Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights

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INTRODUCTION

At first glance, one might assume that judicialization at the national level would enhance the influence of the Inter-American Court of Human Rights (IACtHR). The Inter-American Human Rights System provides national courts with a ready-made arsenal of global legitimacy – in the form of treaty law and court opinions – with which to enter political battles. As politics is displaced from the legislature and the public square into the courts, and as social and political demands more frequently take on the form of an adversarial rights claim, it seems plausible that national judges will deploy this arsenal more frequently, fomenting, in turn, the Inter-American Court’s influence. Scholarship on the European regional systems indeed suggests that national courts have played a pivotal role in regional legal integration (Alter 2001).

Conversely, it could also be that stronger, more politically savvy high courts will be jealous of their power, sidelining the supranational instance so as to retain final arbiter status. The U.S. Supreme Court, one of the world’s most politically prominent tribunals, has a reputation for rejecting the jurisprudence of foreign courts. Most recently, it announced that the rulings of the International Court of Justice (ICJ) are not directly binding on national courts and that the ICJ’s interpretation of international treaties is not definitive. Furthermore, even as courts in Europe have been crucial to the integration of the European Union (EU) system, there have been backlashes. High courts in particular at times try to avoid review by the European Court of Justice, disagree with its rulings, and discourage referrals. In this scenario, judicialization and regional integration are not mutually reinforcing phenomena but, rather, in competition.

There is much to learn, in other words, about when national courts foment regional legal integration, as in the virtuous circle scenario, and when they do not. Furthermore, the question has been little explored in the context of the Latin American human rights system, which presents a different structure from that of the regional European systems, as well as differences in national court structures, laws, and traditions. This chapter takes on a piece of this puzzle by generating theories about when high courts comply with Inter-American Court rulings. In about one-half of the rulings it has issued since it began its work in 1979, the IACtHR issues orders that require action by national courts. Further, it has increasingly taken on a role of reviewing whether national practices of judicial independence and due process comply with the American Convention on Human Rights. This chapter seeks to discern the factors that influence how national courts respond to this incursion into their turf, and whether they act as a partner in regional legal integration by complying with the IACtHR’s decisions. It focuses exclusively on high courts, acknowledging that lower courts have a significant but very different role to play in this dynamic (Naddeo 2009; Alter 2001).

The chapter proceeds by examining recent instances in which the high courts of Argentina, Chile, and Venezuela rejected a ruling of the Inter-American Court. All three countries have experienced the expansion of legal forms into the sphere of politics over the past two decades. However, they present settings with very different high court political roles. Indeed, these three settings are in some ways emblematic of legal-political dynamics in the region today: Argentina is considered a leading example of the “new constitutionalism,” a trend, originating in Europe, of enacting constitutions that not only establish the competence of the branches of government but also include “high levels of substantive norms” that commit the state to “particular objectives” and, correspondingly, a more substantive jurisprudence (Carbonell 2007: 10; see also Couso in this volume). Argentine courts have routinely taken center stage in important political battles, and civil actors have increasingly focused their strategies on the courts (Smulovitz 2005). Chile presents a more traditional setting. Although its constitution was conceived of as a guardian of Pinochet’s neoliberal economic reforms (Couso 2004), its courts have tended to avoid challenging the government on rights issues (Couso 2005; Hilbink 2007), save in the very specific realm of Pinochet-era claims (Huneeus 2010). Venezuela, of course, is a participant of and in many ways the leader of Latin America’s Left. Venezuelan courts were granted greater powers by the 1999 Constitution, and have since participated more fully in political battles. At the same time, the courts now view themselves as participants in the social transformation of Venezuela under the Chavez government’s Bolivarian Revolution. Critics argue that they are increasingly dependent on an executive who uses them to advance political ends (Allen-Brewers 2009; Gomez in this volume; Perez Perdomo 2005).

Amid these contrasts, rejection of Inter-American rulings provides the common ground for the cases here examined. High courts often comply with the
Inter-American Court, and the Argentine Supreme Court is one of its greatest allies in the region. However, the focus on rejection brings out the contrasts in the different courts’ relation to the IACtHR. This is in part because confronting an international court is a difficult step to take, and following Dworkin’s idea that hard cases best serve to elucidate judicial philosophies (Dworkin 1986), these rejections reveal a great deal about judges’ ideas about the relation between the Inter-American and national systems, and about their own role as actors within the international and national systems. Furthermore, the focus on rejection brings to light the fragility of the Inter-American System. A few recent studies emphasize the influence and successes of the Court and Commission (Hawkins and Jacoby 2008; Sikkink 2004; Stacey 2009). However, it is important to keep in view that the system is susceptible to the varying responses of national actors and the vicissitudes of regional politics – more so than its European counterpart. Gerald Neuman argues that the Inter-American Court needs to be more strategic and give greater “consideration to the consent of the regional community of states as a factor” in its interpretive strategy (Neuman 2008: 101). One might add that the Court could do more to win over the region’s high court judges (Parra 2009), and understanding the dynamics of court rejection is a first step.

By tracing high court responses to recent Court rulings in these vastly different environments, then, we can begin to generate theories about how the changing role of courts locally may create opportunities for the Court to exert greater power in the region. This study draws from and contributes to scholarship that asks how supranational legal institutions come to exert influence on state actors. Until now, the field has focused on the European legal system, with little attention to the Inter-American System, let alone the human rights institutions of the African Union. The studies that do look at the Inter-American System have focused on state-level compliance, without disaggregating and looking at separate state actors, such as the courts (Hawkins and Jacoby 2008). The study also informs the question of the relation between legal cultures and judicialization. To date, most studies of comparative judicial politics have employed the models and presumptions of rational choice institutionalism (see Introduction). In generating theories about what factors shape high courts into good interlocutors for the Inter-American Court, however, I also consider ideas and discourse as independent variables. That is, I am interested in how conceptions judges have about their role in the political system generally, and in linking the international and national legal regimes specifically, can enhance or diminish the power of the Inter-American Court.

The following section discusses what the scholarship on the role of courts in fomenting regional court power has said in the context of the European Court of Justice (ECJ), the European Court of Human Rights (ECHR), and the Tribunal of Justice of the Andean Community (AJ). After a brief description of the Inter-American System, the essay moves on to present the three case studies of rejection of the Inter-American Court by local high courts. Finally, drawing from the case
studies, it proposes five hypotheses about when high courts act as a partner to the Inter-American Court, and suggests avenues for further study.

NATIONAL COURTS AND REGIONAL INTEGRATION

Under neofunctionalist theories of the rise of the European legal system, “the self-interests of private litigants, national judges, and the ECJ [European Court of Justice] align such that the mutual pursuit of ‘instrumental self-interest’ leads to the expansion and penetration of European law into the domestic realm” (Alter 2001: 106). Thus, it is not just state interests that matter, as in the realist theories of European integration. The system is structured such that the strategic actions of subnational actors – judges and litigants – enhance ECJ power. An important mechanism underlying this dynamic is the preliminary ruling mechanism, which allows national courts to refer cases that bring up EU-level legal issues to the ECJ. The case then returns to the national court for further adjudication. Thus, lower courts are able to bypass their own hierarchical superiors on many important questions when they deem it convenient (Alter 2001).

Recent findings raise questions about how far we can generalize from the ECJ experience to other regional settings. In the first place, many of the mechanisms available to the European agents – such as trade incentives and direct referral by lower court judges – are absent in the regional human rights systems. It is unclear, for example, to what extent systems with different structures, such as the European Council System or the Inter-American System, put in place incentives for national judges to comply with and cite to regional court rulings. Summarizing a series of country studies on the ECHR, Helen Keller and Alec Stone Sweet find that national judges do, indeed, play an important role in the reception process: “In many states, the courts have taken the lead in incorporating the Convention, and in strengthening other quasi-constitutional mechanisms of reception” (Keller and Stone Sweet 2008: 687). However, we do not yet know why they do so, and the question is all the more vexing because, as Keller and Stone Sweet note, high courts often promote the ECHR at the expense of their own power (Keller and Stone Sweet 2008: 688).

In the second place, even in those regional settings where the same mechanisms are in place as in the EU, national courts do not necessarily play the role of enhancing the regional court. Laurence Helfer and Karen Alter write that the Andean Tribunal of Justice (ATJ) is the world’s third most active international court. Furthermore, it is modeled after the ECJ, including the preliminary ruling mechanism. However, despite its structural similarities to the European system, they find

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that judges have not been important to fomenting ATJ power: “National courts are mostly reluctant and passive intermediaries that rarely submit references on issues Andean law outside of IP and generally refrain from using the Andean legal system to expand their authority” (Helfer and Alter 2009: 4). Alter and Helfer find that domestic administrative agencies have played a very active role in referring cases to the ATJ, concluding that we must pay attention to other domestic actors as robust interlocutors for international courts.

Alter and Helfer, then, do have an explanation for why the ATJ gained power despite “reluctant and passive” national courts: other domestic actors took on that role. However, they do not have an explanation for why national courts would be reticent to enter into a dialogue that would enhance their own power. Judges seem to be avoiding strategic behavior and instead “refrain from using the Andean legal system as a tool to aggrandize their authority” (Helfer and Alter 2009). It is implicit in Alter and Helfer’s argument that the way judges conceive of their role might be a factor influencing their choices: “National courts’ judges have a limited conception of their relationship with the ATJ” (Helfer and Alter 2009: 6). They also note that judges seem to misunderstand the ATJ, and they point to the stickiness of these misconceptions that cause them to act non-strategically.

In turning to the Inter-American System, this chapter draws two lessons from this scholarship on the relation of regional and national courts. First, we need to be on the lookout for factors that can create mutually beneficial incentives, such that judges use the Inter-American Court to gain more power, and, in so doing, enhance the Court’s power. Secondly, and reading between the lines, ideas and conceptions seem to be part of the story of whether and how national judges act to enhance the international system’s influence. We need to be aware that judges are not only self-interested actors looking to aggrandize their own power. They are also embedded actors who participate in and help create institutional ideologies, including ideas about their role at the intersection of national and international realms. These ideas, in turn, may at times guide action.

The Inter-American System

The Inter-American System for the protection of human rights is a creation of the Organization of American States (OAS), a regional institution formed at the close of World War II, when optimism about multilateral cooperation in creating a new world order ran high. The signatories immediately adopted the American Declaration of the Rights and Duties of Man (hereinafter “Declaration”), which predates by roughly six months the UN Declaration of the Rights and Duties of Man. Like the UN Declaration, which resembles it in scope and content, the

3 Few Latin American countries directly participated in World War II, but the region’s countries sided with the Allies, and supported the war effort in various ways.
American Declaration was not created to be binding but aspirational. In 1960, the OAS gave birth to a binding human rights treaty, the American Convention on Human Rights (hereinafter “Convention”). The Convention created a new list of rights, strengthened the powers of the Commission, and created the Inter-American Court. Today, twenty-one members have ratified the Convention, and all of these have conceded jurisdiction to the Inter-American Court (which requires a separate step from that of ratifying the Convention). Excluded are the United States, Canada, Cuba, and most of the Caribbean. Together the Declaration and Convention are the primary human rights instruments of the Inter-American System for the protection of human rights.

The two main regional organs for the protection of human rights are the Commission and the Court. Today the Commission, situated in Washington D.C., carries out quasijudicial and nonjudicial functions, and is in many ways much more active and influential than the Court. It appears before the Court in all cases to argue that a violation has taken place. Its work can be divided into three general areas. The first is that of monitoring OAS states. Indeed, its most influential role has been that of pressuring governments and informing the world about human rights violations through its country reports. Secondly, and most relevant to this chapter, it is charged with investigating petitions alleging human rights violations filed by States’ Parties and individuals. It attempts to resolve the case on its own, submitting a list of recommendations to a State Party if a violation is found. The Commission then refers cases to the Court if the State Party fails to comply, or if it deems the case to have a particular legal or political salience. It appears before the Court in all cases to argue that a violation has taken place. Finally, the Commission is charged with educating the public about human rights.

The Court, created by the Convention, began its work in 1979. It has both adjudicatory and advisory functions, as it is charged with both enforcing the provisions of the American Convention of Human Rights as well as interpreting regional human

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4 Nonetheless, the Court and Commission have both declared it to be indirectly binding, through the American Charter, and through the concept of an evolving system of human rights. I/A Court H.R., Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89 of July 14, 1989, Series A No. 10.

5 Several Caribbean countries, originally signatories, renounced the Convention on the question of death penalty.

6 The U.S. State Department web site concedes, “Through private persuasion and published reports on human rights infringements, the IACHR has been instrumental in improving OAS members’ human rights practices and has helped to resolve conflicts.”

7 Under a recent reform, individual claimants now also appear before the Court, representing themselves, so that the Court hears the arguments of the individual petitioner, the Commission, and then the State in each case.

8 Previously, it was conceived of as an advocate for the claimant. Under a recent reform, individual claimants now also appear before the Court, representing themselves, so that the Court hears the arguments of the individual petitioner, the Commission, and then the State in each case.
rights law. Under the adjudicatory function, the Court decides cases between States’ Parties, or between individuals and a State Party, referred to it by the Commission or a State Party. Individuals cannot refer cases directly to the Court. Furthermore, it has jurisdiction only over states that have voluntarily acceded jurisdiction. Under the advisory function, OAS bodies or member states can request the Court to issue opinions on legal interpretation of regional human rights instruments or on questions of whether local laws are compatible with the Convention. Seven judges sit on the bench, elected on their individual capacity by State Parties to the Convention.

Although the Court has been successful at creating a coherent, oft-cited body of jurisprudence through its roughly one hundred contentious cases, it faces many challenges, including a low budget, a tense relationship with the Commission, and frequent criticism from national governments. Caseload has been a particularly difficult issue. In 2008, the Court issued nine final judgments in contentious cases. Compared to the European Court of Human Rights (ECHR), and even to the work of the Commission, this is a pittance. The ECHR, which has jurisdiction over forty-seven States Parties to the European Convention, issued 1,881 judgments in 2008. The Commission, for its part, reports that it published seventy reports (including forty-nine cases found admissible; ten reports on petitions found inadmissible; four reports on friendly settlements; and seven reports on the merits). The Inter-American Court is working to increase its low caseload, which it rightly views as an important step towards consolidation of its regime.

Compliance has been another challenge. A study comparing compliance to the ECHR and the Inter-American Court found that compliance to the Inter-American Court had been previously understated; while only 9 percent of cases receive full compliance, a more nuanced view of compliance reveals that 76 percent of cases receive partial compliance (Hawkins and Jacoby 2008). Cavallaro and Brewer argue that the Court will be unlikely to gain a high compliance rate given the political challenges of the governments it oversees, but garnering compliance should not be the Court’s only goal; it should also focus on giving social movements jurisprudence relevant to their particular, local human rights struggles (Cavallaro and Brewer 2008). None of these recent studies, however, specifically considers the Inter-American Court’s relation to, and ability to garner compliance and support from, high courts. This seems a particularly important question in light of Felipe Gonzalez’s observation that, during the past decade, the Inter-American Court’s orders increasingly address themselves to the judicial branch (Gonzalez 2009). Because of the requirement to exhaust local resources unless those resources are somehow inadequate, the Inter-American Court often ends up judging local

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judiciaries. In addition, claimants often turn to the Inter-American System with claims of due process violations, and the Inter-American Court has repeatedly asked national courts to reopen closed cases.

To begin the discussion about the Inter-American Court’s relation to local courts, the following sections examine the recent rejection of Inter-American Court rulings by three national high courts, those of Chile, Argentina, and Venezuela. I begin by briefly examining the relation of law and politics in each country and then present the Inter-American Court ruling in question, and examine its reception by the national high court.

THE CHILE CASE

Law and Politics in Chile

Chile moved from authoritarianism to democracy in 1990, the year General Pinochet stepped down as head of government. In the subsequent seventeen years, democracy has flourished. Political party competition is strong. Corruption is low. Vestiges of authoritarian power have slowly but steadily been cast out. Indeed, Chile is one of the highest performers in comparative studies of democracies beyond the North–West quadrant.

In the midst of these momentous legal and political shifts and exposure to outside influence, however, sits a politically cautious, change-averse judiciary. Even as the Chilean state underwent dramatic political and economic shifts and international human rights law was partly reshaped by Pinochet-related litigation, the Chilean judiciary has remained shy of controversy, ducking politically salient issues despite growing public demand (Couso 2004). Gomez and Correa found that the courts avoided reviewing government action in 98 percent of cases that presented cases of acts that were legal according to legislation, but not necessarily under the Chilean constitution.

Another study found that, although courts around the world have recently gained in political prominence (Tate and Vallinder 1995), with some democracies experiencing judicial “rights revolutions” (Epp 1998), Chilean “courts have never expanded – let alone contributed to – constitutional rights” (Couso 2005). During the 1990s, courts avoided reviewing the constitutionality of 98 percent of cases that challenged government action as not permitted under the Chilean constitution (Couso 2004: 79). For constitutional claims that did secure judicial review, “Decisions were as likely to limit constitutionalist principles as they were to uphold

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11 Before the age of democracies in the region, the Court and Commission were more willing to forego the requirement to first exhaust local resources.
14 This study is cited in Couso (2005).
them” (Hilbink 2007). That is why, one scholar concludes, “Minorities have no real reason to feel protected” by their access to judicial review (Atria 2000: 374).15 One recent paper suggests that ideological change is afoot in the Chilean justice system (Couso and Hilbink 2009). But the authors point to the lower judges and the Constitutional Tribunal rather than the Supreme Court. The judicialization of politics has likewise been muted in the realm of civil society. Although Chile had a powerful and law-centered human rights movement during the dictatorship, this did not translate into a vibrant nor legally mobilized civil society after the transition to democracy. Indeed, most of its members were absorbed by the new government, and foreign funding quickly dried up. In contrast to Argentina, the human rights movement of the 1980s, which focused on the violations of fundamental rights such as torture and disappearance, did not spill over into other areas of rights. The dictatorship-era nongovernmental organizations (NGOs) have only in recent years taken on new kinds of causes.

Almonacid v. Chile. In September of 2006, the Inter-American Court issued rulings against the Chilean state on two consecutive Tuesdays. The first was Caso Claude Reyes y otros v. Chile (Sentencia de 19 de septiembre de 2006. Serie C No. 151), in which the Court found that the State of Chile lacked transparency, and had to reform its public information regime. The second case, issued a week later, was Caso Almonacid Arellano y otros v. Chile, a case of a Pinochet-era disappearance that the Supreme Court had closed under the 1978 Amnesty Decree (Sentencia sobre Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 26 de septiembre de 2006. Serie C No. 154.) Arellano Almonacid was one of more than one thousand persons who disappeared during the military regime led by Augusto Pinochet (1973–90). In 1998, the Supreme Court affirmed a ruling granting amnesty to the perpetrators of the crime, and closed the case despite the fact that the investigation had still not uncovered what, exactly, had happened to Almonacid. His family pursued the case, submitting it to the Inter-American Commission, and the Commission, in turn, referred it to the Inter-American Court in July of 2005. The Court held that the Chilean Amnesty Decree of 1978 was in violation of the American Convention. It demanded that the State of Chile repeal the Amnesty Decree, reopen the investigation of the Almonacid case, and punish those responsible.

Together the cases piqued the Chilean media’s interest in matters Inter-American. Each touched on a matter high on the public agenda at the time. Freedom of information was a salient issue in part because President Bachelet had campaigned on a platform including greater citizen and civil society participation in the policy-making process, and in part because actors of the Lagos governments stood accused of corruption charges in a handful of cases making headlines for several years in a row. The legacy of Pinochet-era human rights violations has been a central

15 Whenever I quote a Spanish language source, I use my own translation.
political controversy ever since the transition to democracy, and particularly since
the Pinochet detention in London sparked a wave of prosecutions that unfolds to
this day. Legally, the question of what to do about the 1978 Amnesty Decree in
case of disappearance had only been resolved by the Supreme Court for the first
time in 2004. In that case, the Court said the Amnesty did not apply to cases of
disappearance in which the body had not been found. Now the Inter-American
Court stepped in with a much more sweeping argument: the Amnesty Decree was
invalid. Public attention to the cases was, however, fleeting, and most Chileans
would not know what “Almonacid” refers to today.

Reception of Almonacid

Almonacid makes five separate demands of the Chilean state: 1) The State must ascer-
tain that the Amnesty Decree does not impede the investigation of the extrajudicial
killing of Almonacid, nor the identification and punishment of those responsible
for his death; 2) The State must also ascertain that the Amnesty not impede prose-
cution of other like violations that occurred in Chile; 3) Within one year, the state
must pay the family for the cost of litigation; 4) The State must publish the findings
contained in the Inter-American Court ruling within six months in a newspaper of
wide circulation; and 5) Within a year, the State must issue a report to the Court
about the measures it has taken to comply with the ruling.

Note that the Court ruling does not distinguish between the organs within the state
that must respond. However, under the Constitution, it is the judiciary that is charged
with the functions of investigation of a crime, adjudication, and sentencing. It is thus
to the judicial branch, and specifically to the Supreme Court as final arbiter and
head of the judiciary, that the Inter-American Court addresses itself when it says that
the Almonacid case must be reopened and investigated, and that those responsible
must be sentenced. Furthermore, other cases of like violations must be investigated
and sentences issued. The Amnesty Decree may never again be applied. Arguably,
the Inter-American Court is saying that even the cases in which the Supreme Court
or other court had reached a final judgment and applied the Amnesty during the
1970s must be reopened, upending years of final judgments.

Within two weeks of the ruling, the president of the Supreme Court publicly
declared to the press that Almonacid v. Chile was not binding, but merely a guide.
In addition, he said that the courts do not intervene in the discussion of laws. In
other words, the Supreme Court has no power to rescind the Amnesty; that is the
work of the legislature. Judges merely apply the laws. With his statements, the

16 Many cases had been permanently closed under the Amnesty Decree. However, the argument that
cases of disappearance were different had not been resolved by the court until its ruling in Sandoval.
17 “Presidente de la Suprema: fallo de Corte Interamericana de DDHH no es vinculante,” La Tercera,
October 16, 2006.
Supreme Court president signalled the inevitable breach of at least the first requirement of *Almonacid v. Chile*, that the Almonacid case itself be reopened. For even if Congress repealed the Amnesty retroactively, it would be for the Court to decide whether this case should be reopened. Needless to say, *Almonacid* has not been reopened, nor have other cases that had reached a final decision. Arguably, if the Congress repealed the Amnesty Decree, the courts would no longer apply it to any other cases. However, the decision of whether to do so would still reside with the courts themselves, as they must decide on the question of the retroactivity of penal laws. The President’s statement also misstates the law. Chile has already given binding jurisdiction to the Court, and thus its rulings are binding not advisory.

President Bachelet’s public response to the ruling stood in direct contrast to that of the Supreme Court. At a public event commemorating a Pinochet-era torture center, she announced, “My duty as President is to make sure Chile follows the rulings of the Inter-American Court of Human Rights.”

Francisco Cox, a Chilean lawyer seasoned in Inter-American litigation, reports that for the first time he received calls as never before from the government about how to comply with the ruling. There was a sense among human rights lawyers familiar with the Inter-American System that the Bachelet government was seriously committed, more so than any of its democratic predecessors.

Nonetheless, the Court’s second stipulation has not been met. A bill was submitted to the Congress on December 13, 2007, that would tell the courts not to apply the Amnesty Decree. In May, the president vowed to give “a new impulse to the bill that reinterprets Article 93 of the Penal Code,” but the legislation has not advanced in Congress. Even members of the Center party, the Christian Democrats, were reluctant to back such a piece of legislation, Inter-American Court notwithstanding.

The demand that the Amnesty Decree not impede any case from going forward was not met by the deadline of September 26, 2007.

On the face of it then, we have a flagrant, declared repudiation of an Inter-American Court ruling by the Chilean Supreme Court, coupled by an empty promise of fulfillment by the executive. On closer look, however, we find that the Supreme Court’s press release was not the whole story. On December 13, 2006, almost two months after *Almonacid* and only three days after Pinochet’s death, the Supreme Court issued a landmark ruling on an Amnesty case. For the first time, the

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18 “Chile: President Bachelet – ‘My Duty as President is to Make Sure Chile Follows the Rulings of The Inter-American Court of Human Rights,’” October 14, 2006, U.S. Fed News.

19 Interview with Francisco Cox, January 6, 2007, Santiago, Chile.

20 Organizaciones de DDHH emplazan a Michelle Bachelet durante visita a Suiza. El Mostrador.cl, 1 de Junio de 2007.


22 Indeed, one prominent politician argued that *Almonacid* is the reason that Chile has not yet ratified ICC ratification: the right-wing parties saw it as a negative example of international court incursion into national affairs. 19 de Enero de 2007 Ex senador José Antonio Viera-Gallo: ‘Derecha se opone al TPI por fallo contra aplicación de la ley de Amnistía’ por Macarena López M.
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Supreme Court grounded a ruling in which it did not apply the Amnesty Decree on international law rather than domestic law. Furthermore, it cited *Almonacid v. Chile*. The courts had long been citing international law, especially the Geneva Conventions, but also Inter-American jurisprudence. Suddenly, however, this was the foundation of their decision. It was a victory for the Inter-American Court, but one that was hidden behind the Supreme Court president’s vehement response to *Almonacid v. Chile*. The Supreme Court has also complied with *Almonacid* in that the Amnesty Decree has not been applied by the Supreme Court since the Inter-American Court’s ruling in *Almonacid*.

It is important to note, however, that this is the direction that the Chilean courts have been heading since 1998. Rare was the judge who applied the Amnesty Decree in cases of disappearance and extrajudicial killing. Some had even allowed torture cases to move forward, an action that could only be justified under international law. The few cases to which the Amnesty Decree was applied were usually reversed at the Supreme Court level. The reliance on international law was a milestone, but one in a string of many. Thus, it is impossible to attribute this switch to the Inter-American Court’s single decision, or even its line of decisions. Rather, the Inter-American Court provided one more tool in the kit of those arguing against the Amnesty Decree, and it made it that much more inconceivable for the Supreme Court to apply the Amnesty Decree in the cases that it had not already closed.

**THE ARGENTINE CASE**

*Law and Politics in Argentina*

Since the transition from dictatorship to democracy in Argentina in 1983, the relation between law and politics has become more judicialized. As Pilar Domingo argues, “The experience of the break with military rule was critical in propelling not only a political discourse of rights but also societal consciousness of the need to embrace constitutional democracy and rule of law – moving away from the old logic of populism” (Domingo 2004). One of the first acts of the new government was to put junta members on trial. Catalina Smulovitz argues that civil society in Argentina turned to law in great part because of the drama and symbolism of these trials (Smulovitz 2002). Civil actors responded by bringing cases to the courts. Between 1991 and 2002, the Supreme Court’s caseload grew by more than six times, and the federal court caseload doubled (Smulovitz 2005). The most prominent example of this cycle of civil society’s turn to the courts and greater activism by the courts was the deluge of legal claims against the government during the 2002 financial collapse. At the height of the crisis, the courts challenged the government on the constitutionality of the *corralito*, or the freezing of the bank accounts to stem devaluation of the currency.

The courts, in turn, did not disappoint, at least at first. Under Alfonsin, “the Supreme Court rendered controversial decisions on various issues. It liberalized
society’s laws on divorce, drugs, and other issues… It also frustrated several of Alfonsin’s important policies” (Larkins 1998: 427). In 1992, it even ruled that ratified human rights treaties were directly applicable within the domestic sphere.\(^\text{23}\) This is clearly an example of judicialization enhancing Inter-American Court influence. In 1994, under Menem, a new constitution was promulgated that adopted and further specified this monist conception of the relationship between international and domestic law. Although the constituent assembly was convened under circumstances that were viewed with skepticism by the public (Levit 1999), the resulting document gave the courts greater discretion. Article 75 stipulates that all treaties ratified by Argentina are superior to domestic laws, and that certain human rights treaties, including the American Declaration of the Rights and Duties of Man and the American Convention, have constitutional status. Given that the Constitution also grants judges the power of constitutional review, it thus grants judges power to strike down any law they may deem in violation of certain human rights treaties.

Nonetheless, this cycle of judicialization in Argentina did not necessarily yield greater autonomous court power. President Menem, in particular, had a penchant for intervention into judicial affairs. Most notably he packed the Supreme Court in 1990, expanding it from five to nine, and filled it with his supporters. A string of subsequent rulings made evident the Court’s slavish loyalty to Menem (Larkins 1998). The Court lost legitimacy (Domingo 2004; Smulovitz 2005) even as demand for political intervention by the courts, continued.

**Bueno Alvez v. Argentina.** On April 5, 1988, Mr. Bueno Alvez was illegally detained by Argentine federal police investigators, who then proceeded to torture him so as to force from him a statement against his lawyer. Bueno Alvez subsequently filed suit in federal court, but the criminal investigation of his case was never completed and, in 2004, an Argentina appellate court ruled that the statute of limitations had run out on the case. Bueno Alvez submitted the case to the Inter-American Commission under the argument that torture constitutes a crime against humanity, and therefore no statute of limitations can apply. In its report, the Commission found that Argentina had violated Bueno Alvez’s rights under the American Convention and Declaration. It subsequently submitted the case to the Inter-American Court. The Court ruled against the State on May 11, 2007, demanding that the State pay damages, publish the Inter-American Court opinion in the public media, and reopen the investigation (Corte IDH. Caso Bueno Alves vs. Argentina. Sentencia sobre el fondo, reparaciones y costas de 11 de mayo de 2007. Serie C No. 164). Although the Court agreed that the crime did not classify as a crime against humanity, the lack of investigation was a denial of justice and an ongoing wrong that needed remedy.

Reception of Bueno Alvez

After Bueno Alvez came down, the government accepted its international responsibility and vowed to pay the victim as the Court demanded. The Supreme Court, by contrast, issued a ruling in direct contradiction to that of the Inter-American Court in August. It reviewed the decision to close the case on an extraordinary writ, but then reaffirmed the finding that as the underlying crime was not a crime against humanity, the statute of limitations had run out, and the case had to be closed. The Supreme Court relies on a Public Ministry opinion on the case that speaks directly to the question of the Inter-American Court’s role. Although the Public Ministry opinion pre-dates Bueno Alvez v. Argentina, the Supreme Court’s reliance on it amounts to a direct affront to the Inter-American ruling:

\[\text{[T]he obligation to investigate and punish the violation of human rights exists within the frame and with the tools of the rule of law, and does not stand above them (Derecho, René Jesús s/incidente de prescripción de la acción penal Causa No. 24.079C, para VI).}\]

With this ruling, the Supreme Court places its own judgment above that of the Inter-American Court: indeed, it seems to imply that the Inter-American Court ruling prioritizes the investigation and punishment of violations of human rights above the rule of law itself.

To understand this defiance, it is important to recall that the Constitution of 1994 explicitly brought the Inter-American Declaration into national law, at the level of constitutional law. However, the difficulty is that the Declaration does not trump constitutional law, but must be read to complement it. Article 75 also holds that the American Convention and Declaration, “have constitutional hierarchy, do not repeal any section of the First Part of this Constitution and are to be understood as complementing the rights and guarantees recognized herein.” Since 1994, the Supreme Court of Argentina has been struggling to figure out what this Article of the Constitution means on the ground:

Deconstructing the core tenets of this constitutional provision has been one of the paramount endeavors undertaken by the Supreme Court of Argentina since 1994. By simultaneously deferring to the opinion of supranational adjudicatory bodies, but still conferring the last word regarding the compatibility of relevant regional case law with its core text to the domestic judiciary, the Constitution of Argentina crafted a theoretically compelling, institutionally complex tool to promote compliance with international – and regional – human rights law. (Naddeo 2007: 34)

Furthermore, this was not the first time that the Inter-American Court ordered the Argentine Supreme Court to reopen a case on which a statute of limitation had run.

\[24\] I owe this observation to Cecilia Naddeo.
out and to punish those responsible. The *Bulacio* case had presented similar facts of a torture and extrajudicial killing on which the domestic courts ruled the statute of limitations had run out (Corte IDH. *Caso Bulacio* vs. *Argentina*. Sentencia de 18 de Septiembre de 2003. Serie C No. 100). Criminal lawyers were very critical of the *Bulacio* ruling, claiming that the Court had gone overboard in prioritizing the right of a victim in an ordinary criminal case to have a transgressor punished over the constitutionally enshrined due process rights of the accused. In that case, however, the Supreme Court reluctantly submitted to the Inter-American Court. In this case, it rebelled.

With *Bueno Alvez*, then, the Argentina Supreme Court announced a new solution to the problems posed by Article 75. Prior to the ruling, the situation seemed to be that there were two final arbiters (Naddeo 2007; Levit 1999). Now the Supreme Court displaced the Inter-American Court and appointed itself the final arbiter in “harmonizing” or interpreting the fundamental rights enshrined in international treaties, in the Argentine Constitution, and in the very jurisprudence of the Inter-American Court. Argentina is bound by the Inter-American Declaration, but not by the Inter-American Court’s interpretation of the Declaration when that interpretation creates a conflict with constitutional law.

THE VENEZUELA CASE

*Law and Politics in Venezuela*

Since the 1990s, Venezuelan political battles have increasingly taken judicial forms (Perez Perdomo 2005). As politics grew more contentious in the 1990s, and as Venezuela’s traditional social networks and political pacts began to unravel (Gomez in this volume), political struggles that would previously have been resolved behind closed doors began arriving on court dockets. Since the start of the Chavez administration in 1998, moreover, this judicialization has accelerated. Chavez began his presidency with a constitutional overhaul, and the language of constitutionalism and rights suffuses his discourse. At the same time, former elites increasingly challenge the Chavez government’s political program in the courts (Perez Perdomo 2005) as it is the only political channel available to them. Indeed, Manuel Gomez argues in this volume that the separation of law and politics has blurred under the Chavez regime.

Even as courts became a crucial site of contestation, they were also targeted by Chavez’s reformist efforts, and accordingly they have come under greater political control. After assuming the presidency in 1998, Hugo Chavez called for the creation of a new constitution that would re-found the Venezuelan state. He invoked elections for a National Constituent Assembly, which first convened in 1999 with a strong pro-Chavez majority. The Assembly immediately declared that the judicial branch was in crisis and created a Judicial Emergency Commission to purge corrupt judges
and rewrite the rules governing the judiciary. The new constitution, enacted in December of 1999, called for the creation of a new high court, the Tribunal Supremo de Justicia, with more expansive powers than the traditional Supreme Court. The new court was constituted provisionally in 2000, and the permanent members were appointed in 2001.

The Constitution also called for the creation of judicial disciplinary tribunals, which would be governed by a new Code of Ethics. Furthermore, in its transitional articles, the Constitution called for the creation of the Comisión de Funcionamiento y Reestructuración del Sistema Judicial (CFRSJ), which would be charged with disciplinary matters until the new code of ethics was promulgated. The CFRSJ was created within a year. Since its creation, many judges have been dismissed, and critics argue that Chavez was able to use the CJRSJ, staffed with provisional officers, to selectively purge judges not favorable to his government’s politics. In addition, many of the judges replacing the purged judges have themselves been named provisionally. Judicial independence in Venezuela has thus become a crucial and contested political issue, and so it is perhaps not surprising that it became the focus of an Inter-American Court ruling.

Apitz v. Venezuela. In Caso Apitz, the Inter-American Court reviewed the dismissal of three Venezuelan judges under the Convention’s procedural guarantees. Officially, the judges had been dismissed for “inexcusable judicial error” in their ruling on a case having to do with the registration of a real estate transaction. The judges appealed to the Inter-American System on the grounds that their dismissal was politically motivated. The three served on an important appellate court that reviews administrative acts. They claimed that the Chavez government, which had publicly called for the removal of the three judges, had been unhappy with several of their rulings, and wanted to make room for pro-government judges. The Court ruled in August of 2008 that the procedure to remove the judges had violated their right to an impartial hearing, among other due process guarantees under the Convention. It ordered the State to: 1) pay reparations to the deposed judges; 2) reinstate the judges to a position comparable in rank to the one they last held; and 3) within a year, approve a new ethics code and end the regime of provisional judges. The Court did not find that the evidence sufficed to establish that Venezuela’s Supreme Court or judiciary as a whole lacked independence, as the plaintiffs had argued.

The Apitz case posed a significant challenge to the Chavez administration because it brought to public light the regime of reforms of the judicial system. In particular, the fact that many judges in Venezuela, as well as those in charge of disciplinary matters, hold a provisional and therefore more vulnerable status was placed under scrutiny. The case is also significant in that it reflects a trend, noted earlier, by the

25 The Inter-American Court agreed, calling for an end to the provisional regime. Caso Apitz.
Inter-American Commission and Court of moving into the business of judging judicial systems. The opinion is basically a technical review of procedures for appointing and removing judges.

**Reception of Apitz**

In December of 2008, responding to a government petition, the Venezuela Supreme Court ruled that the *Apitz* ruling could not be executed: The ruling clashes with Venezuelan constitutional law, it proclaimed, and in any case the Inter-American Court had overstepped the bounds of its authority. The Venezuelan court concludes, remarkably, by calling on the executive to withdraw Venezuela from the American Convention of Human Rights.

Three aspects of the Venezuelan Court’s ruling, which provoked both national and international criticism, deserve comment. First, the ruling seems to alter the constitutional status of the Inter-American Convention and Court in Venezuela. Under the Venezuelan Constitution, international treaties are directly applicable and have constitutional status. The Supreme Court is the official arbiter of conflicts between constitutional provisions. However, Article 23 provides that human rights conventions hold a higher hierarchical status if they establish a more favorable rights regime than that provided by the Constitution. This doctrine of greater deference to human rights is called the *progressive principle* (Brewer-Carias 2009). In reviewing the *Apitz* ruling, however, the Venezuelan Court does not grant the Convention’s provisions this greater level of deference. Rather, it treats the conflict it sees between the *Apitz* ruling and the Constitution as a conflict of provisions of equal status (Brewer-Carias 2009).

Second, the Venezuelan Court openly describes its own interpretations as in service to a political project: “Law is a normative theory at the service of the politics underlying the axiological project of the Constitution” (2008: 11). This interpretive philosophy leads the Court to conclude that human rights cannot be treated as absolute or ahistorical, but must be fitted to the needs of that political project. In other words, “Constitutional norms that privilege the general interest and the common good” should prevail, as should those dispositions that “privilege collective interests over particular interests” (2008: 11). Here, the interests of the three ex-judges are trumped by the public interest (in the finality of Supreme Court decisions and in not upsetting the appointments and removals made under the provisional system). Note, however, that the Venezuelan Court echoes the Inter-American Court’s call for the legislature to pass a new Code of Ethics and thereby end the system of provisional judges.

But perhaps the most remarkable aspect of the ruling is its request to the executive that Venezuela withdraw from the American Convention. The reason given is that the Inter-American Court has overstepped its bounds and is meddling in internal legal matters. However, there seems to be no legal foothold for the request. The
single-authored dissent argues that the Venezuelan Court overstepped its authority: decisions on foreign affairs lie exclusively with the executive. The Venezuelan tribunal’s rejection stirred controversy within and without Venezuela. Twelve local human rights’ NGOs together issued a declaration stating that the ruling “weakens human rights guarantees for persons in the country and in the hemisphere.” Apitz himself made the rounds of opposition radio and television talk shows, arguing that the Supreme Court was a Chavez lackey. International human rights organizations such as Amnesty International and Human Rights Watch condemned the ruling as undermining human rights in the region.

Meanwhile, the three judges have not been reinstated, nor have they received compensation, and a new code of ethics has yet to be passed. Arguably the ruling makes it easier for the Chavez administration to withdraw from the Inter-American human rights system by providing him with a high court opinion in support of such a move. It is interesting to note, however, that lately the Venezuelan government often cites Inter-American rulings for support. In March of 2009, the Inter-American Court again ruled against the Venezuelan government. Although the Court found that the government had failed to provide adequate protection for journalists, it did not find that the Chavez government had violated the right to freedom of expression under the Convention. The government has frequently referred to that case to argue that there is freedom of expression in Venezuela, just as it has referred to the Apitz case to say that the Inter-American Court did not find that the judiciary as a whole lacked independence. This reliance on Inter-American Court rulings amounts to an implicit legitimation of the Inter-American System.

ANALYSIS OF THE CASES

This chapter explores synchronicities between regional legal integration and judicialization by looking at when and how high courts comply with the commands of the Inter-American Court. The preceding sections presented three cases of high courts rejecting the Court. In this section I compare the three rejections, and then use the differences to generate a list of factors that may predict whether high courts will comply with or reject the commands of the IACtHR, and how they will do so. At this early stage of social scientific studies of the Inter-American System, we are still in need of theory-generating studies.

28 See, for example, the fact sheets of the Venezuelan Embassy in the United States: http://www.embavenez-us.org/factsheet/FS-CorteIDH.pdf (July 27, 2009).
Comparing the Rejections

Even as they are united in defying the Inter-American Court, the Supreme Courts could not be more different from each other in terms of the relationship they articulate among the Supreme Court, the Inter-American Court, and the national political sphere. The Chilean Supreme Court acts through a nonjudicial forum to announce its noncompliance. It does not dignify the Inter-American Court ruling with a judicial response. The Chilean Court thus misses an opportunity to enter into dialogue with the Inter-American Court and other national courts in the Inter-American System, and to further develop Latin American doctrine on the relation between the Inter-American Court and domestic judiciaries. Furthermore, the Supreme Court president announced that Inter-American Court rulings are only advisory, thereby rendering meaningless the distinction between the Court’s advisory and contentious jurisdiction, and reducing the status of its interpretations to that of soft law. Enrique Tapia also argued that domestic courts have no power to change the laws, equating the act of reinterpreting the Amnesty Decree to rewriting it. Only the legislature, then, is empowered to bring Chile into compliance with international law. The Supreme Court thus erects a dualist regime in which the legislature is supreme, and stands between the Inter-American Court and the Chilean judiciary. Without legislative action, the Inter-American Court is legally powerless within Chile. The Supreme Court does not entirely reject Almonacid. It does occasionally cite Almonacid, and it refrains from applying the Amnesty Decree to cases not already closed. However, this was already the direction it had moved in since 1998.

The Argentine Supreme Court, by contrast, announces its noncompliance in a judicial decision. Thus, it participates in the making of Inter-American jurisprudence, as it has been actively doing since 1992. Moreover, in this decision the Argentine Supreme Court announces a very different hierarchy than does the Chilean Supreme Court. Although it places itself as final arbiter of laws in the national regime, it conceives of international treaties and constitutional law as equal in the hierarchy of laws, as is enshrined in the Argentina Constitution. Thus, it enunciates a monist conception of international law even as it anoints itself final arbiter of how the Inter-American treaties and jurisprudence will be interpreted within Argentina (at least insofar as they are deemed to conflict with constitutional law). Under this hierarchy, Inter-America Court rulings can have direct effect, subject to Supreme Court approval. Even as it rejects the IACtHR’s ruling, then, the Supreme Court further develops a conversation that the Chilean court shut down, and keeps open the door to international law that it had itself opened in 1992 (and which the Chilean Supreme Court shut with its nonjuridical refusal to reopen Almonacid).

At the same time, the Argentine Supreme Court’s defiance can also be read as a backlash. Since 1992, the Supreme Court has given the Inter-American Court a
growing voice in Argentine affairs by announcing a monist regime and by frequently citing Inter-American instruments and jurisprudence (Naddeo 2007). After the Bulacio Inter-American ruling, it even reopened a closed criminal case, to much local criticism. Here, the Supreme Court reverses course and puts itself above the Inter-American Court. Once a monist regime is established, it seems, domestic courts will come into more direct competition with international courts over power in the domestic sphere. As Alter writes, “A virtuous circle, where successful litigation encourages more cases to be raised and more references to the ECJ may certainly emerge, but it is not the only possibility. Negative feedback loops may also emerge” (Alter 2001: 128).

Like the Argentine Supreme Court, the Venezuelan Tribunal dignified the Inter-American Court ruling with a judicial response. Five months after the Inter-American ruling, it issued an opinion complete with cites to Inter-American instruments and to the Peruvian Supreme Court’s jurisprudence on the Court. It thus joined the Inter-American Court dialogue on the Inter-American Court’s status in the realm. Furthermore, unlike the Chilean Supreme Court president, it acknowledged that, under the American Convention, the Court’s rulings have binding authority over Venezuela. Yet, of the three, its ruling deals the hardest blow. Its claim that it is not constitutionally bound to follow the Inter-American Court echoes that of the Argentine Supreme Court. However, in doing so it announced a new, lower status for all Inter-American instruments within the hierarchy of laws than what the Venezuelan Constitution, on its face, seems to demand. Even more damagingly, by calling on the government to withdraw from the Convention and jurisdiction of the Inter-American Court, the tribunal undermined the legitimacy of the Inter-American System, revealing the weak foundations of supranational judicial power.

Factors Contributing to Inter-American Court Power

From these cases, five factors emerge as potentially fruitful hypotheses about when high courts comply with or reject Inter-American rulings, and, more generally, when national courts foment or diminish Inter-American Court influence. These factors are familiar from the judicial politics literature on judicial behaviour. However, they have not been considered in the Inter-American setting and applied to the relation between high courts and the Inter-American Court. I briefly discuss each in turn.

1) Judicial independence from the executive. The three case studies raise an interesting set of questions about executive–judicial relations and the international sphere. Current scholarship suggests that settings in which democracy and the rule of law is generally respected coincide with greater regional court power (Cavallaro and Brewer 2008; Helfer and Slaughter 1997). Further, international relations scholars
have shown that new democracies are particularly keen on performing compliance with international human rights norms so as to legitimate themselves in the international sphere (Simmons 2009). In the case of Chile and Argentina, both presidents welcomed the Inter-American ruling and immediately promised to follow its orders. Both presidents were survivors of the repression of the military dictatorships, committed to human rights discourse, and eager to perform compliance. The Chilean and Argentine courts, in this sense, thwarted their executives’ efforts to uphold the Inter-American System. The cases suggest that judiciaries will not always defer to the international human rights agenda of their executives. This raises the possibility that national settings of democratic governments with a strong human rights agenda coupled with greater judicial independence does not necessarily yield high courts receptive to Inter-American rulings.

2) REGIONAL POLITICS AND THE NEW LEFT. Regional politics affect national politics, and may play a role in judges’ actions. The Chavez regime is in important ways the leader of a movement of governments of Latin America under which executives with strong popular appeal adopt a socialist program even as they alter the constitution and funnel political power toward the executive branch (and away from judiciaries). Under a regional politics thesis, which is an extension of the judicial independence thesis, courts within a country participating in the New Left movement will be less likely to foment Inter-American Court influence. Courts in these regimes will be hard put to use Inter-American rulings to stand up to popular presidents. Further, these governments, which include the governments of Bolivia, Ecuador, and Nicaragua, often directly challenge the Inter-American System. The leaders of the “New Left” embrace the language of human rights, and emphasize social, cultural, and economic rights in particular. Both Chavez and Evo Morales, president of Bolivia, have raised the possibility of creating an alternative regional human rights body under the auspices of the Bolivarian Alliance for the People of Our Americas ALBA or the Union of South American Nations (Unasur), two regional bodies initiated by Chavez.29 Chavez has continually criticized the OAS as a U.S. puppet and has threatened to withdraw from the system in general, and from the Court’s jurisdiction in particular.

In the Apitz scenario, Chavez had publicly called for the removal of the three judges at issue in the IACtHR ruling and publicly spoke out against the IACtHR ruling. In its sentence, the Venezuelan Court openly declares that its jurisprudence is informed by the Socialist–Democratic spirit of the 1999 Constitution, enacted under Chavez. Furthermore, it calls on the government to do what it has already indicated

29 Respectively, Bolivarian Alliance for the People of Our Americas, which includes Bolivia, Cuba, Ecuador, Honduras, Nicaragua, and Venezuela, among others; and the Union of South American Nations, which includes twelve South American nations.
it is considering doing – withdraw from the treaty. It thereby gives withdrawal a judicial imprimatur.

3) IDEAS ABOUT JUDGING. This study is not based on interviews with high courts judges, and cannot reveal how, exactly, judges conceive of their role vis-à-vis the international sphere. We do have studies, however, on how Chilean judges view their interpretive role (Hilbink 2007; Huneeus 2009), and I suggest this may be a significant factor in determining how a high court works with or against the Inter-American Court.

I argue elsewhere that the Chilean judges’ turn to litigation of Pinochet-era claims stems not from an embrace of international human rights norms, but rather an effort to atone for past complicity with the Pinochet regime (Huneeus 2010). Judges describe themselves as protagonists in the judiciary’s turn toward litigation of Pinochet-era cases, and this protagonism serves to relegitimate the judiciary from its past collusion with a repressive regime. Thus, it is a strategy aimed at a national audience, undertaken almost entirely with national legal instruments, and focused exclusively on Pinochet-era cases. The Chilean judges are reluctant to acknowledge the international sphere’s role in the prosecutorial turn, failing to mention even the detention of Pinochet in London as influencing their own actions (Hilbink 2007; Huneeus 2006). While acceding to Almonacid’s demands would open up many more cases for prosecution, it would also take away from judges’ self-described role as protagonists in the prosecutorial turn. It is possible, then, that the nationalist understanding judges have of their role in the prosecution of Pinochet cases accounts for the Supreme Court’s ignoring Almonacid’s commands, just as it has made them ground the majority of their Pinochet-era rulings on national rather than international law.

Studies of judges’ conceptions of their role in cases invoking human rights could be fruitful in explaining when high courts promote regional integration. The judicial culture of the Venezuelan judiciary, in particular, has undergone change during the past two decades, moving from an embrace of formalism to a more purposive view of judicial interpretation: “The formalist and timid attitude predominant in the former Supreme Court has been replaced by an interpretive boldness and a clear desire to renew the legal order under the new supreme tribunal, in particular its Sala Constitucional” (Perez Perdomo 2005: 141). The ruling of the Venezuelan Court indeed openly judges as participants in the Bolivarian Revolution, and as having its social and political program as an explicit end. The Bolivarian Revolution, as its name suggests, is not limited to the national sphere: it has Pan-American aspirations. However, as noted earlier, it prioritizes the common good over individual rights, and the Venezuelan Court accordingly claims an interpretive philosophy in which social and political ends trump the protections of individual civil and due process rights. Inter-American jurisprudence, by contrast, emphasizes individual civil and political rights.
Turning to Argentina, the new constitutionalism emerges as a possibly significant feature of judicial culture. Argentina is considered to be a leading example of the new constitutionalism (Carbonell 2007; Landau 2005), a concept that refers not just to texts, but to theories of interpretation and jurisprudential practices (Carbonell 2007; Couso in this volume). In particular, the new constitutionalism is linked to a more substantive jurisprudence that incorporates consideration of principles and values, proportionality tests, reasonability tests, and other constitutional doctrines that ultimately grant judges a large dose of discretion (Carbonell 2007: 10). Surprisingly, the link between the new constitutionalism and the international realm has not been a focus of scholarship (Pisarello 2007: 159). Clearly, however, the new practices and theories, which emphasize fundamental rights, have important implications for the interpretation of the status and content of international human rights treaties. We are in need of a study on whether these new theories of interpretation spill over and influence how judges conceptualize the content of international rights, the status of treaties in the national sphere, and their own role in articulating the relation between the international and national spheres.

4) Path dependency: familiarity of high court with rights and international law. As noted in the case study sections, the Argentine Supreme Court has participated in much substantive reasoning based on rights provisions in recent years. It is also accustomed to being at the center of political controversy. It is quite plausible that this experience makes the judges more comfortable with and willing to participate in adjudication under international treaties. This argument echoes the argument made by Catalina Smulovitz in this volume that experience with rights litigation made Argentina’s lawyers more likely to bring such claims to the courts. Judges, in turn, have gained experience with rights-based public law litigation. This experience might make them more likely to handle rights cases under international law.

However, this path-dependent argument fails to explain the reception of Almonacid in Chile and Apitz in Venezuela. If there is one area where Chilean courts have been assertive and have gained experience in defending rights, it is in the resolution of Pinochet-era cases of human rights violations after 1998. Furthermore, litigants have argued for decades that Pinochet-era human rights crimes fall under international law. Yet the Chilean Supreme Court has been very slow to draw on international instruments to decide cases, preferring to decide under national law even when this means twisting existing doctrine in new directions. In this case, experience with rights adjudication and greater court assertiveness has not enhanced Inter-American Court power. Similarly, the Venezuelan Court has seen an increasing amount of politically charged rights litigation arrive at its docket in recent years, but this has not made it a proponent of the Inter-American Court.

Familiarity, of course, comes not just from practical experience but also through education. The Chilean justice’s misstatement of Inter-American Court law raises
the possibility that education in international law affects how judges respond to the Inter-American Court. Arnulf Becker argues that while international law was once considered an important political language in the region, it was drained of its salience during the era of dictatorships (Becker 2006). He observes that many Latin American international law textbooks model themselves after European texts and refer to the Inter-American System in only a few pages “in a subchapter of a section dealing with international organizations, and usually after a description of the U.N. System” (Becker 2006: 289). As Keller and Stone have noted in the context of the ECHR (Keller and Stone Sweet 2008), comparative study of the varying positions the Inter-American System occupies in legal education, including judicial training, might shed light on the question of when national courts promote regional integration.

5) THE LEGALIST THESIS AND THE NEW CONSTITUTIONS. The legalist thesis posits that the law itself actually influences outcomes: law constrains judges and determines outcomes. Applied here, it is significant that the Argentine and Venezuelan constitutions are of more recent vintage than the Chilean, and directly address the question of the status and effect of human rights treaties in the national realm. Article 76 of the Argentine Constitution provides that the Inter-American Convention is directly applicable in the domestic sphere and carries the status of constitutional law. The Venezuelan Constitution similarly provides that human rights treaties are directly applicable, and carry the status of constitutional law (Article 23). By contrast, the Chilean Constitution, ratified in 1980 – under the Pinochet regime and only one year after the Inter-American Court came online – does not provide that human rights treaties are directly applicable, nor does it specify the status they occupy within the national regime. It thus leaves Chilean courts with an ambiguous mandate. This difference may help explain why the Chilean Supreme Court ignores the order to reopen the sentence of Almonacid, without directly addressing the IACtHR’s ruling. Explicit constitutional language likely corresponds with a more direct engagement.

Conclusion: Judicialization and Human Rights

It is noteworthy that Inter-American Court rulings have been openly rejected by high courts at least three times in recent years. This resonates with the findings of Alter and Helfer, who note with surprise that the recent empowerment of national courts in Latin America does not seem to have made a difference to courts’ willingness to refer courts to the Andean Tribunal of Justice:

[Recent institutional reforms have increased the assertiveness of many courts in Latin America, especially in the area of individual rights, with the result that judges in the region are exerting more independence and influence over executive branch officials and legislatures. This trend has not, however, spilled over to national court interactions with the ATJ].
However, if we look closely at these instances of rejection of the Inter-American Court, we see important differences in the manner of rejection, and in the consequences of the manner of rejection, and these, in turn, are suggestive of factors that help us understand when courts will enhance Inter-American Court power. The rejections suggest that it would be fruitful to further explore the consequences of executive–judicial relations, of regional politics, of judges’ ideas about and experience with the particular human rights violations they are reviewing, of legal education, and of constitutional texts’ treaty provisions.

Stepping back, it is interesting, if speculative, to reflect on the link between, on the one hand, the type of relation between law and politics within each country, and, on the other hand, the manner of rejection of the Inter-American Court. I noted in the introduction that the three countries in some ways are representative of current trends in the region, with Argentina as an example of the new constitutionalism, Chile as an example of a more traditional, formalist legal culture, and Venezuela as an example of the New Left, wherein law is viewed as participating in the socialist transformation of the state. These differences in legal–political dynamics are reflected in the manner in which the high courts reject the Inter-American Court, and whether they view the Inter-American Court as a threat to the national political project or as a partner in developing regional human rights norms. In other words, the case studies suggest that, with more data, one could construct a typology that links the manner in which the boundary between law and politics is articulated in a particular national setting to the manner in which the relation between the international and national spheres is articulated.

In closing, I note that the discussion here has focused on the first kind of judicialization in Latin America, the greater participation of courts in politically salient public issues. Another next step would be to examine the subtler but likely more pervasive effects of the second aspect of judicialization presented in this volume’s introduction, that of dressing social demands in the language and forms of law: Does the turn toward legal language in political claims enhance the influence of the Inter-American System in national politics?

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Rejecting the Inter-American Court


