine restrictions aimed at

EUROPEAN COURT OF HUMAN RIGHTS: REMEDIES AND EXECUTION OF JUDGMENTS 1, 4-5 (Theodora Christou & Juan Pablo Raymond eds., 2005).

22. European Convention, *supra* note 20, art. 46.

23. Wojciech Sadurski, *Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments*, 9 HUMAN RIGHTS L. REV. 397, 406 (2009).

24. The Convention entered into force on September 3, 1953, with the ratifications of Denmark, Germany, Iceland, Ireland, Luxembourg, Netherlands, Sweden, and the United Kingdom. See Mikael Rask Madsen, *The Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence*, in THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS 46 (Jonas Christoffersen & Mikael Rask Madsen eds., 2011). The Court came into being in 1959 with jurisdiction over Austria, Belgium, Denmark, Federal Republic of Germany, Iceland, Ireland, Luxembourg, and the Netherlands. See *id.* For the text of the Convention, see *The Convention in 1950*, COUNCIL OF EUR., <http://human-rights-convention.org/the-texts/the-convention-in-1950> (last visited Dec. 4, 2014).

25. But this oft-told narrative of law-abiding states seems incomplete. Ireland was a founding member of the Court, and Turkey ratified the Convention in 1954. *Ratification of International Human Rights Treaties – Turkey*, UNIV. MINN. HUMAN RIGHTS LIBRARY, <http://www1.umn.edu/humanrts/research/ratification-turkey.html> (last visited Dec. 4, 2014). Cases of state-sponsored atrocity began appearing before the Council of Europe system in its earliest days. See Başak Çalı, *The Logics of Supranational Human Rights Litigation, Official Acknowledgement, and Human Rights Reform: The Southeast Turkey Cases Before the European Court of Human Rights, 1996–2006*, 35 LAW & SOC. INQUIRY 311, 312-13 (2010). Mikael Rask Madsen argues that the Court deftly handled questions having to do with the colonial—and thus non-democratic—practices and pasts of some of the European states. See Madsen, *supra* note 24, at 43.

legitimate ends, establishing the tests of, for example, access to personal information contained in medical files, the scope of the duties of authorities to consult trade unions . . . or the status of 'illegitimate children.'"<sup>26</sup> In each of these cases, the Court would declare that there had been a violation, and, at times, issue an order for monetary compensation of the victims. The case would then leave the Court's hands. As noted above, the Committee of Ministers, a political body in which ministers of each state sit in representation of their state, is charged with supervising compliance with the European Court's rulings.<sup>27</sup> Once states paid compensation and adjusted their systems to the Convention, the Committee would declare them to be in compliance with the Court's ruling. The Committee used a deferential standard of review of compliance, viewing states as primarily responsible for deciding how to reform their legal and political systems.

### 1. *The Limits of the Declaratory Model in the Americas*

The Inter-American Court was given a broader remedial mandate than its European counterpart. While the European Convention allows the Court to "afford just satisfaction to the injured party," the American Convention on Human Rights provides that having found a violation,

the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.<sup>28</sup>

The American Convention thus explicitly assigns the Inter-American Court remedial powers beyond mere compensation. But, strictly construed, the focus is on repairing the harm done to the victim in the case before the Court. The Court must attend to the *consequences* of the measure or situation to be remedied. The Convention does not explicitly grant the Court power to examine or alter the measure or situation *itself* so as to prevent future violations. Another difference is that the American Convention does not assign supervision to any actor in particular, but provides that the Court shall specify to the Organization of American States (OAS) General Assembly "the cases in which a state has not complied with its judgments, making any pertinent recommendations."<sup>29</sup> The provision implies that the Court must keep abreast of state compliance, but seems to place the power to respond to noncompliance in the hands of the General Assembly.

In its first cases, the Inter-American Court limited itself to ordering

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26. Sadurski, *supra* note 23, at 407 (footnote omitted).

27. European Convention, *supra* note 20, art. 46.

28. European Convention, *supra* note 20, art. 41; Organization of American States, American Convention on Human Rights art. 63(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention].

29. *Id.* art. 65.



monetary compensation and did not supervise compliance with its judgments.<sup>30</sup> This declaratory model of human rights litigation, however, soon revealed its limits. In contrast to the European Court, the Inter-American Court began life in 1979 overseeing a region in which military dictatorships and civil war predominated.<sup>31</sup> Even as the Latin American states supported the creation of a human rights court, many were engaged in campaigns of forced disappearance, extrajudicial killing, and torture targeted against internal dissidents.<sup>32</sup> In such cases, the Court would declare a violation and issue a monetary remedy, much like its European counterpart. It would also, in its reasoning, suggest actions the state should undertake to come into compliance with the Convention. For example, in its first case, which involved forced disappearances in Honduras, the Court suggested that the state must investigate and punish the crime.<sup>33</sup> However, this was not included in the remedial section of the judgment. Honduras was deemed to have complied with the ruling once it paid compensation to the relatives of the victims, even if the state continued to deny and cover up state-sponsored forced disappearances.<sup>34</sup> Under the declaratory model, in other words, the Inter-American Court was not able to protect individuals from ongoing state violations pursuant to a policy. It could only force states to pay for the damage to certain individuals whose petitions made it through the Inter-American System.<sup>35</sup>

The Inter-American Court soon began to depart from the traditional model of compensatory remedies. In 1996, it issued several reparatory rulings addressing state-sponsored violence. In each, the Inter-American Court ordered the state to pay monetary compensation, as it had in earlier cases. But it also began requiring the state to undertake certain acts. For example, it ordered states to investigate the underlying acts and, where there was criminal

30. Thomas Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351, 365-66 (2008).

31. When the Court first convened in June of 1979, the following states were under its jurisdiction: Bolivia, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Panama, Peru, and Venezuela. B-32: *American Convention on Human Rights*, INTER-AMERICAN COMM'N ON HUMAN RIGHTS, <http://www.cidh.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm> (last visited Dec. 4, 2014).

32. See, e.g., STATE VIOLENCE AND GENOCIDE IN LATIN AMERICA: THE COLD WAR YEARS (Marcia Esparza et al. eds., 2010); see also SOCIETIES OF FEAR: THE LEGACY OF CIVIL WAR, VIOLENCE AND TERROR IN LATIN AMERICA (Kees Koonings & Dirk Kruijt eds., 1999) (examining the legacy of state violence in the region). Again, it is important to recall that Spain, Portugal, and Greece also were governed by dictatorships that violated the most fundamental rights. That these cases did not find their way to the European Court speaks also to the question of how states and the European Commission chose their cases before the era of the individual petition. Overall, however, the differences between governments in the two regions are stark, and this likely played a role in shaping the courts' dockets.

33. Velásquez Rodríguez v. Honduras, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 7, ¶ 34 (July 21, 1989); Claudio Grossman, *The Velásquez Rodríguez Case: The Development of the Inter-American Human Rights System*, in INTERNATIONAL LAW STORIES 77, 87 (John E. Noyes et al. eds., 2007).

34. Velásquez Rodríguez v. Honduras, Interpretation of the Judgment of Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 9, ¶ 44 (Aug. 17, 1990).

35. But, as one mother declared, "My son was not a cow, I don't want money, what I want is justice." Viviana Krsticevic, Comment, *Reparations in the Inter-American System: A Comparative Approach*, 56 AM. U. L. REV. 1375, 1419 (2007) (quoting a mother of one of the victims in the case of *El Amparo v. Venezuela*).

responsibility, to punish.<sup>36</sup> In other words, rather than letting the state choose the manner of righting the wrong, the Court demanded specific equitable relief.<sup>37</sup> Note that the remedial order is still focused on retrospectively repairing the harm. In order to comply with such an order, however, states had to undertake structural change, such as derogating amnesties and grappling with the complex power structure underlying impunity. The Court also began to order equitable remedies aimed at restorative justice for the victim. Today, the Inter-American Court is “the only international human rights body with binding powers that has consistently ordered equitable remedies.”<sup>38</sup>

Starting in 2000, the Inter-American Court took its remedial innovation a step further. It began to order not just remedies aimed at making victims whole, but also guarantees of non-repetition aimed at changing the structure of the state, so that the situation that led to the violation would not recur, even against different victims. By the 1990s, most Latin American states were no longer actively engaged in violent political repression. However, the states had large democratic deficits, and, in particular, the states had levels of inequality that ultimately posed a challenge to democracy.<sup>39</sup> Victor Abramovic argues that this led to changes in the kinds of cases that reach the Inter-American System, and the Court in particular. The Court, in turn, began “to set standards and principles to guide the actions of democratic States . . . through the formulation of public policies.”<sup>40</sup> In 2000, the Inter-American Court issued the first four rulings that can be classified as structural—they explicitly demand that the state reform or create a bureaucracy or policy. And then it began to supervise their implementation.<sup>41</sup> Since then, such orders have become common. Today, in over fifty contentious cases, the Court has issued what this Article defines as structural orders.<sup>42</sup>

Parallel to its adoption of innovative remedies, the Inter-American Court began to supervise compliance to its rulings through compliance reports.<sup>43</sup>

36. See, e.g., *El Amparo v. Venezuela, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 28, ¶ 64 (Sept. 14, 1996)*.

37. Alexandra Huneeus, *International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts*, 107 AM. J. INT’L L. 1, 8 (2013).

38. Antkowiak, *supra* note 30, at 355.

39. As noted above, the first steps in remedial innovation have their roots not in structural problems but in prosecution. First, more states were less likely to comply, creating serious problems of legitimacy. Second, the Court was more alone in the enterprise of pushing toward compliance—there was no equivalent to the Committee of Ministers, a political body in the Council of Europe System charged with pushing states toward general compliance and compliance with specific court judgments. Third, in light of the kinds of human rights violations before the Inter-American System, monetary compensation was a particularly weak response.

40. Victor Abramovic, *From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System*, 11 SUR INT’L J. HUM. RTS. 7, 17 (2009).

41. *Barrios Altos v. Peru, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 87, ¶ 50 (Nov. 30, 2001)*; *Villagrán Morales v. Guatemala, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 77, ¶ 123 (May 26, 2001)*; *Paniagua Morales v. Guatemala, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 76, ¶ 229 (May 25, 2001)*.

42. See *supra* note 10.

43. Article 65 of the American Convention says only that the Court can refer a case of noncompliance to the OAS General Assembly. American Convention, *supra* note 28, art. 65. The Court quickly learned, however, that this option was not effective; the General Assembly consistently failed to

Thus the Court came to be involved not just in adjudication, but also the task of monitoring implementation of its orders, mirroring it in years of ongoing involvement with each case. The American Convention does not explicitly give the Court the power to supervise its rulings, and Panama challenged the Court in one of its early attempts.<sup>44</sup> However, the Court issued a judgment affirming its power to monitor compliance as “inherent in its jurisdictional function.”<sup>45</sup> Since then, states have accepted the practice, submitting compliance reports and appearing in compliance hearings at the Court’s request. The Inter-American Court’s shift away from the declaratory model was complete.

## 2. *Docket Crisis in Europe*

With the close of the Cold War, the European Court also came to feel the limits of the declaratory model. The Council of Europe System, originally set up as a bulwark against communism,<sup>46</sup> grew to include the post-Communist states. This expansion was a dramatic change. Not only did the Court’s jurisdiction grow from twenty-three to over forty states in the course of a few years, but it came to include states that were struggling to govern through democracy after years of authoritarianism, and that had economic circumstances very different from those of the founding states. By the 2000s, the Court’s docket was deluged with cases, threatening the Council of Europe System’s viability.<sup>47</sup> Many of the cases, moreover, were “repetitive cases”—cases that shared similar underlying facts, and revealed the same state actor violating the same provision of the Convention over and over again.<sup>48</sup> The rise in the number of repetitive cases showed that states—especially the new states—were not changing their practices in light of Court rulings. Instead, while states complied with the monetary relief demanded in the operative section of the judgment, they failed to fix the underlying state law or practice that created the violation in the first place. Those harmed by state action turned to the Court for relief. But the Court began to sink under the weight of so many claims.

The Council of Europe began to view the docket crisis as a threat to the System: the Court would not be able to work effectively with such a heavy caseload.<sup>49</sup> The solution, originally suggested by the Committee of Ministers,

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respond with sufficient force. Since 1996, the Court has interpreted the Convention to allow it to monitor its own rulings. See *Baena-Ricardo v. Panama, Competence*, Inter-Am. Ct. H.R. (ser. C) No. 104, ¶¶ 100-04 (Nov. 28, 2003) (rejecting Panama’s challenge to its power to supervise compliance); INTER-AM. CT. H.R., RULES OF PROCEDURE, art. 63 (2009), [http://www.corteidh.or.cr/sitios/reglamento/ene\\_2009\\_ing.pdf](http://www.corteidh.or.cr/sitios/reglamento/ene_2009_ing.pdf).

44. See *Baena-Ricardo*, No. 104; INTER-AM. CT. H.R., RULES OF PROCEDURE, *supra* note 43, art. 69 (specifying procedures for supervision).

45. *Baena Ricardo*, No. 104, ¶ 131.

46. Madsen, *supra* note 16, at 140.

47. See *6th Annual Report of the Committee of Ministers*, COUNCIL OF EUR. 41 (2012), [http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM\\_annreport2012\\_en.pdf](http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2012_en.pdf). The Court had over 11,000 cases pending in 2012. *Id.*

48. *Pilot Judgments*, *supra* note 11, at 1.

49. Council of Eur. Comm. of Ministers, *Resolution on Judgments Revealing an Underlying*

was to join repetitive cases and directly order the state to fix the underlying problem. In 2004, the Court created the pilot judgment procedure to address structural “dysfunction affecting the protection of the Convention right in question in the national legal order.”<sup>50</sup> Under this process, the Court selects a few repetitive cases and seeks “to achieve a solution that extends beyond the particular case or cases so as to cover all similar cases raising the same issue.”<sup>51</sup> The Court (a) chooses one case, (b) freezes like cases, (c) issues complex remedial orders demanding that the state restructure the institutions creating the repeat cases, and (d) takes on a greater role monitoring compliance. “The pilot judgment is therefore intended to help the national authorities to eliminate the systemic or structural problem highlighted by the Court as giving rise to repetitive cases.”<sup>52</sup> Eventually the Committee of Ministers approved the pilot procedure, and it is now written into the Court’s rules.<sup>53</sup> By October 2012, the European Court had declared thirteen pilot cases. By September 2014, the Court’s official tally put the number at twenty-one.<sup>54</sup>

It should be noted that the European Court’s engagement with structural reform stretches beyond the pilot procedure. The Court has also increasingly issued so-called quasi-pilot judgments, or Article 46 judgments.<sup>55</sup> In these cases, as in pilot judgments, the Court declares that the rights violation in question is caused by a systemic problem and that the state must take measures to resolve the underlying systemic problem, and it may even suggest which measures the state should take. However, in contrast to pilot judgment cases, the Court does not transform those suggestions into binding orders by putting them in the operative section of the judgment,<sup>56</sup> and the Court does not adjourn similar cases. Finally, the Committee of Ministers has developed its own system for prioritizing the supervision of cases that it views as implicating a need for systemic reform.<sup>57</sup> While these developments also move the Council of Europe toward a system more focused on reforming state structures, this Article focuses only on the pilot procedure cases as a pure case of structural reform practice.<sup>58</sup>

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*Systemic Problem*, 114th Sess. Res. 3 (May 12, 2004).

50. *Hutten-Czapska v. Poland*, App. No. 35014/97, 2006-VIII Eur. Ct. H.R. ¶ 234 (June 19, 2006).

51. *The Pilot-Judgment Procedure*, COUNCIL OF EUR. (2009), [http://www.echr.coe.int/Documents/Pilot\\_judgment\\_procedure\\_ENG.pdf](http://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf).

52. *Id.* ¶ 4.

53. EUR. COURT OF HUMAN RIGHTS, RULES OF COURT r. 61 (2013), [http://www.echr.coe.int/Documents/Rules\\_Court\\_ENG.pdf](http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf).

54. *Pilot Judgments*, *supra* note 11.

55. European Convention, *supra* note 20, art. 46.

56. Examples of quasi-pilot judgments include *Lukenda v. Slovenia*, App. No. 23032/02, 2005 Eur. Ct. H.R. (Oct. 6, 2005); *Sejdovic v. Italy*, App. No. 56581/00, 2005 Eur. Ct. H.R. (Nov. 10, 2005); and *Xenides Arestis v. Turkey*, App. No. 46347/99, 2005 Eur. Ct. H.R. (Dec. 22, 2005). See PHILIP LEACH ET AL., RESPONDING TO SYSTEMIC HUMAN RIGHTS VIOLATIONS: AN ANALYSIS OF ‘PILOT JUDGMENTS’ OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THEIR IMPACT AT NATIONAL LEVEL 24-26 (2010).

57. See *6th Annual Report of the Committee of Ministers*, *supra* note 47, at 25-26.

58. See *supra* note 10.

For both courts, then, the declaratory model of human rights litigation became untenable. And for both courts, the solution was a new form of engagement with states. While there are important differences between the courts' practice of structural litigation, they share certain basic features, constituting a new model of regional rights litigation.

### B. *The Structural Reform Model*

In a famous 1976 article, Abram Chayes analyzed the emergence of structural reform litigation in the United States. Traditionally, he noted, we conceive of litigation as retrospective: “[t]he controversy is about an identified set of *completed* events.”<sup>59</sup> Further, the controversy is conceived of as between two parties: the remedy is tailored to fit the harm caused by the defendant to the plaintiff and “[t]he impact of the judgment is confined to the parties.”<sup>60</sup>

Litigation before the international human rights courts never entirely resembled Chayes' traditional model of private civil litigation. After all, the defendant is a nation-state, and not a private party. The issues that were to come before the human rights courts were always imagined as having a public dimension. The declaratory model of human rights litigation nonetheless was based on and shared many features of the traditional civil litigation model.

Chayes argues that the rise of structural reform litigation in the United States fundamentally altered these classic features. The harm was now conceived of as ongoing; and the remedy was no longer designed to address a discrete harm suffered by the plaintiff, but came to encompass “complex forms of ongoing relief, which have widespread effects on persons not before the Court and require the judge's continuing involvement in administration and implementation.”<sup>61</sup> Further, he observed that in the new litigation, “[t]he traditional adversary relationship is suffused and intermixed with negotiating and mediating processes at every point.”<sup>62</sup>

Similarly, there are three features that define the new structural turn in human rights structural litigation. Each was a feature first highlighted by Chayes in his seminal article. The first feature refers to the complaint itself: the petition to the Court is of such a nature that, even if formally filed as an individual claim, it has implications beyond the individual litigant. In other words, the plaintiff is not claiming that there was a mistake or abuse in a particular interaction with the state, but rather cites “a grievance about the operation of public policy.”<sup>63</sup> In order to remedy the violation, or else to keep it from recurring, the state would have to change its method of provision of a particular service. This feature is what first takes the case beyond what Chayes described as the traditional conception of adjudication, which viewed the

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59. Chayes, *supra* note 1, at 1282 (emphasis added).

60. *Id.* at 1282-83.

61. *Id.* at 1284.

62. *Id.*

63. *Id.* at 1302.

litigation as bipolar—dealing with only two parties.<sup>64</sup> The scope of the matter inherently affects and involves non-parties.

The second feature refers to the nature of the remedies issued by the Court. In the words of Chayes, relief is “forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees.”<sup>65</sup> Usually, courts avoid injunctive relief: it is simpler and quicker, and by now more routine, to order the executive to write a check than it is to order diverse state actors to undertake particular actions. In structural cases, however, courts draw on their equitable powers and embroil themselves in the messy business of injunctive relief. Further, the order seeks not just to make the plaintiff whole, but to alter how the government provides a particular service. Through the remedial order, the judge makes policy that affects broad groups of citizens, and begins to encroach on the legislative and administrative roles.<sup>66</sup>

The third feature refers to what happens after the Court issues the remedies. In traditional litigation, the Court’s involvement in a case ends with the final judgment. In structural reform cases, the judgment only signals the end of the adjudication phase and the beginning of the monitoring phase: the Court becomes involved in the long-term supervision, guidance, and assessment of the implementation of the order. This third point is crucial and often overlooked.<sup>67</sup> Not only does the judge order the implementation of a particular policy, she becomes involved in its execution. If through the second remedial feature the Court begins to invade the legislative role, this supervisory feature takes the judge into the executive’s turf: it involves courts in the work of administrators charged with executing policy.

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64. *Id.* at 1282.

65. *Id.* at 1302.

66. For example, litigation in which the Brazilian courts order the state to provide HIV medication to a single litigant, therefore, would not qualify as public law litigation under this definition. Hoffmann and Bentes make the distinction between individual and collective claims. Florian F. Hoffmann & Fernando R.N.M. Bentes, *Accountability for Social and Economic Rights in Brazil*, in *COURTING SOCIAL JUSTICE*, *supra* note 3, at 100, 101. Landau also makes this distinction, calling the two principles “individualized enforcement” and “large-scale judicial populism.” Landau, *supra* note 4, at 199, 216. Here, I include only cases that directly order reform. Compensating the individual before the court falls into the more traditional notion of public law. Note, though, that if enough rulings come down ordering the government to compensate an individual in a particular manner, the institution might undertake reform of its practice to avoid litigation. This method is less available to the international courts, however, because of the peculiarity and size of their dockets. The pilot procedure retains aspects of this form, however, because it pursues one case to resolve a structural problem, and then returns to other repetitive cases to keep resolving it should the first fail. *Pilot Judgments*, *supra* note 11, at 1.

67. César Rodríguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89 *TEX. L. REV.* 1669, 1674 (2011).

**Table 1:** Two Models of International Rights Adjudication

	Declaratory	Structural
Scope of Claim	Facts and parties before court	Structural situation
Aim of Remedy	<i>Restitutio ad integrum</i>	Reform of structural dysfunction
Method of Enforcement	Political supervision	Judicial supervision

There are significant differences between the courts' two forms of approaching structural reform cases. Once the European Court declares that it will use the pilot procedure, several things follow that have no analog in the Inter-American System. Especially striking is that other like cases are frozen, left in abeyance, until the case chosen as the test case is resolved.<sup>68</sup> Further, in pilot cases, the European Committee of Ministers remains deeply involved in supervision,<sup>69</sup> whereas the Inter-American Court single-handedly supervises all of its cases.<sup>70</sup>

But the main contours of their evolution in this direction are shared, and reminiscent of the move first noted by Chayes from private civil litigation to public law litigation. Faced with the challenge of structural violations, the courts chose to become more deeply involved in policymaking at the state level.

### 1. *International Structural Reform Litigation Today*

The Inter-American Court has issued structural remedial orders and supervised their implementation in a quarter of its roughly 170 contentious judgments.<sup>71</sup> These are cases in which the Court demands in the remedial section of its judgment that the state create or reform the manner in which it

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68. The Inter-American Court does not yet link similar cases against a state in this way. However, it does sometimes use a single compliance hearing to discuss several similar cases against a state, and it has plans to further link the supervision process of similar structural cases. Roberto Caldas, Vice-President, Inter-American Court of Human Rights, Conference Presentation at *La Implementación de las Decisiones del Sistema Interamericano y la Administración de Justicia: El Proceso de Supervisión de Decisiones: La Perspectiva de la Corte Interamericana* (Nov. 24, 2014).

69. See *supra* note 22 and accompanying text.

70. That means that judicial officers follow up with the state, the Inter-American Commission, and the parties, pushing them to report back on the state of implementation. When there is a delay, the Court calls the three parties to a closed hearing, where they sit to work towards an agreement towards implementation. Then the Court returns to requesting information from the parties about compliance. This process continues, sometimes for years, until the Court declares that there has been full compliance with each of its orders. (Note that in structural cases, some argue that the rapporteurships of the Commission also act as a kind of compliance officer.) See Victor Abramovich, *De las Violaciones Masivas a los Patronos Estructurales: Nuevos Enfoques y Clásicas Tensiones en el Sistema Interamericano de Derechos Humanos*, 63 DERECHO PUCP 95, 129-30 (2009).

71. This statement is based on original coding and analysis of the Court's judgments and compliance reports. See *supra* note 10.

provides or protects a particular right in general, or for a particular group.<sup>72</sup> While the cases span many different areas of rights protection, the Court has focused its efforts on certain areas of state practice. For example, the structural reform cases reflect the Court's traditional emphasis on protection against illegal state repression and state-sponsored violence: one line of cases orders states to limit military jurisdiction and to remove other roadblocks to prosecution of gross violations that involve state actors.<sup>73</sup> Another line of cases develops the right to collective property based on traditional usage.<sup>74</sup> In these cases, the remedial order typically demands that the state delimit the community's land and grant collective legal title, in consultation with the benefited group and others whose rights may be affected. A third line focuses on detention practices: the Court has issued remedial rulings that aim to alter conditions of detention of prisoners, immigrants, juveniles, and mental health patients.<sup>75</sup> The Court also typically orders states to create courses on human rights for state workers, at times even specifying the material that the course should include.<sup>76</sup>

The European Court of Human Rights has opened the pilot procedure in over thirty distinct situations, but the majority of these have focused on two main areas. The first is judicial process and judicial reform, particularly to address non-enforcement of judicial decisions in former Soviet-bloc states,<sup>77</sup> and judicial delay.<sup>78</sup> The Court has also issued pilot judgments in a line of cases dealing with compensation and individual property rights in the wake of

72. Thus, the number excludes cases in which the Court makes suggestions in the merits section of the judgment, but does not turn the recommendation into a legal obligation through its inclusion in the operative section. The number also excludes cases in which the Court had not yet supervised the implementation of its structural remedial orders by December 2012, and it excludes cases in which an equitable remedial order aims only to make an individual plaintiff whole.

73. See, e.g., *Radilla-Pacheco v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 346 (Nov. 23, 2009); *Tiu Tojín v. Guatemala*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 190, ¶¶ 118-20 (Nov. 26, 2008); *Palamara-Iribarne v. Chile*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 135, ¶ 14 (Nov. 22, 2005); *Mapiripán Massacre v. Colombia*, Merits, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶¶ 124, 132 (Sept. 15, 2005); *Castillo Petruzzi v. Peru*, Merits, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 52, ¶ 128 (May 30, 1999). This line of cases is discussed in Juan Carlos Gutiérrez & Silvano Cantú, *The Restriction of Military Jurisdiction in International Human Rights Protection Systems*, 7 SUR INT'L J. HUM. RTS. 75 (2010).

74. See cases cited *supra* note 7.

75. See cases cited *supra* note 6.

76. See, e.g., *González et al. ("Cotton Field") v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶¶ 602.22-23 (Nov. 16, 2009) (ordering "permanent education and training programs and courses for public officials on human rights and gender, and on a gender perspective").

77. *Ivanov v. Ukraine*, App. No. 40450/04, 2009 Eur. Ct. H.R. (Oct. 15, 2009); *Olaru v. Moldova*, App. Nos. 476/07, 22539/05, 17911/08, 13136/07, 2009 Eur. Ct. H.R. (July 28, 2009); *Burdov v. Russia*, App. No. 33509/04, 2009 Eur. Ct. H.R. (Jan. 15, 2009).

78. *Glykantzí v. Greece*, App. No. 40150/09, 2012 Eur. Ct. H.R. (Oct. 30, 2012); *Michelioudakis v. Greece*, App. No. 54447/10, 2012 Eur. Ct. H.R. (Apr. 3, 2012); *Ümmühan Kaplan v. Turkey*, App. No. 24240/07, 2012 Eur. Ct. H.R. (Mar. 20, 2012); *Dimitrov v. Bulgaria*, App. Nos. 48059/06, 2708/09, 2011 Eur. Ct. H.R. (May 10, 2011); *Finger v. Bulgaria*, App. No. 37346/05, 2011 Eur. Ct. H.R. (May 10, 2011); *Rumpf v. Germany*, App. No. 46344/06, 2010 Eur. Ct. H.R. (Sept. 2, 2010).



political transitions, and particularly in the transition from communism.<sup>79</sup> Other pilot judgments have addressed problems of detention practices,<sup>80</sup> loss of citizenship,<sup>81</sup> and the right to vote.<sup>82</sup> The majority of the pilot judgments have been issued in the past five years, indicating that the Court is relying more on this tool. Further, although the debate that led to the creation of the pilot procedure stressed the problem of repetitive cases from Eastern Europe, the list of pilot procedures includes judgments against Germany, Italy, and the United Kingdom, as well as long-time members like Turkey and Greece.

## 2. *Constitutional Power Grab?*

The world's two main regional rights courts, then, have begun undertaking structural reform, a practice that even national courts engage in only sparingly and at considerable risk to their legitimacy. The narratives of each court's evolution toward structural intervention differ. One emphasizes the challenges of democratization, the other docket control.<sup>83</sup> But their shared elements can be used to construct an alternative narrative of creeping constitutionalization. Both stories claim that the new post-authoritarian democracies of the post-Cold War period—the democracies born or reborn in the wake of socialism in Europe and in the wake of military dictatorships and/or civil war in the Americas—have weakly institutionalized judiciaries, and are thus incapable of independently making the structural changes necessary to comply with their respective human rights obligations.<sup>84</sup> Further, both claim that what follows from this observation—the solution to the problem—is that international courts need to step in to help states make those structural changes.

This solution, however, is not inevitable. Indeed, what the courts issue as a seeming critique of the new states—that they are too weakly institutionalized to implement complex remedial orders—can be cast instead as a criticism of courts and of trying to solve structural policy questions through case-by-case

79. *Alisic v. Bosnia and Herzegovina*, App. No. 60642/08, 2012 Eur. Ct. H.R. (Nov. 6, 2012); *Maria Atanasiu v. Romania*, App. Nos. 30767/05, 33800/06, 2010 Eur. Ct. H.R. (Oct. 12, 2010); *Suljagić v. Bosnia and Herzegovina*, App. No. 27912/02, 2009 Eur. Ct. H.R. (Nov. 3, 2009); *Hutten-Czapska v. Poland*, App. No. 35014/97, 2006-VIII Eur. Ct. H.R. (June 19, 2006); *Broniowski v. Poland*, App. No. 31443/96, 2004-V Eur. Ct. H.R. (June 22, 2004).

80. *Torreggiani v. Italy*, App. No. 43517/09, 2013 Eur. Ct. H.R. (Jan. 8, 2013); *Ananyev v. Russia*, App. Nos. 42525/07, 60800/08, 2012 Eur. Ct. H.R. (Jan. 10, 2012).

81. *Kuric and Others v. Slovenia*, App. No. 26828/06, 2012 Eur. Ct. H.R. (June 26, 2012).

82. *Greens and M.T. v. The United Kingdom*, App. Nos. 60041/08, 60054/08, 2010 Eur. Ct. H.R. (Nov. 23, 2010).

83. As Sadurski argues, the sense of docket crisis provided cover for a deep transformation: "The central reason provided by the Court to support its use of a pilot-judgment approach is that of docket control: an admittedly much more pedestrian rationale than a grandiose constitutional transformation of the Court itself." Sadurski, *supra* note 23, at 422.

84. On the Inter-American Court, see *Abramovic*, *supra* note 40, at 16, which argues that "states, with their legitimately elected officials, are not capable of reversing and impeding arbitrary practices committed by their own agents, nor of ensuring effective mechanisms of accountability, on account of the precarious functioning of their judicial systems." On the European Court, see, for example, Sadurski, *supra* note 23, at 406-07.

adjudication.<sup>85</sup> The courts could have resigned themselves to a more declaratory role in these types of structural matters. Courts might have concluded that they work best to reform well-functioning democracies at the margins, or else as alarm systems for gross violations. Deep structural problems should be resolved by the political bodies. The risk of this more passive response, of course, is that it could have consigned the courts to irrelevance.

Neither court took this tack. Rather, like U.S. federal courts faced with inertial state-level institutions, they ventured into structural reform. The solution they chose can also be described as a power grab, for under the new model courts claim more power over states than under the declaratory model. The states no longer get to decide what, exactly, compliance to the underlying convention means. That decision is now in the hands of the courts. The next part of this Article examines the strategies the human rights courts use to construct the greater power they now claim.

## II. HOW THEY DO IT: STRUCTURAL REFORM STRATEGIES

It is often said that the key difference between international and national courts—mirroring perceptions about the difference between international and national law—is that international courts cannot enforce their rulings. But this contrast is misconceived.<sup>86</sup> National courts also lack the power of the purse and sword. Like international courts, they belong to legal systems in which other actors, most often national executives, are charged with enforcement. When, as in public law litigation, national courts rule against the government, they are in a similar position as an international human rights court: they have issued an order against the very actor responsible for implementing the order.

Nonetheless, there are other salient differences in the position of international as compared to national courts when they undertake the challenge of issuing and supervising structural reform orders. These differences constrain the strategies of judicial review that the international courts can exert with success, and help explain the particular structural reform strategies the human rights courts have forged.

Part II begins by distilling from the scholarship on comparative judicial review two dimensions of variation among judicial review types: degree of deference to states, and level of participation by actors beyond the judges. Section II.B then examines how the differences in the position of national and

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85. In certain situations, case-by-case adjudication can lead to policy change. For example, the Brazilian Supreme Court, which does not follow *stare decisis*, issued order after order for the state to provide HIV medication until, eventually, the government decided it was better to change its policy and avoid further litigation. See Hoffmann & Bentes, *supra* note 66. But this more gradual case-by-case option was not available to the regional courts. The Inter-American Court could not use this form of pressure because it relies on the Commission to send up cases, but the Commission refers under twenty cases a year. The European Court, by contrast, has too many cases on its docket to effectively wait out the state in the way the Brazilian Court did.

86. See Staton & Moore, *supra* note 15 (arguing that study of the two institutional types—international and national courts—is divided by the same line that traditionally divided comparative and international relations: the presumption of anarchy at the international level, which is no longer useful).

international courts constrains the types of judicial review strategies the human rights courts might adopt in issuing and supervising structural orders. Sections II.C and II.D then examine two case studies of property rights judgments, one before the Inter-American Court and one before the European Court, in order to reveal the distinct strategies the courts use in their exercise of structural reform. Part II concludes by analyzing the salient differences between the courts' strategies.

### A. National Courts and Structural Reform

The practice of judicial review by national courts has spread and diversified in recent decades. Typologies that seek to categorize the emerging varieties of judicial review emphasize two dimensions along which they vary that are relevant to the study of structural reform cases.<sup>87</sup> The first source of variation is the degree to which the court defers to the parties involved and to the defendant state in particular.<sup>88</sup> In the ambit of structural reform, a low degree of judicial deference is exemplified by U.S. courts' desegregation and prison reform cases, in which judges would issue detailed remedial orders and then appoint special masters to implement them.<sup>89</sup> The judicial review practice of Commonwealth courts, such as the U.K. courts' review powers under the Human Rights Act, exemplifies a more deferential model: judges do not have final say on the constitutionality of a particular piece of legislation, but can only signal its incompatibility with constitutional obligations.<sup>90</sup> Similarly, the practice of the South African Constitutional Court's review of socio-economic rights under a flexible "reasonableness" standard exemplifies a relatively high degree of deference to the defendant state.<sup>91</sup>

A second source of variation is the inclusion, and level of participation, of other actors who have a stake in the ruling, whether or not they are a party to the case. An important feature of constitutional review cases, and particularly structural cases, is that the ruling has the potential to affect non-party interests. To what degree are the voices of those non-party interests included in the judicial processes of elaboration of the judgment and implementation of the remedial order? An example of an inclusive process is that of the Colombian Constitutional Court in the cases of internally displaced persons. After declaring an "unconstitutional state of affairs" and issuing complex structural

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87. For a sampling of such typologies, see STEPHEN GARDBAUM, *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE* (2013); *THE GLOBAL EXPANSION OF JUDICIAL POWER*, *supra* note 2; TUSHNET, *supra* note 2; KATHERINE G. YOUNG, *CONSTITUTING ECONOMIC AND SOCIAL RIGHTS* (2012); Rodríguez-Garavito, *supra* note 67; Charles F. Sabel & William H. Simon, *Destablization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004); Miguel Schor, *Mapping Comparative Judicial Review*, 7 WASH. U. GLOBAL STUD. L. REV. 257 (2008).

88. One might also classify review types by remedial practice. However, this study is focused on comparing how courts issue structural remedies, so this dimension will not be explored.

89. Sabel & Simon, *supra* note 87, at 1017.

90. See GARDBAUM, *supra* note 87.

91. See Rosalind Dixon, *Creating Dialogue about Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT'L J. OF CON. LAW 391, 397-98 (2007).

orders, the Court held open hearings and encouraged participation of civil society throughout the implementation stage.<sup>92</sup>

Note that there can be variation on these dimensions through the lifetime of a single structural reform case before a single court, particularly since issuing a judgment and supervising implementation of an order are distinct processes.<sup>93</sup> A court can issue a very specific remedial order at the judgment stage, and then soften its stance and become more deferential during the implementation. Similarly, a court may consider only the arguments of the defendant and plaintiff at the judgment stage, and then open the implementation phase to greater stakeholder participation.

Further, there can be variation on these dimensions through the lifetime of a single court or judiciary. In a *Harvard Law Review* article that could be read as the sequel to Chayes' famous piece, Professors Sabel and Simon argue that the U.S. federal judiciary's practice of structural reform began as a "command-and-control" style of review, but has shifted over time to what they call "experimentalist." Experimentalist intervention "combines more flexible and provisional norms with procedures for ongoing stakeholder participation and measured accountability."<sup>94</sup> They show how in structural reform cases dealing with schools, mental health institutions, prisons, police, and housing, courts have increasingly included stakeholders in defining the remedies and the timing and manner of their implementation. In other words, federal courts have become more deferential to the parties involved, and have included in the implementation stage more actors who have a stake in the ruling.

### B. *Are International Courts Different?*

National courts, then, exhibit a wide variety of strategies and styles when they issue and supervise structural orders. In seeking to understand the structural reform practice of the international human rights courts, the first question is whether they are categorically different from national courts. Are their mandates so distinct, or their position vis-à-vis the state so different, that they cannot use the same review strategies as national courts when they issue and supervise structural orders? Or do they work under similar constraints and employ structural reform strategies that vary along the same two dimensions of deference and plurality? This section argues that four aspects of the structure and position of the international human rights courts constrain the human rights courts' structural reform strategies in distinctive ways. First, whereas national courts have direct authority over the actors who run institutions targeted by court orders, the international human rights courts have jurisdiction over only one type of actor, the state. Second, many national courts are immersed in legal systems that are more institutionalized than are international legal orders, and they thus can rely on more well-developed doctrines and mechanisms for

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92. Rodríguez-Garavito, *supra* note 67, at 1670, 1686.

93. *See id.*

94. Sabel & Simon, *supra* note 87, at 1019.

asserting their authority. Third, international courts have less local knowledge, and locals know less about them. Finally, international courts, as they are not part of a classic separation of powers system, must have a different—if still under-specified—source of legitimacy.

### 1. *Jurisdiction over the Wrong Subject*

National courts have jurisdiction over all kinds of state-actor defendants. Plaintiffs can sue an individual public school teacher, the school principal, or even the governor or President. In *Brown v. Board of Education*,<sup>95</sup> therefore, the party being sued before the federal courts was the institution that had direct managerial authority over the schools to be targeted by reform. Human rights courts, by contrast, can hear cases against only one type of defendant—the state. In reform litigation, that means that national courts can address orders to the bureaucracy directly charged with the matter that led to a violation, but international courts can only direct orders to the state as a whole. This difference is not significant when a court issues an order for monetary compensation. In such a case, the executive branch, which represents the state before the international court, is the actor called on to pay money to the victim.<sup>96</sup> It is not so different either if the court order requires something that the executive—and better yet, the Foreign Ministry—can single-handedly accomplish. Thus, the Inter-American Court's judgments ordering states to apologize to their victims, or to name a road in memory of the victims, achieve relatively high compliance rates.<sup>97</sup> But as orders become more complex, and their implementation requires involvement of more state actors, the international court loses ground. Often they find themselves in the position of ordering something that their main interlocutor, the executive, cannot single-handedly accomplish.

One might object that this is also the case for national courts engaged in structural reform. Critics of this practice in the United States suggest that the courts' authority is too narrow and too shallow to be effective: "Too narrow because the problems of public agencies were linked to myriad other institutions and social practices, while a court's power extended only to the parties before it. Too shallow because the operations of the agencies depended on the street-level conduct of subordinates far below the court's view."<sup>98</sup> But the difference is that the international court's relation of authority to the relevant actor is mediated by at least one extra layer of actors—it communicates exclusively through the state actor designated as representing the state as a whole, usually the foreign ministry of the executive branch. This matters because more intermediary actors mean more potential veto points.

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95. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

96. Further, such judgments for monetary compensation can be enforced through the established method for enforcement of foreign judgments.

97. See Alexandra Hunecus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L.J. 493 (2011).

98. Sabel & Simon, *supra* note 87, at 1017.

Further, it gives the state more discretion as to how it responds to the violation. The state in an international case may have discretion, for example, to choose which state actor implements the order, whereas the national court order can direct a particular state actor to action.<sup>99</sup> Finally, the reality is that a state actor implicated by the court's order may even be unaware of the court's judgment, undermining compliance.<sup>100</sup>

## 2. *Where There Is No Special Master*

A further complication is that the authority of an international court ruling within national law varies from nation to nation. Some nations lean toward monism, making international human rights court judgments directly binding and justiciable in national law. Others are more dualist, meaning that court judgments bind the nation-state under international law, but do not bind individual actors within the state under national law (in the language of U.S. foreign affairs law, the court judgment is non-self-executing). In those states where an international court order is considered to be non-justiciable, an incongruent situation can emerge in which the actor tasked with implementing the reform and the actor upon whom the order is binding do not align. The state as a whole has a legal duty to act under international law, but no single actor has a legal duty to act under national law (and as natural persons, they are not party to the human rights treaties, and so do not have a duty to act under international law).<sup>101</sup> Making matters worse, many nations have yet to work out the exact legal effect of an international court ruling. This is especially the case in the Inter-American System, wherein the Inter-American Court is working hard to convince states that its rulings have direct effect (self-executing), but has not yet won over all states.<sup>102</sup>

Further, as international structural reform litigation is new, methods of supervision are still under-developed. In their study of court-mandated prison reforms in the United States, Malcolm Feeley and Edward Rubin attribute the federal courts' effectiveness to the mechanisms of implementation that they were able to deploy. Faced with recalcitrant officials, judges could threaten to find them in civil or criminal contempt, meaning that judges could levy fines or even throw them in jail.<sup>103</sup> One judge in a California prison reform litigation

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99. This is not to deny that courts also face limits in this sense. As Sabel and Simon point out, "[A] court's direct remedial authority operated mainly against senior officials (and even then, only with severe limitations)." *Id.* at 3. It is just that the limits are greater for an international court.

100. See Huneeus, *supra* note 97.

101. See *Medellín v. Texas*, 552 U.S. 491, 498-99 (2008) (holding that the State of Texas does not have a duty to comply with an international court order directed against the United States).

102. See GÓNGORO MERA, *INTER-AMERICAN JUDICIAL CONSTITUTIONALISM: ON THE CONSTITUTIONAL RANK OF HUMAN RIGHTS TREATIES IN LATIN AMERICA THROUGH NATIONAL AND INTER-AMERICAN ADJUDICATION* 48-61, 65-83 (2011); see also ALLAN R. BREWER-CARIAS, *CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN LATIN AMERICA: A COMPARATIVE STUDY OF AMPARO PROCEEDINGS* 163-76 (2009) (explaining a procedural institution in the Inter-American Court known as *amparo*, which requires prompt remedy for rights recognized in the Convention).

103. MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* 124-25, 135, 322-23, 357 (1998).

case went so far as to sentence each member of the prison's Board of Supervisors "to five days in their own inadequate jail and 'tentatively' fined the county \$9,393,000, an enormous sum when measured against the county's annual criminal justice budget of \$75 million."<sup>104</sup> But the authors place special emphasis on another more frequently used tactic, which relies not on coercing officials but replacing them. Under the Anglo-American equity tradition, courts can place institutions in receivership, which means that their management is taken over by the Court.<sup>105</sup> Of course, judges have neither the time nor expertise to truly become managers of complex institutions. So, again drawing from the Anglo-American equity tradition, they are able to appoint a special master. In U.S. prison litigation cases, the courts appointed neutral outside corrections experts to step in and manage the reform. This individual becomes the manager who implements the orders of the court and is directly accountable to the judge. Feeley and Rubin attribute much of the impact courts had to the special master: "The duties of these special assistants varied widely . . . but everywhere they expanded the capacities of judges to understand problems, formulate solutions and monitor compliance."<sup>106</sup>

Courts outside the Anglo-American common-law tradition, and without these strong tools, have in recent years found ways to undertake such litigation by using more dialogic, soft-power mechanisms, such as issuing compliance reports, hosting open public hearings, and appointing committees to supervise implementation.<sup>107</sup> While fairly new to courts outside the United States, these practices nonetheless have a longer track record than do the international courts.

### 3. *Information Deficit*

The human rights courts oversee vast and diverse regions of the world: the Inter-American Court has jurisdiction over twenty states and the European Court presides over forty-seven. They thus handle information about many different states' governments, laws, politics, and cultures and have less of a sense of each particular national environment than might a national court. Indeed, an international judge may not have stepped foot in the state against which she issues a judgment. Even as she is well informed of the facts of the

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104. *Id.* at 124.

105. See Liat Weingart, *Receiverships in the Prison Litigation Context: Factors Necessary for an Effective Judicial Remedy of Last Resort*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 193, 196 n.13 (2010) ("An equity court can impose three categories of measures to ensure compliance with its orders: first, a civil contempt sanction, in which the court can impose increasing levels of penalties on the defendant to coerce compliance; second, the court can enjoin third parties from aiding the defendant in its noncompliance; and lastly, the court may invoke 'in rem' relief, in which the court or its officers themselves do that which the defendant has refused to do." (quoting James M. Hirschhorn, *Where the Money Is: Remedies to Financial Compliance with Strict Structural Litigation*, 82 MICH. L. REV. 1815, 1826 (1984))).

106. Malcolm N. Feeley, *Implementing Court Orders in the United States: Judges as Executives*, in JUDICIAL REVIEW AND BUREAUCRATIC IMPACT: INTERNATIONAL AND INTERDISCIPLINARY PERSPECTIVES 221, 226 (Marc Hertogh & Simon Halliday eds., 2004).

107. See, e.g., Rodriguez-Garavito, *supra* note 67, at 1676 (arguing that "dialogic activism" is an effective tool for implementation of structural judgments).

case and the underlying treaties, she may know little about the surrounding circumstances of the case.

The judges' distance from the local political situation is, of course, one of the virtues of the international human rights courts and, to some extent, their *raison d'être*. Under a formalist view of law in which the judge deductively applies the rule as strictly construed, abstraction from surrounding circumstances is a virtue: it is the aspiration depicted by Lady Justice's blindfold. Regardless of whether a legalist description of the judicial process is ever accurate, it certainly fails to capture the role of the judge in fashioning and then supervising structural remedies. In these cases, the judge is no longer interpreting the text of the law. Rather, she moves from the task of adjudication to that of instrumentally fashioning policy so as to reach certain (legally required) outcomes. To use the language of Feeley and Rubin, at this point, the judge moves from "interpretation of an authoritative text" to "selection of a desirable result," or policymaking.<sup>108</sup> In this role, information about the world—about the political, social, and legal setting of the institution that the court is pushing the state to create or reform—is crucial. And here, international courts will most often be at a disadvantage.<sup>109</sup>

International courts, in turn, figure less prominently than do national courts in the mind of the public and in media coverage, particularly in the Americas.<sup>110</sup> People likely have less information about their human rights courts and treaties than about their national high court and constitution. This too may pose an impediment to the effective implementation of the international court's rulings—local actors may have to be educated before they will comply.

#### 4. *International Court Legitimacy*

At the national level, the normative legitimacy of national courts is understood through the doctrine of separation of powers and democratic theory.<sup>111</sup> Critics of structural reform cases point not only to the fact that judges lack specialized knowledge about the areas of government bureaucracies they strive to reform but to their lack of democratic credentials to undertake such reform in the first place. Why should unelected judges fashion public policy?

The normative legitimacy of international human rights courts is also traditionally rooted in the nation-state: they are created by treaties which, like contracts, reflect the will of the parties thereto. However, as these courts take

108. FEELEY & RUBIN, *supra* note 103, at 7.

109. See Yonatan Lupu, *International Judicial Legitimacy: Lessons from National Courts*, 14 THEORETICAL INQUIRIES L. 437, 450 (1998) ("[T]he process of accruing legitimacy is more difficult for an international court than a national court because international courts have less information about their audience's preferences."). One might counter that the U.S. federal courts have a similar disadvantage in fashioning policies to be imposed in the state setting.

110. James L. Gibson & Gregory A. Caldeira, *The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice*, 39 AM. J. POL. SCI. 459 (1995).

111. For the distinction between normative and sociological legitimacy, see Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 TEMP. L. REV. 61, 80 (2013).



on new roles beyond their original mandates, and as their rulings increasingly affect third parties and shape policy arenas, the contractual model of legitimacy falters. Many scholars are currently trying to ground the legitimacy of international courts, seeking theories to justify and guide their exercise of power.<sup>112</sup> But there is little consensus on the normative legitimacy of the emerging international judiciary. In this way, their exercise of power, and the project of mandating and supervising structural reform, is especially contested and in many ways on less stable normative footing than the analogous work of national courts. In terms of the task of convincing different audiences to accept their authority, then, international courts face added challenges. Further, convincing different audiences—and in particular executives, national judges, and the public—to accept their authority may be harder if they are perceived as outsiders imposing a foreign human rights ideal on a local matter. Finally, these courts have a much broader and more diverse set of audiences than do national courts: the European Court has over 800 million people and forty-seven states within its jurisdiction, and the Inter-American Court has roughly 600 million people and twenty states within its jurisdiction. The task of constructing their authority is thus much more complex and will vary across states and subject areas.

When they embark on structural reform, then, international courts face certain challenges unique to the international sphere. The next section describes two case studies in order to reveal the strategies that international human rights courts employ to overcome these challenges.

### C. *Rights Review in the Americas*

The Inter-American Human Rights System has two main organs: the Commission, based in Washington, D.C., and the Court, based in San Jose, Costa Rica. While the Commission is a non-judicial organ, charged with such tasks as promotion of human rights, it is also the first step in the individual petition system that leads to the Inter-American Court. Individuals file a petition against their state before the Commission, which then tries to resolve the issue by working with the state and victims towards a friendly settlement. If this fails, however, the Commission submits the case to the Court. But its role does not end there. In the Inter-American System, there are three distinct parties to any case before the Court: the defendant state; the victims, usually represented by an NGO; and the Commission, which presents its own independent view of the case. The Commission accepted 123 individual

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112. See, e.g., U.N. HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY (Helen Keller & Geir Ulfstein eds., 2012); Joseph Conti, *Producing Legitimacy at the World Trade Organization: The Role of Expertise and Legal Capacity*, 8 SOCIO-ECON. REV. 131 (2010); Aaron Fichtelberg, *Democratic Legitimacy and the International Criminal Court: A Liberal Defense*, 4 J. INT'L CRIM. JUST. 765 (2006); Gibson & Caldeira, *supra* note 110; Grossman, *supra* note 111; Lupu, *supra* note 109, at 442; Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach* 106 AM. J. INT'L L. 225 (2012); Erik Voeten, *Public Opinion and the Legitimacy of International Courts*, 14 THEORETICAL INQUIRIES L. 411 (2013).

petitions in 2013 and referred eleven cases to the Court.<sup>113</sup>

The Court, in turn, adjudicates the case, declaring whether the state has violated the underlying human rights convention and ordering remedial action. As noted earlier, the Court has also taken on the task of supervising the implementation of its remedial orders. It also has the power to issue preliminary measures, a form of injunctive relief designed to stop an immediate harm while the Court adjudicates a case.<sup>114</sup> The Inter-American Court has seven judges, meets four times a year, typically decides under twenty contentious cases per year, and runs on a slim budget of roughly \$4 million per year. In 2013, it issued thirteen judgments on the merits in contentious cases, twenty-six compliance reports, and three new provisional measures.<sup>115</sup>

In order to understand the distinguishing features of the Inter-American Court's structural reform practice, it is illustrative to focus on the trajectory of a single case, which will then be compared to a case in the Council of Europe setting. As cases having to do with the right to property account for an important subset of structural cases in both systems, the comparison will involve two precedent-setting property cases that are nonetheless representative of each System's distinct remedial and supervisory practice: *Comunidad Moiwana v. Suriname* and *Hutten-Czapska v. Poland*.

The Inter-American Court has been an innovator in developing the law of indigenous rights, with a series of landmark cases defining, most notably, a right to collectively owned property based on traditional usage. In *Comunidad Moiwana v. Suriname*, the Court extended this right to a non-indigenous maroon community in Suriname.<sup>116</sup> This case, with which Suriname has partially complied, has received three compliance reports. Together with the ruling, the reports provide a window into the Inter-American Court's structural reform strategies.

The *Moiwana* case involves a state-sponsored massacre of at least thirty-nine members of a rural Afro-indigenous community in the sparsely inhabited forests of Suriname. It took place on November 29, 1986, but only came before the Court in 2005. While the case before the Commission focused on the state's failure to prosecute and provide compensation for the crime, the Court's ruling

113. INTER-AMERICAN COMM'N ON HUMAN RIGHTS, ANNUAL REPORT 2013, at 41, 55 (2013), <http://www.oas.org/en/iachr/docs/annual/2013/docs-en/AnnualReport-Chap2A-B.pdf>.

114. Although preliminary measures are meant to be very immediate and individualized, some of the Court's orders in these cases have structural dimensions, such as when the order has to do with the treatment of prisoners who may be subject to an immediate, irreparable harm due to prison conditions. However, these cases will not be discussed here as they are not formally aimed at fixing a systemic situation. For a discussion of provisional measures, see CLARA BURBANO HERRERA, PROVISIONAL MEASURES IN THE CASE LAW OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS (2010).

115. INTER-AMERICAN COURT OF HUMAN RIGHTS, ANNUAL REPORT 2013, at 30, 40, 71 (2014), [http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng\\_2013.pdf](http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2013.pdf).

116. *Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005); see also Thomas M. Antkowiak, *Moiwana Village v. Suriname: A Portal into Recent Jurisprudential Developments of the Inter-American Court of Human Rights*, 25 BERKELEY J. INT'L L. 268 (2007) (arguing for the significance of the *Moiwana* case to the Court's evolution).

also focused on the community's property rights and social conditions. Following the massacre, members of the community were forced to abandon their traditional lands and try to survive elsewhere, internally displaced or in exile in French Guiana. The Court ruled that, in violation of the American Convention, the state of Suriname never undertook a serious effort to determine criminal responsibility, nor did it compensate or aid the surviving community members.<sup>117</sup> It ordered eight main remedial actions: (1) investigating and punishing the underlying crimes, (2) finding and identifying the remains of the victims, (3) granting the Moiwana Community collective title to their traditional lands, (4) guaranteeing the community members safe access should they choose to return to their traditional land, (5) creating a development fund to reconstruct the property of the community and provide health and education services, (6) issuing a public apology, (7) creating a public monument in memory of the massacre, and (8) providing monetary reparations.<sup>118</sup> The *Moiwana* case qualifies as a structural case, as defined above,<sup>119</sup> because the judgment challenges a government policy that applies to an entire community,<sup>120</sup> provides injunctive relief that mandates government change, and, as will be shown below, involves the Court in the long-term supervision of structural changes.

Some of the judgment's remedial orders were written in vague language that gives the state considerable discretion. The order to delimit Moiwana territory and to grant collective title, for example, stated only that the state shall "adopt such legislative, administrative and other measures as are necessary to ensure the property rights of the members of the Moiwana community in relation to the traditional territories from which they were expelled."<sup>121</sup> The state, in other words, can choose the means. But some of the orders are more detailed. The Court indicates that once the Moiwana people return to their village, the state must maintain an ongoing dialogue with victims: "[T]he State shall send representatives every month to Moiwana Village during the first year, in order to consult with the Moiwana residents."<sup>122</sup> The orders to create the development fund are also detailed: the state must create an implementing

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117. Because Suriname acceded to the American Convention only in 1987, the state's responsibility for the crimes themselves was not before the Court. *American Convention on Human Rights: Signatures and Current Status of Ratification*, INTER-AMERICAN COMM'N ON HUMAN RIGHTS, <http://www.cidh.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm> (last visited Dec. 4, 2014).

118. *Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 233.11 (June 15, 2005) [hereinafter *Moiwana v. Suriname-Judgment*].

119. See *supra* Section I.B.

120. In some senses this is a borderline structural reform litigation case because the litigants appeared in the name of the entire community, and so the community itself should be conceptualized as a party to the case. However, as in other indigenous rights cases, the Court orders the state to create a mechanism for delimiting and granting land, and in this sense is mandating the creation of an institution, one which will have effects on third parties beyond the Moiwana community. See *Moiwana v. Suriname- Judgment*, ¶¶ 209-10. Further, the housing, health, and education programs, as well as the land grant, will benefit all Moiwana members, even those who are not survivors of the massacre and diaspora.

121. *Id.* ¶ 209.

122. *Id.* ¶ 212.

committee within six months, and the committee must oversee the implementation of a US\$1.2 million development fund to establish, within five years, community health, housing, and educational programs for the Moiwana community members. Further, the Court specifies the composition of the committee and orders that it be in place within six months of the judgment. Notably, the Court weaves a threat directly into the order: if the state fails to create the implementation committee, it will be asked to explain itself before the Court in Costa Rica.<sup>123</sup> These orders, if not unusual by Inter-American standards, are more specific than those of the European Court. The Inter-American Court appears to subscribe to the theory that more specific remedial orders engender greater compliance,<sup>124</sup> and that threats—even if only threats to report back to the Court—also boost compliance.

After judgment, the Inter-American contentious cases move into the compliance phase.<sup>125</sup> In assessing compliance, the Court relies on information supplied by the three parties. After receiving the state's self-report on the implementation of the remedial measures, the Court provides the representatives of the victims and the Commission the opportunity to comment and provide more information. Drawing on this information, it then determines whether or not the state has complied with each of the remedial measures ordered in the original judgment. If the state has not yet fully complied, the Court publishes a compliance report indicating steps the state needs to take. In this sense, the compliance reports are not only assessments of compliance, but also guides toward implementation.<sup>126</sup> At times the Court also concludes it does not have enough information to make an assessment and requests more information. In the *Moiwana* case, the Court issued its first compliance report in 2007. The twenty-one-page document couples summaries of the information and comment provided by each of the three parties with the Court's assessment of the level of compliance with each order.<sup>127</sup> In 2009, the Court issued a second report, noting the state had failed to provide required information and calling the parties to a closed hearing in Costa Rica in January of 2010.<sup>128</sup> After

123. *Id.* ¶¶ 214-15.

124. Jeffrey K. Staton & George Vanberg, *The Value of Vagueness: Delegation, Defiance and Judicial Opinions*, 3 AM. J. POL. SCI. 504, 504 (2008) (arguing that “established line of research demonstrates that vague judicial opinions are less likely to be implemented than clear opinions”)

125. See David C. Baluarte, *Strategizing for Compliance: The Evolution of a Compliance Phase of Inter-American Court Litigation and the Strategic Imperative for Victims' Representatives*, 27 AM. U. INT'L L. REV. 263, 270 (2012).

126. Note the ambiguity in the legal status of the compliance reports. While the Court's judgments have binding force under the American Convention, compliance reports are not mentioned in the Convention. However, the Court does have the power to keep the case open until it deems the state has fully complied and thus to determine what that compliance means. In this way, the Court bolsters the persuasive power of guidelines it sets in the compliance reports.

127. *Moiwana Community v. Suriname*, Monitoring Compliance with Judgments (Inter-Am. Ct. H.R. Nov. 21, 2007), [http://www.corteidh.or.cr/docs/supervisiones/moiwana\\_21\\_11\\_07\\_ing.pdf](http://www.corteidh.or.cr/docs/supervisiones/moiwana_21_11_07_ing.pdf) [hereinafter *Moiwana v. Suriname- 2007 Compliance Report*].

128. *Moiwana Community v. Suriname*, Monitoring Compliance with Judgments, Order of the President of the Court, “Having Seen,” ¶ 1.7 (Inter-Am. Ct. H.R. Dec. 18, 2009), [http://www.corteidh.or.cr/docs/supervisiones/moiwana\\_18\\_12\\_09.pdf](http://www.corteidh.or.cr/docs/supervisiones/moiwana_18_12_09.pdf) [hereinafter *Moiwana v. Suriname- 2009 Compliance Report*].

that meeting, the Court issued its third compliance report, this time twenty-three pages long.<sup>129</sup>

Seen through the lens of the Court's compliance reports, two features of the ongoing dialogue over the implementation of the Court's order stand out. The first is the importance of the participation of the Commission and of the victims. The state is the main source of information; its reports highlight the different steps it has taken. But the victims respond by pointing out any and all shortfalls with the state's actions. For example, in the 2010 Supervision, in response to the Court's order to "establish a community development fund for health, housing and educational programs," Suriname reports:

[B]ecause the Moiwana Community is still in French Guiana, an independent consultant was hired in order to inquire as to whether the members of the Community were willing to return, the type of houses they preferred, and where they wanted the houses to be located. According to the State, Community members responded that they wanted the houses to be located at the original site, so construction begun there. However, it was halted for new consultations with a neighboring indigenous community. Additionally, the State decided, in consultation with the Moiwana Community, not to undertake the construction of a school or medical center, given that the Community had identified the construction of housing as its top priority. The State indicated that it had earmarked US\$ 1,200,000.00 . . . for this purpose and submitted a schedule showing that this amount was to be paid in five installments over the years 2006 to 2010. . . . Furthermore, five houses have already been built, two more are almost complete, and the foundations of five more have been laid. . . . Finally, the State indicated that the execution of the SSDI project (supra Considering Clause 19) is "in a final phase."<sup>130</sup>

The state, in other words, portrayed itself as having taken concrete steps toward compliance. But the victims dispute this rosy picture. They argue, for example, that "it is entirely possible that the five houses constructed by the State are in a location that will not be agreed to by the indigenous peoples and other Cottica N'djuka communities and [. . .] will therefore have to be dismantled and moved elsewhere."<sup>131</sup> The representatives also complained that the state had not yet transferred the "full amount of funds to the development committee," and that the state will be unable to provide "[h]ouses, a school[,] and [a] health centre . . . until such time as the precise location of the lands in question is . . . legally recognised and secured."<sup>132</sup> The representatives at times even use the opportunity of commenting on compliance to secure further concessions from the state.<sup>133</sup> For its part, the Commission echoes some but not all of

129. *Moiwana Community v. Suriname, Monitoring Compliance with Judgments, Order of the Court (Inter-Am. Ct. H.R. Nov. 22, 2010)*, [http://www.corteidh.or.cr/docs/supervisiones/moiwana\\_22\\_11\\_10\\_ing.pdf](http://www.corteidh.or.cr/docs/supervisiones/moiwana_22_11_10_ing.pdf) [hereinafter *Moiwana v. Suriname- 2010 Compliance Report*].

130. *Id.* "Considering That," ¶ 17.

131. *Id.* "Considering That," ¶ 18 (alteration in original).

132. *Id.*

133. The representatives take this opportunity to complain that the state should put the

the criticisms and tends to acknowledge more of the state's actions. From these three sources, the Court then draws its own conclusions. What is striking, however, is that the Court gives so much space to the parties' views, quoting them extensively in its own compliance reports. Each of the parties' positions and factual allegations, including in particular the victim's worries and concerns, are published and made public through the compliance report—even those that are not taken up by the Court.

The closed hearings similarly reveal the importance of the participation of the parties in the ongoing dialogue toward compliance. In this sense, the *Moiwana* case provides a negative example. Usually, compliance reports that follow on a closed hearing are rife with new ideas about how to accomplish compliance. In these hearings, the three parties meet with the judges to have a conversation about implementation. The parties often accord a new plan of action complete with a chronogram. In the *Moiwana* case, the state's commitment to the process is reflected in the party that it sent to Costa Rica, which included the Permanent Secretary of the Ministry of Regional Development, the Head of the Human Rights Bureau, and Chair of the Commission on the Implementation of the *Moiwana* Judgment.<sup>134</sup> These were clearly actors who could influence implementation based on the outcome of the meeting.<sup>135</sup> However, the representatives of the victims were at the last minute unable to attend the meeting, and thus no accords were reached in this case.

The second notable feature of the Inter-American Court's compliance phase is the depth of direct involvement of the judges in the supervision process. Like U.S. federal judges in structural reform cases, the judges become engaged in policy-making and implementation. The *Moiwana* compliance reports discuss in some detail questions such as whether the state's method of demarcation of *Moiwana* territory places "undue reliance on community land use mapping" and relies too little on "indigenous and tribal peoples' customs, laws, values and land tenure systems."<sup>136</sup> The parties also discuss the placement of the five houses that the state has already constructed,<sup>137</sup> how much say the state should have in approving spending by the development fund,<sup>138</sup> and whether the five houses built by the state were built in the correct place. In other structural reform cases, the judges have gotten into such details as what lines of investigation a national prosecution should follow,<sup>139</sup> and whether the terms of a new law restricting military jurisdiction fulfills

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Development Fund money that has not yet been given to the Fund in an account in the name of community so that the community, rather than the state, can receive the interest while the Fund is still being set up. This was not part of the original judgment, but the state concedes to do so. *Moiwana v. Suriname- 2007 Compliance Report*, "Whereas," ¶¶ 17-18; see also *Moiwana v. Suriname- Judgement*, ¶¶ 213-15.

134. *Moiwana v. Suriname- 2010 Compliance Report*, "Having Seen," ¶ 8 n.1.

135. The absence of any actor with prosecutorial or judicial powers is problematic, especially as this is the order in which the state has done the least.

136. *Id.* "Having Seen," ¶ 22.

137. *Id.* "Having Seen," ¶¶ 34-37.

138. *Moiwana v. Suriname- 2007 Compliance Report*, "Having Seen," ¶ 7(e).

139. *Huneus, supra* note 37, at 10-11.

standards previously set by the Court.<sup>140</sup> If this seems intrusive, it is important to recall that the Court can only enter into as much detail as the state and other parties provide: in this sense the state's cooperation is prerequisite (even if, in the Court's view, it is also legally required). Further, in the closed hearings, the judges play a role not of adjudication or policymaking but of mediators counseling the parties toward agreement. In these sessions, the judges leave the bench to sit around a table with the parties and, over the course of the session, guide them towards a shared plan of action, which then becomes the guide for subsequent supervisions, and the subject of court enforcement.

#### D. Rights Review in Europe

Next to the Inter-American Court, the European Court of Human Rights is a behemoth. It has a budget of €66,815,100,<sup>141</sup> a bench of forty-seven judges,<sup>142</sup> and in 2013 issued 916 judgments.<sup>143</sup> The Council of Europe system no longer has an equivalent to the Inter-American Commission: individuals in the forty-seven states that are part of the Council of Europe system can petition directly to the Court. The Court then adjudicates the case, deciding if there has been a violation of the European Convention and, if so, it may order remedies. Traditionally, after the Court issues a ruling, the supervision of implementation of the judgment falls entirely to the Committee of Ministers, an inter-ministerial body in the Council of Europe system. As argued above, however, the European human rights system has taken a structural turn, particularly through its creation of a new "pilot procedure," which for the first time involves the Court in the implementation phase.

A case that illustrates the distinctive features of the European Court's pilot cases is *Hutten-Czapska v. Poland*, decided in 2006.<sup>144</sup> *Hutten* qualifies as a structural reform case because the Court demanded injunctive relief that changed government policy and had implications beyond the litigant; and the Court then became involved in long-term supervision of the order. Like *Moiwana v. Suriname*, and like many of the structural cases before both courts, this was a property rights case. But whereas *Moiwana* asserted a right to collective title based on traditional usage, *Hutten* found that rent-stabilization controls first put in place under communism violate the right to private property under the Convention. The rent control system at issue made it impossible for landowners to profit from renting their property. Finding that a

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140. *Radilla Pacheco v. Mexico*, Monitoring Compliance with Judgment, Order of the Court, "Considering," ¶¶ 18-29 (Inter-Am. Ct. H.R. May 14, 2013), [http://www.corteidh.or.cr/docs/supervisiones/radilla\\_14\\_05\\_13\\_ing.pdf](http://www.corteidh.or.cr/docs/supervisiones/radilla_14_05_13_ing.pdf). What is notable about this process of assessing whether a new piece of legislation satisfies its judgment means the Court reviews state legislation not in a concrete case or controversy, but as if it had the power to conduct abstract review.

141. *European Court of Human Rights: How the Court Works*, COUNCIL OF EUR. <http://echr.coe.int/Pages/home.aspx?p=court/howitworks> (last visited Dec. 4, 2014).

142. *Annual Report 2013*, EUROPEAN COURT OF HUMAN RIGHTS, 17, 18 (2013), [http://www.echr.coe.int/Documents/Annual\\_report\\_2013\\_ENG.pdf](http://www.echr.coe.int/Documents/Annual_report_2013_ENG.pdf).

143. *Id.* at 197.

144. *Hutten-Czapska v. Poland*, App. No. 35014/97, 2006-VIII Eur. Ct. H.R. (June 19, 2006).

similar situation affected 100,000 property-owners and up to 900,000 renters, the Court, through a June 19, 2006 judgment, declared that there was a systemic problem underlying the case, and issued a pilot judgment. In so doing, it froze roughly eighteen similar cases also filed before the Court (but one of which encompassed the claims of roughly 200 property owners). The Court held that Poland's existing rent control regime, coupled with the lack of a system for landlords to petition for and recuperate losses incurred through renting their property, violated the European Convention of Human Rights. Further, the Court stated in the judgment's remedial section that in order to end the systemic violation, the state must, "through appropriate legal and/or other measures, secure in its domestic legal order a mechanism maintaining a fair balance between the interests of landlords and the general interest of the community . . . in accordance with the standards of protection of property rights under the Convention."<sup>145</sup>

The Court thus imposed on the state the duty to create a different system for property rental. Note that the order is not specific: it does not tell Poland what means it should use, or who should lead the effort to create the new system. The state can implement the measure through legislative and/or administrative actions of its choosing. However, the Court does suggest that the Polish Constitutional Court, in an earlier ruling, had recommended a system that would satisfy the state's obligations.<sup>146</sup>

After the pilot judgment, the *Hutten* plaintiffs and the Polish government worked with the Court's Registry to reach a friendly settlement agreement, which they submitted to the Court for approval in 2008. In its friendly settlement judgment, the Court examined not only whether the plaintiffs had been made whole, but also whether the steps the Polish government had taken toward improving the underlying systemic problem satisfied its original ruling.<sup>147</sup> It found that the state had largely complied by enacting several housing laws, including an amending statute

whereby a number of provisions of the 2001 Act, most notably on the determination of rent, the criteria for judicial control of rent increases and the civil liability of municipalities for failure to provide social accommodation to protected tenants, were repealed or changed with a view to implementing two judgments of the Polish Constitutional Court . . . . Furthermore, the State introduced an information system for monitoring levels of rent within Poland, a tool designed to assist civil courts in resolving disputes arising from rent increases by landlords. It also set up a system of subsidies available to the local government or public benefit organisations for the construction of buildings or dwellings designated for social accommodation or other forms of accommodation for the less well-off.<sup>148</sup>

The list of steps that Poland had successfully taken in compliance with

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145. *Id.* ¶ 239.

146. *Id.* ¶ 199.

147. *Hutten-Czapska v. Poland*, App. No. 35014/97, 2008 Eur. Ct. H.R. (Apr. 28, 2008).

148. *Id.* ¶ 37.



the judgment continued. The Court concluded not only by endorsing the friendly settlement but also by striking the case from its list. However, it kept the pilot procedure in place in light of the related cases, and it left certain questions of implementation pending for supervision by the Committee of Ministers.<sup>149</sup> The Court, in other words, and in contradiction to its tradition, chose to remain involved in the implementation of its 2006 judgment. It falls to the Court to decide whether it should strike a case from its list in light of a friendly settlement. The Court decided that in the context of a friendly settlement reached, as in the present case, after delivery of a pilot judgment on the merits of the case, the notion of “respect for human rights” requires the Court to examine the case also from the point view of “relevant general measures.”<sup>150</sup> It thus created “an alternate ‘route’ . . . that to a certain extent avoids the procedure before the Committee of Ministers by concentrating at the Court.”<sup>151</sup> In 2011, the Court issued a ruling striking out the remaining associated rent control cases from its list and closing the Pilot Procedure.<sup>152</sup>

Even where there is no friendly settlement, however, the Court takes on a greater than usual role in supervision through the pilot procedure. Under the Convention, the Committee of Ministers alone is charged with supervision of judgments. Under the Pilot Procedure system, however, the Court is charged with deciding when to open and when to close the pilot procedure; when repetitive cases should be stayed pending a state’s implementation to the orders issued by a pilot judgment; and when, “in the event of the failure of the Contracting State concerned to comply with the operative provisions of a pilot judgment, the Court shall resume its examination of the applications which have been adjourned.”<sup>153</sup> Once the Court rescinds the Pilot status, the Committee of Ministers can continue supervision of the cases on a one-by-one basis.<sup>154</sup> Another way the Court stays involved is that “if the national measures taken to remedy a violation found by the Court raise a new legal issue . . . the Court feels free to deal with the complaint, regardless of the findings of the

149. *Id.* ¶ 42 (“While the Government’s proposal can obviously be regarded as an important step towards securing the requisite fair balance between the interests of landlords and the general interest of the community, it will fall to the Committee of Ministers to assess what impact this measure would have—if adopted—on the implementation of the principal judgment.”).

150. *Hutten-Czapska v. Poland*, App. No. 35014/97, 2008 Eur. Ct. H.R. (Apr. 28, 2008) (Ziemele, J., concurring).

151. Janneke Gerards, *The Pilot Judgment Procedure before the European Court of Human Rights as an Instrument for Dialogue*, in CONSTITUTIONAL CONVERSATIONS IN EUROPE: ACTORS, TOPICS, AND PROCEDURES 8 (Monica Claes et al. eds., 2012).

152. *Hutten-Czapska v. Poland*, App. No. 35014/97, 2011 Eur. Ct. H.R. (Mar. 31, 2011).

153. *Ass’n of Real Prop. Owners in Lodz v. Poland*, App. No. 3485/02, 2011 Eur. Ct. H.R. (Mar. 8, 2011).

154. Thus, after the Court declared that the cases joined with *Hutten* were struck from the Court’s list, the Committee of Ministers returned the cases to its regular track for supervision of a few pending matters. *Case Against Poland*, Decision, Comm. of Ministers, Council of Eur., No. 7 (June 8, 2011), <https://wcd.coe.int/ViewDoc.jsp?id=1796965&Site=COE> (noting that in this decision “the European Court observed that compensatory refunds are available only to those persons whose property was subject to the rent-control scheme during any period between 12/11/1994 and 25/04/2005, whereas the systemic violation of Article 1 of Protocol No. 1 continued after 25/04/2005,” and transferring the case for examination under the standard procedure).

Committee [of Ministers].”<sup>155</sup> Finally, a new, informal practice of communication between the Committee and Court is emerging. The Committee’s annual report of 2012 notes that the Court has turned to “more and more frequent use of letters to the [Committee of Ministers]” to weigh in on issues of concern, “such as the development of the number of repetitive cases pending before it,” and other issues that it deems require the Committee of Minister’s supervision. The Committee finds that this “new practice allows better exchange of relevant information in real time and is thus an interesting contribution to the efficiency of the Committee of Minister’s supervision procedure.”<sup>156</sup>

Several features of the *Hutten* case are worth noting. First, there is a tension between resolving the pilot case and deciding whether the associated cases that are frozen pending the pilot case resolution are also resolved. This, of course, is the classic problem in class action cases. But what is notable is that the pilot procedure puts the Court in the position of making this decision, giving it a greater role than ever before in the supervision of the implementation of remedies. Another notable feature, to be discussed below, is that this system of structural reform shuts out the similarly situated victims not in the pilot case. Their cases are simply frozen pending resolution. Finally, the system introduces into the supervisory state another set of actors not present in the Inter-American setting or in national settings: the other state parties that are not subject to the order, who participate in the supervision through the Committee of Ministers. These features, and the contrast with the Inter-American system, are further explored below.

#### E. *International Review Strategies*

Much of the scholarly debate surrounding structural reform litigation concerns the question of whether courts can ever be effective in the non-adjudicative activity of defining and implementing institutional reform. While Chayes argued that the federal courts were well suited to act as a last resort for reforming inertial and malfunctioning state institutions, others objected that judges did not have adequate information or training, and that courts did not have jurisdiction over the proper set of actors and institutions to implement meaningful reform.<sup>157</sup> Sabel and Simon counter, in turn, that by using more experimentalist methods, courts *are* able to bypass some of these institutional limits.<sup>158</sup> Through inclusive dialogues that bring the parties and other stakeholders to the table, courts are able to pressure the differing sides to work together, accord a reform plan, and implement it. Courts use a mix of hard and soft power to destabilize the status quo and overcome blockages and

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155. Gerards, *supra* note 151, at 17-18.

156. COUNCIL OF EUR., *supra* note 47, at 17.

157. See Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 49-64 (1979); Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1288-95.

158. See Sabel & Simon, *supra* note 87, at 1100-01.

communication problems that may stall reform.<sup>159</sup>

The case suggests that, like the U.S. federal courts studied by Sabel and Simon, the human rights courts overcome the challenges they face in ordering and supervising structural remedies by using more dialogic and experimentalist strategies. As noted above, while international and national courts face similar constraints and have similar structures, there are several important differences that make the practice of ordering and supervising structural reform particularly challenging for human rights courts. First, the human rights courts have jurisdiction over states, not individual state entities or natural persons, and thus their link to those in charge of changing structures on the ground is more remote. Second, as they are new at this, the human rights courts have less well-developed mechanisms for asserting supervisory control. The human rights courts' strategic response to these challenges has been to create dialogic encounters with relevant parties. Both systems involve parties that play a role in the implementation and compliance conferences. Through these meetings, progress is evaluated, obstacles to implementation become clearer, and the parties work together to make plans and schedules in order to implement the orders. Further, both systems use compliance progress reports as a shaming tool to apply extra pressure toward compliance.

Lack of information about the local context and tenuous legitimacy are the other particularly challenging issues that human rights courts face. Here, the strategic response has been to heighten stakeholder participation and to hold meetings and hearings during the implementation phase. By involving parties whose interests are affected by the judgment, such as victims and other states, the courts are able to legitimate themselves through the principle that those affected by their rule participate in its making.<sup>160</sup> Further, the involved parties have information about the local context and can educate the courts and Committee of Ministers through these dialogic encounters.

On the whole, then, it seems that international human rights courts tend to adopt dialogic and inclusive methods of supervision in the structural reform setting. Yet, as will be discussed below, there are important differences between the courts on the dimensions of deference and of who gets to participate in the supervisory stage.

### 1. *Deference to the State*

The structural reform practice of the Inter-American Court is more judicially directed and less deferential to states than that of the European Court of Human Rights. To this day, it is a judicial invention that grew organically

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159. Sabel and Simon provide a list of mechanisms by which such destabilization occurs. *Id.* at 1073-81. For example, if a new, untried system of doing things is being considered, each player will be less able to "anticipate what the reform will mean for her," and thus she will be less able to make a decision based purely on self-interest. *Id.* at 1074.

160. While this is a fundamental aspect of normative legitimacy, it speaks as well to sociological legitimacy. Tom Tyler's research on procedural justice shows that those who have voice and participate in judicial procedures view them as more legitimate, and are more likely to comply, even when they lose. See TOM TYLER, *WHY PEOPLE OBEY THE LAW* 62, 163 (2006).

from the Court's general caseload. The Inter-American Court does not officially distinguish cases that involve structural problems from other cases. It simply began, in 2001, to add remedial measures that, if nominally aimed at restituting the victim, had more general effects. By contrast, in the European System the call for creation of a special path for systemic cases came first from the Committee of Ministers. In its 2004 report, the Committee of Ministers encouraged the Court to move in this direction.<sup>161</sup> A month later, the Court announced its first pilot case.<sup>162</sup> Thus, it was a political body—one whose members directly represent state interests—that made the first push. The practice was then endorsed by the Group of Wise Persons.<sup>163</sup> Still missing from the Inter-American story is an explicit state endorsement of the practice.<sup>164</sup>

The Inter-American Court's practice also emphasizes judicial discretion in that it issues more detailed remedial orders. The European Court's orders at the judgment stage are more general and thus deferential. Where they do mention policy solutions, they refer to policies already discussed by state actors, such as local court rulings. Further, the American judges are more directly involved in supervision. While the European Court has taken on a growing share of the supervision in pilot cases, it shares this role with, and relies heavily upon, the Committee of Ministers. The Inter-American Court, by contrast, undertakes supervision on its own. As a result, its judges meet with the parties in closed hearings, and in the course of the compliance reports, delve deeply into the particulars of the implementation process.

By taking on a more judicially directed strategy, the Inter-American Court arguably risks greater noncompliance. It seems clear that where courts give states a greater hand in defining the remedy, they will achieve a greater compliance rate. It is difficult to compare the compliance rates of the systems, precisely because of their remedial and structural differences.<sup>165</sup> However, it is noteworthy that in over eighty cases in which it has issued structural remedies and supervised compliance, the Inter-American Court has deemed that states have fully complied in five cases.<sup>166</sup> The upside of the judicially directed approach is that the Court is able to hold states to a more stringent standard, and thus gives domestic groups with an interest in the matter a sharper tool with which to pressure for reform.

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161. See Council of Eur. Comm. of Ministers, *supra* note 49.

162. Broniowski v. Poland, App. No. 31443/96 2004-V Eur. Ct. H.R. (June 22, 2004).

163. *Report of the Group of Wise Persons to the Committee of Ministers*, COUNCIL OF EUR., ¶ 105 (Nov. 15, 2006), <https://wcd.coe.int/ViewDoc.jsp?id=1063779&Site=CM> ("The Group supports these developments.").

164. The Inter-American Court rejected Panama's challenge to the practice of supervision. See *Baena-Ricardo v. Panama*, Competence, Inter-Am. Ct. H.R. (ser. C) No. 104, ¶¶ 100-04 (Nov. 28, 2003). Since then, states have seemingly accepted the practice, but they have not explicitly endorsed it.

165. Courtney Hillebrecht, *Rethinking Compliance: The Challenges and Prospects of Measuring Compliance with International Human Rights*, 1 J. HUM. RTS. PRAC. 362 (2009).

166. See *supra* note 10.

## 2. Stakeholder Participation

Both courts emphasize the inclusion of stakeholders beyond the defendant state. But here, too, their strategies differ. A striking feature of the Inter-American System is the level of participation allowed to the victims. Victims participate in each of the proceedings before the Court, including the supervision phase and the closed hearings. Furthermore, the victims' opinions about implementation of each of the measures—including the general measures—are given voice through ample quotes in the compliance reports. This system resembles U.S. federal judicial practice, in which implementation of a court's decree is a matter to be litigated through adversarial contest. But the Inter-American Court goes even further. In its rulings and supervision reports, the Inter-American Court at times demands that the victim be included in the process of elaborating and implementing policies. This concern with the victim is a feature of the Inter-American System in general. The victim's participation could be viewed as a type of remedy in itself, and as a form of procedural justice. Indeed, a skeptic might suggest, voice in the judicial process is the only kind of justice the victims will achieve, as compliance to orders is low in the Inter-American System.<sup>167</sup> Lacking strong tools to ensure implementation, perhaps the Court instead seeks to provide justice through voice in the process.<sup>168</sup> In the European System's cases, by contrast, the role of the victim is less of an emphasis. Nowhere in the Committee of Ministers reports on compliance, for example, do the victims' views appear.<sup>169</sup>

In the European System, supervision is shared between the Committee of Ministers, which is a state-directed body, and the Court.<sup>170</sup> Further, proceedings before the Committee of Ministers, itself a political body, emphasize dialogue with the member states.<sup>171</sup> Thus, while the emphasis in the Inter-American System is on closed hearings between the victim, the state, and the Commission, the Committee of Ministers has been hosting roundtables in which not the victims but other states weigh in to discuss how to best implement certain kinds of systemic reforms. It is as if, in the United States, federal courts invited representatives of the different states to participate in implementation hearings of structural reform orders. These features all point to a practice more attuned to state politics in the European setting. This seems

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167. Darren Hawkins & Wade Jacoby, *Partial Compliance: A Comparison of the European and Inter-American Courts for Human Rights*, 6 J. INT'L L. & INT'L REL. 35 (2010) (comparing compliance in the European and American human rights systems).

168. I owe this point to Monica Hakimi.

169. The more marginal role of the victims in the European system is further exemplified by the practice of suspending repetitive cases while the pilot procedure unfolds. Similarly situated victims are thus left in limbo while the pilot case judgment is implemented. By contrast, when the Inter-American System considers similar cases brought against the same state, each gets a separate hearing.

170. In the Inter-American System, the Court directs the supervision unilaterally. The Commission participates, but the Commission, like the Court, is an autonomous organ staffed by experts, not state representatives.

171. For an argument that the Inter-American Court gives "insufficient consideration to the consent of the regional community of states," see Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT'L L. 101, 101 (2008).

important for two reasons. First, implementing the measure may require technical knowledge and political buy-in. In these cases, it seems important to involve political actors more familiar with the policy-making process. Second, international courts are created through treaties between states, and thus, while national courts stand in relation to only one state, international courts must be mindful of states other than the defendant state.

Some argue that the European System should grant victims greater voice. Note, for example, that under the pilot judgment procedure, the Court single-handedly chooses one case to represent a class of cases. The other like cases are then frozen until the pilot judgment is resolved. In other words, victims in like cases are shut out, even though they clearly have a stake in the outcome. The entire proceeding thus seems to emphasize the relationship of the court and the states, and to de-emphasize the role of the victims. For both courts, participation of civil society in the supervision stage is an ongoing challenge. However, the European Court does allow civil society groups to present their opinions on implementation to the Committee of Ministers.<sup>172</sup>

Structural reform is a fast-evolving area of both courts' work, and it is perhaps too early to draw conclusive comparisons. So far, however, while both systems are dialogic,<sup>173</sup> the dialogue involves different stakeholders to different extents. In the Inter-American System, the dialogue is judicially orchestrated. It is a conversation over structural reform led by the judges, but which gives a strong voice to the victims. In the European System, the dialogue is more politically infused. The European Court of Human Rights engages in a multilateral review in which member states not party to the case can participate.<sup>174</sup> It gives the victim less voice, emphasizing instead the interactions between the Court, the Committee of Ministers in representation of the contracting states, and the defendant state.

### III. CONCLUSION

There has been an expansion of judicial power in the world over the past four decades.<sup>175</sup> An important piece of politics in our time takes the shape of adjudication, with laws and policies being challenged before judges under higher-ranking laws and principles. At the international level, there are now over twenty-four permanent international courts adjudicating relations among states and between states and their citizens.<sup>176</sup> This Article has revealed and analyzed a new chapter in the ongoing judicialization of politics (and the

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172. *But see* COUNCIL OF EUR., *supra* note 47, at 19 (noting "the increased participation of civil society in the supervision process").

173. *See generally* Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT'L J. CONST. L. 391 (2007) (presenting a theory of constitutional dialogue in the context of a South African case). For criticisms of the concept of dialogic review, *see* GARDBAUM, *supra* note 87; Gerards, *supra* note 151, at 111-21.

174. I thank David Sloss for suggesting the concept of multilateral review.

175. *See* Schor, *supra* note 87; *see generally* Tate & Vallinder, *supra* note 2 (examining the recent trend of global judicialization of politics).

176. *See generally* ALTER, *supra* note 14.

accompanying politicization of law): structural reform litigation at the international level.

The Article's contribution is three fold. First, it has demonstrated that, however unlikely, the two main human rights courts have now involved themselves in overseeing structural reform. They issue structural remedies and then guide and supervise their implementation, a judicial practice first described by Abram Chayes in the context of the United States. While scholars in each region had noted the courts' evolution in this direction, this is the first article to note the coincidence, and divergences, between the two courts' structural practices.

Second, the Article offers an explanation for the structural turn: in the face of third wave democracies and other transitional states that are unable or unwilling to alter a practice that results in ongoing human rights violations, compensatory remedies for each individual violation seem particularly inadequate. Both courts chose to become more involved in reform at the state level, with the idea that the extra pressure so provided would help weakly institutionalized states overcome obstacles to compliance.

The Article thus enhances our understanding of the evolution of the international judiciary and of the challenges faced by human rights courts in particular. When ruling against weakly institutionalized states, human rights courts have a choice. On the one hand, a court can simply declare that a violation has taken place and order monetary compensation, likely leading to judgment compliance. However, if the condemned state then continues to repeat the same violation due to entrenched structural conditions, the court appears ineffective despite judgment compliance. On the other hand, the court can issue structural remedies. With this strategy, the court engages in resolving the problem that is actually creating the violations, and is thus more relevant to norm compliance (and to actually defending human rights). However, this strategy risks a lower compliance rate. Potentially, the court's inability to restructure entrenched institutional patterns—the limits of judicial power—will be made evident. Any human rights court working in regions of state unwilling or unable to reform state institutions will face this dilemma. Quasi-judicial international organs such as the Inter-American Commission and the UN Human Rights Committee working under the individual petition system face a similar choice. This Article's description of the experience and strategies of the Inter-American Court and the European Court will thus be useful to these other courts and international bodies.

The Article's third contribution is to our understanding of the judicial review practices of apex courts. It argues that the international courts have responded to the challenges of structural reform by forging unique judicial review strategies. The Inter-American Court emphasizes judicial discretion and victim participation. By contrast, the European Court introduces into its review a mechanism not available in the national setting: supervision of implementation of remedies by the Court is coupled with ongoing supervision by other states parties through the Committee of Ministers. The domestic analog to this form of review would be that in a structural judgment against, for

example, the California prison system, other states could weigh in on and participate in the supervision of the implementation of the prison reform. This form of multilateral review allows states parties to shape the meaning of compliance and may well yield a more deferential standard. But it also allows states with similar experiences to share their reform experiences with the defendant state, and yield more pragmatic policies. The Article thus opens a new chapter in the study of structural reform litigation and reveals strategies and mechanisms not previously within its purview.

This Article is but a first step: its aim has been to highlight this new practice of the world's two main human rights courts as a single phenomenon and to offer explanations as to why and how they have made this turn. The next step is to consider whether this new practice is effective and desirable. What conditions predict compliance, and what impacts, besides compliance, does international structural reform litigation have? These are important questions. For now, we know only that the European Court has declared as successful at least three of its twenty-nine pilot cases, and the Inter-American Court has closed only one of its roughly fifty-five structural cases.<sup>177</sup> It is still too early to draw conclusions, comparative or otherwise, but the numbers are not encouraging. The challenge is that these structural orders are issued most often against states that have proven through their track records that they either lack the will or ability to implement certain reforms, and it is still unclear whether the international courts can alter the politics on the ground. The risk, as we know from the practice of structural reform litigation in national settings, is that courts get mired in drawn-out local processes that reach compromised and uncertain outcomes. The risk, in other words, is that the courts' reputations will be tainted by national dysfunction (in essence, exactly what they were trying to avoid). Indeed, both human rights systems have recently faced political challenges to their assertion of authority, and the pilot procedure in particular is an ongoing source of debate in the European setting.<sup>178</sup> At the same time, as the case studies show, the courts have managed to engage states and their interlocutors in constructive processes even in cases where full compliance is elusive. Empirical study of the courts' achievements on the ground, and of the conditions that make them effective, is due.

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177. *Suljagic v. Bosnia and Herzegovina*, App. No. 27912/02, 2009 Eur. Ct. H.R. (Nov. 3, 2009); *Hutten-Czapska v. Poland*, App. No. 35014/97, 2006-VIII Eur. Ct. H.R. (June 19, 2006); *Broniowski v. Poland*, App. No. 31443/96, 2004-V Eur. Ct. H.R. (June 22, 2004). In other cases, it has noted that the state has implemented important measures, but that the Committee of Ministers should review their outcome. The one case in which the Inter-American Court has declared compliance is *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶¶ 153, 164 (Aug. 31, 2001).

178. See generally *The Future of the Inter-American System of Human Rights*, 20 HUM. RTS. BRIEF, no. 2 (2013); Helen Keller et al., *Debating the Future of the European Court of Human Rights After the Interlaken Conference: Two Innovative Proposals*, 21 EUR. J. OF INT'L L. 1025 (2011).