Constructing a Regional Human Rights Legal Order: The Inter-American Court, National Courts, and Judicial Dialogue, 1988 – 2014

Ezequiel Gonzalez-Ocantos* and Wayne Sandholtz**

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Why do courts rely on specific bodies of jurisprudence to justify decisions? We analyze judicial dialogue in the Inter-American System, where the Inter-American Court of Human Rights (IACtHR) has defined its mission as the construction of a regional legal order. This order needs courts at all levels to engage with each other. Original databases of citations by the IACtHR to the judgments of national courts and in the opposite direction, allow us to establish whether such practices are emerging. Furthermore, the paper asks why the IACtHR cites some courts but not others, and to what end. Statistical models reveal that the IACtHR is more likely to cite case law from countries that exhibit characteristics that are more conducive to the creation of a regional human rights legal order, and jurisprudence from countries with which it has had more extensive experience and interaction. Qualitative content analysis suggests that the IACtHR uses citations as a source of persuasive authority, but also to showcase domestic acceptance of its doctrines and decisions. This leads us to characterize citations as an effort to educate courts in the use of Inter-American jurisprudence and thus foster greater integration. At the national level, we find considerable temporal/cross-country variation in openness to the dialogue. We rely on original quantitative indicators and case studies to show this is as a function of the IACtHR's growing visibility and networking efforts, as well as country-level changes in legal cultures and judicial personnel that push courts away from formalism.

1. Introduction

The Inter-American Court of Human Rights (IACtHR) is at the core of an ongoing project to construct a regional human rights legal order in the Americas.[1] Indeed, the American Convention on Human Rights (ACHR), in its preamble, declares that the signatory states reaffirm "their intention to consolidate in this hemisphere, within the framework of democratic institutions, a

*Associate Professor, Department of Politics and International Relations & Nuffield College, University of Oxford, UK.

** John A. McCone Chair in International Relations and Professor of International Relations and Law, School of International Relations & Gould School of Law, University of Southern California, USA.

[1] The IACtHR was established in 1969 under the aegis of the OAS and began operating in the 1980s. With headquarters in Costa Rica and jurisdiction in more than twenty countries, it decides on cases in which states are accused of violating the ACHR and adjacent treaties. *See* Alexandra Huneeus & Mikael Madsen. *Between Universalism and Regional Law and Politics: A Comparative History of the American, European, and African Human Rights Systems*, 16(1) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 136-160 (2018).

system of personal liberty and social justice based on respect for the essential rights of man."[2] That goal envisages a legal order integrating regional and domestic law and judicial systems. The Inter-American bodies (the Commission and the Court) oversee the development of regional human rights standards, and domestic courts – the "front line"[3] of human rights protection – ensure the application of those standards within domestic contexts. And if the two levels engage in ongoing dialogue, they can coordinate the creation and application of common human rights norms across the region.[4] In that sense, the human rights legal system in the Americas – still under construction – constitutes a transnational legal order (TLO).[5] A TLO consists of legal norms and practices that develop and settle in a recursive process involving multiple kinds of actors across multiple levels, including the international.[6] Research in this tradition has so far paid limited attention to regional TLOs; this study begins to fill that gap.

Both Inter-American judges and scholarly commentators have recognized judicial dialogue between the IACtHR and national courts as an important mechanism for constructing a regional human rights legal order. Cross-citations are the most visible indication that such jurisprudential exchange is taking place. Citations by one court to the case law of another are not just evidence

2 American Convention on Human Rights, November 22, 1969, in force July 18, 1978. Available at http://www.oas.org/dil/treaties_B__32_American_Convention_on_Human_Rights_sign.htm [accessed 16 March 2020].

3 Diego García-Sayán, *The Inter-American Court and Constitutionalism in Latin America*, 89(7) TEXAS LAW REVIEW 1836 (2011).

4 Sergio García-Ramírez, *The Relationship between Inter-American Jurisdiction and States (National Systems): Some Pertinent Questions*, 5(1) NOTRE DAME JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 126 (2015); Diego García-Sayán, *The Role of the Inter-American Court of Human Rights in the Americas*, 19 UC DAVIS JOURNAL OF INT'L LAW & POLICY (2012); Eduardo Ferrer-MacGregor, *The Conventionality Control as a Core Mechanism of the Ius Constitutionale Commune*, in TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA: THE EMERGENCE OF A NEW IUS COMMUNE 321 (Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales-Antoniazzi and Flávia Piovesan eds., 2017); Mariela Morales-Antoniazzi & Pablo Saavedra-Alessandri, *Inter-Americanization: Its Legal Bases and Political Impact*, in TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA: THE EMERGENCE OF A NEW IUS COMMUNE 255, 265 (Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales-Antoniazzi and Flávia Piovesan eds., 2017).

5 Terence C. Halliday and Gregory Shaffer, *Transnational Legal Orders*, in TRANSNATIONAL LEGAL ORDERS 3 (Terence C. Halliday and Gregory Shaffer eds., 2015).

6 Id.

that the first is aware of the second and cognizant of its reasoning. Cross-citations are also public signals. The court that favourably cites decisions from another jurisdiction conveys to its audiences that it has taken into account, or arrived at similar reasoning to, the other court.[7] Put differently, a court may be influenced by, or agree with, the jurisprudence of another court, yet refrain from saying so in its own decisions. Such "silent" judicial exchange undoubtedly occurs. But explicit citation to an external court provides additional information, namely, that the citing court *is making it known* that it considered the jurisprudence of the other court. Citations between the IACtHR and national courts are therefore informative: they demonstrate that judicial dialogue and the construction of common legal standards are occurring.

This study offers a systematic assessment of the extent and nature of judicial dialogue of this kind between the IACtHR and its domestic counterparts. We take advantage of two unique datasets to describe trends in cross-citations and to explore explanations for them. The datasets cover the formative years of the Inter-American System, the expansion of the IACtHR's case load, and many of its most significant doctrinal developments up to the mid-2010s.

In the first part of the paper, we examine citation practices among 13 national high courts. References to the case law of the IACtHR indicate that national courts are aware of, and take into account, the jurisprudence of the regional court and therefore participate, to some extent, in the construction of a regional human rights legal order. We find that citations to Inter-American case law have increased over time. There is, however, significant temporal and cross-country variation in openness to the dialogue. Specific Inter-American precedents also differ in the extent to which they appeal to national courts. We leverage these types of variation to examine the factors that

[7] Negative citations (disagreeing with or rejecting the reasoning of another court) are possible. In our data negative external citations are virtually non-existent. The court that disagrees with the jurisprudence of an external court need not say anything; it simply stays silent. The logic within a given legal system is different: a court that disagrees with another court within the same legal hierarchy may well be required to say so.

might influence the perceived utility and authority of international case law in the eyes of local judges. The analysis finds that temporal and cross-national variation in use of Inter-American jurisprudence is a function of the changing visibility of the IACtHR, especially as a result of the court's formal and informal networking efforts, and country-level changes in legal cultures and judicial personnel that push courts away from formalism.

The second part of the paper assesses citations by the IACtHR to the case law of national courts in the region. We show that while the IACtHR has increased the number of references to national jurisprudence over time, it engages with a limited set of interlocutors. Statistical models reveal that the IACtHR is more likely to cite case law from countries that exhibit characteristics that are more conducive to the creation of a regional human rights legal order, and is also more likely to cite jurisprudence from countries with which it has had more extensive experience and interaction. A closer look at the content of citations suggests that the IACtHR sometimes uses references to national jurisprudence to support substantive legal points, but also to showcase domestic acceptance of its doctrines and decisions. This leads us to characterize citations not just as a way to profit from the persuasive authority of national rulings, or signal deference and horizontality in the construction of regional legal standards, but as an effort to educate courts in the use of Inter-American jurisprudence and thus foster greater integration.

2. Judicial Dialogue in the Americas

The study of "judicial dialogue" in comparative work on national courts explores how judges from different countries "read and cite each other's opinions."[8] Judges do so not because

[8] Anne-Marie Slaughter, *A Global Community of Courts*, 44(1) HARVARD INTERNATIONAL LAW JOURNAL, 193-193 (2003). Such exchanges have also been labelled "transjudicial communication" (*see* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981)); "transnational judicial dialogue" (*see* Melissa Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93(2) GEORGETOWN LAW JOURNAL (2005)); or "transjudicial dialogue" (*see* Phillip M. Moremen, *National Court Decisions*

the judgments of foreign courts are somehow binding or controlling. Rather, judges invoke external precedent as "persuasive authority." Persuasive authority is grounded in other courts' experience with similar legal issues.[9] Showing that other courts – even foreign ones – have resolved similar legal questions in a similar way, and with similar reasoning, bolsters the legitimacy of a court and of its decisions. The same logic applies to international courts. As Voeten notes, external citations can enhance legitimacy by showing that decisions are not arbitrary.[10] This is especially true when dealing with novel juridical questions. For an international court like the IACtHR, citations to national-level case law can offer an additional legitimacy-building benefit. When the international court can show that its case law is being supported or applied by national courts, it shows that its judgments are being accepted, incorporated, or internalized by those national courts. That demonstration of acceptance or approval enhances the international court's prestige.

This study goes a step further, and asks a series of more granular questions about *patterns* of judicial dialogue in the Americas. Under what conditions do national courts cite Inter-American precedents? What explains temporal, cross-national, and thematic trends? And does the IACtHR cite its national counterparts? If so, why does it cite some courts but not others, and to what end? Most existing work tends to look at citations between national or between international courts, but not across levels; a focus on these two sets of questions therefore allows us to incorporate important transnational dynamics into the study of judicial dialogue. Scholars have written extensively about how judges in the Inter-American and other regional systems are increasingly aware of each other's

as State Practice: A Transnational Judicial Dialogue, 32(2) NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION 262 (2006)).

[9] *See* Carl Baudenbacher, *Judicial Globalization: New Development or Old Wine in New Bottles*, 38(3) TEXAS INTERNATIONAL LAW JOURNAL 523 (2003); Slaughter *supra* note 6, at 217.

[10] Erick Voeten, *Borrowing and Nonborrowing Among International Courts*, 39(2) JOURNAL OF LEGAL STUDIES 553 (2010).

work. Specifically, existing work shows that national and international judges perceive themselves as part of a broader community guided by similar values, concerns, and priorities.[11] Yet we know little about the factors that explain trends in citation practices between the national and international levels. This paper helps plug these gaps.

From a theoretical point of view, our focus allows us to we make two further contributions. First, we contribute to the general understanding of why courts are (or become) more open to judicial dialogue. Inter-American judges, for example, recognize the importance of talking to other courts. Judge Ferrer Mac-Gregor has explained how judicial dialogue enhances the legitimacy of judgments by providing more convincing reasons: "the national and international courts that decide to actively participate in the [judicial] dialogue will seek to exhibit more solid argumentation and strengthen their institutional legitimacy through constant and coherent 'jurisprudential lines'".[12] Despite such potential legitimacy gains, judges in the Americas and elsewhere do not cite each other all the time, and do not see persuasive authority in every national or international precedent. Analyzing patterns in citations can shed light on the determinants of the use of precedents as a tool to wield persuasive authority.

Second, jurisprudential coordination through dialogue between national and international courts is an essential (even if not the only) element for the construction of a common legal standards and the effectiveness of international human rights norms. Crucially, judicial dialogue is a vehicle for embedding regional human rights law in the practices of domestic compliance constituencies and bringing protection standards closer to victims of abuse. In addition, international legal regimes are fraught with compliance problems stemming from the absence of

11 See Wayne Sandholtz, *How Do Domestic Courts Use International Law?*, 38(2) FORDHAM INTERNATIONAL LAW JOURNAl (2015); JUDICIAL DIALOGUE AND HUMAN RIGHTS (Amrei Müller ed. 2017).
12 Eduardo Ferrer-MacGregor, *What Do We Mean When We Talk About Judicial Dialogue? Reflections of a Judge of the Inter-American Court of Human Rights*, 30 HARVARD HUMAN RIGHTS JOURNAL 123 (2017).

clear and enforceable hierarchies. Writing about the Inter-American system, Huneeus points out that national courts are central to compliance with IACtHR remedial orders because a large share of judgments require action by prosecutors and judges. Yet compliance with IACtHR remedies by national judicial actors has been problematic. In light of these findings, Huneeus suggests that "international human rights courts need to directly engage national justice systems, cultivating them into compliant partners."[13] More specifically, the IACtHR could "demonstrate the benefits of partaking in *transnational judicial dialogue* by deferring to, citing to, and otherwise promoting national jurisprudence that embeds the Court and its rulings in national settings".[14] Our study assesses the extent to which such practices are emerging and why.

3. The Citation Practices of National Courts

Do national courts make use of Inter-American jurisprudence? If they do, what are the main characteristics of national citation practices and what factors explain the trends we observe in the data? In order to answer these questions, we created a dataset of references to Inter-American jurisprudence in the rulings of thirteen national high courts handed down between 1994 and 2012.[15] We also rely on original interviews with judges[16] and a series of case studies, to interpret patterns.

We found a total of 4999 citations distributed across 1736 rulings. The vast majority (87.48%) refer to specific Inter-American precedents or Advisory Opinions, as opposed to being merely generic allusions to the jurisprudence of the Court. Interestingly, only 21% of all citations

[13] Alexandra Huneeus, Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights, 44(3) CORNELL INTERNATIONAL LAW JOURNAL 494 (2011).
[14] *See id.,* at 497, our emphasis.
[15] See Appendix A for details.
[16] For example, we use interviews conducted in Colombia in 2016. We discussed judicial dialogue with 25 (former) clerks and judges of the Constitutional Court. As shown below, this is the court that most frequently engages the IACtHR. Our sources could therefore provide acute insights about the motives driving transjudicial dialogue. We also rely on additional interviews with 14 former and current Inter-American (former) clerks and judges.

refer to cases in which the citing court's country is a party. This suggests that high court judges cite a broad array of Inter-American precedents, including those that do not generate direct international responsibilities for their own country.

Considering that most of the courts in our sample issue thousands of rulings every year, it is fair to say that references to the IACtHR's jurisprudence are relatively rare. However, it is difficult to judge a priori whether the observed citation record is strong or poor. In many ways, it would be unreasonable to expect very frequent citations. First, international law is irrelevant for the majority of cases that national courts deal with on a daily basis. It would be unprofessional, and highly questionable, to cite international law if there isn't a strong reason to do so. In fact, most cases that reach Latin American high courts tend to be "routine" cases that judges are able to solve quite easily using procedural arguments or by reference to templates and precedents. In an interview, a Colombian constitutional judge explained:

> Most of our rulings reiterate precedent; they are routine cases. This means they are solved quite easily. There is no clear or necessary relationship with international law. For example, most of the health "tutelas" deal with very similar issues, so we rely on existing templates (Judge, 9 August 2016).

A former clerk told us something very similar:

> [T]he first thing you do is to look for a precedent in the court's jurisprudence. That easily solves the case. International law is never the first port of call [...] Your instinct pushes you to find identical precedents. It is only when those cases don't exist that you start looking elsewhere (Former clerk, 18 August 2016.)

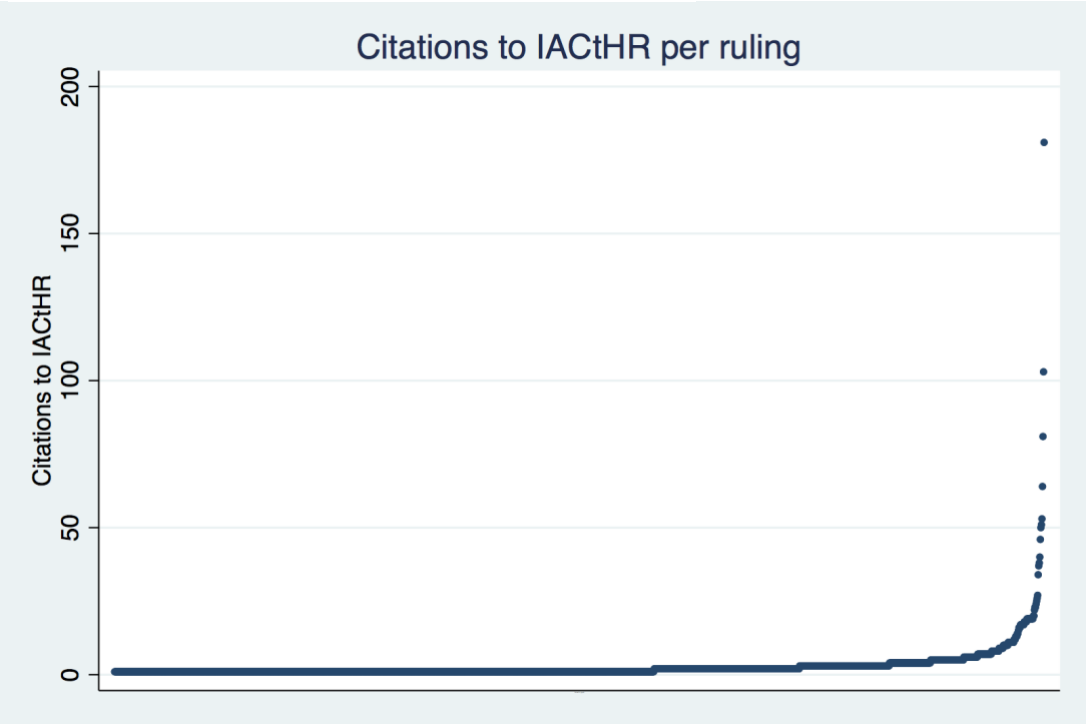
Second, most cases that are not "routine" are unlikely to elicit new or vexing questions related to the protection of fundamental rights, which is the area in which Inter-American jurisprudence can be most helpful. As a result, national judges likely cite international sources of law only when they deal with complex juridical questions for which there are no clear answers in domestic law. As another clerk put it:

> References to international law are an appeal to authority. It's like governing using the expertise of others. When you are trying to advance a *novel position* on an issue, you need to be able to show that it is not a crazy idea. It helps show that another institution, for example, an international court, shares your views […] We use […] to persuade others that those innovations are not capricious, but have a basis in law (Former clerk, 5 August 2016)

With these caveats in mind, two trends in the data are particularly helpful to assess the significance of the citation record. First, 96.09% of national rulings that cite Inter-American jurisprudence feature between 1 and 10 references. In fact, 58.02% of these rulings feature only 1 reference. At the other end of the distribution, three rulings stand out for their heavy reliance on Inter-American jurisprudence: *Expedientes Varios 910/2011* (Mexico, 2011, 81 references), *Simón* (Argentina, 2005, 103 references), and *C-370-06* (Colombia, 2006, 181 references) (Figure 1). These are all instances in which Inter-American jurisprudence was undeniably relevant, especially precedents outlining the parameters that ought to guide transitional justice policies, the reasons why amnesties are illegal under the ACHR, and the main contours of the conventionality control doctrine. In *Expedientes Varios 910/2011*, Mexico's Supreme Court shifted its longstanding scepticism vis-à-vis international law, and accepted its duty to engage in "conventionality control." In *Simón*, Argentina's Supreme Court declared the amnesty laws passed in the late 1980s

unconstitutional. And in *C-370-06*, Colombia's Constitutional Court conditioned the constitutionality of President Uribe's signature transitional justice initiative, the Justice and Peace Law.

Figure 1: Number of citations in national rulings



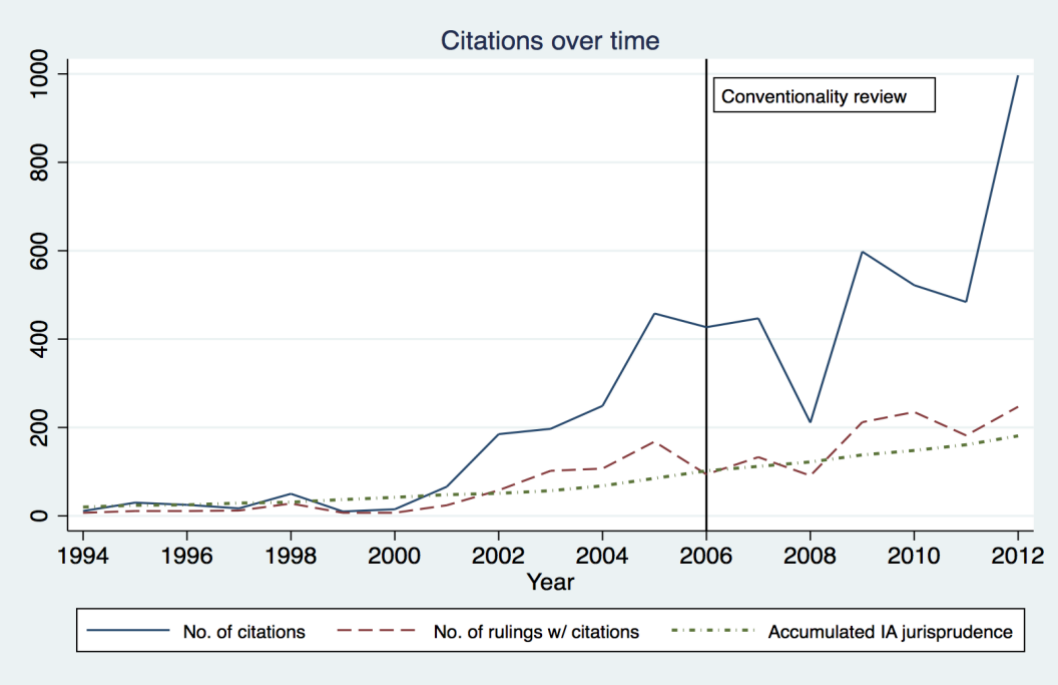
One could argue that these figures show that Inter-American jurisprudence is a peripheral source of law. After all, in most cases there are only a handful of references, indicating that Inter-American jurisprudence is hardly a key pillar of the *ratio decidendi*. But a different interpretation is also possible. The fact that judges are so selective, often citing only one decision, could indicate detailed knowledge of what international precedents have to offer in terms of persuasive authority. In other words, judges do not adopt a "kitchen sink" approach; instead, they prioritize relevance. The fact that the rulings most heavily anchored in Inter-American precedents are ones that deal squarely with issues in which the IACtHR has recognized expertise, also suggests that judges put a premium on relevance, and seek the aid of international sources of law when these have

something important to add. For example, referring to the *C-370-06* case, a former clerk of Colombia's Constitutional Court made the following point:

> We had to justify that decision. The reincorporation of paramilitaries to civilian life [NB: the primary goal of the Justice and Peace Law], required the enforcement of special criminal procedures and rules. And international jurisprudence gave us the necessary tools to think about a case with these characteristics. In fact, it was one of the first approximations of the Court to the issue of transitional justice. The topic was completely foreign to us (18 August 2016).

The second trend that highlights the significance of citation practices is a temporal one. As Figure 2 shows, while citations were extremely rare in the 1990s, they became increasingly common after 2000. Regardless of whether the total number of citations is large or small, it is undeniable that the visibility and influence of the IACtHR has increased dramatically. As one Inter-American judge admitted in an interview, in the 1990s the court's jurisprudence was virtually unknown and this clearly undermined the court's ability to become relevant, authoritative, and legitimate (7 May 2016). Fortunately, things have most definitely changed in a positive direction.

Figure 2: Citations by national courts over time (1994-2012)



In what follows, we discuss a series of conditions that have likely led Latin American judges to make greater use of Inter-American jurisprudence. Specifically, we explore the role of the Court's changing visibility and changes in national legal cultures. The nature of our dataset does not allow us to test why judges cite the IACtHR in some cases but not others. We only observe citations. So rather than thinking of the decision to cite as a strategic choice made by individual justices when confronted with specific cases, we take a more structural and sociological approach. The analysis below argues that the diffusion of new ideas about the law and judicial role conceptions, as well as more routine interactions between judges at both levels, transform the baseline receptivity of national courts to international jurisprudence. This in turn explains shifts in the perceived utility and persuasive authority of Inter-American precedents, and the growing robustness of the region's transjudicial dialogue.

3.1 The IACtHR's changing visibility

One factor that explains the rise in citations is the growing visibility of the IACtHR. First, technological change was a necessary condition for a robust transjudicial dialogue. Before judges and their clerks had access to the Internet, for example, it was almost impossible to stay current on regional jurisprudential developments. As a former clerk of the Colombian Constitutional Court told us:

> Access to information is key. When I arrived in the court in 2004 the Internet did not work very well, lots of us didn't have a computer in our desks, etc. This eventually changed, and we managed to start using international law to justify decisions (Former Clerk, 5 August 2016).

Second, as shown in Figure 2, the gradual expansion of the Inter-American jurisprudential corpus tracks citation trends quite closely. At the beginning of the series, the IACtHR had only handed down a handful of timid rulings in a limited number of areas. As the years passed, the jurisprudence became bolder, and the Court issued streams of rulings that consolidated key standards of rights protection. In addition, the docket expanded significantly, allowing Inter-American judges to make interventions in a wider range of legal debates. These changes naturally increased the authoritativeness of doctrines that were likely seen as experimental or idiosyncratic when they were first developed, and also made the jurisprudential corpus more useful to solve a wider variety of cases.

Third, after the turn of the century the IACtHR upped efforts to establish jurisprudential and personal relationships with national judges, and thus increase its visibility and influence. This is because Inter-American judges recognized that their national counterparts were on the "front line" in applying ACHR rights. As Judge García-Sayán has written, "the role of judges and lawyers

is fundamental to ensuring that the domestic courts guarantee the implementation of international norms and standards at the domestic level."[17] If the objective was the construction of a regional human rights legal order, integrating the jurisprudence of national courts and the IACtHR was crucial. An essential basis for that integration would be judicial dialogue. For Judge García-Ramírez, "the dialogue to which I refer […] should penetrate more deeply, through reciprocal contributions that enrich (cross fertilize) the reasoning and decisions of the tribunals in dialogue."[18]

On the jurisprudential front, the court developed the "conventionality control" doctrine. The goal was to promote greater attention to Inter-American jurisprudence in judicial decision-making routines. Aware that most national judicial decisions hardly ever considered the ACHR or the Court's jurisprudence, Inter-American judges began to promote the idea that:

> [W]hen a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention […] In other words, the Judiciary must exercise a sort of "conventionality control" between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.[19]

The IACtHR thus claimed that reviewing the legality of national statutes or executive decrees not only required constitutionality tests, but also tests based on regional human rights standards. This jurisprudential innovation sparked a lively debate between national and international judges, which

[17] García-Sayán, *supra* note 3, at 1839.
[18] García-Ramírez, *supra* note 4, at 127.
[19] *Almonacid-Arellano v. Chile*, Merits, Reparations, and Costs Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 154, 54-55 (Sept. 26, 2006).

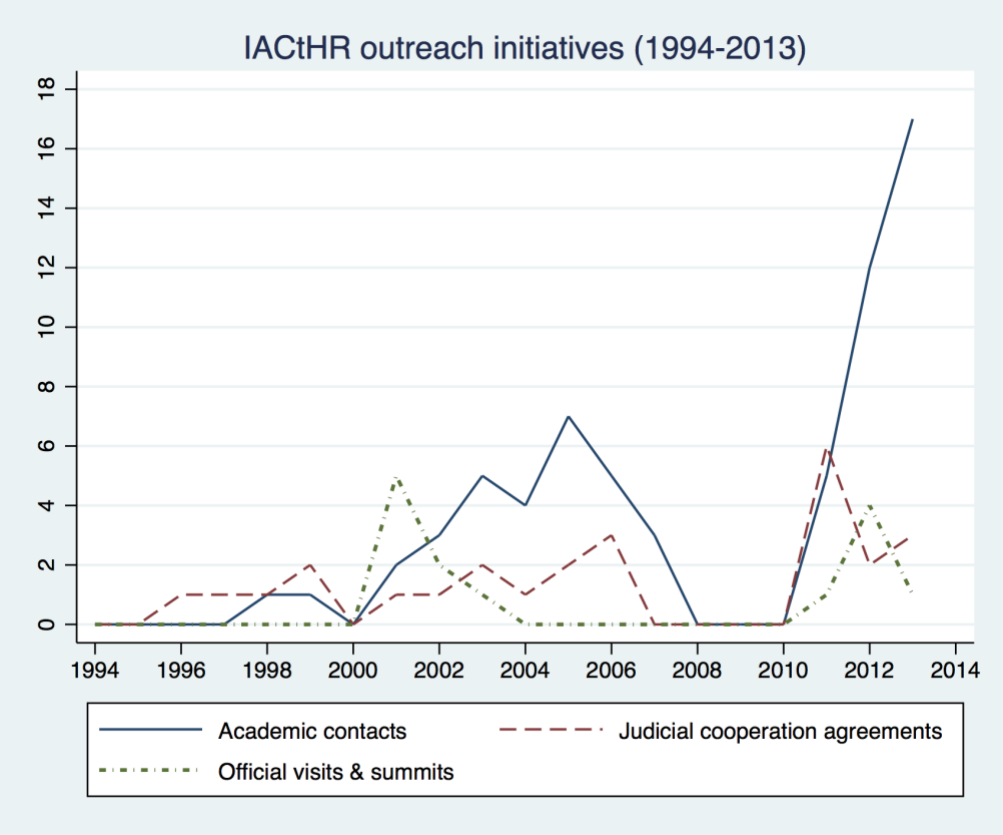
ultimately shed light on the conditions under which national courts should engage Inter-American precedents. Specifically, several local courts responded to the conventionality review doctrine by specifying when and how judges should use Inter-American jurisprudence, thus creating the conditions for a more robust judicial dialogue (Gonzalez-Ocantos 2018).[20] As shown by the vertical line in Figure 2, it is precisely around the time the doctrine was announced (2006) that we see the overall number of citations taking off.

In addition to this jurisprudential overture, the IACtHR sought to establish more personal relationships with members of national legal establishments, including high court judges. Crucially, in 2003 the Court began to hold hearings outside Costa Rica, in an effort to bring the institution closer to its users. Inter-American judges used these country visits as an opportunity to familiarize students and academics with their work, and to meet with high court judges. Between 2003 and 2012, the IACtHR travelled to Argentina, Barbados, Brazil, Bolivia, Chile, Colombia, El Salvador, Ecuador, Guatemala, Honduras, Mexico, Panama, Peru, Paraguay, Dominican Republic, and Uruguay. But networking strategies went far beyond these in-country hearings. Figure 3 plots additional outreach initiatives per year between 1994 and 2013 based on information obtained from the Court's annual reports. *Academic contacts* include formal agreements between the Court and universities to promote academic exchanges, as well as high-profile events featuring academics and members of the Court. *Judicial cooperation agreements* are formal accords between national judicial branches and the IACtHR intended to strengthen institutional ties, promote internship programs, and offer technical assistance on issues related to human rights law. Finally, the third group includes *judicial summits* attended by judges from multiple countries, as well as *official visits* by members of the IACtHR to national courts. The graph shows that the

[20] See Ezequiel Gonzalez-Ocantos, *Communicative Entrepreneurs: The Inter-American Court of Human Rights' Dialogue with National Judges*, 16(1) INTERNATIONAL STUDIES QUARTERLY (2018).

Court's outreach strategy intensified after 2000. This is particularly true for academic contacts, suggesting the IACtHR sought to build awareness from the bottom up, targeting future lawyers and judges, as well as those who develop legal doctrine. Face-to-face contacts with judges also became more common towards the end of the period, affording the IACtHR great opportunities to diffuse knowledge and acceptance of its doctrines. As we shall see later, the Court also used these encounters to learn about local rulings, which in turn enabled Inter-American judges to cite national courts more often and thus make their own contributions to the judicial dialogue.

Figure 3: Outreach initiatives (1994-2013)



A case study is useful to illustrate these networking dynamics. When the IACtHR handed down a decision challenging Uruguay's amnesty law and affirming the conventionality control

doctrine,[21] the relationship between the Uruguayan Supreme Court and its supranational counterpart turned sour. Like many other national judges in the region, Uruguayan justices were reticent to accept the conventionality review, or change their position on the validity of the amnesty. This meant that at the end of the day, the Supreme Court was unwilling to yield to the authority of another tribunal. In order to repair the relationship and promote judicial dialogue, the IACtHR and the Konrad Adenauer Foundation brokered a meeting between Inter-American judges and the 5 justices of the Supreme Court. In an interview, one of the local organizers described the impact of the meeting:

> While at first some of the judges did not show an interest in meeting the Inter-American delegation, in the end they all came […] Before this meeting there was a lot of mistrust and institutional jealousy. That famous dinner was a first step to re-civilize the relationship. If you look at the jurisprudence of the Uruguayan court, it is clear that it's a very conservative court. But it is also clear that the Court has started to pay more attention to Inter-American jurisprudence (12 September 2016).

An Inter-American judge made a similar assessment of the value of these meetings:

> I am absolutely convinced that these personal contacts are crucial, and they work. In Uruguay, for example, the judges were very cautious about accepting the conventionality review after the *Gelman* decision. The meetings we had with the Supreme Court were important to help them understand that the logic of the doctrine is not one of imposition, but of mutual recognition and cooperation in setting human rights standards (10 August 2016).

[21] *Gelman v. Uruguay*, Merits, Reparations, and Costs Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 190 (Nov. 26, 2008).

Our dataset only covers the period up to 2012, so we cannot evaluate the longer-term impact of these exchanges. Two pieces of data, however, are instructive. First, more than half of all references we found to the IACtHR in the rulings of Uruguay's Supreme Court appear in a ruling handed down in 2011, precisely in response to the *Gelman* decision. Second, while during the period between 1994 and 2012 we only found 10 rulings citing Inter-American jurisprudence, a look at the 2013 docket reveals at least 7 rulings that make use of this source of law, perhaps indicating an acceleration of the citation rate.

If our core claim thus far is plausible, namely that growing familiarity with Inter-American jurisprudence coupled with the consolidation of visible and prestigious jurisprudential lines explain changes in transjudicial dialogue, we should also observe certain patterns in citation levels across individual Inter-American precedents. Indeed, among the 10 most cited precedents one finds cases widely considered seminal, and that represent three of the court's most prominent jurisprudential themes.[22] First, the two most cited cases, *Herrera Ulloa*[23] and *Advisory Opinion 05/85*,[24] deal with issues related to freedom of the press and freedom of speech. Second, three of the most cited cases, *Barrios Altos*,[25] *Velásquez-Rodríguez*,[26] and *Radilla-Pacheco*,[27] establish states' international responsibility to investigate and punish serious human rights violations. It is worth noting that in *Barrios Altos* the IACtHR inaugurated its famous doctrine on the illegality of amnesties, and in *Velázquez-Rodríguez*, its seminal jurisprudence on forced disappearances. Third,

[22] See Appendix B for more details.
[23] *Herrera-Ulloa v. Costa Rica*, Merits, Reparations, and Costs Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 107 (July 2, 2004).
[24] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention of Human Rights), Advisory Opinion 5/85,* Inter-Am. Ct. H.R. (Ser. A) No. 5 (Nov. 13 1985)
[25] *Barrios Altos v. Peru,* Merits, Reparations, and Costs Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 75 (March 14, 2001).
[26] *Velásquez-Rodríguez v. Honduras,* Merits, Reparations, and Costs Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 4 (July 29, 1988).
[27] *Radilla-Pacheco vs. Mexico,* Preliminary Objections, Merits, Reparations, and Costs Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 209 (Sept. 23, 2009).

the ranking features three highly visible cases, *Castillo-Petruzzi*,[28] *Suarez-Rosero*,[29] and *Advisory Opinion 08-87*,[30] in which the Court compelled states to safeguard the effectiveness of the writ of *habeas corpus* in cases where security forces apprehend individuals. Finally, two other highly cited cases develop important jurisprudential themes. In *Tribunal Constitucional* the IACtHR makes a strong defence of judicial independence,[31] and in *Baena*, it makes a rare intervention in debates about socio-economic rights.[32]

We ran an OLS regression to assess whether time and the consolidation of visible and prestigious jurisprudential lines are associated with ruling popularity. First, we look at the impact of precedent age. It is possible that judges are more aware of older rulings, and had more opportunities to cite them. Second, we assess whether Advisory Opinions are more popular than regular Inter-American precedents. Advisory Opinions deal with more general points of law, which potentially makes them relevant for a wider range of cases. Third, we probe whether rulings that affirm the conventionality control doctrine, have acquired an edge over those that don't. Finally, we explore the extent to which precedents with recognized relevance or pedigree for the interpretation of specific ACHR articles, are more cited than others: judicial guarantees (Article 8), judicial protections as they apply to the duty to investigate human rights violations (Article 25), the right to life (Article 4), right to personal integrity (Article 5), the legality principle (Article 9), freedom of conscience/religion (Article 12), freedom of speech (Article 13), freedom of

[28] *Castillo-Petruzzi v. Peru,* Merits, Reparations, and Costs Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 52 (May 20, 1999).
[29] *Suarez-Rosero v. Peru,* Merits, Reparations, and Costs Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 35 (Nov. 12, 1997).
[30] *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1), and 7(6), Advisory Opinion 8/87,* Inter-Am. Ct. H.R. (Ser. A) No. 8 (Jan. 30, 1987).
[31] *Tribunal Constitucional v. Peru,* Merits, Reparations, and Costs Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 71 (Jan. 31, 2001).
[32] *Baena and others v. Panama,* Merits, Reparations, and Costs Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 72 (Feb. 2, 2001).

association (Article 16), political rights (Article 23), socio-economic rights (Article 26), and indigenous rights (no specific article). To establish which rulings are part of the "canon" for each jurisprudential line, we rely on the opinion of experts, specifically, the contributors to a 1000+ pages annotated edition of the ACHR (Steiner and Uribe 2014).[33] The editors convened a group of 30 scholars and practitioners to comment on individual articles, in the most comprehensive study of its kind. The chapters helpfully begin with a list of Inter-American rulings that the authors consider most significant for each article. We use this list to construct our variables.

[33] CONVENCIÓN AMERICANA SOBRE DERECHOS HUMANOS: COMENTARIO (Christian Steiner & Patricia Uribe eds., 2014).

Table 1. Factors associated with precedent popularity

	1
Variables	
Age	-2.626***
	(0.479)
Advisory Opinions	-17.160
	(10.789)
Conventionality Review	2.213
	(15.442)
Indigenous Rights	1.484
	(9.018)
Judicial Guarantees	48.743***
	(7.697)
Duty to Investigate	23.793**
	(9.803)
Right to Life	1.087
	(11.820)
Legality Principle	-4.877
	(9.5000)
Freedom of Religion	40.359***
	(12.519)
Freedom of Speech	44.890***
	(9.878)
Freedom of Association	2.991
	(12.922)
Political Rights	12.740
	(11.028)
Personal Integrity	10.723*
	(6.082)
Socio-economic Rights	12.042
	(9.032)
Observations	179
Constant	5271.994***
	(960.921)

Standard errors in parentheses.
*** p<0.01, ** p<0.05, * p<0.1

Some of the results shown in Table 1 suggest that knowledge of the jurisprudential corpus, and differences in the perceived prestige, persuasive authority, and utility of specific jurisprudential lines influence citation patterns. Older rulings tend to be cited more often than

recent ones.[34] Similarly, famous rulings that affirm judicial independence and judicial guarantees, including the writ of *habeas corpus*, are on average significantly more popular than those that do not. The same is true for seminal rulings that establish states' international duties to investigate serious human rights violations. These are precisely the issue areas in which the IACtHR has produced the most path-breaking jurisprudential innovations. Local judges are therefore more likely to know about the rulings, and perceive them as useful and authoritative when dealing with related issues at the local level. Important rulings protecting freedom of speech, conscience and religion, and those protecting the right to personal integrity, are also on average more popular than the rest.

By contrast, rulings that explicitly apply the conventionality control doctrine or that are famous for affirming the rights of indigenous peoples, the right to life, political rights, socio-economic rights, and freedom of association, all have positive, but statistically insignificant coefficients. The case of conventionality control rulings is especially intriguing, and suggests that the IACtHR should do more to boost the popularity of this important jurisprudential innovation. Other statistically insignificant results include those for seminal rulings regulating the legality principle and advisory opinions.

3.2 Changing legal cultures

We now turn to transformations that took place inside judicial branches across Latin America, which improved the receptivity of local courts to Inter-American precedents.

Many Latin American high courts are world-famous for their innovative jurisprudence on fundamental rights. Judges across the region have made important contributions to the

[34] The coefficient is negative because we code the year in which each ruling was handed down.

consolidation of the "new constitutionalism" in the Global South.[35] This progressive re-orientation of Latin American courts, however, is a relatively new phenomenon. Until the 1990s, judicial branches were home to a formalistic version of legal positivism,[36] which engendered "a deferential understanding of the role of the courts,"[37] as well as hostility towards non-textualist readings and non-statutory sources of law. This positivist "habitus" thus stifled the development of creative, rights-oriented constitutional jurisprudence.[38]

International human rights law did not do well in this environment. Until very recently, most law schools did not offer courses on the subject.[39] A survey conducted in Colombia in 1989 showed that only 10% of judges knew at least one human rights treaty.[40] In Peru, judges also lacked "awareness of international human rights instruments," limiting themselves to a "strict and mechanical enforcement of norms."[41] Additionally, using international law to interpret statutes or the constitution implies a departure from plain meaning interpretation, which itself requires familiarity with quite complex hermeneutic techniques that were generally alien to Latin America's highly formalistic judges. In Colombia, for example, changes in interpretive practices, including the introduction of "concepts like 'proportionality,' the 'reasonability test,' 'special

35 *See* CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA AND Colombia (Bonilla-Maldonado ed. 2013).
36 *See* LISA HILBINK, JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE (2007).
37 Javier Couso, *The Transformation of Constitutional Discourse and the Judicialization of Politics in Latin America*, in CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA 141, 152 (Javier Couso, Alexandra Huneeus & Rachel Sieder eds., 2011).
38 *See* DIEGO LOPEZ-MEDINA, TEORÍA IMPURA DEL DERECHO (2004); Karina Ansolabehere, *More Power, More Rights? The Supreme Court and Society in Mexico*, in CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA (Javier Couso, Alexandra Huneeus & Rachel Sieder eds., 2011).
39 *See* Lopez-Medina, *supra* note 25; Larissa Adler-Lomnitz & Hector Fix-Zamudio, *Cultural Elements in the Practice of Law in Mexico: Informal Networks in a Formal System,* in GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION AND IMPORTATION OF A NEW LEGAL ORTHODOXY (Yves Dezalay & Bryant Grath eds. 2002); LUIS PÁSARA, TRES CLAVES DE LA JUSTICIA EN EL PERÚ (2010).
40 Carlos Valencia, *Legislación y Jurisprudencia Colombiana en Relación con los Instrumentos de Protección de Derechos Humanos*, in ESPACIOS INTERNACIONALES PARA LA JUSTICIA COLOMBIANA (Gustavo Gallón ed. 1990)
41 COMISIÓN DE LA VERDAD Y RECONCILIACIÓN DEL PERÚ, INFORME FINAL, Volume III, Chapter II, 2005-256 (2003), our translation.

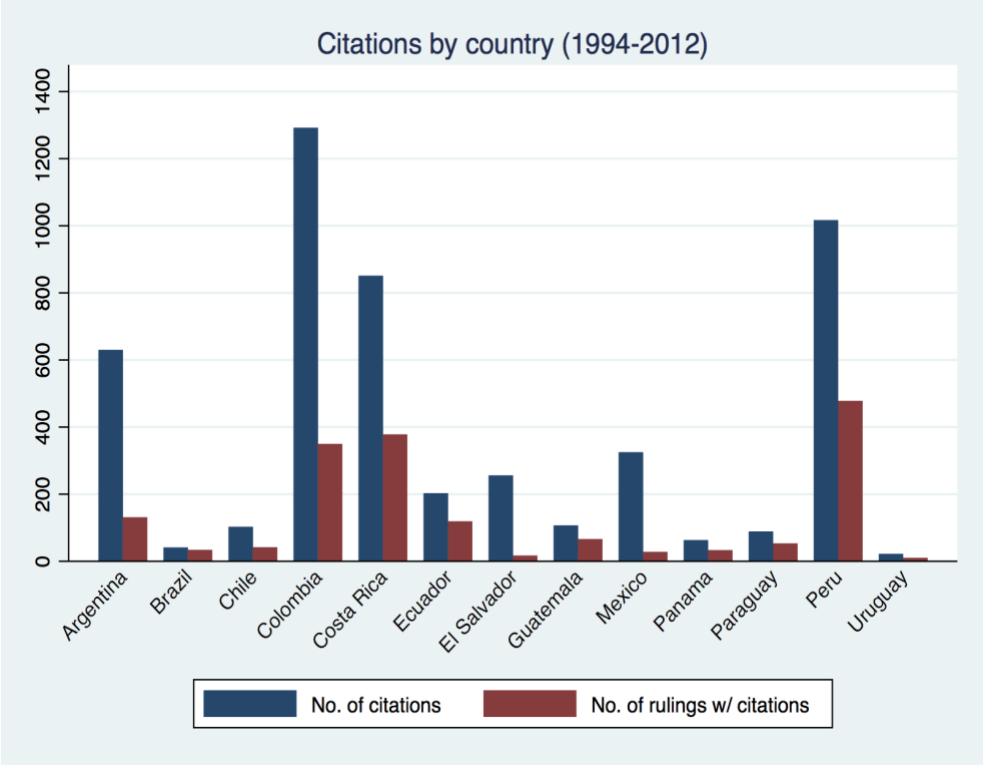
protection,' 'levels of constitutional scrutiny,' 'essential nucleus of rights and competences,'[and] 'legitimate trust,'"[42] were a crucial pre-condition for the development of the "constitutionality block" doctrine, which promotes greater integration between international and domestic law to improve the protection of fundamental rights.

The hegemony of formalism began to weaken in the 1990s with the inflow of "neo-constitutionalist" ideas. This is a rights-centered legal philosophy with obvious affinities with the international human rights regime.[43] Scholars have explored the mechanisms via which these new legal preferences and associated hermeneutic practices reached several high courts in the region, opening up a space for greater engagement with international law. For example, debates over constitutional reforms in Costa Rica (1989), Colombia (1991) or Argentina (1994), were important venues for the incorporation of international legal ideas into domestic law. Some countries even created constitutional courts following the European model of post-war constitutionalism. The reforms not only gave voice to progressive sectors of the legal field that until then had been marginalized,[44] but also led to the appointment of judges uncontaminated by the vices of the judicial "family," including academics committed to neo-constitutionalism.[45] Civil society also became an important force of ideational change by introducing new frameworks via strategic litigation.[46]

[42] JOSÉ MANUEL CEPEDA, POLÉMICAS CONSTITUCIONALES 660-661 (2006), our translation.
[43] *See* Armin Von Bogdany, *Ius Constitutionale Commume en América Latina: Una Mirada a un Constitucionalismo Transformador*, 34 REVISTA DERECHO DEL ESTADO (2015); Sandholtz, *supra* note 9.
[44] *See* Alexandra Huneeus, *Constitutional Lawyers and the Inter-American Court's Varied Authority*, 79(3) LAW AND CONTEMPORARY PROBLEMS (2016).
[45] *See* Rodrigo Nunes, *Ideational Origins of Progressive Judicial Activism*, 52(3) LATIN AMERICAN POLITICS AND SOCIETY (2010); Javier Couso & Lisa Hilbink, *From Quietism to Incipient Activism: The Institutional and Ideological Roots of Rights Adjudication in Chile*, in COURTS IN LATIN AMERICA (Gretchen Helmke & Julio Ríos-Figueroa eds., 2011).
[46] *See* EZEQUIEL GONZALEZ-OCANTOS, SHIFTING LEGAL VISIONS: JUDICIAL CHANGE AND HUMAN RIGHTS TRIALS IN LATIN AMERICA (2016).

Changes in the use of Inter-American jurisprudence over time reflect this new, pro-rights orientation of many Latin American high courts. A quick look at citation practices across countries (Figure 4), however, reveals important differences in courts' receptivity to international sources of law. Variation in the pace and depth of the neo-constitutionalist transformation goes a long way in explaining these differences.

Figure 7. Citations by country (1994-2012)



In the first 10 years of the series, citations were few and far between, and found mainly in the jurisprudence the Supreme and Constitutional courts of Argentina, Colombia, Costa Rica and Peru. These courts were also at the forefront of the exponential rise in citations after the turn of century. This is unsurprising: the scholarly consensus is that it is in these countries where neo-constitutionalism has been most influential. The appointment of progressive academics educated

abroad as judges, the adoption of new constitutional provisions that elevated the status of international human rights treaties, the creation of constitutional courts, and a spike in human rights litigation, led to the development of new rights-oriented doctrines as early as the mid-1990s.[47] Starting in the mid-2000s, a second group of courts began to catch-up. Judges in countries such as Brazil, Chile, El Salvador, Mexico, and Uruguay, started to make greater use of IACtHR jurisprudence. This delay is also unsurprising. High courts in these countries have always been notorious for their resistance to jurisprudential change, their high levels of formalism, their conservative positions, and their lower levels of exposure to innovative human rights litigation.[48]

One way to explore differences in ideational change and receptivity, is to analyse whether a few justices dominate citation practices. If citations to Inter-American jurisprudence remain the exclusive domain of a few justices, this reveals the persistence of pockets of ignorance or resistance to new decision-making routines. By contrast, where citations appear in opinions drafted by a wider range of justices, openness to Inter-American jurisprudence is likely a more structural phenomenon. We were able to obtain authorship information for the rulings of 10 courts. Some rulings in the dataset were drafted my more than one justice, so in those cases we attributed citations to several authors. Applying the Gini coefficient formula to this data, we calculated an Index of Citation Inequality for each court. To do so we considered every judge that sat on these courts between 1994 and 2012, excluding temporary judges. A coefficient close to 1 indicates high levels of inequality, i.e. few justices are responsible for most citations, whereas a coefficient close

[47] *See* Cepeda, *supra* note 29; Bruce Wilson, *Changing Dynamics: The Political Impact of Costa Rica's Constitutional Court*, in THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA (Alan Angell, Rachel Sieder & Line Schjolden eds., 2005); Nunes, *supra* note 32; Gonzalez-Ocantos, *supra* note 33.
[48] *See* Hilbink, *supra* note 23; MATTHEW TAYLOR, JUDGING POLICY: COURTS AND POLICY REFORM IN DEMOCRATIC BRAZIL (2008); Ansolabehere, *supra* note 25; Couso, *supra* note 24.

to 0 indicates a more equal distribution. The results reported in Table 2 are in line with the trends discussed above.

Table 2. Citation inequality by country

Country	**Coefficient**
Argentina	0.492
Costa Rica *	0.503
Colombia	0.616
Mexico	0.732
Brazil	0.824
Panama	0.846
Uruguay	0.883
Paraguay	0.889
Chile	0.946
El Salvador	0.958

Notes: * Sala IV.

High-citation countries, namely Argentina, Colombia and Costa Rica, also have the most equal distributions. This is due to structural changes in the orientation of these courts. In the case of Argentina, the Supreme Court has a relatively long history of acceptance of international law as a source of law. For example, as early as 1992, an otherwise still conservative court ruled that the ACHR takes primacy over domestic law, and that it ought to be interpreted in light of Inter-American jurisprudence. This ruling served as the prelude for the constitutionalization of a series of human rights treaties during the 1994 constitutional convention. The new constitution thus boosted the legal status of Inter-American law, strengthened the menu of rights enshrined in the founding document, and catalysed the spread of neo-constitutionalism.

Colombia adopted a new constitution in 1991, and created a Constitutional Court. The constitution puts a strong emphasis on the non-derogable nature of human rights, and elevates the

status of international human rights.[49] In line with these precepts, "a social understanding developed that the court's mission in the political system is to protect and expand the progressive content of the constitution."[50] The new constitutional ethos required a different kind of adjudication. The first wave of appointments reflected this need to break with old institutional inertias, and facilitated the inflow of judges with different hermeneutic orientations.[51] One of the tools developed by the Court to enrich constitutional interpretation is the "constitutionality block" doctrine. According to this doctrine, laws, decrees and administrative decisions must not only be evaluated in light of constitutional provisions, but also in light of international law. Operationalizing the legal status of this source of law became "a core part of the Court's assertion of power: the importation of international law […] has both strengthened the legitimacy of the Court's decisions and allowed it to construct rights that are primarily present in international rather than domestic law."[52]

Similarly, in 1990, the creation of a specialized constitutional chamber within Costa Rica's Supreme Court dramatically altered the structural openness of the local judiciary to international law. In the past, judges usually "presumed the constitutionality of laws."[53] By contrast, the judges appointed to the new chamber, many of whom came from the academy or harboured unorthodox legal preferences, gradually developed innovative doctrines that enabled the court to make unprecedented assertions of power in defence of fundamental rights.[54] The judges relied heavily

[49] See MAURICIO GARCÍA-VILLEGAS & RODRIGO UPRIMNY, CORTE CONSTITUCIONAL Y EMANCIPACIÓN SOCIAL EN COLOMBIA (2004).
[50] Rodrigo Uprimny, *The Constitutional Court and Control of Presidential Extraordinary Powers in Colombia*, 10(4) DEMOCRATIZATION 63 (2003).
[51] *See* Nunes, *supra* note 32.
[52] DAVID LANDAU, BEYOND JUDICIAL INDEPENDENCE: THE CONSTRUCTION OF JUDICIAL POWER IN COLOMBIA 155-156 (2015).
[53] TOMAS QUESADA-ALPIZAR, INFORMAL MANDATES AND JUDICIAL POWER: THE CONSTITUTIONAL COURTS OF COSTA RICA, CHILE AND URUGUAY 109 (2017).
[54] *See* Wilson, *supra* note 34.

on international human rights law to empower the court. For example, a key doctrine developed in the early 1990s asserted the "supra-constitutionality" of human rights treaties when international protections are stronger than constitutional ones. Quesada-Alpizar attributes this ideational revolution to the pioneering work of Judge Piza, who had been president of the IACtHR between 1979 and 1981.[55]

The experience of these high-citation, low-citation inequality countries points to broad cultural and institutional changes as key drivers of a robust dialogue with the IACtHR. Elevating international human rights law as a source of law followed naturally once these courts adopted an institutional mission focused on expanding the content of fundamental rights. In the remaining countries, which are also the ones with fewer citations, citations tend to be dominated by one or two justices, and are a more recent phenomenon. To be sure, the appointment of certain judges intensified the contact between these laggard courts and the IACtHR, but in the absence of more structural changes in the broader judicial ecosystem, the transformational capacity of such personalities has been quite limited. This second group of cases is nevertheless interesting because it allows us look at the role of judicial leadership in changing dynamics of judicial dialogue. In what follows, we look at how legal philosophies and professional role conceptions can render some "maverick" judges receptive to Inter-American precedents in otherwise sceptical courts.[56]

The appointment of non-career judges is a key mechanism of ideational change in conservative courts.[57] The experience of Mexico's Supreme Court supports this view. By far the most active judge during the period under study was Justice Cossío, with 162 citations (49.4%). At the time of his appointment in 2003, and unlike most of his peers, Cossío had little judicial

[55] *See id.*
[56] For a discussion of other possible motivations behind the behaviour of mavericks, see Appendix C.
[57] David Landau, *The Two Discourses in Colombian Constitutional Jurisprudence: A New Approach to Modelling Behavior in Latin America*, 37(3) GEORGE WASHINGTON INTERNATIONAL LAW REVIEW (2005); Nunes, supra note 32.

experience. He completed a doctorate in Spain under the supervision of influential neo-constitutionalist jurists, and later became a law professor. Upon arrival in the Court, Cossío realized that his progressive constitutional project required changes to the institution's opinion-writing culture. During an interview in 2010, when he was still a lone "citing" wolf, he explained that most of his colleagues had never seriously considered the issue of how to make use of international sources of law (15 July 2010). This created a need for re-socializing judges. Cortez describes how Cossío assembled a team of clerks with an international profile to help him shake things up.[58] Some of the new clerks took it as their mission to spread awareness of Inter-American precedents across the court, gradually improving the overall citation record.[59]

Chile, Brazil, and Uruguay, all countries with historically conservative courts, reveal that *career* judges with unusual profiles can also become citation leaders. In Chile, for example, justice Muñoz is responsible for nearly 72% of all references to the jurisprudence of the IACtHR. Muñoz began his career in 1982 as a court clerk. In 1998 he was appointed judge at a Court of Appeals, quickly gaining fame for his commitment to human rights. For example, he investigated the case of a trade union leader executed during Pinochet's dictatorship. Muñoz quickly jump-started the investigation, which had been ongoing for nearly 17 years with no results, and managed to hand down 12 guilty verdicts. He subsequently trained his eye on Pinochet, using creative investigate techniques to locate the dictator's secret bank accounts in New York.[60] Muñoz was later catapulted to the Supreme Court in 2005, becoming the youngest justice in the court's history. While not an

[58] JOSAFAT CORTEZ, IDEAS, INNOVACIÓN Y CAMBIO ORGANIZACIONAL EN LA SUPREMA CORTE DE JUSTICIA DE LA NACIÓN (2020).
[59] *See* Gonzalez-Ocantos, *supra* note 18.
[60] *See* https://ciperchile.cl/2013/12/04/los-silenciosos-movimientos-que-provoca-la-inminente-llegada-de-sergio-munoz-a-la-presidencia-de-la-suprema/ [accessed, 28 August 2019].

outsider, it is possible that his innovative track record, his more activist conception of the judicial role, and his prior exposure to human rights legal discourses, explain his citation record.

In Uruguay, a career judge is also responsible for more than 70% of citations. Justice Van Rompaey was appointed to the Supreme Court in 2003 after holding numerous other positions in lower courts, and served until his retirement in 2012. Van Rompaey's citation record is partly a function of a different judicial role conception. His academic writings indicate that he conceived of the judicial role in more activist terms:

> Modern constitutions have huge implications that result from the incorporation of a catalogue of human rights that are not merely programmatic, statements of intent, or simple pieces of advice targeted at the legislator, but are directly applicable and operative […] [This] changes the nature of the judiciary, and the relationship between the judge and the law, as it no longer consists in subjection to the letter of the law regardless of its meaning […] Historically, Uruguayan judges have never been activist. If activism takes root, this is because judges will gradually become aware of their essential role as guardians of […] human rights.[61]

The overall impact of this judge, however, has been rather limited: Uruguay has the poorest overall citation record in Latin America, and only two of Van Rompaey's citations made it to a majority opinion.

In Brazil, Judge de Mello accounts for 46% of all citations. He joined the Supreme Court in 1989 after a long career as a prosecutor. During this time, he also had a foot in academia. Like maverick in Chile and Uruguay, what sets him apart is a different judicial role conception and understanding of constitutionalism. Brazil's Supreme Court is characterized by a "conservative

[61] Leslie Van Rompaey, *Reflexiones sobre el Derecho Civil Constitucional y el Activismo Judicial*, 1 *DOCTRINA Y JURISPRUDENCIA DE DERECHO CIVIL* 175-178 (2013), our translation.

mentality."[62] In this environment, Mello was an outsider. As a prosecutor in the 1970s, he scrutinized the military regime and defended the rights of prisoners.[63] Upon joining the Supreme Court, and especially after he became Chief Justice, Mello was resisted by his colleagues for "his view that the Judiciary should be one of the protagonists in the realization of constitutional rights".[64] He is now credited for introducing jurisprudential innovations on civil liberties, most notably, against authoritarian conceptions of criminal law. It is therefore not surprising that the most cited Inter-American precedents in Mello's opinions, *Cantoral-Benavides*[65] and *Palamara-Iribarne*,[66] are leading cases on due process and civil rights.

The cases analysed thus far indicate that changes legal preferences and professional role conceptions played an important role in shaping judges' receptivity to international human rights law. In cases such as Argentina, Colombia, or Costa Rica, structural changes enabled the influx of neo-constitutionalist ideas, which in turn catalysed greater attention to Inter-American precedents. In other cases, the persistence of a more orthodox brand of constitutionalism conspired against the development of an equally robust judicial dialogue. But the trajectory of several courts show that this lack of engagement can be partially remedied by the work of "maverick" judges.

4. The Citation Practices of the IACtHR

62 Paulo Abrão & Marcelo Torelly, *Resistance to Change: Brazil's Persistent Amnesty and its Alternatives for Truth and Justice*, in AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY 152, 174 (Francesca Lessa & Leigh Payne eds., 2012).
63 *See* https://www.conjur.com.br/2018-out-24/celso-mello-enfrenta-autoritarismo-ditadura-militar [accessed, 28 August 2019].
64 *See* https://www.conjur.com.br/2009-ago-15/celso-mello-20-anos-supremo-tribunal-federal [accessed, 28 August 2019].
65 *Cantoral-Benavidez v. Chile*, Merits, Reparations, and Costs Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 88 (Dec. 3, 2001).
66 *Palamara-Iribarne v. Chile*, Merits, Reparations, and Costs Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 135 (Nov. 22, 2005).

We now turn to the citation practices of the IACtHR, specifically whether and how the court cites the jurisprudence of national courts. In addition to relying on national judgements as a source of persuasive authority, there are strategic reasons why international courts may cite their local counterparts. As argued in previous sections, international human rights courts have a dual incentive to be accepted as legitimate by national judges. On the one hand, domestic judges are often crucial to bringing about compliance with human rights remedies. In the case of the IACtHR, this incentive is exacerbated by the fact that most remedies ordered by the court target national judicial authorities, hence the court's insistence on the conventionality review doctrine. On the other hand, international human rights courts seek to build human rights legal orders, integrating domestic and regional law. National judges are indispensable to that effort. As a result of these incentives to engage national courts, international courts may use citations to domestic jurisprudence as a means to temper fears of legal imperialism, signal recognition, and demonstrate openness to having a genuine dialogue. Furthermore, international judges can use references to domestic rulings that effectively incorporate or show deference to international law as a means to demonstrate the viability of such dialogic practices to more reluctant courts.

4.1 The IACtHR and external citations

Before moving to a more granular analysis of the IACtHR's citation practices, it is useful to look briefly at the larger picture. The purpose is not to explain IACtHR citation practices in general, but rather to sketch the context in which the Court cites its national counterparts. Since its first judgments, the IACtHR has referred to external sources of law and jurisprudence. At the beginning, of course, it had no case law of its own to draw upon. But the IACtHR has cited external materials ever since, even after it had developed a substantial body of "internal" jurisprudence.

The following figures depict trends in those external citations. The citations data cover all judgments on the merits and interpretations of judgments on the merits from 1988 through 2014 (a total of 221 judgments).[67]

We include three types of external citations: to international treaties other than the ACHR, to international courts (other than the IACtHR itself) and quasi-judicial bodies (like the Human Rights Committee), and to national courts of countries that have at any point accepted the jurisdiction of the IACtHR.[68] Figure 8 shows the annual average number of external citations of each type per IACtHR judgment (thus controlling for the fact that the number of judgments varies considerably from year to year). The rate of citations (that is, per judgment) to all three types of external materials rises quite dramatically. Also, the IACtHR is more inclined to cite other international courts and court-like bodies than it is to cite international treaties (beyond the ACHR) or national courts. Among international courts, the European Court of Human Rights (ECtHR) is by far the IACtHR's favorite target: out of 1,438 citations to international courts in our dataset, 72 percent are to the ECtHR. The second most cited external body is the Human Rights Committee (14 percent), followed by the International Court of Justice (4.8 percent). For our analytical purposes, however, the most significant observation is that over time, despite fluctuations, the IACtHR has more actively cited national courts.[69] But to place these figures in perspective, in Figure 9 we show the cumulative number of citations for the full period, including those to the

[67] We exclude Advisory Opinions for two reasons. First, though they offer the Court's interpretation of particular ACHR norms, they are not "judicial decisions" in the sense of Art. 38 of the Statute of the International Court of Justice and therefore do not constitute "subsidiary means for the determination of rules of law." Put differently, they may well foreshadow the future development of legal norms and even guide that development, but they do not "make" law. Second, we cannot include Advisory Opinions in the econometric analysis (see below) because we rely on state-level factors to explain IACtHR citations to national courts and advisory opinions are not directed at any particular state.

[68] We include IACtHR citations to case law from Trinidad and Tobago and from Venezuela.

[69] In Appendix D we provide a similar graph showing the average number of external citations per 100 judgment pages, in order to take into account that the length of IACtHR judgments varies and increases over time. The trends are identical.

IACtHR's own case law. Not surprisingly, the Court is far more likely to cite its own precedents than it is to cite any of the external sources.

Figure 8. IACtHR citations to external sources per judgment, 1988-2014

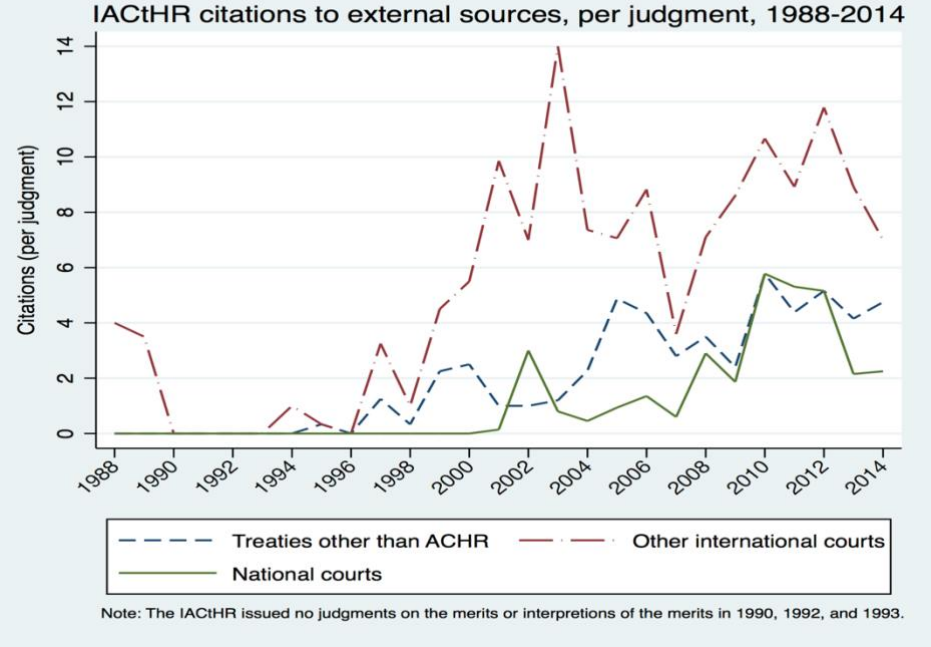
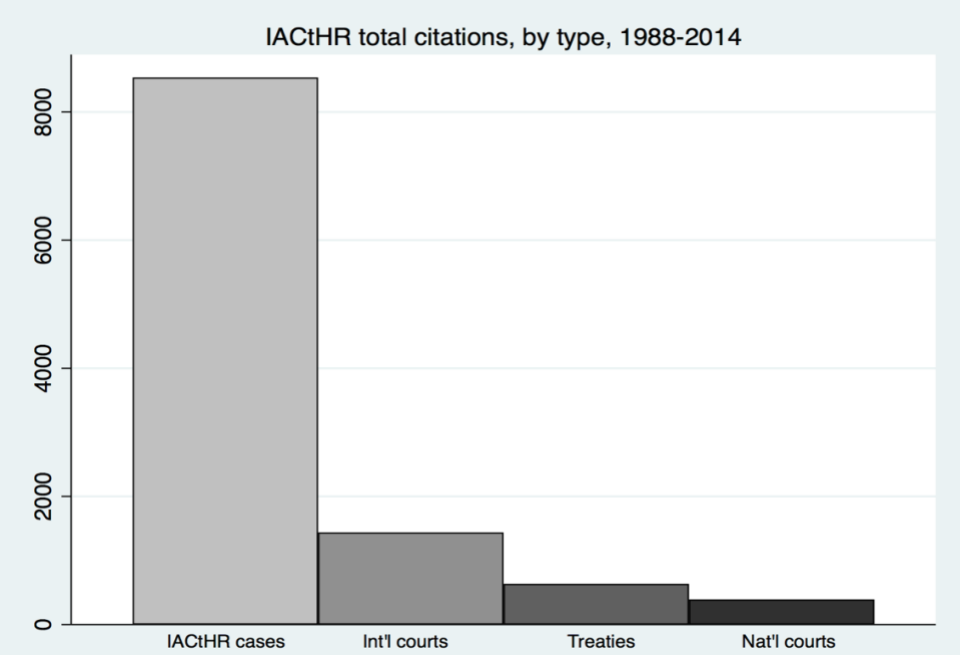


Figure 9. IACtHR total external citations by type, 1988-2014



Because IACtHR judgments are signed by all concurring judges, it is impossible to link external citations to specific members of the Court. Nevertheless, individual judges can affect the way the broader court carries out its work. Court presidents, in particular, can influence the perspectives and practices of their fellow judges. For example, Judge Cançado-Trindade was a vigorous proponent of judicial dialogue between the IACtHR and the ECtHR. As president of the IACtHR (1999–2003), judge Cançado-Trindade played a leading role in initiating annual meetings between the two courts, precisely to encourage the exchange of ideas. Speaking at the opening of the judicial year of the ECtHR in 2004, he noted that "the spirit of mutual *confiance* between our two Courts has [...] paved the way for a remarkable jurisprudential cross-fertilisation," resulting in "approximations and convergences in their respective case-laws."[70] Not surprisingly, the rate of IACtHR citations to other international courts (mainly the ECtHR) rose dramatically during the years of Cançado-Trindade's presidency.

By contrast, Judge García-Sayán, president from 2010 to 2013, frequently emphasized the key role of national courts in building a shared human rights legal order. In 2005, while already a judge on the IACtHR, he referred to judicial dialogue, noting that one observed "not only influences of the international legal order on the domestic, but also the interaction and feedback of the domestic on the international."[71] Later, while president, García-Sayán pointed to the "lively dynamic that is being constructed between the jurisprudence of the IACtHR and the jurisprudence

[70] Antonio Cançado-Trindade, The Development of International Human Rights Law through the Activities and Case-law of the European and the Inter-American Courts of Human Rights. Speech Delivered at Opening of the Judicial Year of the European Court of Human Rights, 22 January 2004, Strasbourg. Available at http://www.corteidh.or.cr/tablas/24088_eng.pdf. [accessed 5 June 2017], para. 2, 4.

[71] Diego García-Sayán, *Una Viva Interacción: Corte Interamericana y Tribunales Internos*, in LA CORTE INTERAMERICANA DE DERECHOS HUMANOS: UN CUARTO DE SIGLO 1979-2004 323, 328 (Corte Interamericana de Derechos Humanos ed. 2005), our translation.

of important tribunals in the region."[72] It is perhaps not a coincidence, then, that IACtHR citations to national courts surged during the years of García-Sayán's presidency. It is impossible to show that García-Sayán was responsible for the increase in citations to national courts (other judges undoubtedly also played a role), but the rise in such references is consistent with the importance that he placed on jurisprudential dialogue.[73] More generally, Table 3 shows the percentage of judgments that cite national case law under each court president. Presidencies are ordered from highest to lowest percentage. Not surprisingly, García-Sayán is near the top, with both a large number of total judgments and a high rate of citing national courts. We cannot, nevertheless, draw strong conclusions from this data. First, the link between presidencies and citations to national case law is indirect, in that a president can at most encourage clerks and the other judges to include such references in IACtHR judgments. Second, the data on court presidents closely tracks the general upward trend in citations to national courts after 2001. Note that the ordering in terms of citation rates exactly matches the chronological order, with the more recent presidencies at the top and the earlier ones at the bottom. This time trend may reflect changing attitudes within the Court generally, not the influence of presidents.

[72] Diego García-Sayán, *Justicia Interamericana y Tribunales Nacionales*, in DIÁLOGO JURISPRUDENCIAL EN DERECHOS HUMANOS ENTRE TRIBUNALES CONSTITUCIONALES Y CORTES INTERNACIONALES 805, 833 (Eduardo Ferrer-MacGregor & Alfonso Herrera-García eds., 2013).

[73] Some might object that because IACtHR opinions are drafted by the Court's clerks, it is impossible to attribute any citation tendencies in IACtHR judgments to the judges. That argument is implausible, for three main reasons: (1) Law clerks probably draft judgments at most courts in the world, yet scholars, commentators, and other judges universally attribute the contents of those opinions, including citations, to the judges. Our approach here thus accords with standard practice. (2) Though law clerks may draft judgments, they do so under the supervision of the judges, whose preferences and attitudes (toward external citations, for example) the clerks will be motivated to implement. Our interviews with clerks confirm this. (3) When a judgment is finalized, the judges sign it, indicating their approval of its contents. At a minimum, then, judges who sign a decision signal that they endorse and assume responsibility for it. For these reasons, we follow general scholarly practice in attributing opinions to judges, even while recognizing that those opinions are likely drafted by staff members. That said, it would be a useful project for future research to investigate the role and influence of IACtHR clerks in identifying and incorporating external jurisprudence.

Table 3: Court presidents and rates of citation to national courts

President	Presidency years	Judgments citing nat'l courts	Total judgments	Percentage citing nat'l courts
Sierra Porto	2014	6	14	43%
García-Sayán	2010 - 2013	26	62	42
Medina Quiroga	2008 - 2009	11	26	42
García Ramírez	2004 - 2007	17	71	24
Cançado Trindade	1999 - 2003	4	27	15
Salgado Pesantes	1997 - 1998	0	6	0
Fix-Zamudio	1990 - 1992, 1994 - 1997	0	6	0
Nieto Navia	1987 - 1988	0	4	0

Note: The data cover years through 2014 only.

Having described the general context for, and broad patterns in, the use of external citations in judgments of the IACtHR, what factors affect whether a particular judgment cites decisions from national courts? In the following section, we offer a series of propositions that address that question. The propositions are grouped under two headings: *state-level factors* and *IACtHR-level factors*. With respect to state-level factors, we hypothesize that the IACtHR is more likely to cite case law from countries that exhibit characteristics that are more conducive to the creation of a regional human rights legal order. With regard to IACtHR-level factors, we hypothesize that the IACtHR is more likely to cite jurisprudence from countries with which it has had more extensive experience and interaction.

a. State-level factors

In any given judgment, the IACtHR could cite decisions from any national court.[74] We focus on those states that have ratified the ACHR. Because we are interested in the construction

[74] The IACtHR does cite judgments from the national courts of countries that have not accepted its jurisdiction, or that are outside the region. We focus on states that participate in the Inter-American System because our purpose is to examine judicial dialogue as a means of building a regional legal order.

of a regional human rights legal order, and judicial dialogue as a means of achieving that end, it is appropriate to include all countries that have accepted the fundamental legal instrument undergirding that order.

Multiple logics would underpin the desire of the IACtHR to highlight case law from states that display core values. First, by citing countries that embody the traits that the Court wishes to promote, it recognizes and reinforces positive state behavior. This is a logic of *positive reinforcement*. Second, by citing the "good citizens," the Court signals to other states the model that they should follow. This is a logic of *encouraging emulation*. Third, from the IACtHR's point of view, judgments from the courts of countries that are on a favorable human rights trajectory may be more likely to affirm the values that the IACtHR seeks to promote in its jurisprudence, and may therefore be more substantively consistent with the IACtHR's own case law. This *logic of alignment* is nicely captured by a quote from an interview we conducted with a former Inter-American judge: "to the extent that national high courts were producing important democratizing innovations, we wanted to be able to learn about those rulings and include them in our jurisprudence" (5 September 2016).

Given these logics, the IACtHR may be more inclined to cite countries that display:

1. *Democracy and respect for rights*. The IACtHR is more likely to cite courts from countries that display political attributes that the Court seeks to encourage throughout the region, in particular, democracy and respect for human rights. Well-functioning democracies are more likely to respect rights.[75] And countries that better respect human rights are, by definition, more compliant with their ACHR obligations – objectives that the IACtHR clearly seeks to promote.

[75] Pedro Salazar-Ugarte, *The Struggle for Rights and the Ius Constitutionale Commune*, in TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA: THE EMERGENCE OF A NEW IUS COMMUNE (Armin Von Bogdandy, Eduardo Ferrer-MacGregor, Mariela Morales-Antoniazzi & Flavia Piovesan eds., 2017).

For the data analysis, our measure of *Democracy* is the widely-used Electoral Democracy Index from the Varieties of Democracy project.[76] Our measure of *Respect for rights* is the one developed by Fariss which has the advantage that it considers that human rights standards have risen over time.[77]

2. *Empowered domestic courts*. The IACtHR may be more likely to cite domestic courts that more fully display the institutional features associated with rights-promoting judiciaries: independence from the political branches of government and the authority to exercise judicial review. These attributes are especially important given the Court's doctrine of "conventionality control." Domestic courts that are more independent of the political branches and that have the authority to exercise judicial review are better positioned to fulfil that role. Our measures of *High court independence* and *Judicial review* both come from Varieties of Democracy.[78]

3. *High quality jurisprudence*. The IACtHR might also seek to recognize and draw attention to the case law of domestic courts that are seen as producing higher quality jurisprudence. That is, some national judiciaries may be seen as more influential than others, because of the depth, richness, clarity, and persuasiveness of their reasoning. For instance, Colombia's Constitutional Court is widely respected for the quality of its jurisprudence. A broad, reliable measure of *Judicial quality* does not exist. We employ the Judicial Decision Quality Index developed by Basabe-

[76] *See* MICHAEL COPPEDGE, JOHN GERRING ET AL., V-DEM [COUNTRY-YEAR/COUNTRY-DATE] DATASET V.8. VARIETIES OF DEMOCRACY (V-DEM) PROJECT (2018); Michael Coppedge, John Gerring et al., *The V-Dem Measurement Model: Latent Variable Analysis for Cross-National and Cross-Temporal Expert-Coded Data*, VARIETIES OF DEMOCRACY INSTITUTE WORKING PAPER NO. 21 (2018).

[77] The Fariss indicator measures respect for physical integrity rights but has been shown to be strongly correlated with the broader range of rights included in major treaties, including the Convention on the Elimination of Racial Discrimination, the Convention on the Rights of the Child, the Convention on the Elimination of Discrimination against Women, and the International Covenant on Economic, Social, and Cultural Rights. The indicator we use is therefore a plausible proxy for respect for rights in general. *See* Christopher Fariss, *Respect for Human Rights Has Improved Over Time: Modelling the Changing Standard of Accountability*, 108(2) AMERICAN POLITICAL SCIENCE REVIEW (2014).

[78] *See* Coppedge, Gerring et al., *supra* note 60.

Serrano.[79] The index is based on a survey of experts who were asked to rate the quality of judicial decisions for 152 judges in eleven countries. The index has two limitations. First, it covers only eleven out of the 25 countries in our dataset. Second, the survey was conducted once, in the early 2010s, which meant that the score for each country is constant from year to year. The necessary assumption here is that judicial quality changes only slowly in any given country. For these reasons, we take the results on this variable as suggestive only; they must be interpreted with a great deal of caution.

b. IACtHR-level factors

We also consider factors related to the nature and scope of the IACtHR's interactions with domestic judiciaries. More extensive experience and familiarity may lead to greater judicial dialogue.

1. *Respondent country*. The IACtHR is more likely to cite judgments from the state that is the respondent in a given case. The logic is straightforward: if the Court seeks to encourage compliance and cooperation on the part of judges in the state that is the subject of a judgment, it makes sense to engage in judicial dialogue with the courts of that country. A binary variable codes whether the state in question is the respondent state.

2. *Prior IACtHR judgments*. An important source of interaction between the IACtHR and national judiciaries can be prior cases involving that country and decided by the IACtHR. At a minimum, in previous cases involving a given state, the IACtHR will be acquainted with the proceedings in national courts given the requirement of exhaustion of local remedies. In addition, through its monitoring reports, the IACtHR will be aware of the role of domestic courts (if any

[79] Santiago Basabe-Serrano, *The Quality of Judicial Decisions in Supreme Courts: A Conceptual Definition and Index Applied to Eleven Latin American Countries*, 37(4) JUSTICE SYSTEM JOURNAL (2016).

were called for) in implementing remedies ordered in prior cases. For each IACtHR judgment, we counted the number of previous judgments involving the same respondent country.

3. *National contacts*. Inter-American judges have recognized the need for ongoing contact and dialogue with national judges. Contacts with national judiciaries have taken two primary forms. First, the Court has occasionally held session, for the hearing of oral arguments, in a variety of member states. During these country visits Inter-American judges usually meet with local judicial authorities, bar associations, and legal academics. Second, the Court has initiated workshops and seminars, held in member states, to which domestic judges are invited to attend. In principle, the seminars promote the sharing of information and views about the work of the IACtHR and its relevance in national legal orders. We speculate that the larger the number of such contacts that the Court has experienced with a given country, the more likely the IACtHR will be to cite judgments from that country, based on increased familiarity. Such contacts are particularly important given differences across countries in the accessibility of national court jurisprudence. When national jurisprudence might be more difficult for IACtHR staff and judges to access, personal contacts may matter even more. Our measure of national contacts is the cumulative number of in-country hearings and workshops and seminars in a given country, prior to the year of the IACtHR judgment.

4. *Responding to national jurisprudential achievements*. Finally, the IACtHR may cite national courts that have a proven record of making important, perhaps ground-breaking, contributions to the domestic incorporation of Inter-American jurisprudence. Not only is this jurisprudence more likely to be known, but responding to such achievements with reciprocal citations is a way of recognizing those national judiciaries that help in the construction of a regional legal order. It is also a way of showcasing "best practices" to others. A reasonable proxy for these

contributions, at least from the perspective of the IACtHR, is available in the form of national court decisions reported in the journal *Diálogo Jurisprudencial* (*DJ*). The journal is a joint project of the IACtHR, the Inter-American Institute of Human Rights (a research center co-founded by the IACtHR), and UNAM's Instituto de Investigaciones Jurídicas. *DJ* publishes selected national court judgments (or excerpts from them) that make reference to IACtHR jurisprudence, in order to highlight how top courts in Latin America have incorporated IACtHR case law in their decision-making.[80] Because the journal was established under the auspices of the IACtHR and is designed to foment dialogue between it and the national courts, we assume that the judges and clerks of the IACtHR are likely to be acquainted with it, and thus see which national courts are issuing decisions that refer to IACtHR jurisprudence. We counted for each country the number of such judgments reported in *DJ* each year. In the analysis below, we test whether the number of national judgments from a particular country published in *DJ* is associated with a higher likelihood that the IACtHR cites decisions from the courts of that country. We can only draw conclusions from that part of the analysis for the period beginning in 2006, which is when *DJ* started to publish.

c. Control variable: Spanish language

Some national courts may be more cited than others for the practical reason that their judgments are published in Spanish. As Judge Ferrer-MacGregor has noted, judicial dialogue is especially fruitful among states that have accepted the jurisdiction of the IACtHR because "most of these countries speak the same language, Spanish, which largely facilitates judicial borrowings and communication."[81] Spanish has been the de facto dominant language in the work of the IACtHR: of the 35 judges who have served on the Court from its inception through 2014 (the

[80] Sergio García-Ramírez, Sonia Picado et al., *Presentación*, 1 DIÁLOGO JURISPRUDENCIAL xii-xiii (2006).
[81] Ferrer-MacGregor, *supra* note 4, at 323.

period covered by our analysis), 29 were nationals of Spanish-speaking countries. Moreover, of the 25 countries included in our analysis, Spanish is the official language in 17. Spanish-language case law would be more accessible to the vast majority of IACtHR judges and is more prevalent among the countries that are potential targets of citations. We therefore include in the models a binary variable for Spanish language countries as a pragmatic "control," without attributing to it theoretical implications.

4.2 Analysis

Our dependent variable is a binary indicator of whether (1) or not (0) a particular IACtHR judgment cites a court from a specific country. That is, for each judgment, the courts of each state that has ever ratified or acceded to the ACHR are included as potential "targets" of citation. Our data include 25 countries: the 20 states that currently accept the Court's jurisdiction; Venezuela and Trinidad and Tobago, which earlier accepted the Court's jurisdiction but have withdrawn; and Dominica, Grenada, and Jamaica, which have ratified the Convention but not accepted the jurisdiction of the IACtHR. We recorded every citation to national courts in judgements on the merits and interpretations of merits judgments through 2014. For the analysis reported here, we included only citations that occurred in the portions of the judgments containing the Court's analysis, reasoning, and findings. We excluded citations that were included only as part of the procedural history or the facts of the case because they do not contain statements relevant to jurisprudence. Our data include 221 IACtHR judgments containing 400 references to the national courts of 21 countries.[82]

[82] There were no citations to decisions from the courts of Dominica, Grenada, Haiti, Suriname, or Trinidad and Tobago.

Figure 10 shows the number of IACtHR judgments containing citations to national courts each year; the total height of each bar indicates the number of judgments issued in a given year. Both the number of judgments citing national courts and the proportion of all judgments including such references increase over time, especially after 2000. In 2014, for example, 47 percent of the 15 judgments rendered contained citations to national case law. It is worth noting, however, that Inter-American judges prefer some interlocutors over others. Figure 11 depicts the total number of judgments with citations to each country's courts and the cumulative number of citations per country. Colombian and Peruvian jurisprudence, in particular, seems to attract the IACtHR's attention. As we saw in the section on national citation trends, these are two of the courts that have demonstrated greater openness to the judicial dialogue, and therefore produce the kind of jurisprudence that the IACtHR finds useful or worth recognizing.

Figure 10. IACtHR judgments citing national courts, 1988-2014

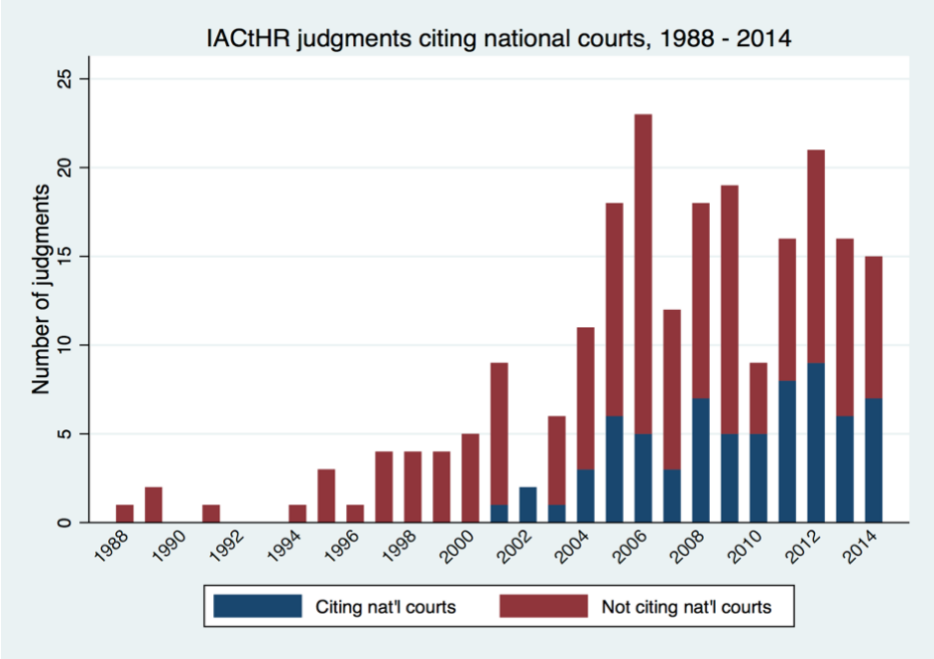
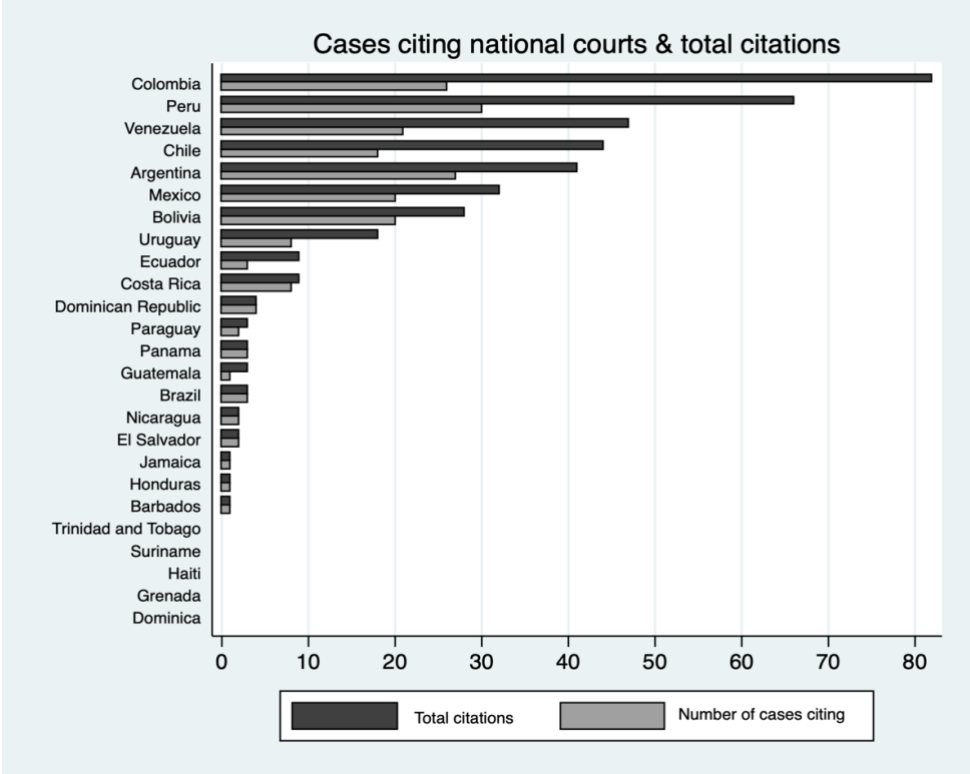


Figure 11. IACtHR citations by country



In order to paint a more systematic picture of citation patterns, we turn to regression models that estimate the likelihood of citing a particular national court in all 221 judgments.[83] Among the state-level variables, *Democracy* has a consistent positive effect on the likelihood of IACtHR citation to a country's national courts. Citing courts from more democratic countries is logical: the IACtHR could reasonably expect that courts in more democratic countries will be more willing to uphold Convention rights and that their jurisprudence may be more in line with that of the IACtHR's. In contrast, *Respect for rights* is not a good predictor of citations to a country's courts. *High court independence* has no significant effect and, contrary to expectations, *Judicial review* is negatively associated with the likelihood that the IACtHR cites a country's courts. Finally, the *Quality of judicial decisions* variable did not have a significant effect, though we cannot draw strong conclusions from that given the geographic and temporal limitations of the underlying index. All of these results hold while controlling for Spanish-language country, which is positive and significant.

Turning to the IACtHR-level variables, we find significant positive effects for all of them. The greater the scope of interaction between the IACtHR and a given country, the more likely the IACtHR is to cite that country's courts. First, in any given judgment, the IACtHR is five times more likely to cite courts of the respondent state than it is to cite those of other states.[84] Similarly, the more judgments the IACtHR has issued regarding a particular country in prior years, the more likely the IACtHR is to cite that country's case law in a new case. And a larger number of

[83] See Appendix E for a description of the operationalization strategy and full regression results.

[84] We also tested for the possibility that a judge from the respondent country being a member of the IACtHR could affect the Court's propensity to cite case law from that country. Because, since 2005, IACtHR judges cannot sit on cases brought against the country of their nationality, a judge from the respondent country would not be involved in writing the judgment. Rather the logic is that the presence of a judge from the respondent country could raise the other judges' awareness of or appreciation for that country's jurisprudence, and thus increase the likelihood that the other judges might cite it. In the analysis, the variable was not significant (results not presented here but available from the authors).

Cumulative IACtHR contacts (hearings, seminars and workshops) in a given country is also associated with a higher likelihood of citing that country's courts. Finally, the larger the number of judicial decisions from a given country reported in *Diálogo Jurisprudencial*, the more likely the IACtHR is to cite that country's courts.

Table 4 reports the main findings (from table E1, model 2 in Appendix E) in a form that allows for comparison of the effects of the various factors. Each entry in the table shows the effect – in the form of a multiplier – of a given variable on the probability that the IACtHR cites a particular state's courts in a given judgment. The effect of each variable is the effect on that probability if that variable increases from its lowest to its highest value. Multipliers greater than one indicate that a variable increases the probability of citing a national court by that factor. For instance, if the *Democracy* score increases from its minimum value (an autocratic state) to its maximum (a strong democracy), the probability of an IACtHR citation to that country's courts becomes more than five and a half times greater. For the binary variable *Respondent country*, the table reports the effect of changing its value from zero to one. For example, if a country is the respondent in a given judgment, the probability of an IACtHR citation to its courts is more than four times greater than if it were not the respondent in that case. As shown in the table, the two variables with the largest effects on the probability of citing a national court are the IACtHR-level factors *Cumulative IACtHR contacts* and *Prior IACtHR judgments*, followed by the country-level factor *Democracy*. A graphic presentation of the relative effects of the variables is available in the appendix.

Table 4: Predicted effects on the probability of citing national courts

How does an increase in each variable from its lowest to its highest value affects the probability of citing a given national court (multiplier)?

	Multiplier effect on probability of citing	Interpretation
Respect for rights	0.50	50% lower probability of citing
Democracy	5.64	More than 5.5 times greater probability of citing
Judicial review	0.44	More than 50% lower probability of citing
High court independence	0.67	One-third lower probability of citing
Respondent country	4.22	More than 4 times greater probability
Prior IACtHR judgments	7.07	7 times greater probability
Cumulative IACtHR contacts	9.77	Nearly 10 times greater probability

Note: Not shown but included in the regression: Spanish-language country; full results in model 2, table A1 (appendix).

4.3 Motivations for citing local courts

We drew a random sample of 206 of the 400 citations in the dataset to explore more closely the major purposes for which the IACtHR invokes national jurisprudence. The three categories we describe below were drawn inductively, without predetermined classifications: (1) "*substantive" references*, in which the IACtHR invokes specific norms, standards, or principles enunciated in the domestic judgment; (2) "*global integration" references*, in which the Court points to national courts asserting that global human rights norms must be applied in the domestic legal order; and (3) "*affirming IACtHR leadership" references*, in which the Court highlights national courts that have recognized the IACtHR's role as authoritative interpreter of the ACHR.

a. *Substantive*

The IACtHR frequently cites legal norms or principles that have been expressed in national court judgments. The IACtHR makes these references not because the national court jurisprudence

is novel, but because it supports interpretations that the IACtHR itself seeks to advance. The subject matter for such substantive citations is wide-ranging. Here, we provide an illustrative sampling.

The IACtHR has cited national courts in cases involving violations of political rights. For instance, the IACtHR cited Paraguay's Supreme Court in support of the idea that speech in the context of an election campaign is especially protected as a matter of public interest in a democratic society.[85] In a later case, the Court supported its point that political rights, freedom of expression, and freedom of association are interconnected and jointly "make democracy possible" with a reference to a decision by Colombia's Constitutional Court.[86] The IACtHR has also cited national courts in a substantive way in some of its more sensitive decisions. In *Atala Riffo and Daughters*, a decision upholding LGBTQ rights, the IACtHR cited judgements from Colombia's Constitutional Court rejecting discrimination on the basis of sexual orientation and declaring that a lack of social consensus cannot justify restrictions on LGBTQ rights.[87] In *Artavia Murillo*, one of the IACtHR's few forays into reproductive rights, it referred to a decision of Brazil's Supreme Court concluding that an *in vitro* embryo does not possess the full right to life.[88]

The Court often makes substantive references in what we label "cluster citations," that is, multiple citations on the same point within the same page or even the same footnote, suggesting that it seeks to add persuasive firepower to specific points of law. For instance, in several judgments, the IACtHR has cited multiple national courts to reinforce its conclusion that, given

[85] *Ricardo Canese v. Paraguay*, Merits and Reparations Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 111, 59 (Aug. 31, 2004).
[86] *Cepeda-Vargas v. Colombia*, Merits and Reparations Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 213, 60 (May 26, 2010).
[87] *Atala-Riffo and Daughters v. Chile,* Merits and Reparations Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 239, 33-34 (Feb. 24, 2012).
[88] *Artavia-Murillo et al. v. Costa Rica*, Merits and Reparations Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 257, 78 (Nov. 28, 2012).

the ongoing nature of the crime of disappearance, newly enacted laws criminalizing forced disappearance are immediately applicable, without violating the principle of non-retroactivity.[89] Similarly, the Court has cited various national courts in support of its finding that states are under an obligation to consult indigenous groups on measures that especially affect them.[90] Finally, the Court has also made use of cluster citations to reinforce its decisions nullifying amnesty laws.[91]

b. Global integration

The Court cites examples of national courts invoking global human rights treaties to affirm and apply ACHR rights. This practice fits with the IACtHR's conception of the Inter-American System as being integrated within a larger international human rights legal regime (Sandholtz and Feldman 2019). At times, the IACtHR simply notes that a domestic court has applied international treaty norms in resolving cases. For instance, the IACtHR has favorably cited Colombia's Constitutional Court for its application of Geneva Protocol II for the protection of civilians in a non-international armed conflict,[92] and Colombia's Supreme Court for establishing that the ACHR should be interpreted in light of international humanitarian law.[93] The IACtHR also frequently

[89] *Tiu Tojín v. Guatemala,* Merits and Reparations Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 190 31, fn. 99 (Nov. 26, 2008); *Gelman v. Uruguay*, Merits and Reparations Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 221 82, fn. 294 (Feb. 24, 2011); *Liakat Ali Alibux v. Suriname*, Merits and Reparations Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 276, 22-23, fn. 80, 81 (Jan. 30, 2014).
[90] *Sarayaku v. Ecuador*, Merits and Reparations Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 245 43-44, 52, 58 (Jun. 27, 2012).
[91] *La Cantuta v. Peru*, Merits and Reparations Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 162, 92-93 (Nov. 29, 2006); *Gelman v. Uruguay*, Merits and Reparations Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 221, 77-79 (Feb. 24, 2011).
[92] *Mapiripán Massacre v. Colombia*, Merits, Reparations, and Costs Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 134, 91, fn. 196 (Sept. 15, 2005); *Ituango Massacres v. Colombia*, Merits, Reparations, and Costs Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 148, 92, fn. 199 (Jul. 1, 2006).
[93] *Santo Domingo Massacre v. Colombia*, Merits, Reparations, and Costs Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 259, 54, fn. 254 (Nov. 30, 2012).

cites national courts whose judgments are consistent with international treaties on forced disappearance.[94]

Furthermore, the IACtHR favorably references national courts that more broadly embrace international human rights law in domestic jurisprudence. For example, the Court cites Colombia's Supreme Court where it asserts that human rights norms form part of "General International Law" and that norms recognized as *jus cogens* are "irrevocable, imperative ... and non-disposable."[95] Similarly, the IACtHR invokes the Constitutional Court of Colombia's declaration that constitutional rights and duties must be interpreted in light of ratified human rights treaties.[96] Furthermore, it also cites this court for determining that the case law of international human rights treaty bodies provides a "relevant hermeneutic" for interpreting constitutional provisions on fundamental rights.[97] Finally, the IACtHR cites approvingly Bolivia's Constitutional Tribunal for declaring that international human rights treaties are part of the "constitutional bloc," that is, the body of domestic constitutional law.[98]

c. *Affirming IACtHR leadership*

94 *Ticona-Estrada et al. v. Bolivia*, Merits, Reparations, and Costs Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 191, 41, 124, (Nov. 27, 2008); *Anzualdo-Castro v. Peru*, Merits, Reparations, and Costs Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 202, 21-22, fn. 66, 67 (Sept. 22, 2009); *Radilla-Pacheco vs. Mexico*, Preliminary Objections, Merits, Reparations, and Costs Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 209, 43, fn. 127 (Sept. 23, 2009); *Ibsen-Cárdenas and Ibsen-Peña v. Bolivia*, Merits and Reparations Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 217, 19, fn. 53 (Sept. 1, 2010); *Gomes-Lund et al v. Brazil*, Merits and Reparations Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 219, 39-40, fn. 129 (Nov. 24, 2010); *Contreras et al. v. El Salvador*, Merits and Reparations Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 232, 30, fn. 106 (Aug. 31, 2011); *García and Family Members v. Guatemala*, Merits and Reparations Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 258, 35-36, fn. 141 (Nov. 29, 2012); among others.

95 *Gelman v. Uruguay*, Merits and Reparations Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 221, 80, fn. 286 (Feb. 24, 2011).

96 *Cabrera-García and Montiel-Flores v. Mexico*, Merits and Reparations Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 220, 85, fn. 341 (Nov. 26, 2010).

97 *Chocrón-Chocrón v. Venezuela*, Merits and Reparations Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 227, 51, fn. 203 (Jul. 1, 2011); *Cabrera-García and Montiel-Flores v. Mexico*, Merits and Reparations Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 220, 85, fn. 341 (Nov. 26, 2010).

98 *Ticona-Estrada et al. v. Bolivia*, *supra* note 92.

The IACtHR regularly cites national courts that explicitly acknowledge its primacy in the regional construction of human rights. Accepting the primacy of the IACtHR means recognizing that domestic judicial interpretations of human rights should be guided by Inter-American jurisprudence. For example, the IACtHR highlights judgments of domestic courts that are consistent with IACtHR jurisprudence on questions such as forced disappearances[99] and the right to effective judicial recourse.[100] The Court also flags examples of domestic courts using IACtHR judgments and advisory opinions to guide the resolution of domestic human rights cases.[101] And it cites Bolivia's Constitutional Tribunal for going one step better, explicitly declaring that IACtHR decisions are binding on domestic courts.[102]

The IACtHR's most assertive expression of its leading role in the construction of an Inter-American legal order is the doctrine of conventionality control, and the Court uses citations to signal approbation for those national courts that have accepted that vision. In *Cabrera García and Montiel Flores*, the IACtHR cites a number of national courts that have referred positively to conventionality control or carried it out in their judgments.[103] For instance, the IACtHR cites Bolivia's Constitutional Tribunal for its declaration that judgments of the IACtHR "form part of [the] collection of constitutional standards."[104] It further cites Argentina's Supreme Court, which stated that judgments of the IACtHR are binding "for the Argentine State" and that decisions of the Argentine Supreme Court "must be subordinated to the decisions of the international Court."[105]

99 *Portugal v. Panama*, Merits and Reparations Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 186, 29, ft. 71 (Aug. 12, 2008); *Gomes-Lund et al. v. Brazil*, *supra* note 92, at 39, fn. 129.
100 *Acevedo-Buendía et al. v. Peru*, Merits and Reparations Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 198, 28, fn. 68 (Jul. 1, 2009).
101 *Acevedo-Jaramillo et al. v. Peru*, Merits and Reparations Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 144, 16, fn. 11 (Feb. 7, 2006).
102 *Ticona-Estrada et al. v. Bolivia*, supra note 92.
103 *Cabrera-García and Montiel-Flores v. Mexico*, supra note 94, at 84-85.
104 *Id.,* at 84, fn. 335.
105 Id., at 85, fn. 339.

The Court also references the Constitutional Chamber of Costa Rica's Supreme Court, which, in applying conventionality control, declared that interpretations of the ACHR by the IACtHR have the "same value" as Convention rules themselves.[106] In *Chocrón Chocrón*, the IACtHR refers to the Dominican Republic's Supreme Court, which similarly declared that both the ACHR and its interpretation by the IACtHR are binding on the state and the judiciary.[107] The IACtHR subsequently cites Argentina's Supreme Court (among other national courts) as having affirmed conventionality control, taking into account not only the Convention but also the interpretations offered by IACtHR, which it referred to as "the ultimate interpreter of the American Convention."[108] In the same fashion, the IACtHR cites a number of top national courts that "cited and applied" conventionality control, acknowledging that that domestic judges "must take into account not only the Convention, but also the interpretation thereof by the IACtHR."[109]

5. Conclusion

This study analyzed original citation databases and primary and secondary sources of qualitative evidence to explore the drivers of the jurisprudential dialogue between the IACtHR and 13 national high courts under its jurisdiction. We argued that at a systemic level, judicial dialogue facilitates the diffusion and integration of human rights protection standards in a region with a tragic recent past, fledgling democracies, institutional weaknesses, and record-high levels of violence. In other words, the sharing of human rights norms and principles between the regional court and national courts is an essential mechanism for constructing a human rights legal order in the Americas.

106 *Id.*
107 *Chocrón-Chocrón v. Venezuela*, *supra* note 95, at 50, fn. 198.
108 *López-Mendoza v. Venezuela* (2011), 81, fn. 298.
109 *Atala-Riffo and Daughters v. Chile*, *supra* note 85, at 79-80.

The IACtHR plays a key role in fostering judicial dialogue. We showed that in recent years the IACtHR developed an institutional interest in contributing to regional legal integration by moving away from an almost exclusive focus on external case law issued by peer institutions to also consider Latin American jurisprudence. Statistical models revealed that the court focuses on courts from countries that exhibit characteristics that are more conducive to the production of jurisprudence that may assist in the creation of a regional human rights legal order. We also find that sociological factors, such as contacts with specific judges and awareness of their work, drive the focus on some Latin American courts. Furthermore, we presented evidence that the IACtHR cites national decisions in an attempt to further jurisprudential integration, signal best practices in the use of international human rights law by domestic courts, and reinforce its own leading role in the development of regional human rights. In other words, there is strong pedagogical orientation in the court's citation practices. Thus, though the Inter-American Court is clearly citing national case law, it does not yet appear to be deferring much to domestic jurisprudence, as Huneeus has suggested it could in order to deepen judicial dialogue.[110] The case law of national courts is not yet having a major substantive effect on the Inter-American Court's reasoning and doctrine. The recursivity at the heart of the transnational legal ordering (TLO) framework – with influence on the understanding and application of norms flowing in both directions – is still at an early stage of development.[111]

The IACtHR also plays an important role in boosting receptivity to its jurisprudence among national courts. In addition to discussing how the Court's growing visibility and the prestige of certain judgements inspired greater dialogue, we showed that jurisprudential overtures, most notably the development of the conventionality review doctrine, as well as informal networking

[110] Huneeus, *supra* note 13, at 105.
[111] Halliday and Shaffer, *supra* note 5.

efforts, helped stimulate a conversation and put local judges at ease with the idea of furthering legal integration. But judicial dialogue in the Americas is not driven exclusively by top-down processes. We also argued that changes in domestic legal cultures and judicial personnel were crucial to guarantee baseline levels of receptivity to the IACtHR's jurisprudence as a source of law. The key finding in this regard is that courts that have experienced a more structural re-orientation towards "neoconstutionalism" are also those at the forefront of the judicial dialogue.

Our research suggests additional avenues for productive investigation. First, we showed that the IACtHR's citation practices are partly designed to showcase local best practices in the use of international law and bolster the Court's authority in an integrated regional legal order. Unfortunately, the nature of our national citations database did not allow us to explore whether there is also a strategic dimension in the use of Inter-American jurisprudence by national courts. Future research could therefore go beyond our analysis of the drivers of baseline levels of receptivity, and explore the extent to which judges deploy the persuasive authority of Inter-American citations strategically in pursuit of their own institutional goals. For example, do national courts seek refuge in IACtHR precedents when their rulings challenge powerful governments?

Second, we know that when the IACtHR cites outward (to other regional or international courts),[112] the citations first appeared in litigants' briefs and filings. Is a similar mechanism at work in domestic courts, with parties to a case bringing relevant external case law to the attention of judges? Do litigants also bring relevant domestic case law to the attention of the IACtHR? In this sense, it is highly likely that human rights NGOs, including prominently CEJIL, play a key role in finding and diffusing external case law at various levels. If so, future research could illuminate a possible driver of judicial dialogue not explored in this paper, i.e. the extent to which the

[112] See, for example, Wayne Sandholtz & Adam Feldman, *The Trans-regional Construction of Human Rights*, in CONTESTING HUMAN RIGHTS: NORMS, INSTITUTIONS AND PRACTICE 107 (Alison Brysk & Michael Stohl eds., 2019).

willingness to invoke jurisprudence from across jurisdictional boundaries in specific cases is being driven by national and transnational networks of activists, advocates, and educators. This type of analysis could also explain why certain precedents or jurisprudential lines acquire greater prestige than others, thus attracting most of the attention of courts participating in the judicial dialogue.

Supplementary Information - Constructing a Regional Human Rights Legal Order

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Appendix A: Dataset of national citation trends

To create the dataset, we counted the number of references to the jurisprudence of the IACtHR in the entire universe of rulings handed down by thirteen national high courts between 1994 and 2012. The dataset covers the jurisprudence of the Constitutional Courts of Colombia, Costa Rica (Sala IV), Guatemala, Ecuador, and Peru, as well as the Supreme Courts of Argentina, Brazil, Chile, El Salvador, Mexico, Panama, Paraguay, and Uruguay.[113] In most cases, we used the search engines available on the websites of each court to identify rulings that reference Inter-American jurisprudence. When in doubt about the reliability of the search engines (i.e. whether they are programmed to search for key words in the main text of rulings, and in the entire universe of rulings), we took advice from country experts. This exercise led us to exclude some countries from the study. For two of the cases with problematic search engines, Colombia and Ecuador, we managed to obtain CDs containing every single ruling handed down during the time period of interest, and used those files to look for citations.

[113] We also collected data on Chile's Constitutional Court. Unfortunately, we only have access to rulings issued after 2005, so we decided to exclude it from the analysis.

The keywords we used to identify citations were variations of the Spanish and Portuguese words for "Inter-American" (e.g. "interamericana", "inter-americana," etc.). Coders were instructed to read in full all rulings that contain any of the keywords. This was important for a number of reasons. First, it allowed us to discard false positives (e.g. references to the Inter-American Commission of Human Rights, or to companies with names such as "Compañía Interamericana de Químicos"), as well as irrelevant references (i.e. those that appear in summaries of the briefs filed by litigants, Attorney Generals, or friends of the court). Second, we are able to code multiple references to the jurisprudence of the Inter-American Court in each ruling, including generic references and references to specific Inter-American precedents. Third, we coded other variables of interest, including whether references appear in majority, minority or concurrent opinions; the name(s) of the judge(s) responsible for the citation; the date of the citation; and whether the citing court's country is a party to the Inter-American case being cited (generic references to Inter-American jurisprudence were coded as not involving the citing court's country).

Appendix B: 10 most cited Inter-American rulings

Ruling	Year	Citations	Description
Herrera Ulloa v. Costa Rica	2004	329	Mauricio Herrera Ulloa in a defamation case filed against him in Costa Rican courts. The IACtHR decided that the ruling against the journalist was in violation of the right to free speech.
Advisory Opinion 05/85	1985	253	Costa Rica asked the IACtHR to evaluate whether requiring journalists to be part of an association in order to practice their profession was compatible with free speech rights protected by the ACHR. The IACtHR found that the requirement of compulsory membership to an association violated convention rights.
Barrios Altos v. Peru	2001	197	known as Grupo Colina, were accused of killing 15 civilians during a raid in Lima's Barrios Altos neighbourhood in 1991. The Peruvian Congress subsequently passed an amnesty law that benefitted civilian, military and police officers responsible for human rights violations during the armed conflict. The Peruvian state did not investigate the Barrios Altos massacre. The IACtHR ruled that the amnesty law was

			nullification.
Velásquez-Rodríguez v. Honduras	1988	193	The case examines the international responsibility of the Honduran state in the detention and subsequent disappearance of Ángel Manfredo Velázquez-Rodríguez by members of the armed forces. This was one of hundreds of similar cases reported during the first half of the 1980s. Courts never conducted an appropriate investigation. The IACtHR defined the crime of forced disappearance as a crime against humanity and established that Honduras had breached its international obligation to investigate and punish serious human rights violations.
Castillo Petruzzi and others v. Peru	1999	130	The case refers to the detention of 4 Chilean citizens in 1993. They were not allowed access to adequate legal representation, and tried for treason in military courts by so-called "faceless judges". All writs of habeas corpus filed on their behalf were rejected. The IACtHR concluded that Peru had violated convention rights to due process, judicial protections and personal integrity.
Suárez-Rosero v. Ecuador	1999	127	The case concerns the illegal and arbitrary detention of Rafael Suárez-Rosero by police agents in 1992. Suárez-Rosero had no access to legal representation when the

			police first questioned him. A writ of habeas corpus filed on his behalf was rejected. Suárez-Rosero was eventually found guilty of trafficking illegal substances and sentenced to two years in prison. The IACtHR concluded that Ecuador had violated convention rights to due process and judicial protection.
Radilla-Pacheco v. Mexico	2009	104	The case concerns the disappearance of Rosendo Radilla-Pacheco in 1974 during Mexico's "dirty war." The investigation was re-opened in the early 2000s, but the case languished in military courts. The IACtHR ruled against Mexico for violating a series of convention rights and questioned the use of military jurisdiction in forced disappearance cases. The ruling also affirmed the conventionality control doctrine.
Advisory Opinion 08/87	1987	103	The Inter-American Commission of Human Rights asked the IACtHR to rule whether according to the ACHR it is possible for a state to suspend the writ of habeas corpus during states of emergency. The IACtHR ruled that states are not allowed to do so.
Tribunal Constitucional v. Perú	2001	100	The case examines the impeachment of three Constitutional Court judges in 1997. The IACtHR ruled that the Peruvian state had violated their rights to judicial protection and judicial guarantees.

Baena and others v. Panama	2001	98	The case looks into Panama's responsibility in the wrongful dismissal of 270 public employees and trade union leaders. The dismissals took place in 1990 after the government accused these individuals of participating in protest activities. The IACtHR concluded that the state had violated due process rights, as well as the right to freedom of association.

Appendix C: Additional cases of citation leaders

In the article we identify citation leaders in several low citation, high citation inequality countries. Certain individual judges in Mexico, Chile, Uruguay and Brazil are responsible for a large portion of the citations to IACtHR precedents found in the rulings of their respective courts. The analysis reveals that unorthodox legal preferences and different judicial role conceptions account for why these judges differ from their peers in their level of openness to international case law.

In two of the remaining low citation, high citation inequality countries, namely El Salvador and Panama, in addition to innovative legal ideas, other personal characteristics seem to play an important role in turning certain individual into citation leaders. In particular, we identify "victimhood" as a plausible explanatory factor.

Like Uruguay, Brazil, and Chile, El Salvador's overall citation record pales in comparison to that of high courts in Argentina, Colombia, Costa Rica, Peru, and even Mexico. Nevertheless, a close look at who cites in El Salvador sheds additional light on the kinds of personal traits that might make judges more permeable to international law. In El Salvador, the country with the highest level of citation inequality, one judge is responsible for 89% of all references to the IACtHR. All of these references appear in decisions on a series of extradition requests filed by a Spanish court investigating international crimes perpetrated during El Salvador's civil war. While the court's majority denied the extradition requests in all cases, confirming the judiciary's commitment to preserving impunity for human rights violations, one judge issued dissenting opinions heavily grounded in international law. Her name is Mirna A. Perla Jimenez, a lawyer with a past in leftist student movements and human rights activism. Importantly, her husband, also

a human rights activist, was murdered in 1987 by the security forces.[114] This personal tragedy intensified her involvement with human rights organizations until she reached the Supreme Court in 2003. Victimhood probably goes a long way to explain Perla Jimenez's position vis-à-vis the extraditions, as well as her citation activity. While her impact on the court's jurisprudence as a whole is admittedly quite limited (citations appear in a handful of identical cases), this might be due to the fact that during most of her time as a justice, she was assigned to the chambers dealing with family, labour, civil and commercial law, areas in which Inter-American jurisprudence has limited relevance. It is also possible that victimhood or experience with human rights activism only predisposes judges to use Inter-American jurisprudence in a very narrow set of cases, i.e. those related to the judge's personal struggles.

It is worth mentioning that Perla Jimenez's votes in the 2012 extradition cases were heavily influenced by another dissenting opinion written by Justice Melendez in 2009, in which he disagreed with the majority's refusal to cooperate with Spanish courts in the investigation of the same international crimes. Melendez is the second most active judge in El Salvador with 17 citations. His past as a former member of the Inter-American Commission of Human Rights, possibly explains why.[115]

Victimhood also appears to play a role in Panama. The bother of Panama's citation leader, justice Winston Spadafora, was murdered by Noriega's regime in 1985. Spadafora immediately took his brother's case to the Inter-American Commission of Human Rights,[116] but only achieved justice after the regime collapsed and local courts re-opened the investigation. While his personal

[114] For a more detailed biography, see http://www.embracingelsalvador.org/mirna-perla-spanish-version/ [last accessed, 29 August 2019]
[115] For Melendez's CV, see: http://scm.oas.org/pdfs/2006/AG03036s-%20ii.pdf [last accessed, 29 August 2019]
[116] For the Commission's proceedings on this case, see https://www.cidh.oas.org/annualrep/87.88sp/Panama9726a.htm [last accessed, 29 August 2019]

tragedy and subsequent engagement with the Inter-American system might explain why he cites Inter-American precedents more often than his colleagues, one should not to overstate the case. Unlike his counterparts in El Salvador, Spadafora only concentrates around 36% of all citations, and is followed closely by another judge who concentrates 24%. Moreover, Spadafora is clearly a regime insider, with few disruptive qualities or a consistent record protecting fundamental rights. For example, Spadafora was accused of corruption and forced to resign in 2015.

While victimhood seems like a plausible reason that may lead certain judges to become knowledgeable and open to Inter-American case law, an example from Argentina points to its limited impact. It also lends additional support to the view that citation practices are more likely a function of professional role conceptions and judicial philosophies. Justice Carmen Argibay, a political prisoner during the 1976-83 dictatorship and former judge of the International Criminal Court, was a member of the Argentine Supreme Court between 2005 until her death in 2014. Based on her personal and professional experiences, no one could claim that Argibay was either indifferent to human rights or ignorant of international law. Yet, she only accounts for 4% of all references to Inter-American jurisprudence. The explanation lies in Arbigay's legal preferences and professional role conception, which trumped her personal views. Argibay believed firmly that the Supreme Court should play a very limited role in the political system, not so much in terms of rights activism (e.g. she was a champion of women's rights), but in terms of the number of cases the court reviews each year. As a result, she was a strong proponent of enforcing strict admissibility criteria (Argibay 2008). This is why Argibay frequently dissented with other progressive justices, and why studies that estimate judges' ideologies based on their voting record place her among the most conservative members of the court (Gonzalez Bertomeu et al. 2017). A close look at the record reveals that her dissents stem from her belief that the court had no business hearing the

cases at all. In cases in which her colleagues wrote long opinions, often anchored in Inter-American precedents, it was common for Argibay to write very short dissents, often one paragraph long, arguing against the admissibility of the case on the basis of Article 280 of the Code of Civil and Commercial Procedures, which regulates the writ of certiorari.

Finally, it is worth mentioning that Paraguay is the only case in the sample in which citation leaders do not fit the profiles found in the other cases: individuals with different legal ideas or victims of human rights abuses. Paraguayan Justices Nuñez and Blanco concentrate 70.2% of all references to the IACtHR. They were both appointed due to their close links to the Liberal Party and have no academic record of note that indicates they harboured neo-constitutionalist legal preferences or a non-traditional judicial role conception. In addition, both faced corruption accusations, which led to Nuñez's resignation[117] and Blanco's impeachment.[118] Interestingly, a good portion of their references to Inter-American jurisprudence appear in a series of decisions that favoured General Lino Oviedo, a controversial former president. Oviedo spent some time in prison for his participation in a military uprising in 1996 and for his apparent responsibility in a massacre that took place in 1999, until the Supreme Court acquitted him. The decision to acquit was anchored in Inter-American precedents. In principle, even those accused of the most egregious human rights violations should benefit from Inter-American due process protections. This instance of transjudicial dialogue, however, does not seem motivated by the desire to promote the rule of law, but by political factors. The case of Paraguay thus highlights the panoply of reasons that may lead judges to rely on international sources of law.

[117] See http://ea.com.py/v2/se-viene-una-corte-mas-a-medida-de-cartes-y-llano/ [last accessed, 29 August 2019]
[118] See https://www.ultimahora.com/senado-destituye-ministro-la-corte-sindulfo-blanco-n2779423.html [last accessed, 29 August 2019]

References:

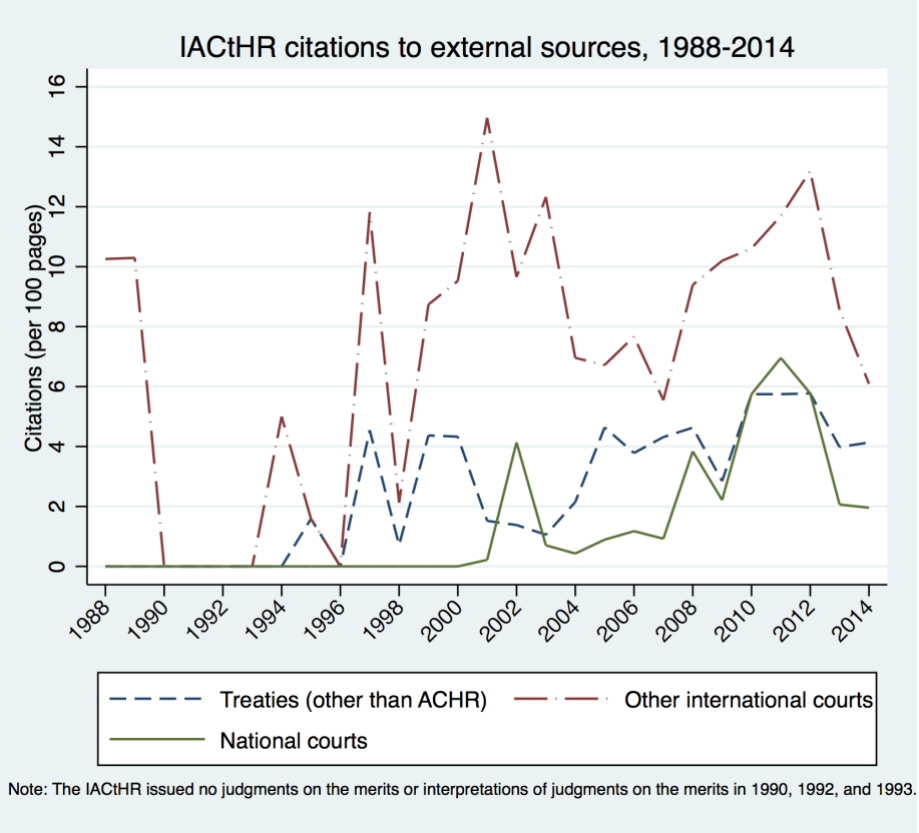
Argibay, Carmen. 2008. “La balanza de la justicia, (o cómo aprendí a desconfiar de la doctrina de la arbitrariedad.” *Jurisprudencia Argentina*, 2(2): 1322-1325.

Gonzalez Bertomeu, Juan, Dalla Pellegrina, Lucia, and Nino Garoupa. 2017. “Estimating Judicial Ideal Points in Latin America: The Case of Argentina.” *Review of Law & Economics*, 13(1).

Appendix D: IACtHR citations to external sources, additional data

The length of judgments varies substantially and longer opinions provide greater opportunity for external citations. In fact, the average length of IACtHR judgments has increased over time. Figure E1 takes this into account, showing the number of external citations per 100 judgment pages. The overall picture is the same as described in the main text: the IACtHR cites national courts at an increasing rate over time.

Figure E1. IACtHR citations to external sources, 1988-2014



Appendix E: Analysis of IACtHR citation practices

Table E1: IACtHR citations to national courts, logit regressions

	1	2	3	4
State-level factors				
Democracy	8.007**	16.993***	2.978	10.474**
	(7.108)	(18.176)	(5.167)	(11.084)
Respect for rights	0.840	0.839	1.096	0.798
	(0.112)	(0.119)	(0.233)	(0.126)
Spanish language country	10.561***	11.138***	6.276**	6.652***
	(6.412)	(6.799)	(5.436)	(4.484)
Judicial review		0.684*	0.531*	
		(0.155)	(0.176)	
High court independence		0.916	1.093	
		(0.074)	(0.140)	
Quality of judicial decisions			1.141	
			(0.161)	
IACtHR-level factors				
Respondent state	5.407***	5.502***	5.083***	4.041***
	(1.122)	(1.147)	(1.193)	(0.957)
Prior IACtHR judgments	1.078***	1.086***	1.082***	1.054***
	(0.011)	(0.012)	(0.014)	(0.012)
Cumulative IACtHR contacts	1.108***	1.120***	1.086***	1.044*
	(0.021)	(0.023)	(0.027)	(0.024)
Diálogo Jurisprudencial				1.220***
				(0.078)
Observations	4,055	4,055	2,162	2,450
Log likelihood	-628.9	-627.0	-487.2	-555.6
Chi^2	233.70	237.50	125.70	134.10
p > chi^2	0.0000	0.0000	0.0000	0.0000

Note: Odds ratios with standard errors in parentheses.
*** p<0.01, ** p<0.05, * p<0.1

Figure E1 shows the relative effects of the variables on the likelihood that the IACtHR cites a particular country's courts in a given judgment. The advantage of depicting the results graphically is that they have been standardized, which means that it is possible visually to compare the size of the effects of the various factors. Points farther to the right of the vertical "zero" line

signify a larger positive effect on the likelihood of citing a national court. The horizontal lines represent 95 percent confidence intervals; if the confidence interval intersects the zero line, we cannot be confident, at standard significance levels, that the variable does in fact affect the likelihood of citation. As shown in the graph, among the state-level factors, *Democracy* has the largest effect on the likelihood that the IACtHR cites a particular country's case law. Among the IACtHR-level factors, *Respondent state* has the largest effect. The two variables that measure IACtHR interactions with states – *Prior cases* and *Cumulative contacts* – both have a positive, though smaller, effect on the likelihood of citing a country's courts. *Spanish-language country* has a strongly positive effect (as shown in table E1 above) but we do not present it here because it carries no theoretical substance.

Figure E1: Effects of variables on citations to national courts, standardized coefficients