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Communicative Entrepreneurs: The Case of the Inter-American Court of Human Rights' Dialogue with National Judges

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Many norms develop in the absence of clear templates for how to implement them. I argue that, even under these conditions, individuals and organizations can still successfully push for new norms, along with attendant changes in state practices. They do so through a mode of action that I term *communicative entrepreneurship*. Unlike *norm entrepreneurs*, communicative entrepreneurs do not project normative or technocratic certainty. They use nudges and networking strategies to trigger debates that define the contours of emerging normative scripts. I illustrate this dynamic with the case of the Inter-American Court of Human Rights, which became interested in regulating the use of its jurisprudence by local judges. Lacking a script amenable for diffusion, it triggered a dialogue with national courts to jointly regulate citation practices, and more generally, judges' obligations with respect to international human rights jurisprudence. Using original interviews and other sources, I trace the impact of communicative entrepreneurship on the behavior of Mexican and Colombian high courts. I show that it led to the development of new judicial decision-making standards in two very different contexts and therefore bolstered the authority of the Inter-American Court.

Introduction

Scholars often rely on models of *norm entrepreneurship* to explain how weak international actors promote new standards of appropriate behavior that, in turn, transform state practices and identities (Finnemore and Sikkink 1998; for example, Keck and Sikkink 1998; Alford 2008; Deitelhoff 2009). In these accounts, nonstate actors, such as nongovernmental organizations (NGOs) or intergovernmental organizations (IGOs), spread highly specific recipes of behavior. These transnational activist networks, when successful, trigger "norm cascades" that fundamentally change ideas about right and wrong and, with them, state practices (Sikkink 2011, chapter 1). Competitive or identity-based emulation processes (Simmons and Elkins 2004, 172–176; Cao 2010, 826–829), and the creation of institutions relying on carrots and sticks to deepen socialization (Greenhill 2010, 131–133), reinforce these cascades.

But how do norms take hold when the actors who promote them lack templates regarding the behavioral, technocratic, or moral standards they would like states to adopt? In this article, I develop an account of one possible process, which I term *communicative entrepreneurship*. Communicative entrepreneurs begin by identifying social domains in which they would like to see greater agreement concerning standards of appropriate behavior. Unlike norm entrepreneurs, however, they do not start with a clear normative script that they can advocate. Thus, communicative entrepreneurs cannot engage in the standard tactics available to norm entrepreneurs, such as shaming, pedagogy, or persuasion (Finnemore 1993; Risse-Kappen, Ropp, and Sikkink 1999; Johnston 2001; Payne 2001; Goodman and Jinks 2013). Instead, they aim to draw relevant interlocutors into a conversation about how to actualize a set of values.

Communicative entrepreneurs promote exchanges during which their targets are invited to supply ideas and jointly craft new behavioral standards. They present, and conceive of, their project of norm development as an open-ended dialogue. Communicative entrepreneurs create special venues that provide a playing field conducive to genuine discussion. Norm development thus becomes a multidirectional, consensual, and participatory process—one that acquires a fundamentally horizontal character. While they want to "build community" and promote convergence in behavioral patterns, communicative entrepreneurs lack normative or technocratic certainty. They do not put forward, let alone harbor, precisely defined ideas about how to operationalize new standards. Under such conditions of uncertainty, communicative entrepreneurship plays a key role in bringing people together to define the contours of emerging normative scripts. In doing so, it creates a broader community of stakeholders with an interest in defining and implementing a new norm.

In the next section, I provide a more detailed discussion of communicative entrepreneurship. I show how actors use nudging and networking strategies to promote dialogue and thus thicken the normative fabric of international society in otherwise poorly scripted domains. I then use the case of the Inter-American Court of Human Rights (IACtHR) to illustrate this alternative type of agency in norm cycles. Like other international courts, the IACtHR became interested in regulating the use of its jurisprudence as a source of law. Lacking a clear script ready for propagation, however, it triggered a dialogue of equals with national judges in order to jointly develop norms of transjudicial communication. Communicative entrepreneurship led to the operationalization of new judicial decision-making standards that increased the IACtHR's influence in the region and helped put an end to a long history of resistance to international law among high courts. While the literature on the causes of the increasing relevance of international law among domestic courts tends to focus on domestic factors, including the constitutionalization of human rights treaties (Huneeus 2016, 180), the

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creation of constitutional courts and the inflow of new judicial personnel (Landau 2005, 710–711; Nunes 2010, 83–86), intercourt power jockeying (Alter 2001), or strategic litigation (Gonzalez-Ocantos 2016, chapter 2), my focus on an international factor shows that these are only partial accounts. Specifically, I trace how communicative entrepreneurship interacts with local circumstances to condition the pace and shape of normative change.

To trace the motivations, modus operandi, and effectiveness of the IACtHR as a communicative entrepreneur, I rely on an original citation database covering the jurisprudence of thirteen national courts, interviews with key players in the Inter-American System, and official documents. Furthermore, I leverage temporal variation in the jurisprudence of two national courts, the Supreme Court of Mexico and the Constitutional Court of Colombia, to unpack the mechanisms through which communicative entrepreneurship jump-started a productive conversation. These cases present contrasting levels of prior openness to international law: Mexico's high court has been historically wary of external legal influences, whereas Colombia's has always been open to foreign sources of law. The comparison therefore reveals communicative entrepreneurship as the catalyst of a collective scripting exercise despite different initial predispositions to address the issue and highlights the contributions of local judges to norm development.

Communicative Entrepreneurship

In 1929, democratic theorist Alexander Lindsay noted that through deliberation "something emerges [that] each can recognize as embodying the truth of what he stood for and yet (or rather therefore) is seen to serve the purpose . . . better than what any one conceived for himself" (quoted in Milewicz and Goodin 2016). Habermas went a step further, associating the legitimacy of rules with inclusive deliberation: "[o]nly those laws count as legitimate to which all members of the legal community can assent in a discursive process of legislation" (Habermas 1996, 110). Similarly, Brunee and Toope's interactional theory of law (2010, 24–25) suggests that law becomes authoritative "only when it is mutually constructed." These deliberative understandings of legitimacy help conceptualize pathways to international norm construction that are more consensual and participatory than those depicted in models of norm entrepreneurship and that do not view the projection of moral or epistemic certainty as a necessary trigger of widespread transformations in states' practices and identities. I refer to international actors that adopt a deliberative approach to norm development as *communicative entrepreneurs*.

Entrepreneurs promote ideas, activities, and business ventures; *communicative* entrepreneurs promote discussions. To do so, communicative entrepreneurs create venues for open debate and want others to perceive such venues as highly inclusive, horizontal, and participatory. They thus seek to reach common ground to establish behavioral standards for poorly regulated social interactions. The logic of action that drives communicative entrepreneurship is akin to Risse's (2000) "logic of arguing." This is a noninstrumental form of rationality that commits actors to deploying good, universalizable reasons to defend opinions in front of others. Crucially, as in Habermas's social theory, communicative entrepreneurs are fully prepared when instigating debates to submit their views to the force of the better argument (Habermas 1984). They are not motivated by the "logic of consequences" because they do not seek to manipulate discourse in order to impose a predetermined script. Neither are their actions guided by the "logic of appropriateness," for at this stage, norms are still blurry, contested, or simply nonexistent and will be the product of the conversation.

The contrast with *norm entrepreneurs*, who feature prominently in agency-based models of norm development, is instructive. First, norm entrepreneurs harbor clear behavioral standards that they seek to propagate. They have "*strong* notions about appropriate or desirable behavior" (Finnemore and Sikkink 1998, 896). Consequently, their campaigns develop and promote clear operationalization strategies. For example, scholars have documented how NGOs craft highly detailed legal arguments to facilitate human rights prosecutions and thus propagate anti-impunity norms (Gonzalez-Ocantos 2016, 43–49). And those who study NGOs committed to advancing political equality norms show how activists promote the adoption of legislative gender quotas with specific design characteristics (Towns 2010, chapter 7).

Communicative entrepreneurs, by contrast, lack this conceptual and operational clarity. They seek neither to convince their interlocutors of a deeply held belief, nor to offer a highly scripted alternative course of action. Instead, communicative entrepreneurs aspire to a greater understanding of, and ease with, evolving normative prescriptions. It's not that communicative entrepreneurs lack an agenda; after all, "communicative action serves to coordinate the action of people in order to achieve certain objectives" (Müller 2004, 405). But communicative entrepreneurs are usually at a loss regarding how best to accomplish these objectives, and do not always know how to define workable parameters of behavior. Consequently, they reach out to relevant stakeholders to instigate talks, share insights, and figure this out.

Second, the central tool of norm entrepreneurs is socialization. Socialization involves drawing others into an existing community bound by specific norms and values (Johnston 2001, 494–496; Checkel 2005, 804). Although they sometimes use coercive strategies such as shaming, norm entrepreneurs seek principally to persuade states (Payne 2001). This involves creating discursive frames that link their ideas to those principles that enjoy widespread legitimacy and resonate with audiences, including universal values like equality or dignity (Keck and Sikkink 1998, 27; Sandholtz and Stiles 2009, 15–18). Persuasion is therefore a unidirectional process that transforms the values, priorities, and causal beliefs of targets in line with predefined standards (Checkel 2001, 562; Johnston 2001, 496–499). Norm entrepreneurs are not willing to submit their views to the force of the better argument; they are convinced theirs *is* the better argument.

Communicative entrepreneurs operate differently. When communicative rationality, as opposed to persuasion, characterizes a social interaction, actors aim jointly to fill in the blanks of otherwise vague behavioral standards and thus replenish the reservoir of common understandings that facilitate interaction and social integration (Habermas 1984). Communicative entrepreneurs may of course fail to reach a consensus, but they strive to have an open debate that helps define what ought to be done, providing an actionable template acceptable to all. Instead of *deploying frames*, communicative entrepreneurs therefore *instigate debates* provoking responses from their desired interlocutors and creating suitable venues for such exchanges to unfold. These efforts raise problem salience and emphasize the need to find solutions. Discursive strategies focus on conveying openness to having discussions in which nobody projects normative certainty and different views are given equal consideration.

Third, accounts of norm entrepreneurship posit isomorphism as the ultimate goal, or sign of success (Towns 2010,

24–34). Indeed, some see "localization" practices as potential signs of norm perversion or resistance (Capie 2008; Acharya 2013). To be sure, communicative entrepreneurs also want to promote convergence in behavioral patterns. Unlike norm entrepreneurs, however, they are prepared to accept greater variability in the way their interlocutors operationalize norms. This is a function of the communicative entrepreneurial ethos, which makes such actors willing to submit to the force of the better argument. After all, given the overall uncertainty regarding the norm and its operationalization, the better solution may be context-dependent. And in order to legitimate these new standards, it is often important to accept the input of relevant interlocutors, as well as to understand their needs. In this sense, communicative entrepreneurs are aware that normative uncertainty, which encourages communicative entrepreneurship in the first place, makes it difficult to craft, let alone agree on, highly specified and generalizable operational guidelines. Far from seeing local variability as a perversion, communicative entrepreneurs embrace it as a way to improve the chances of successful norm development in the absence of a ready-made script available for top-down diffusion.

The concept of communicative entrepreneurship points to the dialogic dimension of norm cycles. In doing so, it stands together with a number of other scholarly contributions. For example, Sandholtz (2008) shows that the application of general principles to concrete situations triggers public arguments that lead to cycles of norm change. Similarly, Risse (2000, 33) suggests that dialogue is a prominent feature of norm cycles because the "public spheres enabling challenges and counterchallenges to validity claims" are present "in many issue-areas and regions of the world." What's more: dialogue often transforms how states perceive their interests and identities in unexpected ways through processes such as "argumentative self-entrapment" (Risse 2000, 22–23). Others too contend that, when dialogue is present, it increases the susceptibility of states to the influence of weaker nonstate actors. As Deitelhoff (2009, 44) notes, moving away from bargaining, and closer to a conversation, "changes the underlying power structure of negotiations." Finally, for some scholars the availability of spaces for inclusive dialogue and active norm contestation by relevant stakeholders is a precondition for norm legitimacy (Wiener 2017). These arguments tend to focus on the structural conditions that facilitate dialogue or communicative action and trace the consequences of dialogue or its absence. Attention to communicative entrepreneurship, by contrast, reveals how actors themselves can purposely create those conditions.

An Application to International Courts

Communicative entrepreneurship, as a model of norm development, is useful for thinking about how international courts boost use of their jurisprudence by domestic judiciaries, thereby scripting and routinizing the influence of international law.

Scholars tend to assume that national courts are aware of international law and behave opportunistically, ignoring or citing it depending on the circumstances (Black and Epstein 2007, 803). Some suggest that referring to international legal instruments is a useful strategy when judges pursue a variety of agendas because international law has "persuasive authority" (Martin and Simmons 1998, 749). In particular, since international human rights law and the rights enshrined in domestic constitutions share "substantive normative foundations," judges wishing to enforce those rights can rely on international law to bolster the appeal of their decisions (Sandholtz 2015, 608).

Yet, we cannot take for granted judges' awareness of international law and jurisprudence and the obligations these impose on them. For example, throughout the twentieth century, members of the legal field in Latin America perceived citations of sources of law other than domestic statutes as utterly inappropriate due to the hegemony of legal positivism (Lopez-Medina 2004, chapter 1; Couso 2010). Until recently, Mexico's Supreme Court even explicitly banned the use foreign precedents (Cortez 2017, 19). Likewise, a survey conducted in Colombia in 1989 showed that only 10 percent of judges knew of at least one human rights treaty (Valencia 1990). Judges interviewed by Gonzalez-Ocantos (2016) in five countries also admitted profound ignorance of international human rights law, even after key treaties were granted constitutional status. Scholars also document a similar resistance in post-1945 Western Europe and Eastern Europe prior to EU-accession (Alter 2001, chapters 3–4; Skomerska-Muchowska 2017).

In order to observe high levels of transjudicial communication, judges first have to modify interpretive reflexes nurtured via professional socialization dynamics that lead them to ignore, or be skeptical of, foreign sources of law (Benvenisti 1993). Once ignorance is overcome, they have to operationalize the influence of international law and regulate its use in concrete cases. Although the broad values promoted by a treaty may be clear ("torture is unacceptable"), there is considerable uncertainty surrounding how domestic judiciaries might enforce those values. This ambiguity is especially salient in the case of international jurisprudence. In Europe, for instance, there is huge variability in how courts interpret the status of the jurisprudence of the European Court of Human Rights (Voeten and Helfer 2014, 77–78; Müller 2017, chapters 8–10). Crucially, most treaties and constitutions remain silent on whether national judges have the responsibility to render decisions that take into account international rulings. Do these precedents apply to all parties to the treaty or just to the plaintiffs? Are provisions mandatory or simply advisory?

In the absence of clear rules that operationalize the effects of international jurisprudence in domestic law, the robustness of transjudicial communication is likely to suffer because local courts will either ignore precedents or use them in inconsistent ways. By contrast, a successful scripting exercise is bound to systematize the influence of international courts. But how do new norms of transjudicial communication develop, in turn transforming decision-making routines? Communicative entrepreneurship provides useful tools for understanding how international courts might expand judges' tool sets and promote the habit to consider international jurisprudence.

First, the aforementioned uncertainty surrounding the legal status of international jurisprudence also affects international courts. As a result, an inclusive conversation can aid in the development of the necessary standards. For one, international courts cannot simply dictate operational rules applicable to all courts under their jurisdiction, for domestic judges work in heterogeneous institutional environments. General solutions based on a formalistic understanding of the relationship as strictly hierarchical are hence unlikely to work across countries (Shany 2007, 7). Moreover, national judges may rebel against this imposition, or decide to delegate harmonization to international courts, in both cases continuing to rule as they see fit. To further complicate matters, international courts, especially human rights courts, often rule on exceptional cases. The relevance of this

jurisprudence for the daily work of domestic courts is far from clear, and it is difficult to extract general decision rules from it.

Due to the uncertainty surrounding this issue domain, international courts cannot behave as "teachers of norms" (Finnemore 1993). After all, teaching presupposes clarity about the principles one intends to disseminate. International courts must therefore rely instead on alternative mechanisms to increase their influence over judicial practices. Specifically, a dialogic approach to legal construction is bound to be productive, because taking into account the insights of domestic courts enables international courts to proffer solutions to the problem of the status of international jurisprudence bound to work best in contexts with varying political and constitutional constraints. A two-way flow of information and ideas increases the likelihood that informative, viable, and acceptable operational standards emerge. This flow can also disrupt local jurisprudential inertia and ultimately plug the normative gap.

Second, regardless of the availability of ready-made operational rules, international courts have a limited capacity to force states to take them seriously. A robust transjudicial communication is unlikely to emerge from a top-down process through which international courts compel domestic judges to systematically use their jurisprudence via sanctions. An international human rights court can, for example, shame a state into implementing a specific decision, but it can hardly force a supreme court to accept its pronouncements as routine compulsory reference points. Indeed, the politics of regulating the authority of international precedents are bound to be more complex than, say, the politics behind the development of standards regulating treaty citations, simply because international jurisprudence is more threatening for local judges. By applying treaties to concrete cases, international court rulings inevitably reduce the degrees of freedom for treaty interpretation available to local courts. These degrees of freedom are otherwise quite generous (Sandholtz 2015, 608–615). Furthermore, acknowledging the authority of international jurisprudence risks upsetting the hierarchy of the domestic legal order. Among other things, it gives lower courts a platform from which to justify deviations from high courts' criteria (Alter 2001, 48–49).

In light of these tensions, it is not surprising that local courts often prefer a loosely regulated relationship with international jurisprudence, as this affords them greater latitude to invoke precedents opportunistically. If international courts are to avoid negative reactions and promote tighter behavioral scripts that lead to a consistent engagement with their jurisprudence, they must temper this resistance. To do so, they can proceed in ways that nurture self-policing impulses among national courts. Communicative entrepreneurship helps achieve this. When behaving as communicative entrepreneurs, international courts recognize the input of local judicial actors in the process of establishing norms about whether, and under what conditions, international jurisprudence can/must be invoked as a valid source of law.

Mechanisms of Influence

How do communicative entrepreneurs instigate norm development? First, communicative entrepreneurs deploy nudges. Nudges are not "mandates" or explicit behavioral scripts that prescribe alternative courses of action (Thaler and Sunstein 2008, 6). By contrast, nudges are subtle interventions that entice others to think differently about the choices at hand, interrupt routine decision-making patterns, and problematize taken-for-granted habits. The disruptive and nonprescriptive properties of nudges enable communicative entrepreneurs to call attention to poorly normed social interactions and lure reticent, uninterested, or reluctant stakeholders into discussions about the creation of new behavioral scripts.

The content of nudges varies across political/social domains. In the case of international courts that seek to trigger discussions about the legal status of their jurisprudence, nudges are usually embedded in ruling and include messages targeted directly at national judiciaries. To call the attention of these stakeholders, international courts avoid the usual practice of addressing the "state" as a unitary actor and write rulings that send signals to local courts, treating them as distinct entities. The goal is to open a formal channel of communication that transforms the choice architecture of local judges and interrupts business as usual.

For example, some nudges try to showcase intercourt citations as a viable opinion-writing tool for local judges. In this sense, one option available to international courts is to use national jurisprudence as a source law. This argumentative technique signals the presence of shared concerns/values, shows consideration for local ideas, and indicates that transjudicial communication is not a hierarchical phenomenon but a tool for the collective construction of legal standards. For national courts, these references are a source of pride. While citations may soften resistances to start a dialogue, other nudges offer more direct means to jump-start a conversation. For instance, international courts can explicitly to mention in their decisions that international jurisprudence creates responsibilities for national judiciaries, thus compelling local judges to respond in order to define what those responsibilities are. When acting as communicative entrepreneurs, international courts do not provide a clear operationalization of the responsibilities invoked in the nudge; they simply argue that those responsibilities exist and thus provoke a discussion. At a very practical level, this ensures that national judges are formally notified of international rulings. More importantly, mentioning judges as subjects of international legal obligations increases the likelihood that local courts will not see international court rulings as a foreign policy issue to be dealt with exclusively by the executive, as it has traditionally been the case (Benvenisti 1993), and feel the urge to respond.

Second, communicative entrepreneurs network. Spaces purposefully created to discuss face-to-face the possibility of coming up with new behavioral scripts allow communicative entrepreneurs to engage their targets directly. For example, international courts often visit countries to meet with members of the legal field. When acting as communicative entrepreneurs, they leverage these meetings to showcase the existence of a community of practitioners united by common legal instruments (Helfer and Slaughter 1997, 366–370; Slaughter 2004), lobby local judges about the merits of international jurisprudence (Helfer and Alter 2009, 900–912), and follow-up on the nudges. When they manage to draw judges to intimate venues, international courts find ample opportunities to have open conversations, intensify informational flows, and ultimately achieve greater certainty regarding the legal status of international precedents. During these encounters, international courts modify their own views, show deference to their peers, and thus provide local judges with additional incentives to participate in the dialogue.

In the next sections, I show that the IACtHR deployed communicative entrepreneurship to great effect, using nudging and networking to offer local courts a level playing

during the process of creating norms of transjudicial communication.

Launching an Inter-American Conversation

The IACtHR was established in 1969 under the aegis of the Organization of American States (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 American Convention on Human Rights and adjacent treaties (Pasqualucci 2013). The IACtHR faces several institutional challenges. For example, two countries—Trinidad (1998) and Venezuela (2012)—withdrew permanently from its jurisdiction. The budget is also minimal. In 2016, the OAS covered 53.55 percent of the US $5,147,157.23 budget; the remainder came from voluntary contributions. Compounding things further, the IACtHR has no ministerial body like the Council of Europe, which in that case helps the European Court of Human Rights monitor compliance. It is therefore not surprising that the IACtHR's compliance record is poor (Hawkins and Jacoby 2010; Hillebrecht 2014). Finally, rules of standing are restrictive and limit the size of the docket and the scope of the court's agenda.

The IACtHR's limited influence over the behavior of national courts is a particularly pressing challenge for the development of coherent human rights protection standards across the region. The court lacks treaty-based channels such as Article 177 of the Treaty of Rome, which played a key role in establishing the authority of the European Court of Justice among local judges (Burley and Mattli 1993, 58). True, the IACtHR advanced a robust set of standards on access to justice, thus cementing its reputation as a bulwark against impunity from early on. It also consolidated clusters of rulings on topics such as indigenous rights, reproductive rights, and freedom of speech. Until the 2000s, however, national courts rarely used this jurisprudence in their day-to-day activities, undermining the reach of the IACtHR's progressive standards (Figure 1).

Around the turn of the century, the IACtHR became aware of this impact deficit and reached the conclusion that its jurisprudence would not automatically translate into greater influence over domestic courts. It therefore began to consider the need to spark a transjudicial dialogue about the international legal obligations of national judges. But in light of the historic resistance to international law among Latin American judiciaries, the IACtHR had to approach the issue with great care so as to generate goodwill prior to beginning discussions about developing norms of transjudicial communication. According to a former clerk,

> The issue of impact was a central concern . . . Resources were scarce and we received few cases, so it was really important to find other ways of generating impact . . . Impact meant being cited more and more often. We had to engage national judges.[1]

Increasing citations was a first step to boost awareness of the court and ensure "that we are no longer in the 1990s when our jurisprudence was virtually unknown."[2] The IACtHR believed that more citations would lead to the institutionalization of new judicial habits compatible with stronger rights-protection standards. In the words of a former judge,

> [I]nternational courts can't replace states when it comes to compliance. If we are to see human rights respected . . . we must contact our national counterparts to start a dialogue [because they] are the ones that can most directly apply [the Convention]. States comply . . . because someone within the state pushes in that direction . . . That's why we care about being cited.[3]

The IACtHR, though, lacked a clear vision about how to regulate the use of its jurisprudence by local courts. Top-down diffusion of ready-made behavioral scripts, following a norm entrepreneurial model, was thus a nonstarter. The court began to behave as a communicative entrepreneur, using its rulings to nudge domestic judges in ways that put on the table previously ignored questions about the authority of international jurisprudence. While the IACtHR had argued before that state practices contrary to the Convention were invalid, prior to the mid-2000s it had never referred to the role of judges in policing incompatibility.[4] Its rulings had instead addressed the state as a unitary actor, failing to build specific bridges with judicial constituencies to clarify their duties. This changed when the court introduced the idea of the "conventionality review," first in Judge García-Ramírez's vote in *Myrna Mack v. Guatemala* (2003) and later in the majority's decision in *Almonacid v. Chile* (2006). Consistent with the use of nudging by communicative entrepreneurs, the IACtHR coined a term that made the issue an unavoidable topic of conversation and quickly became the focal point of debates about how national courts ought to deal with Inter-American jurisprudence:

> [J]udges, as part of the state apparatus, are also subject to [the American Convention] . . . The judiciary must exercise a type of *"conventionality review"* [of] internal juridical norms . . . In doing so, the judiciary must not only take into account the treaty, but also interpretations rendered by the Inter-American Court.[5]

Inter-American judges were unable to provide a more specific formula to operationalize the "conventionality review." The vague enunciation of what the court hoped would become a new behavioral standard reflects this uncertainty. In fact, the IACtHR saw these rulings as the beginning, not the end, of a conversation. Some observers, however, misunderstood its intentions, characterizing the proposal as a

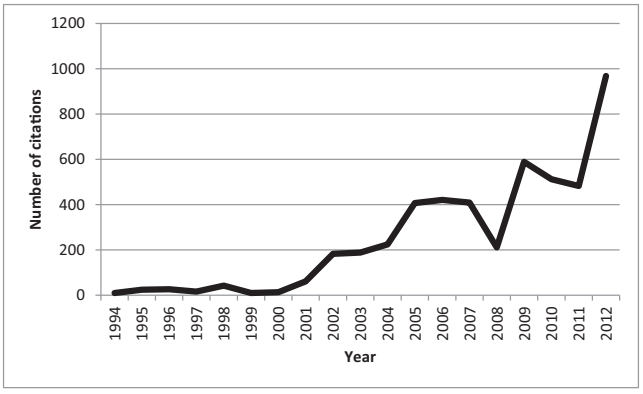

Figure 1. Citations of IACtHR rulings (1994–2012)
Note: Includes the jurisprudence of the Supreme Courts of Argentina, Brazil, Chile, Costa Rica, El Salvador, Mexico, Panamá, Paraguay and Uruguay, and the Constitutional Courts of Colombia, Ecuador, Guatemala and Peru.

[1] March 11, 2016.
[2] Former IACtHR Judge, May 7, 2016.
[3] May 4, 2016.
[4] *OC 14/44* (1994); *Barrios Altos v. Peru* (2001).
[5] *Almonacid v. Chile* (2006).

move to impose the supremacy of Inter-American law and not as an invitation to talk (Dulitzky 2015). In a region only starting to get used to the review of constitutionality, the idea that judges ought to also check the "conventionality" of laws sounded, understandably, quite radical. The IACtHR was aware that being perceived as a top-down entrepreneur of strict standards of behavior could hamper the development of a productive relationship with domestic courts, so the judges quickly clarified their "communicative" intentions. The message therefore became one where national courts should only exercise the conventionality review within the boundaries for their own prerogatives (see Ferrer-MacGregor 2015). Judge García-Ramírez was particularly keen to highlight the importance of rejecting rigid interpretations and accommodate differences in national constitutions and judicial structures. The court made it clear that the doctrine was not a ready-made template for action, but an opportunity to discuss how to apply Inter-American jurisprudence in diverse contexts.

During interviews, judges spoke as communicative entrepreneurs. They doubtless understood the perils of overreach and, crucially, lacked a clear vision of how to operationalize the conventionality review. According to one judge,

> [C]ommentators made extremely generous interpretations of the meaning of the doctrine, so we clarified our intentions . . . The court wanted to provoke national courts, but didn't know exactly what the specific parameters of use should be. Those had to be established by national jurisprudence.[6]

The doctrine, in this interpretation, was therefore nothing more than a catch phrase, a nudge used to remind "judges that they too had to abide by the Convention."[7] In other words, the conventionality review was not part of a pedagogical effort:

> Our message to local courts was that they ought to take the jurisprudence of the IACtHR into account, but always decide using the instruments that provide the best possible protections for the rights in question. *These may or may not be found in international law* . . . The development of the doctrine was an effort to get judges to pay attention to the Convention . . . *But the goal was not a pedagogical one. When we began to experience jurisdictional conflicts between supreme courts and the IACtHR, we thought this doctrine would allow us to find a solution.*[8]

Two other judges also emphasized the importance of projecting uncertainty:

> There isn't certainty about which are the rules that judges should follow to incorporate international law . . . Here is where we find the debate around the conventionality review. This doctrine is still in the making . . . The only thing that the conventionality review tells judges is that they must use international law. How? Well, each one must do so mindful of the rules regarding the distribution of prerogatives within their respective states. There is more than one valid technique of legal integration.[9]
>
> Our job has been to reassure local judges that the conventionality review does not trump the judicial prerogatives established by national constitutions.[10]

Promoting a horizontal dialogue was an appealing way to engage national courts. Inter-American judges, unable to launch a crusade to impose standards of judicial behavior, used communicative entrepreneurship to signal both that domestic courts were crucial to crafting new norms of transjudicial communication and that they were willing to delegate the final word to their interlocutors. After all, as a former clerk mentioned, national judges were in a position to ignore the IACtHR if they regarded its doctrines as intransigent.[11] This is exactly the way communicative entrepreneurs operate: they project uncertainty and show willingness to submit their views to the force of the better argument.

Networking efforts during the 2000s provide further evidence of the IACtHR's normative uncertainty and its willingness to jump-start a dialogue. The record indicates that, between 1980 and 2014, the court organized 449 outreach activities. These included the following: interactions with local judges during seminars, official visits, and the signature of inter-institutional accords; academic events to discuss Inter-American jurisprudence; and official visits by heads of state and representatives of international organizations. As shown in Figure 2, academic events and meetings with judges were nonexistent during the first fifteen years of the series. By 2014, however, they had grown to become as, if not more, common than political contacts. The development of the conventionality review, which is contemporaneous with this trend, created a fertile discursive focal point for face-to-face interactions.

Two examples of networking illustrate the IACtHR's modus operandi. One is in the early 2000s, when the court began to attract external funding that in turn strengthened its capacity to interact with local judges. Most notably, the court used the money to organize hearings away from its headquarters, thus enabling closer contacts with domestic actors. As a judge explained, "when we arrived in those countries, judges, lawyers' professional associations, everyone was interested in meeting with us."[12] These trips raised the profile of the IACtHR and compelled several local courts to seek closer institutional ties, leading to the signature of cooperation agreements that included the possibility of sending clerks to its Costa Rica headquarters so that they could study Inter-American jurisprudence.

Another example relates to how the court sought the support of the Konrad Adenauer Foundation (KAF) to build bridges with national judges. To this end, in the mid-2000s it began to participate in the KAF's regional summits of high courts.[13] A KAF officer, involved in developing the partnership, described both the IACtHR's reasons for joining the network and the venues created to promote dialogue:

> The IACtHR had great interest in talking to supreme and constitutional courts because it realized that its legitimacy depended on the goodwill it could generate among local judges . . . [The] summits offered the perfect environment to start this dialogue . . . because these are closed seminars . . . As a result judges could openly exchange points of view.

[6] September 5, 2016.
[7] Former IACtHR Judge, May 4, 2016.
[8] IACtHR Judge, June 6, 2016.
[9] August 10, 2016.
[10] June 9, 2016.
[11] September 15, 2016.
[12] Judge, June 6, 2016. These meetings are not included in Figure 3, so the graph underreports "judicial contacts."
[13] KAF Officer, August 18, 2016.

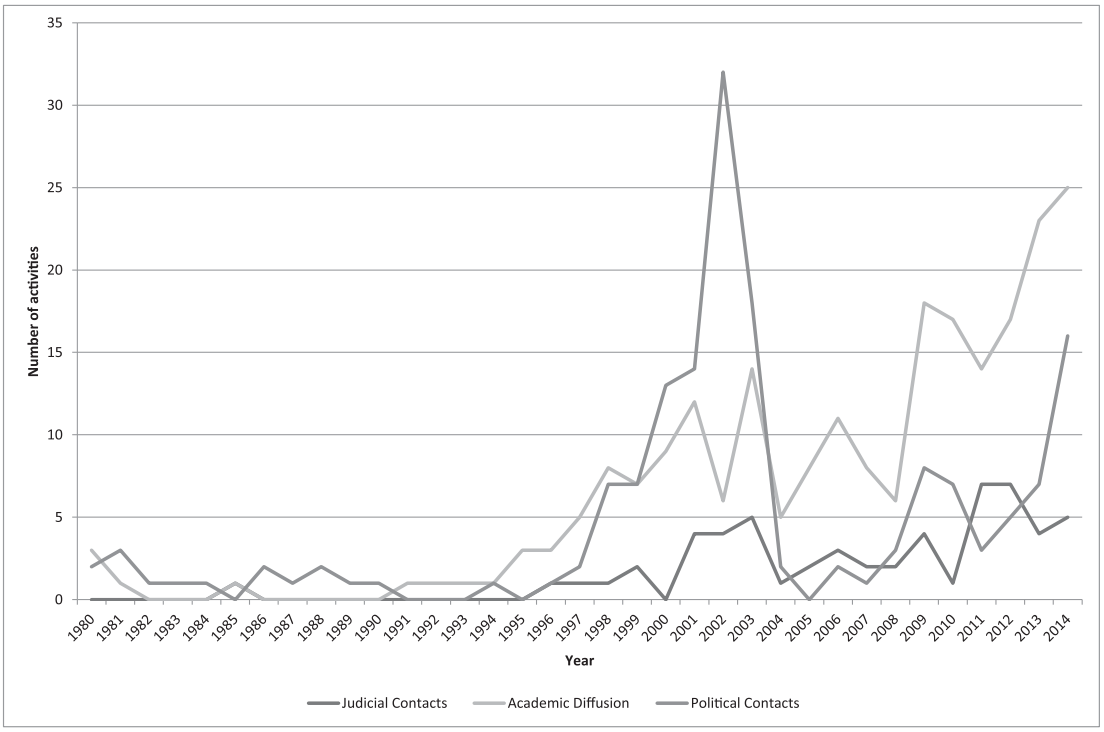

Figure 2. Activities organized by the IACtHR (1980–2014) *Source:* IACtHR Annual Reports

The IACtHR thrived in this context, approaching local judges in nonthreatening ways and collecting valuable information:

> It was absolutely essential that the judges got to know each other personally . . . *Both had to realize they were dealing with reasonable people, capable of putting together cogent arguments. [For the IACtHR] it was crucial to generate the impression that the conventionality review was not part of a power play and that any controversy surrounding it was simply a matter of different opinions* . . . The network allowed the court to take the pulse of national judiciaries . . . It's important that an international court knows how to measure its strength and legitimacy and to know when it can push for certain processes and when to act prudently.[14]

Other testimonies reinforce the point that networking allowed the IACtHR to present itself as a nonthreatening actor willing to promote the participation of local courts in horizontal discussions. According to a former clerk, "for some Inter-American judges it was very important to start a personal dialogue with local courts to explain their goals and intentions and expose themselves to criticisms."[15] Judges exploited this intimacy to project openness to ideas that could help them clarify the contours of the conventionality review: "face-to-face our judges are better able to put forward a moderate vision of the conventionality review, one that generates fewer frictions."[16]

It is of course difficult to reconstruct precisely what happened during these informal exchanges or whether ideas indeed flowed. But the testimonies of some participants do hint at how horizontality played out:

> I met in private with high court judges. One of them told us that she was happy to abide by the Convention, but not by the court's jurisprudence. So we argued. When we talked about the conventionality review I told them that it didn't mean that they had to directly apply all rulings. *I clarified that they had to analyze each precedent to see if they could be useful to solve specific cases* . . . [In another country] we also met in private with some judges and gave them ideas on how to [comply with our jurisprudence]. *But we also asked them for ideas on how to approach a judgment we were drafting at the time. This kind of deference is crucial.*[17]

Another judge also characterized these meetings as a two-way street that helped shape of the conventionality review doctrine:

> We wanted to trigger an exchange. An exchange means that ideas should circulate both ways . . . To the extent that national high courts were producing important innovations, *we wanted to be able to learn about those rulings* . . . These meetings also produce interpersonal exchanges that thaw relationships with reticent courts, allowing us not to persuade, but to explain our motives. This is what happened with the Uruguayan court after the 2011 *Gelman* decision.[18]

The timing of the IACtHR's efforts to hook local courts to a conversation matches the overall evolution in citations. This is suggestive of some level of impact. Interestingly, after the IACtHR launched the conventionality review, we observe an uptick in citations both among national courts that were already open to international law (for example, Colombia, Costa Rica, Argentina) and courts that had hitherto

[14] September 21, 2016.
[15] March 11, 2016.
[16] Clerk, September 15, 2016.
[17] IACtHR Judge, August 10, 2016.
[18] September 5, 2016. *Gelman* nullified Uruguay's amnesty law. At first, judges refused to comply. They changed their minds after meeting the IACtHR. A lawyer who witnessed the exchange confirmed this (interview, September 12, 2016).

resisted external legal influences (for example, Mexico, Brazil, Uruguay).[19] Communicative entrepreneurship played a catalyzing role in both sets of cases, speeding up the development of new norms of constitutional interpretation regardless of this initial predisposition.

To illustrate how this happened, and show that greater attention to Inter-American rulings had substantive consequences for the development of rights protections, I trace the impact of nudging and networking in countries belonging to both groups. First, I look at how the IACtHR disrupted longstanding decision-making patterns in Mexico, luring reticent and ignorant judges into a productive discussion about the status of international jurisprudence. Second, I turn to Colombia, where, despite greater openness to international law, communicative entrepreneurship also played a role in regulating the influence of international jurisprudence. The IACtHR triggered an intense discussion that led to the development of more detailed behavioral scripts than those the Constitutional Court had been willing to produce on its own. Throughout the narrative I show the insufficiency of domestic factors highlighted by scholars interested in explaining the rising impact of international law, such as the constitutionalization of treaties (Huneeus 2016), the creation of constitutional courts and the inflow of new judicial personnel (Landau 2005; Nunes 2010), or intercourt power jockeying (Alter 2001). Furthermore, I explore how communicative entrepreneurship interacts with these factors, pushing norm development forward.

Mexico

Prior to 2006, the Mexican Supreme Court had never cited Inter-American jurisprudence. In the following six years, however, the citation count rose to 325, putting Mexico in fourth place in the overall ranking of Latin American courts. This temporal change in judicial habits is puzzling because Mexico's Supreme Court is famous for its history of resistance to foreign sources of law. The change in trajectory can be explained in part by the communicative entrepreneurship of the IACtHR, which thus influenced a "least-likely" case.

During the Partido Revolucionario Institucional's regime, the Mexican judiciary was an appendix of the presidency. This began to change in the 1990s when the ruling party strengthened the autonomy of the supreme court by giving it original jurisdiction in matters raised by legislatures, parties, and governors. The court thus became a referee in disputes between the branches of the federal government and between levels of the federation (Magaloni 2003). Despite these changes, the supreme court still lagged behind the regional trend toward more robust rights-protecting jurisprudence (Ansolabehere 2010), a phenomenon that is often attributed to a rigid view of the constitution: judges still favored plain-meaning interpretation and did not see it as their duty to expand the content of rights by interpreting the constitution creatively, in light of, for example, international human rights law. According to this rigid version of formalism, the law involves a set of unequivocal, noncomplementary written rules, leaving little room for judicial interpretation. For example, Article 133 of the constitution incorporates international law into the legal system, but supreme court precedents historically downgraded its status.

The testimony of a former supreme court judge crystallizes a legal philosophy that fails to encourage judges to think about the compatibility of laws with fundamental rights and leads them to apply constitutionality tests in purely procedural terms:

> Our role . . . is to read the constitution, not to say what I would like the constitution to say. This position . . . reduces the court to a technical role . . . We must establish what is technically correct given what the constitution says. We are not here to say if a law is good or bad.[20]

The pervasiveness of formalism was partly a legacy of authoritarian rule. During the era of one-party rule, supreme court jurisprudence was meant to strictly regulate legal interpretation, discipline lower courts, minimize their ability to discretionally interpret the law, and make them perfect agents of the regime. The system thus promoted an extreme version of formalism, engrained rigid interpretative routines, and stifled judicial power (Magaloni 2007). The judiciary also failed to reward innovative behavior. A supreme court judge reflects on how difficult it is to disrupt the reproduction of these problem-solving templates: "There is an institutional inertia that determines attitudes and ways of reading the constitution and our main laws. It is hard to overcome this longstanding way of understanding the role of the judiciary."[21] Formalistic routines also limited judges' knowledge of alternative sources of law. For example, when asked why in famous forced disappearance cases the supreme court virtually ignored seminal Inter-American jurisprudence, another justice explained,

> The opposition to other ways of thinking about and reading the law has a lot to do with ignorance. The fact that the 2003 [supreme court] ruling on forced disappearances does not mention any international legal instruments is the product of ignorance . . . In Mexico we have members of the supreme court who are very formalistic.[22]

What accounts for the change in citation practices? New personnel doubtless played a role. Justice Cossío, who arrived in 2003, broke with the tradition of promoting existing judges to the supreme court and facilitated the influx of fresh legal ideas compatible with a dialogue with Inter-American judges. Before joining the court, Cossío was a law professor at a private university that promotes a more modern approach to law than the Autonomous National University of Mexico, the traditional incubator of judges in the country. In addition, Cossío completed a doctorate in Spain under the supervision of influential neoconstitutionalist jurists, who left a strong imprint on his legal preferences. In time, Cossío became aware of the importance of resocializing judges in this alternative tradition to deinstitutionalize certain decision-making routines and, thus, to open the judiciary to international law:

> Mexican lawyers do not cite [international jurisprudence]. Many judges do not know about these things because they have simply not encountered them before. This court should start doing it, but for the most part it doesn't know how to, which means we have to retrain our lawyers.[23]

To help implement this modern vision of constitutionalism, he recruited clerks educated abroad who were also judicial outsiders. Their mission was to disrupt the formalistic

[19] See Appendix.

[20] July 27, 2010.

[21] Personal correspondence.

[22] September 3, 2010.

[23] July 15, 2010.

instincts typical of supreme court jurisprudence. As one explained,

> We began to include references to international law in the draft opinions we shared with other judges. We had the crazy idea of throwing everything in . . . so that at least some of those references would stick . . . I have a file with a list of Inter-American rulings, indicating which rights are discussed in each case. I've distributed it among my colleagues so that they can use it too.[24]

Resistance to modify longstanding routines, however, remained strong, with there being various internal barriers to change. As a condition to join Cossío's opinions "other judges usually told us to remove some or most of the citations."[25] Another clerk similarly admitted that, for many of her colleagues, trudging the jurisprudence of the IACtHR was like "going to Mars."[26] Little wonder, then, that by 2010 just thirty-eight of the 159 references to Inter-American jurisprudence found in supreme court rulings belonged to decisions drafted by judges other than Cossío.

While Cossío's changes did begin to expose the court to international standards, they were alone insufficient to guarantee a robust transjudicial dialogue. The communicative entrepreneurship of the IACtHR added crucial momentum to the process. First, the IACtHR deployed networking strategies. For example, the staff of the Mexican branch of the KAF was responsible for spearheading the regional network described in the previous section, so the IACtHR took advantage of these connections. As organizers of the "Working Group on Constitutional Justice," which included Inter-American judges and academics with strong links to the Mexican judicial establishment, KAF officers were uniquely positioned to connect both courts. In addition, one of the members of the group had clerked in the supreme court and was now affiliated to the Instituto de Investigaciones Jurídicas, an institution that played a crucial role in the development of the conventionality review doctrine. These ties, and the geographical proximity of the actors, allowed the IACtHR to cultivate strong bonds with the supreme court and introduce new ideas about transjudicial communication. An important institutional outcome of these contacts was the creation of an internship program that allowed Mexican clerks to spend time in Costa Rica. Between 2005 and 2012 at least nine clerks made use of the scheme (Cortez 2017, 125–128).

Second, the IACtHR made use of jurisprudential nudges. Indeed, Mexico's Supreme Court did not seriously debate the status of Inter-American jurisprudence until the IACtHR put the issue on the table in *Radilla v. Mexico* (2009). Nudging lured Mexican judges into thinking systematically about how to define the parameters of use of international case law, thus triggering a conscious effort to operationalize a radical change in the court's interpretive routines. This in turn catalyzed a rise in citations.

In *Radilla* the IACtHR ordered Mexico to investigate a forced disappearance that took place in 1974. Crucially, the ruling invoked the conventionality review to remind Mexican judges of their responsibilities under international law and invited them to adopt more demanding standards when addressing rights violations. Importantly, unlike previous decisions against Mexico, this one unequivocally mentioned the judiciary as one of its intended interlocutors. When comparing the reaction of the supreme court to this and previous IACtHR rulings, it is clear that the nudging employed in *Radilla* played a role in jump-starting a conversation. As a clerk privy to the internal debate explained, "*Campo Algodonero v. Mexico* [n.b. an earlier ruling] didn't make much noise inside the court. *It never mentions the federal judicial branch . . . Radilla is different: it called the attention of the court.*"[27]

The Supreme Court began to discuss *Radilla* in 2010.[28] Initially, the judges had a protracted debate about whether they should hear the case at all. The tone of the debate showed how disconcerting it was to discuss the possibility of transforming interpretive routines.[29] According to a clerk with access to these deliberations, "the idea that they had to discuss the implications of an international ruling against Mexico, and comply with it, were not things that fell within their legal horizons."[30] A majority eventually agreed to address the issue and in July 2011 handed down a landmark ruling stating that judges must exercise the conventionality review.[31] The change was so radical that *Radilla* officially inaugurated a new "jurisprudential era" in the history of the court.[32]

Interview data suggests that the interaction between communicative entrepreneurship and local factors explains this dramatic jurisprudential shift. For example, a clerk mentioned intercourt power jockeying as one of the factors that explain why the supreme court responded to the nudge the way it did:

> They were able to moderate the impact of the IACtHR and explain the way in which Mexican judges should apply a part of the legal order over which supreme court judges have no control. *It was a way of internalizing the external juridical problem.*[33]

Another factor mentioned in the interviews was timing: while the supreme court debated *Radilla*, Congress amended the constitution to elevate the status of human rights law. This too demanded a response, especially in light of the new Inter-American precedent:

> It was necessary to build a narrative that explained these changes . . . Lower court judges were anxious to hear what these changes meant for them . . . This is what strengthened the position of the majority, because it was clear that the court . . . could not remain silent.[34]

Put another way, because of the possibility of lower courts clinging to Inter-American rulings to develop independent jurisprudence and the novelty implied by constitutionalization of human rights treaties, the supreme court found it in its institutional interest to acknowledge the IACtHR as a valid interlocutor. It felt strongly compelled to participate in a transnational dialogue to regulate how the Mexican judiciary would respond to the new paradigm of judicial reasoning implied in the conventionality review doctrine. This would avoid a breakdown in the judicial chain of command and secure the supreme court's position.

[24] September 24, 2010.
[25] Ibid.
[26] August 10, 2010.
[27] September 29, 2010.
[28] At the same time, the IACtHR intensified networking efforts. KAF Officer, September 21, 2016.
[29] Transcripts: https://www.scjn.gob.mx/pleno/Paginas/ver_taquigraficas.aspx.
[30] June 12, 2014.
[31] *912/2010* (2011).
[32] Supreme court jurisprudence is officially categorized into "eras." *Radilla* opened the tenth era.
[33] June 16, 2014.
[34] Clerk, June 12, 2014.

Communicative entrepreneurship catalyzed the transjudicial dialogue by intensifying debates inside the court regarding the status of international law. At the same time, however, the vagueness of the conventionality review doctrine left enough space for the supreme court to micromanage the influence of international jurisprudence, in line with its domestic predicaments. Indeed, far from being passive listeners, Mexican judges used this and other rulings to operationalize the doctrine in ways that reduced the threat of international law and appeased internal divisions.

For the formalist camp, allowing lower courts to rule in light of Inter-American precedents represented a threat to constitutional supremacy and an affront to legal sovereignty. Furthermore, they believed that allowing judges freely to integrate different legal frameworks would result in disparate readings of Mexican laws.[35] Judges in the majority, by contrast, called for the adoption of dialogic hermeneutic practices in which no source of law automatically outranked the other. Their understanding of the conventionality review was remarkably in line with the IACtHR's:

> [National courts] are in a constant dialogue with the international court . . . It is not the case that the IACtHR substitutes the supreme court or that its jurisprudence must be uncritically applied. But [judges should strive to] always favor the person by enforcing norms or interpretations of those norms that prove most favorable.[36]

With the intention of ameliorating those tensions *Radilla* brought to the surface, judges in the majority used another case to concede that IACtHR decisions do not trump the constitution. In so doing they preserved parts of the old hierarchy.[37] The IACtHR did not protest this move to establish narrower boundaries for the obligations arising as a result of the conventionality review doctrine. This attitude is consistent with the ethos of communicative entrepreneurship.

Radilla led to a clearer operationalization of judges' international obligations and catalyzed a change in interpretive habits via a rise in citations of IACtHR jurisprudence. In fact, more than 50 percent of citations of Inter-American jurisprudence between 1994 and 2012 appear during the three-year period following the nudge (2010–2012). The change also affected lower courts. In a survey of 141 federal judges conducted in 2015, 70 percent reported upholding a variety of fundamental rights since 2010 and using the conventionality review (Ansolabehere, Botero, and Gonzalez-Ocantos 2015). For example, a handful of judges began to rely on IACtHR jurisprudence to limit the jurisdiction of military courts, with important implications for cases of human rights violations. Indeed, this is why some crimes perpetrated by the army during the "war on drugs," such as the 2014 Tlatlaya massacre that ended with the brutal execution of twenty-two people, are being tried in civilian courts. This new criteria increases the chances of favorable outcomes for the victims of state violence, something unimaginable just a few years ago.

To summarize, the IACtHR summoned Mexican judges to a conversation many of them originally refused to have. Without communicative efforts it certainly would have taken longer for Mexican judges to begin to regulate the status of international jurisprudence and apply it more frequently. For example, the arrival of ambitious new judges with fresh ideas about the nature of constitutionalism was insufficient to manufacture a radical shift in jurisprudence. By contrast, the clarion call coming from Costa Rica was hard to ignore, even for the old guard. But communicative entrepreneurship did benefit from other local developments, such as changes in the formal constitutional status of human rights treaties. Importantly, communicative entrepreneurship gave Mexican judges room to contribute to the development of new standards, thus allowing them to craft norms of transjudicial communication with an eye on their own needs and priorities.

Colombia

The communicative entrepreneurship of the IACtHR also intensified the debate about the status of international jurisprudence in Colombia. Compared to Mexico, however, the context is different, not least because Colombia's Constitutional Court has always been open to international law. Greater openness notwithstanding, communicative entrepreneurship was still instrumental in overcoming reluctance to regulate the influence of Inter-American precedents. This suggests that as a mechanism of norm construction, communicative entrepreneurship is productive under a variety of conditions.

Colombia's 1991 constitution created a Constitutional Court, recognized new fundamental rights, and constitutionalized human rights treaties. Inspired by this architecture, the Constitutional Court has produced world-famous rulings demanding the redesign of public policies, with far-reaching budgetary and political implications (García-Villegas and Uprimny 2004; Rodríguez-Garavito 2011). One of the formulas developed to justify this rights-oriented jurisprudence is the "constitutionality block" doctrine, according to which laws subject to constitutionality tests must be read in light of international law (Uprimny 2008). Anchoring arguments in international law constitutes "a core part of the court's assertion of power" (Landau 2015, 155–156) because it allows it to legitimize controversial decisions.

The constitutionalization of human rights treaties and the concomitant development of the constitutionality block since the mid-1990s, however, were not sufficient to automatically raise the profile of Inter-American precedents. Citations were almost nonexistent until the 2000s. According to a former clerk, "the majority believed that in order to cement its authority the court ought to find its own voice."[38] Several interviewees also mentioned lack of familiarity and highlighted the arrival of the Internet as a game changer. Another factor contributing to this neglect was the mismatch between the causes each court championed in the 1990s: whereas Colombia's Constitutional Court addressed socioeconomic rights, the IACtHR focused on transitional justice.[39] When transitional justice cases reached the Constitutional Court in the mid-2000s, though, Inter-American precedents became more useful: "This topic was alien to us, so relying on Inter-American jurisprudence proved crucial."[40]

By the time the IACtHR turned to communicative entrepreneurship, admittedly, the neglect of Inter-American precedents in Colombia was less severe than in Mexico. But important challenges still remained. In terms of institutionalizing the influence of human rights jurisprudence, the problem was less the absence of citations than the ways

[35] *912/2010* (2011).
[36] Ibid.
[37] *293/2011* (2013).
[38] August 22, 2016.
[39] Interviews: former judge (August 24, 2016), former clerk (August 19, 2016), clerk (August 29, 2016).
[40] Former clerk, August 18, 2016.

usage remained opportunistic. In 2000 the Constitutional Court authorized the use of Inter-American jurisprudence to define the content of fundamental rights, but did so briefly and vaguely (C-010/2000). As a result, judges "still didn't have any certainty about the rules relative to the incorporation of this jurisprudence."[41] The outcome was an "instrumental use of international law"[42] when judges needed to additional firepower, or "as a sign of cosmopolitanism and erudition."[43]

A former judge explained that "finding the right formula took time" because of treaty silence on this point.[44] Exacerbating this was that "citing jurisprudence is more complex than citing treaties. One is always more fearful when interpreting another court because it is hard to identify clear decision rules."[45] At the heart of the matter, however, were concerns about the distribution of power inside the court and between the court and the IACtHR. Not regulating the practice meant sidestepping a thorny issue:

> Self-regulation on these matters is unlikely because power is at stake. On the one hand, forging a consensus among constitutional judges is difficult because this source of law bolsters the power of those with more progressive positions. It is no secret that the IACtHR favors prorights criteria. On the other hand, the absence of clear rules widens the court's margin of appreciation in relation to the Inter-American system. My power is greater when I'm free to decide when to use this jurisprudence.[46]

When the IACtHR launched the conventionality review doctrine, the Constitutional Court gradually became less reluctant to face these political and technical challenges. The IACtHR's nudges encouraged Colombian judges to hand down rulings clarifying the authority of international jurisprudence in a number of ways (C-442–11; SU-712–13; C-500–14). First, the Constitutional Court specified that although only decisions against Colombia are mandatory, judges must consider criteria expounded in precedents against other countries and, if necessary, provide reasons for departing from them. Second, the court indicated that the conventionality review did not imply an automatic transplant of Inter-American criteria. Inter-American precedents only have domestic implications when judges find unequivocal similarities between cases. Moreover, the court ruled that judges have to evaluate whether the domestic legal order already offers adequate protections. If this is the case, following Inter-American jurisprudence becomes unnecessary. In one ruling, for example, the Constitutional Court was asked to declare the unconstitutionality of libel laws, in line with an Inter-American judgment against Argentina. In turn, the court explained that its jurisprudence already limited the scope of these laws, rendering unnecessary any attempt to rid them as mandated by the IACtHR. Third, the court found that isolated precedents do not constitute sufficient grounds for exercising the conventionality review. Inter-American doctrines only become relevant when the IACtHR reiterates the same criteria in several cases.

Communicative entrepreneurship transformed the choice architecture of Colombian judges, putting a complex issue on the table in a way that made it impossible for them to ignore it. As one clerk put it, "the conventionality review triggered a fierce internal debate. Judges were forced to compromise. In the past it hadn't been necessary to deal with this issue."[47] In Mexico, this form of nudging was productive because it interacted with domestic factors that raised concerns about judicial power. In Colombia, too, the nudge worked in combination with local factors. In particular, interviews suggest that judges' desire to regulate the impact of international law and preserve their autonomy in the process triggered the decision to participate in a dialogue about the conventionality review:

> The conventionality review was the first attempt by the IACtHR to regulate the conversation . . . Up to that point our jurisprudence had been deferent toward the IACtHR, but only because we were free to be deferent when deference helped us . . . [But] this freedom was put into question, so we started to think more carefully about the status of international precedents.[48]

> When the IACtHR puts a name to our international responsibilities, the situation changes. My colleagues chose to start a dialogue of equals to regulate this . . . [Before] it wasn't clear that the IACtHR wanted to regulate the dialogue, so it wasn't necessary to send a message affirming our autonomy.[49]

> The constitutionality bloc led to the realization that international law can enrich domestic law. But with the conventionality review we moved from this moment of discovery and awe to a more reactive phase . . . We must preserve our autonomy . . . [It's] the only way to rule justly.[50]

Interviewees also suggest that the conventionality review produced an intense conversation about the status of Inter-American jurisprudence because the doctrine was launched at a time when Inter-American case law had become more diverse. The rise in thematic areas covered by the IACtHR increased the risk of clashes between courts. More worryingly, being forced to blindly follow Inter-American criteria on such a diverse number of issues could set the Constitutional Court on collision course with domestic actors. The need to regulate the impact of international jurisprudence therefore became more pressing:

> Harmony between both courts is no longer guaranteed. When the court identified this risk, it began to think more carefully about its autonomy. This doesn't mean that we reject the IACtHR. But with the development of the conventionality review we felt the need to establish some rules.[51]

> Every time the IACtHR declares that something is in breach of the Convention, it reduces our margin of appreciation. So when the number of IACtHR decisions grows, our degrees of freedom are reduced. If you combine this with the conventionality review, it is only to be expected that we will try to defend our autonomy.[52]

A clerk illustrated the court's reasoning with reference to a case in which transplanting IACtHR jurisprudence could have led to a conflict with the attorney general (SU-712–13):

> The fact that the IACtHR could question the attorney general's prerogatives made our judges stop and think

[41] Former judge, August 10, 2016.
[42] Former clerk, August 5, 2016.
[43] Former clerk, August 10, 2016.
[44] August 23, 2016.
[45] Clerk, August 4, 2016.
[46] Clerk, August 24, 2016.
[47] Clerk, August 4, 2016.
[48] Former judge, August 10, 2016.
[49] Judge, August 30, 2016.
[50] Judge, August 9, 2016.
[51] Clerk, August 25, 2016.
[52] Clerk, August 29, 2016.

> about the legal and political implications of accepting very liberal interpretations [of the reach of Inter-American jurisprudence].[53]

The Colombian case shows that the robust constitutionalization of human rights treaties, or the presence of judges open to and knowledgeable of international law, do not automatically lead to the development of norms of transjudicial communication. Indeed, judges can be quite reluctant to regulate the influence of international jurisprudence. In this sense, communicative entrepreneurship is an effective mode of norm development that international courts can use to launch a productive conversation and overcome resistance. Importantly, the reaction of the Constitutional Court suggests that a top-down approach would have been counterproductive, possibly resulting in no progress at all in the creation of detailed scripts. Inviting and accepting contributions, by contrast, allowed the IACtHR to engage its local counterpart and ultimately led to greater clarity regarding the status of international precedents. This invitation interacted with local concerns about judicial autonomy to produce the desired effects.

Like in the Mexican case, there is nothing in the official record indicating that the IACtHR protested the new Colombian jurisprudence. A mute response is compatible with the notion that it behaved as a communicative entrepreneur, welcoming a collaborative approach. But this silence is by no means conclusive evidence. When asked about the Colombian case, however, Inter-American judges and clerks did indicate that they did not object to the Constitutional Court's criteria. An Inter-American judge even explained that openness to local views is crucial to improving human rights protections:

> To reach just decisions local courts require flexibility . . . The problem with a strict interpretation of the conventionality review is that it can lead to injustice. Establishing clear criteria for the influence of Inter-American jurisprudence is important because it reduces opportunistic usage. But to make these criteria compatible with the human rights cause, we need a dialogue between courts.[54]

Conclusion

International relations scholars convincingly argue that weak actors can diffuse norms and, in doing so, radically transform state practices and identities. These norm entrepreneurs harbor firm convictions that allow them to formulate detailed templates. Scholars "point to the objective (noninterpreted) clarity" of the proposed alternative beliefs, organizational forms, or technical recipes, as one of the main reasons why norm entrepreneurs succeed (Towns 2010, 31). The relative ease of transmitting clear and specific messages helps weaker actors in their efforts to change the behavior of stronger ones. They facilitate the operationalization of abstract values, become focal points that quickly overshadow alternatives, and render less challenging the identification and repudiation of noncompliant behavior (Chayes and Chayes 1993; Keck and Sikkink 1998).

In this article, I argue that weak nonstate actors can bring about normative change even when they lack moral and epistemic certainty. They can become communicative entrepreneurs who invite others to talk, create venues for conversations to unfold, and thus transform partners into stakeholders who themselves help supply ideas about how to translate values into normative templates. I illustrated communicative entrepreneurship using the case of the IACtHR and its attempt to regulate the use of international jurisprudence. For an institution virtually ignored during its first twenty-five years of existence, this was not merely a procedural matter. It was rather a crucial objective designed to solidify its influence over the development of regional human rights protections and ensure that the tentacles of Inter-American jurisprudence could benefit victims of state abuse—all without the need for lengthy international litigation battles. The lack of a clear behavioral script to challenge and reform existing judicial habits could have undermined the project from the start. But the skillful deployment of nudges and networking strategies constructed the space, and the willingness, to debate a complex issue.

Contrasting the IACtHR's efforts to promote norms of transjudicial communication with its behavior in the propagation of the norm against impunity underscores the importance of uncertainty as a catalyst of communicative entrepreneurship. The issue of transjudicial communication had never been seriously debated before the IACtHR introduced the conventionality review doctrine and continued to be marred with uncertainty afterward. By contrast, whether amnesty laws favoring the perpetrators of egregious human rights violations are acceptable or not was a debate that had received a great deal of attention before the IACtHR's famous interventions in this norm cycle. During the 1990s, the Latin American human rights community produced a clear normative script that established the extent of states' responsibilities in the investigation and punishment of serious human rights crimes and formulated a detailed technical basis for rejecting amnesties. For example, an influential 1992 report by the Inter-American Commission of Human Rights, as well as the work of domestic NGOs and lower courts, especially in Argentina, operationalized the anti-impunity norm, turning the moral repudiation of amnesties into an actionable legal template (Sikkink 2011; Lessa and Payne 2012; Gonzalez-Ocantos 2016). Resultantly, the IACtHR chose a very different mode of engagement than that used to instigate norms of transjudicial communication. In a remarkable stream of rulings starting in 2001 against Peru, Chile, Brazil, and Uruguay, the court pushed for the adoption of this clear behavioral template, calling for the nullification of amnesties, and for states to support investigations and punish the perpetrators (Davis 2014).

My argument likely explains dynamics outside of the Inter-American system. For example, the European Court of Justice (ECJ), created in 1952 to ensure the even application of European law across members of the European Economic Community, also used communicative entrepreneurship to reduce uncertainty surrounding the legal status of its judgments and its relationship with national judges. The ensuing scripting exercise became a pillar of European legal integration. The "preliminary ruling" mechanism in Article 177 of the Treaty of Rome established an official channel for transjudicial communication, allowing national courts to seek ECJ advice on questions of European law. But in the 1960s, when the ECJ developed an interest in routinizing these referrals to expand its opportunities to interpret European law (and its authority), this mechanism remained an obscure clause. Local courts hardly considered using it (Alter 2001, 15). Moreover, we find no consensus concerning the place of European law in domestic legal system. The ECJ responded by starting to cautiously deploy jurisprudential nudges to incentivize referrals. Some of its rulings were "carefully crafted appeals to judicial ego" (Burley and Mattli 1993, 63), aimed at luring national courts. The ECJ

[53] August 24, 2016.
[54] June 9, 2016.

presented itself as the "protector of the prerogatives of lower national courts" (Burley and Mattli 1993, 64), ruling that the resolution of certain issues required an exclusive dialogue between them and the ECJ. In addition, it planned outreach activities to engage judges in discussions about how to operationalize referral practices (Burley and Mattli 1993, 58–62; Helfer and Slaughter 1997, 303). Like in the Americas, nudging and networking ultimately transformed the choice architecture of national courts and promoted reactions from local actors that ultimately led to the development of scripts that created plausible paths for judges to engage with European law.

Research on communicative entrepreneurship could move forward in two directions. First, scholars could apply communicative entrepreneurship beyond the judicial realm, especially in domains where norms and their operationalization remain vague. Communicative entrepreneurship is likely to be particularly attractive to new institutions trying to find their bearings on the world stage or seeking to routinize precise rules of engagement with states, as well to activists who detect new challenges that lack off-the-shelf expert, technical, or political solutions. For instance, as debates about arms control (for example, Petrova 2016) move to the realm of cybersecurity, the absence of clear normative templates may encourage communicative entrepreneurship. Similarly, as the challenges stemming from climate change become more complex, environmental activists may need to shift from norm entrepreneurship to communicative entrepreneurship in order to bring together relevant stakeholders to define the contours of new normative scripts.

Second, some critical constructivists argue for inclusive participation in the development of new norms—and active contestation by all stakeholders thereafter—on moral and ethical grounds. They also contend that it creates benefits in terms of the acceptability and durability of norms (for example, Weiner 2017; Zimmermann 2017, chapter 8). The conceptual structure developed in this article offers a heuristic device to examine this proposition, for example, by comparing the consequences of norm and communicative entrepreneurship for norm legitimacy. Such undertakings would add an empirical component to what still remains a largely normative and theoretical literature.

Supplementary Information

Supplementary information is available at the *International Studies Quarterly* data archive and at https://www.politics.ox.ac.uk/academic-staff/ezequiel-gonzalez-ocantos.html.

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