Karen J. Alter "The Evolution of International Law and Courts." Oxford Handbook of Historical Institutionalism, Orfeo Fioretos, Tulia G. Falleti, and Adam Sheingate, eds (Oxford University Press, 2016: 590-610). Reprinted in: International Politics and Institutions in Time (Oxford University Press, 2016)

CHAPTER 35

THE EVOLUTION OF INTERNATIONAL LAW AND COURTS

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Many studies of international cooperation proceed as if the world were a blank slate with governments coming together to make rational decisions about building international institutions to achieve functional objectives. But when examining the history of empire, colonialism, and post-colonialism, and the small and very traditional world of international diplomacy, it becomes immediately obvious that functional explanations would be insufficient, and that historical institutional analysis would have much to offer.

This chapter uses the issue of the post-Cold War proliferation of international courts to show how historical institutional approaches provide insight into international systemic change.

The creation and increased usage of permanent international courts to deal with a broad range of issues is a relatively new historical phenomenon. A quick perusal of the founding dates of international courts (ICs) suggests that three critical junctures were important in the creation of the contemporary international courts: the Hague Peace conferences and with it the larger movement to regulate inter-state relations through international legal conventions (1899–1927), the post-World War II explosion of international institutions (1945–52), and the end of the Cold War (1990–2005). The best way to understand the creation, spread and increased usage of ICs today is to think of the proliferation of "new style" ICs as a form of international institutional evolution emanating from earlier historical junctures.

Reframed as international institutional evolution, the question becomes how can historical institutional approaches help us understand why groups of governments decided to add or change the design of international courts in the context of pre-existing international institutions? And why is there cross regional variation in the willingness of governments to submit to international judicial oversight? The next section, "The Creation of International Courts," juxtaposes the adoption and rejection of proposals

for international courts across time, discussing of how historical institutionalism asks different questions about this pattern and generates fundamentally different expectations compared to rationalist approaches that have long dominated the study of international institutional creation and design. The following two sections, "The Role of Critical Junctures," and "Antecedent and Permissive Conditions in the Timing and Designof ICs" explain how critical junctures intersect with permissive and antecedent conditions to contribute to the spread of a more intrusive "new style" model of an international court. Bringing together critical junctures, permissive and antecedent conditions, "Variation in International Human Rights Courts" charts in greater depth the variegated pattern of creating international human rights courts. The Conclusion argues that the growing role of international courts is generating a paradigmatic and structural change in international relations, transforming international law from a breakable contract between governments to a system of laws that legitimate governments must obey.

The Creation of International Courts

Rationalist approaches search for functional reasons that might account for past decisions. In researching the proliferation of international courts, rationalist scholars ask "what benefits accrue from delegation to ICs?" and "which countries delegate authority to ICs?" The analysis that then follows tends to be static, with scant attention to the timing of the decisions.

Scholars have identified a range of functional benefits from states delegating authority to ICs. For example, scholars argue that collective binding to the authority of international institutions, under a rule of law, eases concerns that powerful actors will wield law and power unfairly (Ikenberry 2001). Agreeing to international oversight makes commitments more credible, and states can use delegation to fill in incomplete contracts and coordinate the application of international rules across jurisdictions (Cooley and Spruyt 2009; Garrett and Weingast 1993). Self-binding to international judicial oversight helps to lock in the preferences of today, creating costs should governments in the future be tempted to walk away from international agreements (Moravcsik 1995). Scholars have also tested and documented the functional benefits that accrue from the decision to empower ICs to adjudicate legal disputes involving states (Allee and Huth 2006; Simmons 2002, 2009).

These functional benefits surely exist, but these benefits should have always existed. Historical institutional approaches, by contrast, begin with temporal and regional variation that calls for explanation. Looking at the same basic facts about international courts, historical institutional scholars ask about the timing of institutional creation and raise questions such as "Why were governments so much more open to the idea of self-binding to international judicial oversight in the post-Cold War era?" Rationalist scholars also care about explaining variation, but their accounts tend to be more of a snapshot than a moving picture (see Pierson 2004). Whereas rationalist scholars might

ask "which states make decision x and why do they make this decision?", historical institutional scholars are more likely to investigate "why was choice in time 1 "not x" whereas the choice in time 2 was "x."

When analyzing basic information about the founding and design of international courts today, the issue of timing and IC design presents itself as a puzzle. *The New Terrain of International Law: Courts, Politics, Rights* (Alter 2014) documents a fundamental change in government willingness to self-bind to international judicial oversight. In the first half of the twentieth century, there were few international courts and most international courts allowed states to opt into their jurisdiction and then later opt out. The vast majority of countries did not fall under the compulsory jurisdiction of a single international court. And most ICs only allowed states to initiate international litigation.

Following the end of the Cold War, many more ICs were created. Today's ICs tend to emulate the design of Europe's international courts. They have compulsory jurisdiction for all member states, and they allow non-state actors to initiate litigation involving states. In Europe, Latin America, and Africa, most countries fall under the compulsory jurisdiction of multiple international courts. Indeed very few countries today fall under the compulsory jurisdiction of no international courts (Alter 2014, 101).

Figure 35.1 juxtaposes parts of Alter's (2014) periodization of the creation of ICs with Romano's (Romano 2014, 113) list of "nipped in the bud" ICs where proposals were abandoned, and (Katzenstein 2014, 159) discussion of proposals for ICs that were rejected in the early part of the twentieth century. The figure is organized around critical junctures. The years of each critical juncture is long because it can take a long time for a proposal to be ratified by a sufficient number of member states, and for the court to be created. The key insight is the limited experimentation before World War II, the large number of abandoned proposals before and during the Cold War, and the large number of implemented proposals following the end of the Cold War.[1]

The first experiments in creating and using ICs occurred in the context of the Hague Peace Conferences, where diplomats dared to imagine that legalized inter-state dispute settlement might replace war as a tool of international politics. The Hague conferences generated a number of legal ideas that endured, and by some accounts marked the beginning of a new world order (Reus-Smit 1997). The Hague Peace Era established "old-style" ICs, where the focus was inter-state dispute settlement. These ICs lacked compulsory jurisdiction, only states could initiate litigation in front of the courts, and the larger objective of a system of ICs failed (O'Connell and VanderZee 2014). Indeed, more proposals to create ICs failed than succeeded during the Hague Peace Conference era (Katzenstein 2014).

Although the grandiose aspects of Hague Peace vision failed, the Hague Peace process sowed seeds that later germinated. Negotiating, creating and using the Hague-era ICs helped proponents hear and address logistical questions and concerns. Many of the proposals that were rejected in the 1940s and 1950s came to fruition much later, in some cases carried forward by the very people who had been involved in Hague Peace era conversations.[2] The International Court of Justice, the World Trade Organization's

Critical Juncture	International Courts (by year created)	Inoperative or abandoned ICs (by year proposed)
Hague Peace Conference Juncture (1899–1935)	Permanent Court of Arbitration (1899) Central American Court of Justice (1908–1918) Permanent Court of Justice (1922–1946)	Central American Arbitration Tribunal (1902) International Prize Court (1907) Central American Tribunal (1923) Terrorism Court (1937) Inter-American Court of International Justice (1938)
Post WWII Juncture (1945–1960)	1. International Court of Justice (1945) International Criminal Tribunal of Nurnberg (1945) *General Agreement on Tariffs and Trade 1948–1994 2. European Union's Court of Justice (1952) 3. European Court of Human Rights (1958) 4. Benelux Court (1974) 5. Inter-American Court of Human Rights (1979) 6. Andean Tribunal Of Justice (1984)	Arab Court of Justice (1945) European Nuclear Energy Tribunal of the OECD (1957) *Arbitral College of the Benelux Economic Union (1958) *Court of Arbitration of the French Community (1959) *Arbitration Tribunal of the Central American Common Market (1960) European Tribunal on State Immunity (1972) *Judicial Board of the Organization of Arab Petroleum Exporting Countries (1980) Court of Justice of the Economic Community of Central African States (1983) International Islamic Court of Justice (1987) Court of Justice of the African Maghreb Union (1989)

FIGURE 35.1 Periodization of Established vs. Proposed ICs

Critical Juncture	International Courts (by year created)	Inoperative or abandoned ICs (by year proposed)
Post Cold War Juncture (1990–2010)	7. European Free Trade Area Court (1992) 8. Central American Court of Justice (1992) 9. International Criminal Tribunal for the Former Yugoslavia (1993) 10. Economic Court of the Common-Wealth of Independent States (1993) 11. International Criminal Tribunal for Rwanda (1994) 12. World Trade Organization Appellate Body *(formerly GATT)* (1994) 13. West African Economic and Monetary Union Court of Justice (1995) 14. International Tribunal for the Law of the Seas (1996) 15. Organization for the Harmonization of Corporate Law in Africa Common Court of Justice and Arbitration (1997) 16. Southern Common Market (1999) 17. Eastern and Southern Africa Common Market Court of Justice (1998) 18. Central African Economic and Monetary Community Court of Justice (2000) 19. East African Community Court of Justice (2001) 20. Caribbean Court of Justice (2001) 21. Economic Community of West African States Court of Justice (2001) 22. International Criminal Court (2002) 23. Arab Investment Court (2003) 24. Southern African Development Community (2005) 25. African Court on Human and Peoples' Rights (2006)	Court of Justice of the African Economic Community (1991) Court of Conciliation and Arbitrage for the OCED (1994) ASEAN Appellate Body (2005) *Court of Union State between Russian Federation & Belarus (1999) Court of Justice of the African Union (2003)

Italics = non-permanent court. *= that were later created in a different form. # = 25 permanent ICs created by 2006.

FIGURE 35.1 Continued

Appellate Body, International Criminal Court (ICC) and International Tribunal of the Law of the Sea are in many respects modern incarnations of the Hague vision.

The Role of Critical Junctures

World War II and the onset of the Cold War was a critical juncture in the creation of international courts. Critical junctures are moments of political flux in which structural constraints are relaxed, and new opportunities for institutional change present themselves (Capoccia and Kelemen 2007, 343). Following World War II, international diplomats worked to create stable national and international institutions that could avoid the repeat of a global market crash and the return of nationalist governments. The International Court of Justice, the dispute resolution system of the General Agreement on Tariffs and Trade, and Nuremberg-style international criminal prosecutions were all efforts to overcome the inter-war years and World War II. Europe's Court of Justice and Human Rights system were also inspired by the goal of avoiding another European war.

The more idealistic aspirations following World War II soon gave way to the Cold War political reality. No ambitious proposal could garner support from states on opposite sides of the Cold War, and international law proposals that did make it through the diplomatic labyrinth were often filled with compromises that advocates found distasteful. The clear limits of a global approach fueled the drive for regional approaches to international adjudication. There were real benefits to a regional approach. Because regional courts rely on judges from the region, the economies and fates of countries tend to be more interlinked. Equally important, regional cooperation initiatives did not need to satisfy US and Soviet concerns. Regional courts and the "new style" IC model thus emerged during and in part because of the Cold War freeze (Alter 2011, 393–399).

The end of the Cold War, when the political order created by Cold War alliances unfroze, provided a third critical juncture. It triggered a rush of countries wanting to join the institutions of the West, which spurred Western countries to adopt long discussed institutional changes before accepting new members. The end of the Cold War also ushered in the Washington Consensus, where international institutions, the US and Europe all advocated for the adoption of democracy, liberal economic policies, and rule of law institutions (Alter 2011, 401–408). After the Cold War, a number of existing ICs were amended to widen jurisdiction and access to the court, and the number of operational permanent international courts grew from 6 to 25.

The post-Cold War critical juncture was different from the World War II juncture in part because of evolutions in legal practice, which changed the decision-making context. Europe's Court of Justice (ECJ, now called the CJEU) was an exception to the rule for international courts because member states had to accept the ECJ's compulsory jurisdiction and both private litigants and the supranational High Authority (later redefined as the Commission) could initiate litigation against states. The ECJ, through activist rulings in cases raised by private litigants, transformed the Treaty of Rome into

a constitution for Europe by declaring the direct effect and supremacy of European law (Weiler 1991).

Europe's legal revolution has a systemic effect by introducing a model of an effective "new-style" IC that has been widely emulated. This "new-style" model, which includes compulsory jurisdiction, access for non-state actors, and understandings about what contributes to effective supranational adjudication, was then emulated when the next critical juncture—the end of the Cold War– created political openings in other settings (Alter 2014, 127–132).

A second important change in legal practice concerns unilateral enforcement action on the part of American and European judges. The United States passed legislation (the so-called "Super 301" provision) that authorized American authorities to sanction countries if the United States Trade Representative determined that the country was violating the rules of the General Agreement on Tariffs and Trade. American judges also used the revived Alien Tort Statute to sanction human rights abuses by foreigners committed abroad. Belgium declared universal jurisdiction over mass atrocities committed abroad, and Britain's House of Lords revoked the sovereign immunity of Augusto Pinochet because of credible allegations of torture committed in Chile vis-à-vis Spanish nationals. These changing legal practices meant even where governments did not consent to jurisdiction, foreign judges might be adjudicating their compliance with international law (Alter 2014, 138–142).

If legal practice can lead to institutional and systemic change, then what is the role of government's rational decisions in the design of ICs? Systemic change, like that which occurs during critical junctures, surely transforms the preferences of states. But international relations scholars tend to assume that states are in the driver's seat of international institutions, controlling international institutions through appointments, budgets, political vetoes or threats of noncompliance (Bradley and Kelley 2008; Hawkins et al. 2006). Historical institutionalism brings attention to additional actors, including actors above and below the state such as international and domestic judges, who may also be forces for institutional change.

Historical institutionalism also considers that actions by governments may have unintended downstream affects that come to shape future decision-making. In a detailed analysis of the transformation of the Economic Community of West African State's (ECOWAS) Court of Justice (Alter, Helfer, and McAllister 2013) focus on how government preferences evolved from 1975, when ECOWAS governments agreed in principle but made no moves to create an ECOWAS court, to 1993 when governments agreed to create the ECOWAS court yet rejected a proposal to allow direct private access, to 2005 when ECOWAS member states agreed to allow direct private access for human rights violations. They argue that collective decision to use ECOWAS forces to intervene in the Sierra Leone and Liberian conflicts generated a cascade of events that members of the ECOWAS court, the ECOWAS secretariat and human activists later drew upon when they argued for allowing direct private access to adjudicate human rights violations.

Regardless of whether key decisions about institutional change came from judges, sub-state actors, or governments, the central point is that historical institutional

approaches focus us on how world-historical forces interact with state-level and international incentives, and on how sub-state behavior of litigants and advocacy groups make international law more enforceable. This dynamic has made ICs more independent, increased the number of cases raised, facilitating law-making, and allowed ICs to connect with actors within the state to promote greater respect for international law (Alter 2006, 2014; Keohane, Moravcsik, and Slaughter 2000; Stone Sweet 1999). This is a different political dynamic from that which rationalist scholars tend to study, which is focused on the "problem structure" of international cooperation, the sovereignty concerns of governments, and the tools governments use to try to control international institutions.

Antecedent and Permissive Conditions in the Timing and Design of ICs

Critical junctures may generate openings and incentives for change, but how these incentives get channeled varies based on the permissive and antecedent conditions in a given context. To understand the variegated change following critical junctures, we need to think about how permissive and antecedent conditions interact with critical junctures.

Permissive conditions are factors that can occur at any time and that facilitate a specified change (Soifer 2012).

Before the advent of permanent ICs, countries relied on ad hoc arbitration or the creation of specialized legal bodies—mass claims courts—to handle their disputes (Crook 2006; Martinez 2012). These bodies could be created as needed, staffed by specialized judges, and they would be dismantled as soon as demand for adjudication dissipated. The idea of a system of permanent international courts, set up by multilateral agreements, with broad, ongoing and adjustable jurisdiction, to be staffed by judges from many countries who would be appointed in advance of an actual dispute, was a radical notion.

When legal advocates first proposed the creation of a permanent international court, governments had many questions and concerns. How would judges be selected? How could litigants be certain that international judges were sufficiently neutral and qualified to deal with the variety of complex legal and political issues that might arise? How would the jurisdiction of the IC be defined in practice? What would happen if a government refused to file their papers or otherwise participate?

Through legal practice by Hague-era ICs—by appointing judges and adjudicating cases—these "how," "what," and "if" questions were addressed. Having addressed these concerns, and having showed that permanent ICs were in fact feasible, the Hague Peace Conferences thus created an important permissive condition that shaped subsequent decisions regarding ICs.

The Hague Peace experience influenced subsequent ICs in a number of ways. First, the Hague Peace era bequeathed a permanent International Court of Justice that can be designated as the legal body competent to interpret disputes involving bilateral and multilateral treaties. From 1946 on, international treaty negotiations included a conversation about whether to stipulate that the International Court of Justice or some other adjudicatory mechanism as the venue for interpreting the treaty. Second, the Hague ideals were not simply hopes and aspirations; they also survived in the minds of legal advocates. Concrete and fundamental legal precepts of the Hague Peace era endured, such as the Geneva Conventions governing war and the idea of requiring peaceful change of borders. The larger vision of subordinating power to the law also endured. Diplomats involved in the Hague Peace Conferences transferred legal practices and aspirations into regional movements in Europe and Latin America.

Development of ICs did not, however, proceed in a linear or progressive way following the Hague Peace era. Many countries drew the lesson that the Hague experience was a failure. After World War II it became clear that most governments were not interested in a system of international courts, even fairly modest courts with many political checks (Allain 2000). For most of the Cold War, governments instead displayed a clear aversion to generating new ICs or to consenting to compulsory dispute adjudication (Katzenstein 2014; Levi 1976; O'Connell and VanderZee 2014).

This is where antecedent conditions become important. Antecedent conditions are "factors or conditions preceding a critical juncture that combine with causal forces during a critical juncture to produce long-term divergence in outcomes" (Slater and Simmons 2010, 889). In Europe, World War II provided the antecedent condition that made many people unwilling to return to the Hague approach of voluntary inter-state dispute adjudication. Pierre-Henri Teitgen, a drafter and proponent of the European Court of Human Rights, famously summarized the lesson Europe's anti-fascist elite had learned:

> Democracies do not become Nazi countries in one day. Evil progresses cunningly, with a minority operating, as it were, to remove the levers of control. One by one freedoms are suppressed, in one sphere after another. Public opinion and the entire national conscience are asphyxiated. And then, when everything is in order, the 'Führer' is installed and the evolution continues even to the oven of the crematorium. It is necessary to intervene before it is too late. A conscience must exist somewhere which will sound the alarm to the minds of a nation, menaced by this progressive corruption, to war[n] them of the peril and to show them that they are progressing down a long road which leads far, sometimes even to Buchenwald or Dachau. (cited in Bates 2011, 7)

Pierre-Henri Teitgen did not just make stirring speeches. He helped draft the European Convention on Human Rights, and worked within French and European politics, as a Minister of Justice, international diplomat and a professor, to make these ideas into reality (Madsen 2007, 141).

The functional benefits and costs of submitting to international judicial review remained largely constant across time. What changed were the models and ideas about ICs. Overall the Cold War generated two models with clearly divergent outcomes. Europe's supranational courts were proving helpful in promoting respect for the legal rules they oversaw. Meanwhile in the rest of the world, advocates, governments, and opposition parties had quite a long time to evaluate the limitations of relying on international treaties that lacked compulsory judicial oversight. For example, the problems of the dispute settlement system for the General Agreement on Tariffs and Trade became very apparent. The failure of the international community to deal with war crimes during the Cold War period provided additional lessons on the limits of government respect for international legal rules. Lawyers observed these failings, standing ready to offer legal solutions designed to address growing concerns about legal violations and noncompliance with international conventions.

The three critical junctures triggered variegated IC creation that "encapsulate the shift from "old style" to "new style" ICs," and "[t]he path-dependent nature of institutional change meant that the form and nature of international judicial institutions did not repeat; rather, it evolved across iterations" (Alter 2104, 112–114, 117).

This evolution is evident when observing the changing design of ICs that were eventually created. Courts that emulate key features associated with the success of Europe's supranational courts are "new-style" ICs with many similarities to European models (Alter 2014, 81–85).

There is still great variation in the willingness of governments to consent to the jurisdiction of new-style ICs. African, European and Latin American countries are most willing to submit to compulsory international judicial oversight, committing to the compulsory jurisdiction of up to seven different ICs. Island states, Middle Eastern countries, and to a lesser extent Asian countries reveal a significant aversion to compulsory international judicial oversight. Today only 13 countries fall under the compulsory jurisdiction of no ICs, and 21 countries have only consented to the compulsory jurisdiction of the WTO's dispute adjudication system, of which the United States, China, Cuba, and Israel are prime examples (Alter 2014, 91–109 and chapter 4).

Variations in International Human Rights Courts

This section raises questions that are yet to be answered about the design choices for human rights oversight mechanisms, including whether design decisions that shape a commitment to IC oversight becomes politically meaningful in practice. The architects of international human rights bodies have a pretty good sense of how certain design choices help or hinder the enforcement of human rights obligations. The key issue for human rights adjudication is whether or not private litigants have access to

an international legal system, and on what terms. Human rights advocates prefer a maximalist approach of direct private access to international judicial institutions that can offer binding legal remedies. The more minimalist approach is to rely on UN Treaty Bodies, under-resourced and highly politicized institutions that can generate findings but not binding legal rulings. There are also in-between models, as well as a number of creative ways to limit the extent of international human rights review, which is why the design of adjudicatory mechanisms is important. Figure 35.2 discusses in simplified terms three international oversight models for international human rights conventions. The figure indicates when design choices promote the maximalist goals of human rights advocates (+) or the more minimalist goals of sovereignty jealous states (-).

Historical institutionalism provides a useful way to explore the origins of these variations, and it raises fundamental questions about why states vary in their design choices over time. The debate over how to enforce human rights obligations began immediately following World War II. The UN Treaty Body model emerged in the 1960s when states negotiated what became a series of human rights treaties that UN members could ratify. All negotiating parties agreed in principle to the Treaty Body structure, a decision that was easier because countries could then decide whether or not to opt-into these oversight mechanisms.[3] In what follows I explain the emergence of the European Court model, versions 1.0 and 2.0.

In 1950, dismayed by the limited UN initiatives to protect human rights, distrustful of government promises to respect human rights, and wanting to demarcate West European practices from Soviet practices in the East, the Council of Europe decided to create its own human rights system (Madsen 2010, 36–39). National sovereignty concerns and European engagement in decolonization wars then interceded, leading to a greatly constrained human rights court. The first European human rights model—European Court of Human Rights (ECtHR) version 1.0–let either the European Commission on Human Rights or a member state refer a case to the court. Governments had to first consent to the jurisdiction of the ECtHR, and separately agree to allow private litigants to complain to the European Commission on Human Rights. Originally only Sweden, Ireland, Denmark, Iceland, Germany, and Belgium accepted ECtHR's compulsory jurisdiction and only Sweden, Ireland, and Denmark accepted the right of individual petition. Moreover, a number of acceptances were provisional, made for only a few years at a time.

The Commission proceeded with great caution, so as to encourage more states to sign on and avoid future opt-outs. Between 1954 and 1961, less than one half of one percent of the 1,307 applications filed with the Commission were declared admissible—with the result being that in its first ten years of operation, the ECtHR ruled on only seven cases (Schermers 1999, 825). The caseload increased slowly; but after 24 years of operation the ECtHR had still only issued 37 binding rulings!

Over time, more governments joined the Council of Europe's human rights system and it became politically more difficult for these governments to later withdraw their conditional acceptance of ECtHR jurisdiction (Bates 2011; Madsen 2010). The Commission began to refer more cases to the Court, leading to the overburdening of

Institutional choices	Essential features	Human rights pros & cons	Sovereignty pros & cons
UN treaty bodies	States selectively opt in. Periodic oversight results in non-binding findings.	– Process is slow and politicized. – Findings of violations are not binding.	– No obligation to comply. – Governments can repudiate the process as political and not legal.
European Court of Human Rights v 1.0 (1952)	States opt in to court and private access. Commission vets complaints, issues non-binding findings and negotiates solutions. Unresolved cases sent to the Court.	– Commission gatekeeping slows process, and blocks cases. + Cases referred to Court lead to binding legal rulings.	+/– Court adjudicates state-initiated suits. – Commission vets private suits. – Commission process provides opportunity for negotiated solutions.
European Court of Human Rights v 2.0 (post 1994)	Club model that does not allow state opt-in. Direct private access to Court. Binding legal rulings.	+ Direct access provides quickest and least politicized process. + Legal rulings are binding (eliciting compliance remains a challenge).	+ Inconvenient cases reach court. +Outcome is a binding finding of a human rights violation. +Legal process can be hard to sway.

– = Preferred by sovereignty jealous states

+ = Preferred by human rights advocates

FIGURE 35.2 The Choice Regarding International Human Rights Oversight

the part-time Court. In 1994, just before the broad expansion of the Council of Europe, existing member states accepted Protocol 11, creating the ECtHR version 2.0. The new version eliminated the gate-keeping and screening role of the Commission and required all Council of Europe members to accept the ECtHR's compulsory jurisdiction and direct access for private litigants. ECtHR 2.0 reflects the reality that the Council's human rights system had become irreversibly embedded in Western democracies, and the desire to bind post-Soviet states to this model (Helfer 2008; Moravcsik 1995).

The European Court of Human Rights began operation in 1958. The first three UN Treaty Bodies began operation in the mid-1960s.[4] Figure 35.3 maps the membership of states in human rights courts and Figure 35.4 puts on a timeline the creation of these institutions and models.

Historical institutionalist approaches use this type of variation to identify the permissive and antecedent conditions that might have led Latin American leaders to embrace the European model in the 1960s, and African leaders to embrace European models in the 1990s. Meanwhile, Asia continues to discuss yet resist the creation of an Asian human rights charter.

Latin American countries copied the ECtHR version 1.0, but later in time. The IACtHR was created by treaty in 1969, came into existence in 1979 after a sufficient number of states had ratified the relevant legal instruments, and it issued its first ruling in 1987. The delay is surprising in that the American Declaration on the Rights and Duties of Man preceded the 1948 United Nations Universal Declaration of Human Rights by six months.

Historical institutionalist approaches could be used to investigate both the delay and the design choices for the IACtHR, which can be seen as the ECtHR version 1.1. The IACtHR includes a government right to opt in and out of the court's optional compulsory jurisdiction, and the Commission serves as a gatekeeper to the court. Since the pre-existing Commission allowed individual complaints, the Inter-American system did not include a separate protocol authorizing private litigant access. As occurred in Europe, Commission screening greatly limits the number of cases proceeding to court. The IACtHR issued only eight rulings in its first ten years of operation. In 2001 the Commission decided to forward all unresolved cases to the court, contributing to the court's greater activation.

Africa resisted the pressure to adopt regional human rights instruments for even longer than Latin American countries. Following World War II, African governments and peoples were focused on decolonization and expelling European influences rather than promoting respect for human rights. Politicians asserted that national rule would ameliorate the human rights violations of the past, and this promise at first sufficed.

However, as atrocities in civil wars mounted, governments violently outstayed their welcome, and as Latin American governments moved ahead with their own regional human rights regime, African leaders asked a committee of experts to create a human rights charter that was analogous to the European and Latin American charters, though specific to the African context. The committee drafted what became the "Banjul

	UN proposal for a human rights court rejected	European Convention on Human Rights ratified, with plan to create a ECtHR	ECtHR created	American Convention on Human Rights signed, with plan to create a Inter-American Court of Human Rights	Inter-American Human Rights Court created
Cold War Era	1949	1953	1958	1969	1979
Design Model			ECtHR v 1.0		ECtHR v 1.1
	ECtHR reformed to allow direct private access	Organization of African Unity agrees to create an African Human Rights Court (1998)	People's charter calls for the establishment of an Asian Human Rights Charter, with a court or a commission	Economic Community of West African States adds a human rights competence to its court	African Court of Peoples' and Human Rights created
Post Cold War Era	1994	1998	1998	2005	2006
Design Model	ECtHR v. 2.0			ECtHR v. 2.0	ECtHR v. 1.0

FIGURE 35.3 Creation of International Human Rights Courts Over Time

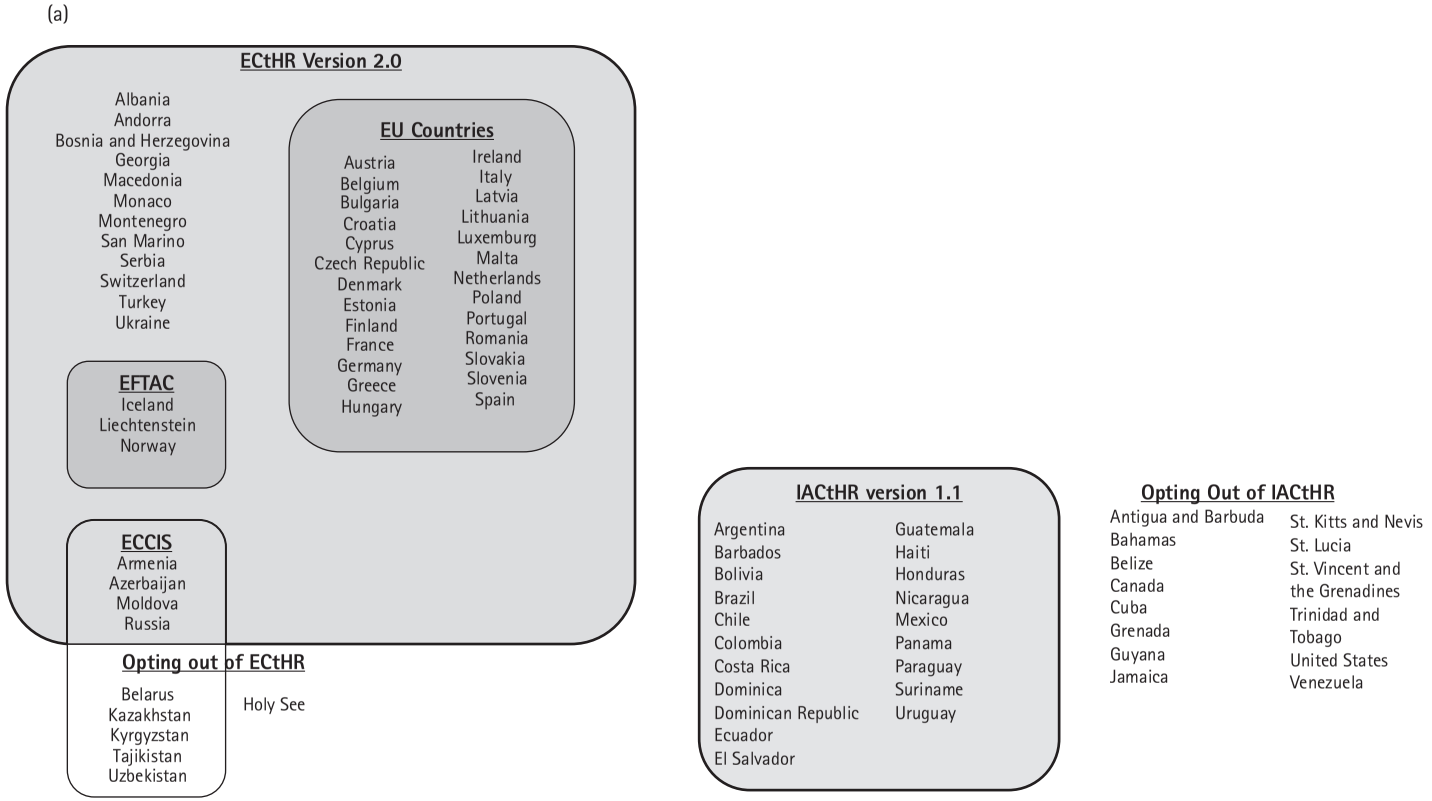

FIGURE 35.4 Membership in Human Rights Courts in Europe, Latin America, and Africa (2013)

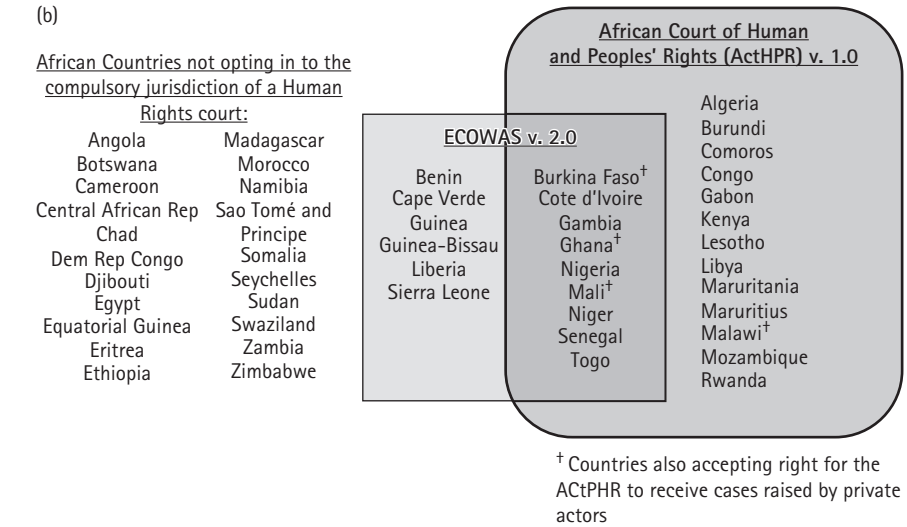

FIGURE 35.4 Continued

Charter," which emphasizes the rights of "peoples" and the duties of individuals and peoples.

The Committee's drafters considered Africa "not ready for a supranational judicial institution at that time," and recommended the creation of an African Commission on Human Rights to oversee respect of the African Charter (Viljoen and Louw 2007, 2). Only after the Cold War ended did African states agree to add a court to their human rights system. The African Court of Human and Peoples' Rights (ACtHPR) emulated the ECtHR version 1.0, allowing governments to opt-in and out of the court's compulsory jurisdiction and limit private actor access to the ACtHPR.[5]

The African Union's (AU) human rights system today resembles the European system of the 1960s. Fewer than half of African countries (26 out of 54) have consented to the court's jurisdiction and only seven have authorized direct private access to the court. Commission decisions are not considered binding, and the AU's Human Rights Commission worries that African governments will not join, or that current "joiners" will opt-out of the system. These concerns contribute to the Commission's gatekeeping caution. Nine years into the court's operation, the ACtHPR's had issued final rulings in only 19 cases, and most of the rulings dismiss the application for various jurisdictional, standing and evidentiary reasons.

The limitations of the AU system, in the post Cold War pro-human rights context, has led regional integration courts in Africa to address human rights violations. Human rights advocates have been engines of this institutional change as they seized the momentum created when ECOWAS security forces committed human rights abuses. Their mobilization led to a proposal, implemented via a vote of ECOWAS governments, to authorize private litigants to raise violations of human rights in front of the ECOWAS Court. ECOWAS essentially copied the design of the ECtHR version 2.0 (e.g., no opt out

allowed, no Commission gatekeeper, direct private access). Meanwhile governments in Eastern and Southern Africa have yet to endorse a human rights jurisdiction for their regional courts, though advocates have raised cases and judges have been adjudicating human rights claims (Ebobrah 2009).

This cursory discussion of the development of international human rights courts illustrates how attention to critical junctures, permissive and antecedent conditions, and path dependent development help explain regional variation in international human rights oversight. Developments in one part of the world do influence developments elsewhere, and ideas and models are transmitted by networks of actors. But the delays in adopting foreign models suggest that local intervening factors are important in explaining institutional diffusion and evolution.

Understanding permissive conditions also requires investigating proposal that do not succeed. Why, for example, has ASEAN created a Charter of Human Rights but not a court? Given that Asian countries have yet to embrace human rights review, while poor and authoritarian African countries have embraced international human rights review, one can reject the notion that capitalism, the growing strength of the middle class, or threshold GDP levels account for the success of human rights movements in establishing international judicial review. An historical institutional approach encourages scholars to instead focus more deeply on the tactical choices of local movements and the permissive conditions that create openings that groups seize upon as they promote change within existing institutions.

Conclusion

As governments have submitted to international judicial review by new-style ICs, systemic changes have occurred in the world of international courts. The Hague era approach and conception of international adjudication is quite different from what we find today. In the 1920, ICs were essentially voluntary inter-state dispute resolution bodies. Governments could decide treaty by treaty, and often case by case, whether to consent to judicial resolution of a dispute. Or governments could commit for a specified number of years to allow specific courts to adjudicate any dispute that arose between states that had also assented to the specific court's compulsory jurisdiction. Even with optional provisions, however, most of the Hague era proposals failed. A larger and deeper ontology underpinned the Hague era approach to international adjudication. The inter-state dispute settlement approach conceived of international law as contract among states. Since contracts primarily bind the signatory parties, it makes sense to limit access to legal suits raised by states.

The contractual perspective allows a country to abrogate legal treaties. This decision is not costless, but repudiating treaties also does not per se mean that a country is a law-breaker. For example, in 2001 George W. Bush notified Russia, Belarus, Kazakhstan, and Ukraine that the United States intended to withdraw from the Anti-Ballistic Missile

Treaty. The world had changed very much since 1972, Bush noted, and he wanted to find new ways to protect the American people. Some may think this was a bad and perhaps unduly costly decision. But it certainly was not an illegal decision. Rather, the United States was exercising its legal right under the treaty to give a six-month notification of its decision to abrogate the Treaty.

Some scholars cling to the contractual approach to international law. Eric Posner and Alan Sykes, for example, posit the seemingly modest heuristic that international law be seen through an economic contractual perspective. They advocate for a principle of "efficient breech," suggesting that governments should violate international agreements once "the benefits to the breaching party exceed the costs to all non-breaching parties" (2013, 25). Posner and Sykes do not explain how costs are measured, and they certainly do not advocate turning over decisions about whether or not to allow a violation to independent international courts. Bundled into the contractual perspective is the idea that non-signatories gain few legal rights under international law. This contractual approach is quite different from a rule-of-law approach, where the law is binding regardless of what other states do. The new-style features of ICs, namely their compulsory jurisdiction and the ability of non-state actors to initiate litigation, signals and serves to instantiate a shift to a rule of law ontology.

Most ICs today reflect a shift toward a rule of law perspective. International courts have been delegated a broader range of judicial roles, including assessing state compliance with international rules and treaties. Governments, commissions, prosecutors and private litigants have raised thousands of cases claiming legal violations. International judges repeatedly reject government arguments that suggest that violations by others provide them licence to retaliate. The claim here is not that governments in the past violated international law, and today regularly respect international law. Nor is the claim that power has become irrelevant in international relations.

Instead, the argument is that state decision-making over time has evolved. Systemic-level changes, such as the end of the Cold War, combined with smaller incremental changes, such the ECJ's legal revolution and changing practices regarding extraterritorial national enforcement of international law, to alter state preferences regarding international courts. In 1950, governments faced the choice of no international judicial oversight or creating untested international courts. In 1989, many countries wanted to join the institutions of the West, and governments around the world found that that American and European legal actors were, in fact, making unilateral determinations about their compliance with international law. The cumulative changes in the choices facing governments, alongside a rising sense that good governance requires the rule of law, and that legitimate governments respect the rule of law, made embracing compulsory international judicial oversight more attractive. Together these changes created a more profound evolution in the understanding of the legal obligations generated by international law.

This changing environment has also shaped IC behavior and influence. Many domains of international law–international human rights law, criminal law, investment law, intellectual property law and more–generate rights and obligations that are binding

regardless of what other states do. International courts follow the law. It is inconceivable that the International Criminal Court or a human rights court would absolve an accused war criminal of his legal responsibility just because Syria's human rights violations remain unpunished. Moreover, increasingly courts adjudicating economic claims reject the notion that states can raise or impose tariffs and duties in response to another country's breech of an economic agreement.

The proliferation of ICs adjudicating legal cases involving a broad range of international legal rules reflects an expectation and a desire for a different world. This desire led to the creation of new-style ICs, and it is, to a large extent, a realization of the idealistic Hague-era vision of subordinating international politics to a rule of law.

Notes

* The author wishes to thank Orfeo Fioretos and Steve Nelson for comments on earlier versions of this chapter.

1. For abandoned ICs, the dates reported denote the year states agreed in principle to create an IC. For ICs created, there can be a time lag because it can take a long time for a sufficient number of states to ratify international proposals, to then commit and collect the resources to found a court, and to collectively select international judges. An asterisk signals an abandoned court that later appeared in a much different form.
2. Scholars have traced juris-diplomats from the inter-war years, to the post-World War II prosecution of war collaborators, to the founding of European integration projects (Guieu 2012; Madsen and Vauchez 2005). It is likely that a careful tracing of legal networks would reveal a direct lineage between the Hague Peace project and the creation of subsequent ICs.
3. Yet To Come
4. The Committee on Racial Discrimination began operations in 1965. In 1966, the Human Rights Committee (the oversight body for the International Covenant on Civil and Political Rights) and the Committee on Economic, Cultural and Social Rights began operation. See <http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx> (accessed August 3, 2015).
5. The African system is a little different in that in Europe states were opting to allow individual complaints to the Commission, whereas in African the 'opt in' concerns access to the Court. See Viljoen (2007).

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